

IN THE DISTRICT COURT OF THURSTON COUNTY, NEBRASKA

ROGER L. GUSTAFSON and DAVID GUSTAFSON, individuals; and R.D.G. ENTERPRISES, INC., a Nebraska Corporation,

Plaintiffs,

Vs.

PAUL J. BODLAK and JEAN M. BODLAK, individuals; THE COUNTY OF THURSTON, NEBRASKA, a political Subdivision of the State of Nebraska; CLAYTON D. VONSEGGERN, TRUSTEE OF THE BILLY L. VONSEGGERN FAMILY TRUST; R.H.F. FARM, INC.; ALVIN J. SUNDERMAN and RAE SUNDERMAN; VERA W. WACHTER ESTATE; WESLEY V. DUNN and CHARLENE K. DUNN; EUGENE F. SCHUTTE FAMILY, LIMITED PARTNERSHIP; RICHARD A. HEYNE, MARY HEYNE and WAX3 FARMS; THE UNITED STATES OF AMERICA; and THE UNITED STATES ARMY CORPS OF ENGINEERS,

Defendants.

Case No. CI 13-58

IN DISTRICT COURT OF THURSTON COUNTY, NEBR. GINA ROTH, CLERK

NOV 30 2016

FILED

ORDER

A trial on Plaintiffs' Amended Complaint was held on April 18-22, 2016 and August 25, 2016. Plaintiffs were represented by Clarence Mock. The Defendant County of Thurston, Nebraska ("County") was represented by its attorney Charles Campbell. The Defendants Paul J. Bodlak and Jean M. Bodlak were represented by their attorneys Thomas Wilmoth and Vanessa Silke. The Defendant Eugene F. Schutte Family, Limited Partnership was represented by Stuart Mills.

All of the other Defendants, namely Clayton D. VonSeggern, Trustee of the Billy L. VonSeggern Family Trust; R.H.F. Farm, Inc.; Alvin J. Sunderman and Rae Sunderman; Vera W. Wachter Estate; Wesley V. Dunn and Charlene K. Dunn; and Richard A. Heyne, Mary Heyne,

WAX3 Farms did not appear or otherwise answer or plead in this matter and upon request of the parties, said individuals and entities were found to be in default. The Defendants United

COPY TO
PLAINTIFF
P ATTORNEY
DEFENDANT
D ATTORNEY
JUDGE
PROB OFFICER
SHERIFF
JOURNAL



States of America and the United States Corp of Engineers were previously dismissed by the Federal District Court.

Upon the verbal motion of Paul J. Bodlak and Jean M. Bodlak, their Counterclaim was dismissed, without prejudice.

At the request of Plaintiffs, on September 14, 2016, the Court personally viewed the relevant areas in dispute.

I. INTRODUCTION

Plaintiffs, in their Amended Complaint, brought their action for damages and injunctive relief related to drainage conditions on real estate in Township 26 North, Range 5, East of the 6th P.M. in Thurston County, Nebraska. Plaintiffs sustained crop damage due to flooding in June, 2010.

Plaintiffs Roger Gustafson and David Gustafson own real estate located within Sections 24 and 25. Together the Gustafsons are also controlling shareholders of Plaintiff R.D.G. Enterprises, Inc. that leases farm ground within Section 14. For simplicity, the Gustafsons and R.D.G. Enterprises, Inc. will be collectively described as "Plaintiffs."

Defendants Paul J. Bodlak and Jean M. Bodlak own property in Section 25 that adjoins the southern boundary of Gustafsons' real estate in Section 24.

Defendant County of Thurston installed and controls certain drainage structures within the Old Logan Creek channel near the Gustafson and Bodlak properties.

The evidence shows the Old Logan Creek is a natural watercourse that slopes at the rate of approximately 1.6' per mile in a meandering fashion through property farmed by Gustafsons in Sections 14, 24, and 25 within Township 26 North, Range 5, East of the 6th P.M. in Thurston County, Nebraska. The Old Logan Creek channel on the Gustafson property absorbs diffuse surface waters from a watershed area above "E" Avenue of approximately 6.5 square miles. Between "E" Avenue and "G" Avenue, the Old Logan Creek adds hundreds of additional acres of surface water drainage.

Old Logan Creek is the natural watercourse which is in dispute in this case. Logan Creek is a manmade watercourse. It is commonly referred to as "The Dredge." It is a separate and distinct watercourse than what is referred to herein as "Old Logan Creek."

In regard to County, Plaintiffs allege that crop damage was caused as a result of the installation by County of an inadequate culvert located at 12th Road crossing and an inadequate

culvert installed at the "G" Avenue crossing of Old Logan Creek. Plaintiffs are requesting money damages and an injunction. Plaintiffs' cause of action for damages against County is based upon the claim of inverse condemnation pursuant to *Neb. Const.* art. I, §21.

In regard to Bodlaks, Plaintiffs seek injunctive relief and monetary damages for the alleged filling of Old Logan Creek channel on real estate owned by Defendants Bodlak and their maintenance of this fill through the date of filing of the Amended Complaint. Plaintiffs' cause of action for damages against Defendant Bodlak is alleged to be based upon a common law duty.

Generally, under Nebraska law, a natural drainway must be kept open to carry the water into the streams, and as against the rights of the upper proprietor, the lower proprietor cannot obstruct surface water when it has found its way to and is running in a natural drainage channel or depression. It is the duty of the lower landowner who builds a structure across a natural drainageway to provide for the natural passage through such obstruction of all the waters which may be reasonably anticipated to drain therein, and that is a continuing duty.¹ The duty to refrain from structural obstruction of a natural drainageway is imposed on private proprietors and public officials as well.²

Plaintiffs request a joint and several judgment of money damages in favor of Plaintiffs and against the Defendants County of Thurston, Nebraska and Paul J. Bodlak and Jean M. Bodlak. Plaintiffs seek a judgment in the total amount of not less than \$449,521.04 as a result of the Defendants' alleged combined interference with the flow of water in the natural drainageway of Old Logan Creek.

In regard to the injunctive relief against County, Plaintiffs seek a mandatory injunction directing County to immediately redesign the 54" and 48" drainage structures located at 12th Road and "G" Avenue, respectively. Plaintiffs seek to have the size of both drainage structures increased in order to allow the natural flow of the water of the Old Logan Creek channel to pass through those locations in an effort to minimize flooding effects on the Plaintiffs' property.

In regard to injunctive relief against Bodlaks, Plaintiffs seek a mandatory injunction directing Bodlaks to immediately remove the fill they placed, and continue to maintain, in the channel of the Old Logan Creek on the Bodlak property. Plaintiffs request is made to allow the natural flow of water of the Old Logan Creek channel to pass through the Bodlak property in an effort to minimize flooding effects on Plaintiffs' properties.

¹ *Romshek vs. Osantowski*, 237 Neb. 426 (1991); However, see also, *Neb. Rev. Stat.* 31-201, et seq.

² *Gruber vs. County of Dawson*, 232 Neb. 1 (1989).

County denied all of the allegations against it and raised as an affirmative defense the statute of limitations.

Bodlaks denied all of the allegations against them and as affirmative defenses alleged that: (i) Plaintiffs have stated no cause of action against them; (ii) the statute of limitations bars recovery; (iii) Plaintiffs failed to mitigate the damages; (iv) Plaintiffs own actions contributed or created their damages; and, (v) the lack of subject matter jurisdiction because not all necessary parties have been joined.

Defendant Eugene F. Schutte Family, Limited Partnership generally denied all of the allegations against it.

A more detailed analysis of the applicable law and facts of this case is set forth below.

II. ANALYSIS

A. Inverse Condemnation Against Thurston County, Nebraska

Plaintiffs were owners or lessees of the following described real estate located in Thurston County, Nebraska on which they individually and through Plaintiff R.D.G. Enterprises, Inc. (hereinafter referred to as "R.D.G.") produced crops:

Part of Section 24, Township 26 North, Range 5 East of the 6th P.M.; Thurston County, Nebraska, described as follows: The SW1/4 and the SW1/4 SE1/4 of said Section; and,

Part of Section 25, Township 26 North, Range 5 East of the 6th P.M., Thurston County, Nebraska, described as follows: The NW1/4 NE1/4 of said Section.

Part of Section 14, Township 26 North, Range 5 East of the 6th P.M., Thurston County, Nebraska, described as follows: The SW1/4 of the NE1/4 and the NW1/4 of the SE1/4 of said Section, presently owned by Kenneth B. Gustafson, Trustee, and Virginia G. (Glee) Gustafson, Trustee, of the Kenneth and Glee Gustafson Trust, dated September 6, 2002; and,

That part of Section 14, Township 26 North, Range 5 East of the 6th P.M., Thurston County, Nebraska, consisting of approximately 147 acres, held in trust for the benefit of Walking Priest; and,

That part of Section 14, Township 26 North, Range 5 East of the 6th P.M., Thurston County, Nebraska, consisting of approximately 80 acres, held in trust for the benefit of Mrs. Blackeagle.

Hereinafter the combined properties described above shall be described as “Plaintiffs’ Real Estate.”

Thurston County, Nebraska is a political subdivision organized and existing by virtue of the laws of the State of Nebraska.

As indicated above, Plaintiffs’ claim for monetary relief against County is based solely upon inverse condemnation.

The elements which Plaintiffs must prove by a preponderance of the evidence in order to prevail on its inverse condemnation claim are as follows:

1. Whether Thurston County’s actions constituted a taking or damage of Plaintiffs’ property for public use. In order to meet the threshold question, it must be shown:
 - a) That there was an invasion of property rights that was intended; or,
 - b) That there was an invasion of property rights that was the foreseeable result of an authorized government action;
2. Whether the actions of Thurston County were a proximate cause of Plaintiffs’ damages; and,
3. The amount of the damages.³

A discussion of the elements is set forth below:

(i) Invasion of Property Rights that was Intended

The first issue to be considered is whether the invasion of property rights was intended by County.

As indicated above, diffused surface waters drain into the Old Logan Creek channel in the northwest corner of Thurston County, Nebraska at the crossing of “E” Avenue in Section 14, Township 26 North, Range 5 East of the 6th P.M., Thurston County, Nebraska. The channel crossing at “E” Avenue currently and at all times material here consisted of an approximately 20’ long timber structure bridge which has been in place for many years. This “E” Avenue bridge is calculated to allow a capacity of 600 cubic feet per second (“cfs”) flow of water without overtopping the road. The “E” Avenue bridge crossing is visibly much higher in elevation than “E” Avenue immediately east and west thereof. During peak rain events, “E” Avenue road, on either side of the “E” Avenue bridge, not surprisingly, has been overtopped by past water flows.

Old Logan Creek is a natural watercourse within the meaning of Neb. Rev. Stat. §31-202.

³ Henderson vs. City of Columbus, 285 Neb. 482 (2013).

The Old Logan Creek channel is relatively flat between "E" Avenue crossing and 12th Road crossing (about 1.6' drop per one mile) and it meanders in a serpentine manner making it an inefficient drainageway of water from the basin.

12th Road is a public county road under the supervision of Thurston County, Nebraska. After the water passes under 12th Road, the water naturally drains within the channel of the Old Logan Creek in a southerly direction toward the Bodlak property. At the southern end of the Bodlak property, the channel crosses under "G" Avenue in a 48" culvert which was installed prior to 1968. "G" Avenue is also a public county road under the supervision of Thurston County, Nebraska.

Thurston County used a 54" corrugated metal culvert to make the channel crossing at 12th Road. This culvert was installed sometime between approximately 1970 and 1980 when the previous 24' long bridge was removed. County was responsible for removal of the bridge and replacement of it with the culvert. A 54" culvert has the maximum capacity to allow approximately 220 cfs of water to flow.

The 12th Road crossing of the Old Logan Creek channel had been served by the 54" wide culvert for more than 30 years prior to the 2010 flood. Old Logan Creek water flow never overtopped 12th Road during that time period, nor subsequent thereto.

Over the years, County has experienced an ongoing problem with maintenance of the 12th Road crossing – primarily the west shoulder of the road – due to bank erosion in the location of the culvert.

In the fall of 2009, County repaired the bank and shoulder of 12th Road around the culvert by installing dirt to fill in the erosion and build up the shoulder in order to make the road safe for travel. Repairs were once again made to the bank and shoulder. The repairs usually involved hauling dirt with a frontend loader and packing the dirt. There was no removal, replacement, or alteration of the culvert at the crossing at 12th Road as part of any road repair project prior to the June, 2010 flood.

In regard to the erosion, one county road worker indicated that on one occasion he saw muskrat holes in the bank which caused the erosion. Another worker stated that it looked like the erosion was the result of sloughing off from the road bank. Neither of them saw any water passing under 12th Road from west to east underneath the road. Both Road Department employees were credible witnesses.

Michael Anderson was called by Plaintiffs to testify on their behalf. He farms ground in and around Plaintiffs' farmland. He was generally familiar with the channel crossing at 12th Road. Mr. Anderson observed that the depth of the Old Logan Creek channel did not vary in depth much from "E" Avenue through the Gustafson property and that it was approximately 5' to 6' deep.

Roger Gustafson testified that he had observed water flowing, prior to 2010, around the 54" tube under 12th Road at the Old Logan Creek crossing. Mr. Anderson had heard Plaintiffs' complaint that water flowed around the culvert under 12th Road. However, Mr. Anderson did not personally see the water flow event himself. There was no credible evidence or any witnesses which corroborated Mr. Gustafson's water flow observations.

The Court finds that although water may have been causing the west bank of 12th Road in the area of the 12th Road crossing to erode, the water did not flow, from the west edge of 12th Road to the east edge of 12th Road, around the 54" culvert under the travelled portion of 12th Road at the Old Logan Creek crossing. The repairs made by county employees on the west bank of the road, which occurred several times between 2000 and June 2010, merely repaired the erosion of the west bank and did not block a flow of water around the 54" culvert under 12th Road.

In 2011, the County Board hired engineer Brian McDonald to study the ongoing erosion problem of 12th Road and to make recommendations for improvement. McDonald conducted a study of the 12th Road crossing. As part of the study he analyzed the flow of the Old Logan Creek channel upstream and downstream of the crossing. McDonald reviewed historical maps, data, and materials and gathered information from County officials and employees as well as property owners and also personally viewed the area as part of his engineering study.

McDonald prepared a report which set out his findings and recommendations as a result of his study and made his professional recommendations for permanent improvements to the 12th Road crossing. He essentially found that the 54" culvert was too short for the width of the road and the amount of fill that it was retaining.

McDonald's report and recommendations were submitted to the Thurston County Board of Supervisors. McDonald recommended two options in regard to the existing culvert at the 12th Road crossing. The first option was to replace the existing 54" culvert with a new 54" wide culvert that was 78' in length. The second option was to replace the existing 54" culvert with a new 54" culvert of the approximate same length as the existing culvert, but it would be anchored

with a steel headwall and sheet-pile wings. These structures were to be attached to the new culvert and would be permanently installed to correct the shoulder and bank erosion problems that had previously occurred.

The first option would have required the County to obtain an easement from Plaintiffs to accommodate the longer culvert. Plaintiffs refused to grant an easement to allow a 78' culvert to be installed at the 12th Road crossing unless the County installed two 10' wide culverts to replace the existing culvert under the road. There was no evidence that Plaintiffs obtained an agreement from any downstream property owners to their request that County install the two 10' wide culverts under 12th Road or any evidence that Plaintiffs obtained approval of their plan by the U.S. Army Corps of Engineers.

McDonald advised the Board that it would not be appropriate for the County to install the larger culverts under 12th Road requested by Gustafsons, as this would alter the established drainage condition of the Old Logan Creek channel under 12th Road as it had existed for many years. The larger structures could increase the flow of the channel and cause potential flooding to downstream landowners. McDonald further advised the Board that because increasing the flow of water under 12th Road would alter the established drainage condition that similar alterations of downstream crossings would likewise be necessary to avoid possible flooding downstream properties. These downstream changes would need approval by the Corps of Engineers.

The Court accepts McDonald's testimony that it is appropriate to consider existing established conditions in making hydrological recommendations and that this standard is an accepted principle used by hydrology engineers.

Based upon the recommendation of McDonald, the County Board denied the Plaintiffs' request to install two 10' wide culverts under 12th Road. As a result, Plaintiffs did not grant an easement to County for installation of a 78' long culvert under 12th Road. Due to Plaintiff's refusal to grant the County an easement to install a 78' long culvert, the County adopted McDonald's second option – replacement of the existing 54" culvert with a new 54" culvert that was to be anchored with a steel headwall and sheet pilings. The culvert could then be permanently installed to correct the prior shoulder and road erosion problems.

In August 2011, County road employees removed the existing 54" culvert and a new culvert was installed. The new culvert was also a 54" wide tube, which was the same size and length as the previous culvert but was anchored with a headwall. The replacement of the existing

54" culvert with a new 54" culvert, as recommended by McDonald and authorized by the County Board, was approved by the Corps of Engineers.

It was County's intent in replacing the damaged 54" culvert to not alter or affect the established existing drainage of the Old Logan Creek channel in any manner as it passed through the properties upstream or downstream from 12th Road.

The new 54" metal culvert was placed in the Old Logan Creek channel at approximately the same location as the old 54" culvert. However, due to an error in construction, in about 2015, the new 54" culvert was reinstalled about 1.9' lower. This lower elevation reinstallation was also approved by the Corps of Engineers.

Roger Gustafson testified that during the period from 1977 to 1986, before they purchased their farms, he observed water escape from the creek channel into low lying areas in the fields, however there was never massive flooding. Mr. Gustafson also testified that there was a five inch rain event that occurred in about June, 1990 but that creek water did not back up or flood the fields near the Old Logan Creek channel at that time. Plaintiffs never filed a claim for crop loss due to flooding for any year prior to June, 2010.

George E. Bryan, a professional engineer, testified on behalf of Plaintiffs. Mr. Bryan's experience included, among other things, storm water permitting, watershed and floodway evaluation, waterway design and mitigation, hydrological and hydraulic modeling and design.

Mr. Bryan testified that it was his opinion that the 54" culvert at the 12th Road crossing was undersized. Bryan also testified that it was his opinion that the 54" culvert at the 12th Road crossing contributed to the flooding of the Plaintiffs' property in 2010.

In explaining his opinion, Mr. Bryan stated that the combination of the undersized culvert and the downstream channel work conducted by the Bodlaks were factors that contributed to the flooding to the Plaintiffs' fields in 2010.

Mr. Bryan said that water ponded in the channel upstream of the Bodlak property as a result of Bodlaks' alterations to the creek bed. He also said that if the Bodlak fill was removed from the creek bed that there would be no ponding and the water would move naturally down the Old Logan Creek channel. He acknowledged, however, that the ponding of the channel downstream of 12th Road would only "inhibit a little bit" the flow of water through the 12th Road crossing from west to east out of the Gustafson field.

Mr. Bryan testified that soil saturation would affect the run off of water from fields, and that he did not consider soil saturation as a part of his study. Mr. Bryan also acknowledged that he did not independently verify the rainfall data that was provided to him by the Gustafsons. Furthermore, he did not consider the Gustafsons' irrigation practices or their well water elevations. Lastly, he acknowledged that it would be reasonable for an engineer to consider all of the above-described factors in determining the cause of the flood to the Gustafson property.

Mr. Gustafson acknowledged that Plaintiffs irrigated their fields but that he did not know how many inches of irrigated water they applied to their fields in the individual years. He did state that he tries to keep the soil moisture content at a range of 50% to 55% for corn and slightly less for beans.

Although Mr. Gustafson indicated he was not specifically aware of how much the water table had increased in the area of the crop damaged fields, Mr. Bodlak testified that he regularly monitors this. He said that the water table had increased significantly over the last several years.

Roger Gustafson testified that between June 10, 2010 and June 11, 2010 the area received between 1.8" – 2.05" of rain and further that he did not recall much rainfall between June 12, 2010 and June 14, 2010. However, Mr. Bodlak kept detailed records of rain for many years on his calendar. Mr. Bodlak testified from his records that between June 1, 2010 and June 14, 2010, the area had received approximately 6.35" of rain and that the area had received approximately 3.3" of rain on June 10, 2010 and June 11, 2010 alone. Therefore, it appears that there was a fairly high level of rainfall in the area on and before the date of the flooding – significantly more rainfall than Mr. Gustafson recalled.

Plaintiffs' real estate is, in large part, located in a flood plain. Water standing and slowly draining from a flood plain is expected to occur on occasion.

Mr. Bryan submitted a supplemental report in approximately August, 2014. This report recommended that the channel on the Bodlak property be restored to the original flow line and that the drainage structures at 12th Road and "G" Avenue each be replaced with four 6' diameter culverts or an equivalent box culvert. At trial, Mr. Bryan continued to propose these recommendations.

In regard to the Bodlak property, Mr. Bryan opined that the creek channel be lowered. However, during the course of Mr. Bryan's testimony he revised his recommendations due to an oversight. The revised recommendation included a proposal to lower the Old Logan Creek channel

on the Bodlak property an additional 3.5' – a fairly significant modification over the depth he initially suggested.

County's engineer, Brian McDonald disagreed with many of Mr. Bryan's opinion in regard to the 12th Road crossing. In addition, Thomas Riley, P.E., testified on behalf of Bodlaks. He also disagreed with several of Mr. Bryan's opinions. The Court finds that the hydrologic/hydraulic expert testimony given by Brian McDonald and Thomas Riley to be more credible than the opinions of Mr. Bryan. More weight is given, therefore, to the McDonald and Riley testimony. As noted in more detail below, Mr. McDonald and Mr. Riley disagreed with the methodology and bases of Mr. Bryan's opinions.

In conclusion, in regard to the initial question, the Court finds there was no credible evidence that Thurston County intentionally damaged or invaded property of Plaintiffs by reason of an alleged undersized 54" tube at 12th Road crossing or by virtue of the repairs to the banks of 12th Road crossing in the vicinity of Old Logan Creek, prior to June, 2010. In addition, the County has never intentionally stored, appropriated, diverted, or otherwise altered the flow of water under 12th Road in Section 24 for its own use or profit in any of the water-related projects constructed or maintained on 12th Road.

The next issue is whether the June, 2010 flood was foreseeable.

(ii) Invasion of Property Rights that was Foreseeable

The Court now needs to resolve whether there was an invasion of property rights that was the foreseeable result of an authorized governmental activity (i.e. installation of 12th Road and "G" Avenue culverts).

The Court finds that the crops damaged by the flooding of Old Logan Creek channel in June, 2010 was not the foreseeable result of authorized government action by Thurston County. In reaching this conclusion, the Court does not accept Plaintiffs engineer's analysis that the 54" culvert was undersized to handle the flow of Old Logan Creek in June, 2010. In addition, the 54" culvert had been in place for at least approximately 30 years prior to the flood and, prior to June, 2010, Plaintiffs had incurred no substantial flooding as a result of that culvert.

Of note, the only flooding incident causing crop damage to Plaintiffs was the flood event of 2010. Plaintiffs did not present evidence which showed it was foreseeable to County that frequent or repeated flooding would occur as a result of the replacement of the bridge with the

54" culvert. In fact, as discussed above, Roger Gustafson described a 5" rain in 1990 which did not cause much flooding and for the most part the water flowed through the 12th Road structure in an uneventful manner during that rain event.

Additionally, the Court finds that 12th Road was not undermined, as argued by Plaintiffs, by the flow of Old Logan Creek water but that there was only erosion on the west bank which was periodically repaired by the County. There was no convincing evidence that Old Logan Creek water was flowing, from the west end of the bank to the east end of the bank, underneath 12th Road outside of the walls of the old 54" metal culvert.

Lastly, creek water has never overtopped 12th Road during any rain event.

The Court finds that Plaintiffs did not meet their burden of proof to establish that there was an invasion of Plaintiffs' property rights that was the foreseeable result of the installation of the culverts at 12th Road and "G" Avenue.

(iii) Summary of Taking or Damage for Public Use

The Court finds that the Plaintiffs did not meet their burden of proof to show that their property was taken or damaged for public use by County under the standards for inverse condemnation.⁴

Notwithstanding the fact that Plaintiffs have not met this burden of proof, the Court further finds that Plaintiffs also failed to meet their burden of proof in regard to their damages sustained. The failure of Plaintiffs to meet their burden of proof in regard to damages is discussed in more detail in Section E, Damages, hereinbelow.

Lastly, the Court also finds that Defendants' affirmative defense for statute of limitations does not apply. The right to damages for an obstruction of a stream by an insufficient culvert or drain does not accrue when the structure is built but when the overflow actually occurs.⁵ Because the flood damages occurred in 2010, Plaintiffs' cause of action was timely filed.

⁴ See note 3.

⁵ Schmutte vs. State, 147 Neb. 193 (1946).

B. Injunctive Relief against Bodlaks

Injunctive relief may be granted to an adjoining land owner upon a proper showing that an obstruction in a drainageway or natural watercourse constitutes a continuing permanent injury.⁶

Where an obstruction in a drainageway or natural watercourse constitutes continuing and permanent injury to adjoining landowners, injunctive relief may be granted upon a proper showing.⁷

When Bodlaks purchased the Section 25 property in 1966, the banks of the Old Logan Creek were approximately 10' high. Beginning in approximately 1970 through 1985, Bodlaks removed trees from the channel and began a process of contouring the banks by taking the edges off the banks. This was done with a Caterpillar bulldozer with a blade. Mr. Bodlak did not haul any of the dirt away from the site. Some of the dirt from the sides of the Old Logan Creek channel went into the creek. Mr. Bodlak acknowledged in a deposition that essentially he took some of the excess dirt from the sides and some of it went into the floor of the channel. Mr. Bodlak changed the contours of the Old Logan Creek channel throughout his property in Section 25 by using the process of taking excess dirt from the sides and relocating some of it to the floor of the Old Logan Creek channel.

Aerial photographs of the Bodlak property over a series of years were received into evidence. The aerial photography shows the changes in the Old Logan Creek channel and the contouring of the Old Logan Creek channel on Section 25. It is plain to see that beginning in the 1970's, the channel ceased to exist in its natural form. Over the last decade or so, row crops have been planted over some areas of Old Logan Creek.

The Court finds that Plaintiffs' evidence is persuasive that Bodlaks obstructed the flow of water in the Old Logan Creek channel on Section 25, to some degree, by raising the elevation of the creek bed. The obstruction has caused a ponding effect, at times, in the Old Logan Creek channel between 12th Road crossing and the Bodlaks' northern property line.

The difficulty for the Court is that injunctive relief may only be granted if the obstruction in the natural watercourse constitutes a continuing and permanent *injury* to the landowner.⁸

⁶ Romshek vs. Osantowski, 237 Neb. 426 (1991).

⁷ Gruber vs. County of Dawson, 232 Neb. 1 (1989).

⁸ Romshek vs. Osantowski, 237 Neb. 426, 445 (1991).

Further, an injunction, in general, is an extraordinary remedy that a court should ordinarily not grant except in a clear case where there is actual and substantial injury.⁹

Plaintiffs' expert testified that the ponding of the channel downstream of 12th Road "will inhibit a little bit" the flow of water through the 12th Road crossing from west to east out of the Gustafson field. Whether inhibiting the flow of water "a little bit" rises to the level of a continuing and permanent injury to Plaintiffs' real estate is troubling. Although Mr. Bryan's opinion was that the fill placed in the channel on the Bodlaks' property affected the flow of the channel and backs up water onto the Plaintiffs' property, he acknowledged that: (i) he had not independently verified the rainfall data that was provided to him by Plaintiffs; (ii) he did not consider previous rainfall events; and (iii) he did not consider the Plaintiffs' irrigation practices, the well elevations, or the soil types. Mr. Bryan further acknowledged that it would be reasonable for any engineer to consider all of these factors in determining the cause and effect of flood damage to the Plaintiffs' property. Plaintiffs' expert disclaimed any attempt to evaluate the relative impact of Bodlaks' actions versus County's action on the flooding in question. Therefore, he could not give an opinion as to the amount of damage, if any, caused by Bodlaks' alterations to Old Logan Creek.

In addition, the common law drainage doctrines established by the Supreme Court are modified by Neb. Rev. Stat. §31-225 which states:

It shall be the duty of any landowner or tenant who shall occupy or use land through which a watercourse...or drainage course shall run or have its course, and who shall plow over or plant crops in the bed of such watercourse, ...or drainage course, to dig out or by other means deepen, at least once a year, between March 1st and April 15th, to at least a depth equal to that of such watercourse...or drainage course, before same was plowed or seeded to crop *if plowing and planting as aforesaid causes an overflow or flooding of other land along the course of said drainage ditch, slough, or drainage course.* (Emphasis added.)

Therefore, even though the Court finds that Defendant Bodlaks have raised the channel bed by some unknown amount which has impeded the flow of water in the Old Logan Creek channel, the Court further finds that Plaintiffs' expert ascribed a de minimis effect (i.e. the ponding of the channel "will inhibit a little bit" the flow of water). There was no credible evidence that the ponding between 12th Road and Bodlaks' property has ever overflowed the creek bank.

⁹ Fyfe vs. Tabor Turnpost, LLC, 22 Neb. App. 711 (2015).

The Court also finds that Plaintiffs did not meet their burden of proof to show that the plowing and planting performed by Bodlaks caused an “overflow or flooding of other lands along the course of said drainage ditch, slough, or drainage course.”

As discussed above, two other reputable experts in the field of hydrology and hydraulics testified and both disagreed with the underlying flood opinion of Plaintiffs’ expert. Thomas Riley and Brian McDonald both indicated that there were numerous factors which Mr. Bryan did not consider. Moreover, questions were raised regarding some of the methodology applied by Mr. Bryan. Specifically, the type of hydrologic and hydraulic analysis required to ascertain the impact of each respective Defendant’s alleged actions was not performed by Plaintiffs’ expert. To restore the channel to its natural condition, as requested by Plaintiffs, there would need to be an additional analysis (e.g. geomorphology analysis, physics of the channel, nature of the watershed, types of vegetation changes, rainfall patterns, etc.). This analysis was not performed. Without proper study, the remediation generally described by Plaintiffs’ expert could lead to bank destabilization.

Injunctive relief will not lie unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice.¹⁰

In this case, the Court finds the Plaintiffs have not met their burden of proof to show that their right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice because of the continuing nature of the obstruction created by Bodlaks to the natural flow of water in the Old Logan Creek channel.

Therefore, Plaintiffs’ request for injunctive relief against Defendants Bodlaks is denied.

C. Injunctive Relief against Thurston County, Nebraska

For the reasons discussed above, the Court also finds that the Plaintiffs have not sustained their burden of proof to show that the installation and maintenance of the 54" tube at the 12th Road crossing or by replacement of the 54" culvert in 2011 and 2015 created an obstruction in the Old Logan Creek drainageway due to an undersized culvert. Therefore, the Court denies Plaintiffs’ Complaint for injunctive relief against Thurston County, Nebraska in regard to the 54" culvert installed at 12th Road crossing.

¹⁰ Young vs. Lacy, 221 Neb. 511 (1985).

Secondly, the Court further finds that Plaintiffs did not meet their burden of proof to show that Thurston County created an obstruction of the Old Logan Creek drainageway by placing and maintaining an undersized culvert at the southern end of the Bodlak property at “G” Avenue. Therefore, the Court finds Plaintiff’s request for injunctive relief in regard to the 48” culvert at the “G” Avenue crossing on the south end of the Bodlak property is denied.

D. Action for Damages against Bodlaks

As discussed above, the Court did not accept the testimony of Plaintiffs’ engineer in regard to cause and effect of the obstructions placed in Old Logan Creek by Bodlaks. In addition, no analysis was done to determine the flooding caused specifically by Bodlaks (other than the opinion that the flow of water from Plaintiffs’ land was “inhibited a little bit”).

Therefore the Court finds that Plaintiffs did not meet their burden of proof in regard to their claim for a monetary judgment against Bodlaks.

E. Damages

As indicated above, even if Plaintiffs had met their burden of proof in regard to their inverse condemnation claim against County or their obstruction of a drainageway claim against Bodlaks, the Court further finds that they did not meet their burden of proof in regard to determination of the amount of damages.

While damages need not be proved with mathematical certainty, neither can they be established by evidence that is speculative and conjectural.¹¹ The question whether damage based on the destruction of an unmaturing crop is speculative is decided by whether there is sufficient data to determine with reasonable certainty the probable value it would have had if it would have matured.¹²

In awarding damages, the factfinder is not required to accept a party’s evidence of damages at face value, even though that evidence is not contradicted by evidence adduced by the party against whom the judgment is entered.¹³

¹¹ Bristol vs. Rasmussen, 249 Neb. 854, 863 (1996); Lone Cedar Ranches vs. Jandebeur, 246 Neb. 769 (1994).

¹² Bristol vs. Rasmussen, 249 Neb. 854, 863 (1996); Patrick vs. City of Bellevue, 164 Neb. 196 (1957).

¹³ Bristol vs. Rasmussen, 249 Neb. 854, 863 (1996).

The measure of damages for the destruction of an unmaturing growing crop is the value the crop would have had if it had matured, minus any savings to the plaintiff, and the costs of producing, harvesting, and transporting the crop to market.¹⁴

There are several factors to assist in determining the value of an unmaturing crop at the time of its injury or destruction, including: the nature of the land; the type of crop planted; the kind of season, whether wet or dry; the yield of crops growing in such a season; the average yield of crops on neighboring lands; the development of the crop at the time of destruction; the yield of a similar crop not injured; the market value of the crop as injured; the market value of the probable crop without injury; the type of injury; the expense that would have been incurred if the crop had not been injured; the circumstances which surrounded the crop which may have resulted in the crops not maturing; and all other circumstances illustrated by the evidence tending to establish such value.¹⁵

The initial determination for the Court to make is the number of flooded acres which were proximately caused by the alleged acts of the Defendant Thurston County, Nebraska and the alleged acts of the Defendant Bodlaks.

Roger Gustafson testified on behalf of the Plaintiffs in regard to the effect of the June 2010 flood on the Plaintiffs' crops. Mr. Gustafson stated that 284.7 acres of Plaintiffs' 2010 acres of corn were lost as a result of the flood. In addition, he said that 215.4 acres of Plaintiffs' acres of soybeans were affected by the flood. Plaintiffs took many photographs of the areas which they indicated were damaged as a result of 2010 flood. Plaintiffs also provided production worksheets which Plaintiffs used for crop insurance claims and also provided some elevator tickets showing the bushels of corn and soybeans which were sold.

Plaintiffs' expert, Mr. Bryan, noted on cross-examination that some of the flooded crop acres shown in some of the photographs were not caused by the Old Logan Creek channel alteration by either County or Bodlaks. In addition, other photographs showed that some of the water in the fields did not appear to be flood waters but instead was water bubbling up from subsurface moisture which had percolated to the surface. As discussed above, the water table in the area had increased significantly.

¹⁴ Id. at 863.

¹⁵ Id. at 864.

Mr. Gustafson further indicated that it was “too complex” for him to identify the exact areas of the 2010 flooding and crop damage on the photographs depicting the alleged acres of crops which were damaged by the 2010 flood. As acknowledged by Plaintiffs’ counsel, Mr. Gustafson was able to show the general areas using a laser pointer on the overhead photographs but he could not relate or show what was depicted on photographs as damaged crop areas on the aerial plat maps in evidence.

In regard to crop yields, Defendants, during cross-examination of Mr. Gustafson, established that not all of the sales records were produced by Plaintiffs during discovery. Mr. Gustafson indicated that his brother and his sister-in-law were responsible for maintenance of the financial records, which included the grain sales records and the income tax records. Numerous times he indicated on cross-examination that he could not answer the specific questions on grain sales without checking the corporate records. He further testified that the financial exhibits did not include all of the Plaintiffs’ records but he said that the missing pages were for other farms. He also testified that Plaintiffs had not produced the contracts for future delivery of crops for the 2010 crop year. He mentioned that it was his understanding that these records were kept for approximately three years and then destroyed. Mr. Gustafson could not answer the question of whether, on the date of filing the lawsuit (April 17, 2013), Plaintiffs still had possession of the crop records. In short, Plaintiffs did not produce all of the 2010 crop sales records which would have potentially supported his damage calculations.

Plaintiff has the burden to establish by a preponderance of the evidence the damages caused by the flood event of June 2010.

As indicated earlier, while damages need not be proven with mathematical certainty, neither can they be established by evidence which is speculative and conjectural.¹⁶ Plaintiff has established some crop damage which was the result of flood damages. However, determination of the exact areas and number of acres flooded is complex, as acknowledged by Mr. Gustafson. The only evidence in regard to the specific number of acres of crops damaged by flood water is the testimony of Mr. Gustafson. His testimony was based upon his review of photographs showing flooded crops and attempting to compare that to the crop insurance records and the elevator records. Mr. Gustafson readily acknowledged that he was not the person who kept track of or completed the business records.

¹⁶ Bristol vs. Rasmussen, 249 Neb. 854 (1996);


Therefore, although the Court finds that the Plaintiffs' evidence shows that there are some acres of crops which were damaged as a result of the 2010 flood, not all of the damage shown in the photographs was caused by the Old Logan Creek channel flood. Given the fact that the Court is unable to unravel, without speculation, (i) the exact number of flooded acres which may have been caused by the backup of Old Logan Creek, or, (ii) the specific crop yields, the Court finds that Plaintiffs did not meet their burden of proof in regard to the amount of damages claimed.

III. CONCLUSION

IT IS HEREBY ORDERED that, pursuant to the findings above, Plaintiffs' Amended Complaint for damages and injunctive relief against the Defendants Paul J. Bodlak, Jean M. Bodlak, the County of Thurston, Nebraska, and Eugene F. Schutte Family, Limited Partnership, and all of the defaulting defendants, be and hereby is dismissed, in its entirety, with prejudice.

Signed and dated this 28 day of November, 2016.

BY THE COURT:



JOHN E. SAMSON, DISTRICT JUDGE