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Springer v. Kuhns, 571 N.W.2d 323 (Neb. Ct. App. 1997)

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on the previous owners' right in order to tack their time of use to the present possessor's time. The previous owners erroneously thought they had a real property right to the water. This produced a color of title that allowed the Hooks to tack on the previous owners' time of adverse use.

Joseph A. Dawson

NEBRASKA

Springer v. Kuhns, 571 N.W.2d 323 (Neb. Ct. App. 1997) (holding that a statute authorizing ground water transfer off overlying lands to adjacent lands for agricultural purposes operates retroactively on existing agreements).

In 1995, Nebraska passed a statute that authorized ground water transfers off overlying lands to adjacent lands for agricultural purposes. This case presents the question of whether that statute should apply retroactively, specifically to an agreement made in 1989.

The Springers owned eighty acres of farm land, and offered to sell sixty to Kuhns. The Springers wanted to keep the southern most twenty acres to retain access to a well and underground pipeline with which they planned to irrigate their adjoining land. Kuhns offered to provide an easement for access to the well and pipeline if she could purchase the entire eighty acres. The Springers agreed, and the parties signed a warranty deed. The Springers retained all water rights and an easement. The easement provided "for access, maintenance and repair to an irrigation pipeline and related equipment to the existing or replacement well"

After five years, a dispute arose between the parties, and Kuhns refused to honor the reservation of water rights in the deed. The Springers filed suit in district court, requesting either rescission of the deed, or "reformation of the deed and an order quieting title in them to the retention of the water rights." The court issued a temporary injunction and, equating such reservation of water rights to that of mineral rights, issued quiet title in the Springers to the water and the easement, and enjoined Kuhns from preventing the Springers' use of the well. Kuhns alleged the district court erred in finding that the agreement severed water rights from ownership of the overlying land.

The court of appeals affirmed the district court's holding, but on different grounds. To reach its decision, the court examined the history of Nebraska ground water law and the legislature's intent in passing the 1995 statute. Prior to 1957, Nebraska water law prohibited transfer of ground water from overlying land. Beginning in 1957, the Nebraska legislature passed various laws that allowed for exceptions to the general rule.

The 1995 statute is one such exception. It allows transfer of ground water to adjacent lands for agricultural purposes. The court found that the 1989 agreement between the parties met the requirements of the statute because it served agricultural purposes, would not adversely affect any other users, was consistent with applicable laws and regulations, and served the public interest. The remaining issue was whether the statute applied retroactively to the 1989 agreement.

The court found that a previously unlawful agreement could become lawful if the legislature intended, through a change in the law, to validate the previous agreement. Although there is no specific language in the statute suggesting that the legislature intended to apply it retroactively, the court held that the statute does apply retroactively. The court based its reasoning on two factors: 1) legislative history reflected that the legislators knew such agreements had been made in the past, and 2) the legislature did not void prior agreements. The court reasoned that solely prospective application of the statute would probably result in disruptive economic and legal consequences.

Debbie Eiland

NEVADA

Desert Irrigation, Ltd. v. State of Nevada, 944 P.2d 835 (Nev. 1997) (holding that a detached parcel was not "land being developed" within the statute when the party did not include it in the original site for water use, but that it would be manifestly unfair to cancel the water right due to inaccurate advice given by the State Engineer).

In 1971, the State Engineer granted a permit to a developer that allowed a certain amount of water per acre-feet annually for use at a residential site known as the Allen Estates, located in the Pahrump Basin. In 1980, the developer formed a partnership with Desert Irrigation, Ltd. ("DI") and eventually quit claimed all his rights to DI. Over the next several years, DI requested and received fifteen time extensions for an application for proof of beneficial use. While waiting for its sixteenth time extension, DI discovered that the original amount permitted for use exceeded the amount needed for the Allen Estates. DI filed an application to change the point of diversion of the uncommitted water for use on a new residential site six miles from the Allen Estates. Following consultation with the State Engineer's office, DI withdrew the application. The Engineer's office incorrectly informed DI that the unused water rights would revert to an irrigation certificate, and would not be lost. After an investigation, the State Engineer concluded that the new site was not within the original permit. The State Engineer further found that DI was not putting the unused water to beneficial use, and canceled the excess water rights.