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NEBRASKA



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I. Introduction

The following is an update on Nebraska legislative activity and case law relating to oil, gas, and mineral law from August 1, 2020, to July 31, 2021.

II. Legislative and Regulatory Developments

There have not been any significant legislative or regulatory developments affecting Nebraska oil and gas law from August 1, 2020, to July 31, 2021.

III. Judicial Developments

A. Supreme Court Cases

*1. FTR Farms, Inc. v. Rist Farm, Inc.*¹

A farm corporation that owned an undivided one-half (1/2) interest in a tract of farmland brought an action against another owner seeking partition by sale. The principal issue was whether partition in kind can be decreed using “owelty”. Owelty is a monetary payment to equalize values. The Supreme Court of Nebraska held that owelty is permitted in partition cases. However, partition in kind could not be made without great prejudice to one or both owners, even with owelty. The court further held that the trial court was not required to consider alternative methods to partition in kind not presented to the court before ordering partition by sale.

a) Facts and Procedural History

FTR Farms, Inc. and Rist Farm, Inc. each own an undivided one-half (1/2) interest in a 311-acre tract of farmland in Richardson County, Nebraska. A winding river, identified in the record as the Nemaha River, Little Nemaha River, or Big Nemaha River, creates a natural dividethrough approximately the middle of the property.²

The river separates the property into two tracts: north and south. The north tract of the property is approximately 135 acres. The south tract is approximately 176 acres. Both tracts have high quality soil, but the north tract's soil is marginally better. A bridge connects the tracts.³

1. *FTR Farms v. Rist Farm*, 305 Neb. 708, 942 N.W.2d 204 (2020).

2. *Id.* at 710.

3. *Id.*

Prior to the partition action, FTR Farms, Inc. and Rist Farm, Inc. each paid half of the annual payment on a promissory note obtained to secure the property.⁴

In March 2017, FTR Farms, Inc. filed a complaint for partition of the property, seeking partition by sale. It alleged that the property could not be partitioned in kind according to its respective interests without prejudice to its rights. In response, Rist Farms alleged that the property could be physically partitioned without great prejudice to the parties. Rist Farms also asserted that partition by sale would be harmful to the parties' farming operations.⁵ The trial court ordered partition and appointed a referee to determine if partition could be made in kind.

The referee appointed by the district court determined that partition in kind could not be made without great prejudice to the owners, or at least one of them. He further opined that the property should be sold.

Rist Farm, Inc. disagreed, still seeking a partition in kind. Rist Farm pointed out that it farmed the south tract and that FTR Farms, Inc. farmed the north tract. The president of Rist Farm claimed that if the property was sold, he would lose equity in the land, as well as his pride, farming operation, and profits. Rist Farm, Inc. stated that it would prefer the south tract and would be willing to pay \$215,000.00 to FTR Farms, Inc. to equalize the value of the property.⁶

The district court declined to adopt Rist Farm's proposal to award owelty to equalize the difference in value for "lack of established authority in Nebraska to do so in a situation like this, both in terms of statutes and case law."⁷

The district court further found that physical division "cannot be made without greatly prejudicing its owners and that this real estate should be sold at public auction as provided by law." (insert footnote to cite here maybe since it's a direct quote?) It authorized the referee to sell the property "as one tract, as two separate tracts, or in any manner which might be desirable to prospective buyers."⁸

Rist Farm, Inc. appealed. The Nebraska Supreme Court moved the appeal to its docket.

4. *Id.*

5. *Id.* at 711.

6. *Id.* at 712.

7. *Id.* at 713.

8. *Id.*

b) Analysis

The Supreme Court reviewed the decision de novo on the record. It ruled that owelty is permitted in partition cases but that it is used sparingly and only in particular circumstances. The Court noted that with respect to real estate, it has employed the concept only twice in a century and a half. The Court agreed with a Minnesota court that “[o]welty is predicated upon a division. There can be no owelty in the absence of a division of property.”(insert footnote cite) The court further agreed with many states that have found owelty should be rarely utilized and only when equitably necessary. The court then addressed whether owelty, albeit permitted, was appropriate in this case.⁹

The court concluded that FTR Farms sustained its burden to establish that partition in kind could not be had without great prejudice. The court held that partition in kind was not feasible and that the district court did not err in accepting the referee’s report and ordering partition by sale.¹⁰

c) Conclusion

The Supreme Court held that the district court did not err in rejecting the owelty award and finding that partition in kind would cause great prejudice to the owners. The court further held that the trial court was not required to consider alternative methods to partition in kind not presented to the court before ordering partition by sale.

The Supreme Court affirmed the district court's order imposing partition by sale, and remanded to allow the district court to make the adjustments necessary to achieve complete justice to the parties.

9. *Id.* at 720.

10. *Id.* at 724.