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City of Lincoln v. Cent. Platte Natural Res. Dist., 638 N.W.2d 839 (Neb. 2002)

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Finally, the court determined the water court's inclusion of the *Bean Lake* remark in any cases prior to this decision did not constitute a policy stance or opinion, and therefore did not violate provisions of the claim examination rules put forth by the court. In essence, the court resolved the "remark" controversy in favor of the water court, but in resolving the confusion underlying the remark, the court ruled in favor of non-diversionary, non-consumptive public water rights in Montana.

Daniel C. Wennogle

NEBRASKA

City of Lincoln v. Cent. Platte Natural Res. Dist., 638 N.W.2d 839 (Neb. 2002) (holding: (1) a decision not to allow a party to join a water permit application can not be arbitrary, capricious, or unreasonable; and (2) the party seeking to become part of a water permit application must prove why they would benefit or be harmed if the application was granted).

The appellee, City of Lincoln ("City"), filed an application for a water permit. The appellant, Saunders County ("County"), objected to the permit, requested a hearing, and sought to become a party to the proceedings. The Director of the Nebraska Department of Natural Resources ("Department") denied the County's request to become a party. The County appealed the ruling to the Supreme Court of Nebraska.

The City filed a permit application to appropriate flows of the Platte River for induced ground water recharge on September 9, 1993. Following the application, the City published a notice announcing the deadline for filing objections and requests for a hearing was August 17, 1994. Several parties filed timely objections, various hearings occurred, and the City dismissed some of the objections. The remaining objectors settled with the City. The settlement reduced the stream flow initially requested by the City.

On September 23, 1999 the County filed an "Objection and Request for Hearing" and asked to become a party to the proceedings. The City opposed the County's request since it was filed five years after the deadline. Subsequently, the director of the Department denied the request due the County's late response and failure to prove injury. The director based the denial on the County's failure to prove either that it would benefit or be harmed if the City granted the application. The director considered five factors in the conclusion: (1) why the County did not file its request by the deadline; (2) whether the County had sufficient interest in the subject matter; (3) whether another party represented the County's interest; (4) whether the County's

participation would be helpful in a decision; and (5) whether the County's participation would unduly disrupt or delay the proceeding. The director found each factor sufficient to deny the request.

The County based this appeal on twenty assignments of error. The Supreme Court of Nebraska focused on whether the director's decision was arbitrary, capricious or unreasonable and discussed all the other assignments of error in relation to this issue. First, the County argued the Department used incorrect standards to determine if the County could be a party and that the Department failed to keep complete records. The court held the County did not establish why the standards were incorrect. Also, the court found the Department's decision was not arbitrary, capricious, or unreasonable even though the record does not include a draft of the Department officer's findings.

Secondly, the County claimed Susan France, the division manager, LeRoy W. Sievers, the hearing officer, and the Department director participated in *ex parte* communications excluded from the record. Further, the County asserted France and Sievers were investigators on the City's application. According to the County, the Department should have excluded France and Sievers from serving in administrative proceedings regarding the same case. Sievers also served as legal counsel for the Department and provided advice on applications proceedings. The director stated in response that no one from the Department served as an investigator in the contested case. Accordingly, no one from the Department participated as an advocate or prosecutor in this case since 1994. The court rejected the County's allegations for lack of factual support to prove France and Sievers were prosecutors, investigators, or advocates in this matter.

The County then asserted Sievers erred in denying its request for subpoenas for a state hydrologist and France. According to Nebraska Evidence Rules, the party who objected to the denial of subpoenas must prove the people subpoenaed had necessary and unique knowledge relevant to the case. Therefore, the County had an obligation to prove the hydrologist and France had unique knowledge necessary to whether or not the County could be a party. The court held the County failed to meet its burden of proof.

Finally, the court addressed whether the director's decision was arbitrary, capricious, or unreasonable. The County claimed it did not object to the application sooner, because they did not know the City changed the original proposal by not asking for enough water to recharge the aquifer under the Platte River and to provide water for the County. Further, the County based its claim of interest in the application on five reasons: (1) citizens' interests; (2) Clear Creek Drainage District rights; (3) zoning regulations; (4) the County's rights to County roads; and (5) County riparian rights. The court found the County failed to support any of its claims of interest and the director's decision was based on competent, relevant evidence.

Therefore, the court affirmed the Department's decision since the

County failed to establish the director's denial of the County's hearing request was arbitrary, capricious, or unreasonable.

Susan Curtis

Saunders County v. Metro. Utils. Dist.-A, 645 N.W.2d 805 (Neb. Ct. App. 2002) (holding: (1) a plaintiff must have standing to bring the cause of action; (2) a given water right will not give standing to challenge previously established water rights; (3) the authority to enforce zoning and flood plain regulations does not provide standing without evidence the water rights will violate these regulations; (4) riparian rights alone will not give standing without evidence of their infringement by the water right being contested; and (5) a contractual relationship alone will not suffice to establish standing to challenge a water right).

Saunders County brought this action before the Nebraska Court of Appeals after the Nebraska Department of Natural Resources ("NDNR") dismissed eighteen causes of action filed by the county against the Metropolitan Utilities District ("District").

On October 6, 1993, the District applied to the NDNR for a permit to appropriate the natural flow of the Platte River for induced ground water recharge. On March 1, 1994, the District filed a second application with the NDNR requesting the transference of the Platte waters to the Platte West Wellfield. The NDNR published notice of the District's requests on multiple occasions during July and August of that year. No parties filed objections in response to these notices, and as a result, the NDNR granted the two permits on December 10, 1998.

On May 11, 1999, Saunders County filed a complaint with the NDNR regarding the District's applications. Saunders County argued the NDNR's initial approval of the District's application was void due to procedural inadequacies, and the county requested a hearing on these matters. The county also sought an injunction halting further water withdrawal.

In November 1999, the NDNR responded to the seventeen causes of action, ruling Saunders County did not have sufficient standing to contest the District's applications. The county later sought a hearing on this issue, which the NDNR granted, but only to uphold its previous dismissal of Saunders County's claims due to a lack of standing. Subsequently, the NDNR denied Saunders County's request for a rehearing. The county appealed to the Nebraska Court of Appeals on five grounds: (1) NDNR violated the county's due process rights; (2) NDNR erroneously allowed a department hearing officer and unit supervisor to be involved in the proceedings; (3) NDNR erroneously denied requested subpoenas; (4) NDNR failed to keep a complete record; and (5) NDNR erroneously dismissed the county's seventeen