11-25-2013

Northwest Farm Credit Services, FLCA v. Lake Cascade Airpark, LLC Appellant's Reply Brief Dckt. 40992

IN THE SUPREME COURT OF THE STATE OF IDAHO

Supreme Court Docket No. 40992

NORTHWEST FARM CREDIT SERVICES, FLCA,
a federally chartered instrumentality of the United States of America,

Plaintiff-Respondent,

v.

LAKE CASCADE AIRPARK, LLC, an Idaho limited liability company;
DONALD MILLER and CANDACE W. MILLER, husband and wife,

Defendants-Appellants,

and

DAVID A. BUICH and KAREN L. BUICH, husband and wife,

Defendants.

REPLY BRIEF OF APPELLANTS LAKE CASCADE AIRPARK, LLC AND DONALD AND CANDACE MILLER

Appeal from the District Court of the Fourth Judicial District for Valley County
Case No. CV-2012-33
The Honorable Thomas F. Neville, District Judge

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. REPLY ARGUMENT 2

A. The District Court Committed Clear Error Finding The Property Was Valuable Only As Agricultural Land And Worth No More Than $4,500 Per Acre Or $1,501,500. 2

1. Appellants Challenge The District Court's Finding That A Wetland Mitigation Bank Would Add No Value To The Property, Not The Competency Of NFCS's Evidence Or The Finding That The Development Of A Residential Airpark Was Not Feasible. 2

2. The Court Should Be Left With A Definite And Firm Conviction That A Future Wetland Mitigation Bank Would Add Great Value To The Property And That The Property Should Not Have Been Valued As Only Agricultural Grazing Land. 3

B. The District Court Abused Its Discretion When It Refused To Amend Its Findings And Grant A New Trial On The Reasonable Value Of The Property. 8

C. The Prevailing Party In This Appeal Is Entitled To Costs And Attorney Fees. 9

III. CONCLUSION 9

TABLE OF AUTHORITIES

Page(s)

Cases

Kennedy v. Schneider,
151 Idaho 440, 259 P.3d 586 (2011) 3, 8

Lanham v. Idaho Power Co.,
130 Idaho 486, 943 P.2d 912 (1997) 8

PacifiCorp. v. Idaho State Tax Comm'n,
153 Idaho 759, 291 P.3d 442 (2012) 4

State v. Roe,
139 Idaho 18, 72 P.3d 858 (2003) 3

Statutes

Clean Water Act, 33 U.S.C. § 1301, *et seq* 1

Idaho Code § 12-120(3) 9

Rules

Idaho Appellate Rule 40 9

Idaho R. Civ. P. 52(a) 3

Idaho R. Civ. P. 52(b) 8

Idaho R. Civ. P. 59(a)(6) 8

Idaho R. Civ. P. 59(e) 8

Regulations

33 C.F.R. § 332.3(b)(2) 7

33 C.F.R. § 332.8 7

40 C.F.R.§ 230.93(b)(2) 7

40 C.F.R.§ 230.98 7

I. INTRODUCTION

The district court clearly erred when it found that real property once owned by Appellants Lake Cascade Airpark, LLC ("Lake Cascade Airpark") and Donald and Candace Miller (the "Millers") was valuable only as agricultural grazing land and worth no more than $4,500 per acre or $1,501,500.[1] That is because, as shown at trial, the property is uniquely suited for development as a wetland mitigation bank pursuant to the Clean Water Act, 33 U.S.C. § 1301, *et seq.*, and sellable credits from the bank have great value and are marketable in southwest Idaho—not just Valley County. While recognizing that future potential, the district court still found a wetland mitigation bank afforded the property no additional value, ultimately finding the proof at trial showed the property only has value as agricultural land.

In this case, after reviewing the entire record, the Court should be left with a definite and firm conviction that a mistake has been made. Evidence presented by Respondent Northwest Farm Credit Services ("NFCS") that a wetland mitigation bank was not feasible on the property in 2012 was inconsistent with an earlier appraisal it prepared in 2008 to underwrite the loans. Further, NFCS's assumptions on the developmental potential of a wetland mitigation bank were not only contradicted at trial but unquestionably wrong. A reasonable decision maker would not have relied on such evidence and found the property could only be valued as agricultural land. Thus, as explained further below, the Court should reverse the district court's factual findings on the value of the property as clearly erroneous.

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[1] As in their opening appeal brief, Lake Cascade Airpark and the Millers are, at times, referred to collectively as "Appellants."

II. REPLY ARGUMENT

A. The District Court Committed Clear Error Finding The Property Was Valuable Only As Agricultural Land And Worth No More Than $4,500 Per Acre Or $1,501,500.

1. Appellants Challenge The District Court's Finding That A Wetland Mitigation Bank Would Add No Value To The Property, Not The Competency Of NFCS's Evidence Or The Finding That The Development Of A Residential Airpark Was Not Feasible.

Appellants explained in their opening brief (at pages 15-16) that key to the district court's valuation of the subject property[2] was its finding that the property "was valuable only as farm or ranch land." Quoting R. 398.[3] On that basis, the district court found the property's reasonable value was no more than $4,500 per acre or $1,501,500. R. 64, 398-99. NFCS argues that competent and substantial evidence supports those findings and points to the May 2012 appraisal of the property prepared by its employee, Susan Robbins, and her trial testimony. *See* Respondent's Brief at 9-11. In particular, Respondents cite Robbins' opinion that the market for agricultural land in Valley County for recreational and residential purposes had collapsed by 2012. *Id.* at 10-11. According to Robbins, land that had sold for such purposes years before was again selling as agricultural land and at lower prices to reflect that classification. *See id.*

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[2] The real property in question is more fully described in Appellants' opening brief. *See* Appellants' Brief at 3-6.

[3] Appellants use the same system for record cites in this brief as they did in their opening brief. The Clerk's Record on Appeal is cited as "R." and the transcript from the September 25, 2012 trial is cited as "Tr." The exhibits admitted at the trial are cited as "Ex." Because the trial exhibits are compiled and numbered sequentially, the page number of the compilation is cited, as opposed to the page number of the exhibit itself. For instance, "Ex. (H) at 37" refers to Exhibit H and page 37 of the compilation of exhibits, not page 37 of Exhibit H.

By this appeal, however, Appellants do not challenge the competency of NFCS's evidence. Nor do they challenge the district court's finding that the local real estate market did not support the development of a residential airpark on the property's west side (adjacent to the Cascade Airstrip). *See* R. 64, 398. That finding was arguably supported by the sales comparisons used by Robbins in her 2012 appraisal and her general experience and knowledge of the real estate market in Valley County. *See generally* Ex. (H). In contrast, the nature of the evidence supporting the district court's finding that a wetland mitigation bank would add no value to the property was far different. As explained in Appellants' opening brief (at pages 15-20), that evidence was riddled with inconsistencies and unsupported and unsupportable assumptions about the developmental potential of a wetland mitigation bank on the property and the market for sellable credits from the bank, once established.

2. The Court Should Be Left With A Definite And Firm Conviction That A Future Wetland Mitigation Bank Would Add Great Value To The Property And That The Property Should Not Have Been Valued As Only Agricultural Grazing Land.

On that basis, Appellants submit that the district court's finding that the property is valuable only as agricultural land—and gains no value as a wetland mitigation bank—should be set aside as clearly erroneous. *See* Idaho R. Civ. P. 52(a). In other words, the Court should be left with a definite and firm conviction that a mistake has been made regarding those findings. *See State v. Roe*, 139 Idaho 18, 21, 72 P.3d 858, 861 (2003). The facts found must also sustain conclusions of law, *Kennedy v. Schneider*, 151 Idaho 440, 442, 259 P.3d 586, 588 (2011), and here they do not. NFCS responds by arguing that substantial evidence supports the district

court's finding on the property's limited value, namely that: (1) Robbins "discarded the Subject Property's developmental potential as a wetland mitigation bank"; (2) a wetland mitigation bank had not been approved on the property; and (3) there was no active market for sellable mitigation credits from a mitigation bank in Valley County. *See* Respondent's Brief at 11-13.

But a reasonable fact finder would not have relied on such evidence. *See PacifiCorp. v. Idaho State Tax Comm'n*, 153 Idaho 759, 768, 291 P.3d 442, 451 (2012) (explaining that evidence is substantial if reasonable trier of fact would accept it and rely on it to determine disputed point of fact). As for Robbins, her view of the developmental potential of a wetland mitigation bank on the property's eastern side was inconsistent, as she rendered completely different opinions on its feasibility and value in 2008 and 2012. When Robbins appraised the property in 2008—to underwrite the loans—she stated, "the wet land areas are considered in the valuation of this property," Ex. (2) at 78, and found "[t]he wet land mitigation bank may have some impact" on the east side of the property, *id.* at 81. Ultimately, she considered the developmental potential of a future wetland mitigation bank, as well as an airpark on the remaining property. *See id.*; *see also* Tr. at 65:19-66:9. She valued the entire property at $15,406 per acre or $5,141,040. Ex. (2) at 72, 84.

In 2012, now appraising the property to support NFCS's foreclosure of the loans, Robbins found the property worth far less, $4,001 per acre or $1,335,000. Ex. (H) at 31. In reaching that conclusion, Robbins took an entirely different view of a wetland mitigation bank and concluded such a use was not feasible on the property. *Id.* at 27, 37, 39; Tr. 37:13-25, 62:13-19. She did so despite observing, just as she did in 2008, that the mitigation bank was not

complete. *Compare* Ex. (H) at 27, 37 *with* Ex. (2) at 78. Moreover, Appellants' work to establish the wetland mitigation bank was, by 2012, even further along than in 2008. *See* Tr. 123:25-124:25 (testimony of James Fronk, explaining that between 2007 and 2009 he conducted wetland delineation of property, prepared soil analysis, and monitored groundwater, among other activities); Tr. 106:17-23 (testimony of Don Miller regarding feasibility report requested and paid for in 2010).

Thus, given the regard Robbins gave a future wetland mitigation bank in 2008, it was unreasonable to find a mitigation bank had no value in 2012. As even NFCS acknowledges, James Fronk, an Army Corps of Engineers certified wetland delineator, testified it would take approximately one year to update the site plan, obtain governmental approval, and develop the wetlands, all at a cost between $50,000 and $75,000. *See* Respondent's Brief at 12; *see also* Tr. 127:24-128:21, 132:4-133:25. Indeed, Fronk testified that the mitigation bank could be reintroduced to the Corps of Engineers and the Environmental Protection Agency using the same data that Appellants had already developed. Tr. 126:17-127:5. All in all, a wetland mitigation bank could be completed well within the 12- to 24-month marketing time to sell the property Robbins used in reaching her 2012 valuation. *See* Ex. (H) at 31. The fact that the mitigation bank was not complete was simply of no import given its undisputed developmental potential within the anticipated marketing time.[4] *See generally* R. 61 (finding "[i]t is undisputed that part

[4] As explained in Appellants' opening brief (at pages 4-6, 11-12, 17-18), the east side of the property was determined to be "a prime spot for a wetland bank" given its unique natural attributes. Tr. 125:5-126:5, 127:6-17. The property is located within a large drainage close to (continued . . .)

of the property has future potential as a source of wetland mitigation").

Finally, Robbins' most basic understandings of the workings of a wetland mitigation bank under the Clean Water Act were unquestionably flawed. Particularly notable was Robbins' mistaken belief that the market for sellable credits from a wetland mitigation bank on the property was limited to Valley County and that no such market existed in Valley County. *See* Tr. 53:19-54:12. NFCS continues to perpetuate that misunderstanding in its appeal brief, *see, e.g.*, Respondent's Brief at 13 ("More importantly ... there is no active market in Valley County for wetland credits."), apparently based on Fronk's testimony that credits have not been bought and sold in the Valley County drainage, *id.* at 12.[5]

Whether credits have been bought and sold in Valley County, however, has no bearing on whether credits from a mitigation bank on the property are marketable. Once established, credits from the bank are sold to Section 404 permittees—such as the Idaho Transportation Department ("ITD") and other developers that adversely impact aquatic resources—within distinct service

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(. . . continued)
Cascade Reservoir and has naturally high groundwater levels and prehistoric drainages that run to the middle of the property, allowing wetlands on the property to be self-sustaining. *Id.*

[5] NFCS also argues that Fronk "testified that in his 20 years of experience only 100 acres of wetlands had been developed in Valley County." Respondent's Brief at 12. That is not how Fronk testified. When asked about his professional experience, Fronk stated:

> In the past 20 years, ... I've probably delineated, per the Clean Water Act process, probably over 200,000 acres of wetlands in the Valley, and Adams County, and Ada County area. ... I estimate I probably constructed wetlands in the area of 100 acres that have been built and constructed.

Tr. 118:22-119:4.

areas.[6] *See* 40 C.F.R. §§ 230.93(b)(2), 230.98; 33 C.F.R. §§ 332.3(b)(2), 332.8. The service area for the planned mitigation bank on the property would include not only the Payette River drainage but also the Boise River drainage and Weiser River drainage. Tr. 101:6-14, 134:5-12. That area encompasses a large portion of southwest Idaho, not simply Valley County.

In any event, NFCS can point to no evidence in the record to suggest that credits from a wetland mitigation bank on the property could not be sold in Idaho. To the contrary, Fronk testified that an established market for the wetland credits already exists in the state. Tr. 130:18-131:13, 134:5-16. Although fairly new, there are four existing wetland mitigation banks in Idaho. Tr. 131:6-13. Fronk also explained that ITD recently purchased three to four acres' worth of emergent wetlands for approximately $25,000 per tenth of an acre. Tr. 130:18-131:5. Other evidence showed that the City of Boise recently purchased credits for $4.50 per square foot (or approximately $180,000 per acre). *See* Tr. 106:17-107:20. It follows that a ready market for credits from a wetland mitigation bank on the property already exists and that the credits would be extremely valuable, well above $4,500 per acre (as found by the district court) or $4,001 per acre (as found by Robbins).

In sum, the district court clearly erred when it found the property was valuable only as agricultural land and that a future wetland mitigation bank would afford no value to the property. No reasonable view of the evidence can lead to such findings when the evidence, as here, was

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[6] In fact, it was ITD, a potential customer, who first approached Lake Cascade Airpark regarding the property and its potential as a wetland mitigation bank. Tr. 97:21-98:5; *see also* Tr. 95:14-96:16; Ex. (2) at 78.

internally inconsistent, contradicted by external evidence, and ultimately insubstantial. After considering the entire record, the Court should be left with a definite and firm conviction that a mistake has been made regarding the district court's valuation of the property. *See Kennedy*, 151 Idaho at 445-46, 259 P.3d at 591-92 (finding trial court committed clear error in finding plaintiffs proved claim of adverse possession when court's findings were not supported by substantial evidence).

B. The District Court Abused Its Discretion When It Refused To Amend Its Findings And Grant A New Trial On The Reasonable Value Of The Property.

The district court also abused its discretion when it denied Appellants' motions to amend the findings and conclusions pursuant to Idaho R. Civ. P. 52(b) and 59(e) and motion for a new trial pursuant to Idaho R. Civ. P. 59(a)(6). In its opposition brief, NFCS supports the district court's denial of those motions based on the fact that the court recognized its decisions were discretionary. Respondent's Brief at 15-16. While that is true, whether a district court abuses its discretion also turns on whether it acted within the boundaries of its discretion and reached its decision through an exercise of reason. *Lanham v. Idaho Power Co.*, 130 Idaho 486, 497-98, 943 P.2d 912, 923-24 (1997). As already explained, substantial evidence does not support the district court's finding that the property has value only as agricultural land. Given the lack of substantial evidence, the court did not act within the bounds of its discretion or reach its decisions based on reason. For that reason, the district court abused its discretion in refusing to amend its findings and conclusions and to grant a new trial.

C. The Prevailing Party In This Appeal Is Entitled To Costs And Attorney Fees.

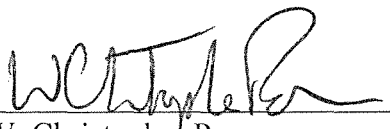
NFCS does not challenge Appellants' right to costs and attorney fees on appeal, should Appellants prevail. *See* Respondent's Brief at 17-19. Raising no such objection, NFCS necessarily concedes that Appellants are entitled to recover costs pursuant to Idaho Appellate Rule 40 and attorney fees pursuant to Idaho Code § 12-120(3) in that situation. *See* Appellants' Brief at 21-22. On the other hand, should NFCS prevail, Appellants concede the two loan agreements entitle NFCS to recover its reasonable attorney fees on appeal.

III. CONCLUSION

For the reasons set forth above, Appellants respectfully request the Court reverse the district court's order finding the subject property was valuable only as agricultural land and that the property's reasonable value was no more than $4,500 per acre or $1,501,500 and remand this matter to the district court. Appellants also request that the Court award them costs and attorney fees as the prevailing parties on appeal.

RESPECTFULLY SUBMITTED this 25th day of November, 2013.

STOEL RIVES LLP



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 25, 2013, I served a true and correct copy of the foregoing **REPLY BRIEF OF APPELLANTS LAKE CASCADE AIRPARK, LLC AND DONALD AND CANDACE MILLER** on the following, in the matter indicated below:

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