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In re 2007 Administration of Appropriations of the Waters of the Niobrara River, 820 N.W.2d 44 (Neb. 2012)

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hattan sought the Department's authorization to withdraw a total of 646 acre feet of water per year from any combination of five wells, and to expand its place of use to include the geographic area within which Manhattan is authorized to adopt a growth policy. All of the well rights in question had been established prior to July 1, 1973.

The Department requested additional information concerning Manhattan's pre-1973 historical use of the well rights. Specifically, the Department requested a map of Manhattan's service area and a list of each water hook-up and the volume of water delivered to each hook-up, as those conditions existed prior to July 1, 1973. Manhattan contended such information was irrelevant to its application because Manhattan's water rights included the right to expand water use as needed for municipal growth.

When Manhattan failed to comply with the Department's request, the Department dismissed Manhattan's application as incorrect and incomplete. Manhattan appealed the ruling to the Eighteenth Judicial District Court, Gallatin County, Montana, which affirmed the Department's ruling. Manhattan then appealed to the Montana Supreme Court.

The Court focused its analysis on the requirements of the Montana Water Use Act ("Act"). The Act recognizes lawful water rights that existed prior to July 1, 1973, prescribes an application procedure to change the existing water rights, and allows the Department to adopt rules to implement the Act. Pursuant to this authority, the Department adopted a rule ("Rule") that required applicants intending to change pre-1973 water rights to provide information regarding the historical use of the rights prior to July 1, 1973.

Manhattan did not challenge the validity of the Rule. Instead, it argued that the Department assigned improper weight to its historical use information when it reviewed Manhattan's application. Manhattan argued, pursuant to a 1985 Temporary Preliminary Decree from the Montana Water Court, that its existing municipal water rights included expansion of water use to satisfy municipal growth. Manhattan argued the Department's review of its historical use information would be irrelevant. However, because the Department terminated the application as incorrect and incomplete without making a decision on the application, the Court held none of Manhattan's arguments were ripe for review. The Court also held the Department properly followed its existing Rule.

Accordingly, the Court affirmed the district court's decision that the Department had the requisite authority to request historical use information from Manhattan in connection with reviewing Manhattan's application.

Natalia Schissler

NEBRASKA

In re 2007 Administration of Appropriations of the Waters of the Niobrara River, 820 N.W.2d 44 (Neb. 2012) (holding (i) the law-of-the-case doctrine did not prevent junior water rights holders from objecting to issues over the burden of proof and the Department of Natural Resources' alignment as a party litigant; (ii) the alignment of the Department as an adverse party was proper in a case where plaintiffs challenged its method of administration; (iii)

the burden of proof was on objecting junior rights holders when they challenged closing notices; (iv) a hearing officer's denial of a plaintiff's request to amend a complaint was not an abuse of discretion when the requested amendment was meritless; and (v) parties appropriately raised the issue of abandonment and forfeiture of water rights through statutory and common-law methods).

The Nebraska Public Power District ("NPPD") operates a hydropower facility on the Niobrara River near Spencer, Nebraska. Attached to the facility are three separate water rights, all owned by NPPD. Jack Bond and Joe McClaren Ranch ("Landowners") own property upstream of the Spencer facility with junior surface water rights appropriated for agricultural use. In March 2007, NPPD requested the Nebraska Department of Natural Resources ("Department") place a call on the Niobrara River to curtail the water rights of junior upstream landowners, asserting that the River's flow was insufficient to satisfy the Spencer facility's more senior water rights. After repeated measurements of the Niobrara River, the Department determined the flow was insufficient to satisfy the Spencer facility's water rights. Accordingly, the Department issued closing notices to Landowners and approximately four hundred other junior appropriators.

Landowners filed a request for an administrative hearing before the Department, alleging NPPD had abandoned its water rights and Landowners were not subject to the closing notices under the futile call doctrine. The Department appointed an independent attorney to act as the hearing officer. During the hearing, Landowners objected to the Department appearing as a party. After the hearing officer determined the Department was a proper party, the Department left the matter pending, which allowed NPPD to enter into subordination agreements with upstream users.

While the administration proceedings were still pending, Landowners filed a petition for condemnation of NPPD's water rights in Boyd County Court ("county court"). The county court granted a condemnation award to Landowners and a twenty-year compensation award for NPPD. NPPD then filed to dismiss the administrative proceedings because the condemnation award rendered the proceedings moot. Accordingly, the Department dismissed the administrative proceedings for lack of subject matter jurisdiction.

On appeal to the Nebraska Supreme Court, Landowners argued the proceedings were not moot because a determination on the status of NPPD's water rights could benefit them because they would not need to pay NPPD for water if NPPD's water rights had been abandoned. The Court held the proceedings were not moot and remanded the case for further proceedings.

On remand back to the Department, Landowners sought to amend their complaint to add an estoppel claim. Landowners also wished to add an assertion that NPPD had not called for water administration in fifty years and the Department never previously issued closing notices on NPPD's behalf. The Department appointed a different independent attorney as the hearing officer. The new hearing officer refused to allow Landowners to amend their complaint. NPPD next filed a motion to impose Nebraska's rules of evidence and to exclude evidence that the Spencer facility had wasted water through leakage. The hearing officer granted NPPD's motion.

The hearing officer allowed several exhibits over the objections of NPPD because the exhibits were not relevant to the proceedings. The Director of the Department ("Director") soon issued his final order based on the hearing. The Director overruled the hearing officer on allowing the exhibits. Additionally, the Director determined that Landowners initiated the action under NEB. REV. STAT. § 61-206; which places the burden of proof on Landowners, and also that the Department's status as a party was proper because Landowners were challenging the Department's methods for water administration.

The Director also determined that the dispute over whether NPPD had abandoned its water rights was irrelevant for an action brought under § 61-206 because Landowners did not properly challenge NPPD's water rights under NEB. REV. STAT. §§ 46-229 to 46-229.05. The Director also noted that Landowners did not provide any evidence that NPPD had abandoned its water rights. The Director then ruled Landowners failed to meet their burden of proof to dispute the futile call analysis and denied their claims regarding the propriety of the closing notices.

Landowners appealed the Director's rulings back to the Nebraska Supreme Court. Landowners claimed the Director erred in (i) aligning the Department as a party litigant; (ii) assigning burden of proof to Landowners; (iii) excluding evidence that the Spencer facility had wasted water through leakage; (iv) declining to allow Landowners to amend their complaint; (v) rejecting evidence after the hearing officer had admitted the evidence; (vi) determining that the claims against NPPD's water rights were excluded from the proceedings; (vii) determining that NPPD had not abandoned a portion of its rights; (viii) concluding that NPPD could place a call for the full amount of its water rights; and (ix) determining that the Department conducted a proper futile call analysis.

The Court first held Landowners were not prevented from objecting to the assignment of the Department as a party litigant based on the law-of-the-case doctrine. The Court reasoned the original appeal of this case did not address the issue of the Department's status and Landowners were not bound by the hearing officer's original decision that the Department was a proper party. The Court then held because Landowners challenged the administration of the Department's enforcement of water rights, it was appropriate for the Department to defend its methods of administration. Landowners then argued the Department's alignment as a party violated due process. The Court held some mixing of judicial and prosecutorial functions was acceptable and these functions were not improperly combined.

Next, the Court held Landowners bore the burden of proof to show NPPD had abandoned its water rights because they raised questions outside the scope of the call for administration. Additionally, the court held the landowners' request for hearing was more akin to a petition. The Court then held the hearing officer's denial of Landowners' request to amend their complaint was appropriate and not an abuse of discretion. The hearing officer had sustained NPPD's objections to Landowners' request to amend because the Department did not have general equitable jurisdiction and could not be estopped from performing its legal duties.

Finally, the Court held the Director erred in refusing to address whether NPPD abandoned its water rights. The Court held NEB. REV. STAT. § 46-229 only laid out a procedure the Department must follow when cancelling a water right. The statute did not eliminate common-law methods for challenging an appropriation.

Accordingly, the Court again remanded that case back to the Department with directions to determine whether NPPD's appropriations had been abandoned or forfeited.

Christopher Butler

NEVADA

In re Nevada State Engr Ruling No. 5823, 277 P.3d 449 (Nev. 2012) (holding that a court's jurisdiction over an applicant's appeal of a state water engineer's decision is not limited to the county in which the applicant's water rights lie, but rather, a court may hear an appeal in any county in which the decision affects the applicant).

This case concerns the Nevada State Engineer's ("State Engineer") Ruling 5823, which allocated groundwater rights in the Dayton Valley Hydrographic Basin ("Basin"), located in Lyon County, Nevada. Most of the applications the State Engineer considered in Ruling 5823 asked to change the point of diversion, place, and manner of use of existing groundwater appropriations in the Basin. Churchill County, Nevada and the Pyramid Lake Paiute Tribe ("Appellants"), believing the Basin was already over-appropriated, had protested the allocations on the basis that the changes would injure their interests in the Basin. The Basin's groundwater is hydrologically connected to the Carson River, which flows into the Lahontan Reservoir. Appellants argued to the State Engineer that approving the applications in Lyon County would deplete these waters in neighboring Churchill County, in which Appellants have an interest. The State Engineer rejected Appellants' arguments and issued Ruling 5823.

Appellants filed appeals in the Third Judicial District Court in Churchill County ("district court"), invoking NEV. REV. STAT. § 533.450(1) ("Statute"), which enables those negatively affected by a State Engineer's decision to pursue judicial review of that decision. The Statute also provides that an appeal "must be initiated in the proper court of the county in which the matters affected or a portion thereof are situated." Asserting improper venue, the State Engineer requested a venue change from Churchill to Lyon County because Appellants' water rights are or would be located in Lyon County. Appellants argued in return that the Statute allowed for more than one possible venue and that either court was proper.

The Pyramid Lake Paiute Tribe filed a separate appeal in federal district court, arguing the state district court venue was improper because the Tribe's water rights were federally decreed water rights and therefore the decree court, not the state district court, had jurisdiction over the rights. The federal district court ruled that the Statute granted exclusive jurisdiction in the court where the applicant's actual or proposed water rights were located. In the context of Ruling 5823, the federal district ruled jurisdiction was proper in Lyon County.