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Joe McClaren Ranch, L.L.C. v. Neb. Pub. Power Dist. (In re 2007 Admin of Waters of the Niobrara River), 851 N.W.2d 640 (Neb. 2014)

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NOA, and that the lands that Duncan owned that were subject to the 1895 NOA reflected a chain of title that did not reference the 1895 NOA. Accordingly, both Duncan and Skelton lacked the requisite contractual relationship with the original appropriator.

The Court then addressed the 1902 and 1913 NOAs and held that the water court was correct in finding that Duncan and Skelton abandoned any water they claimed to have used that exceeded the flume's capacity. The Court reasoned that the flume's capacity limited the amount of water available for beneficial use for eighteen to twenty-nine years, a period of time sufficient to raise a presumption of abandonment. Duncan and Skelton argued that their predecessors' continuous struggle to repair and expand the original flume demonstrated an intention to maintain the rights. The Court found this unpersuasive, holding that those efforts merely signaled an intention to continue to use the amount of water carried by the original 1912 flume. Accordingly, the Court held that the Master and water court did not err in finding the claimed water in excess of the flume's capacity abandoned.

Finally, the Court addressed whether the water court correctly adopted the Master's conclusion that neither Duncan nor Skelton acquired any water rights by adverse possession. Duncan and Skelton argued that if they did lose their interest in the 1895 appropriation, they or their predecessors reacquired ownership of that right through adverse possession. The Court stated that in order for Duncan or Skelton to prove adverse use, they had to provide evidence that they or their predecessors used the water "at a time when the owner of the right to use the water had need of it, used it in such a substantial manner as to notify the owner that it was being deprived of water to which it was entitled; and that during all of that period, the owner could have maintained an action against him for so using the water."

The Master determined that Skelton was not entitled to any portion of the 1895 appropriation based on adverse possession because Duncan's predecessors, as upstream users, used all of the water right carried in the 1912 flume before Skelton could attempt to use it. The Master then determined that Duncan did not provide sufficient evidence to support an adverse possession of either the 1895 or 1902 appropriations. The Court therefore agreed with the Master's determination that neither Duncan nor Skelton were entitled to claim any water from the 1895 appropriation based on adverse possession.

Accordingly, the Court affirmed the water court's opinion on all four issues raised by the claimants.

Brock Miller

NEBRASKA

Joe McClaren Ranch, L.L.C. v. Neb. Pub. Power Dist. (*In re 2007 Admin. of Waters of the Niobrara River*), 851 N.W.2d 640 (Neb. 2014) (holding that: (i) the legislative history of the statutes governing the Nebraska Department of Natural Resources' water right cancellation procedures was not relevant to the issues of common law abandonment or statutory forfeiture, but its improper admission was harmless; (ii) NPPD's failure to call for administration of the Niobrara River prior to 2007 was not evidence of an intent to abandon its water

rights; (iii) forfeiture of water appropriations through nonuse is governed by the period of limitations relating to real estate, and the Department's factual findings demonstrated that NPPD did not statutorily forfeit its appropriations; (iv) the Department's policy of allowing senior appropriators to place a call for the full amount of its water despite the existence of subordination agreements was not arbitrary, capricious, or unreasonable; and (v) the Department's determination that it conducted a futile call analysis where appropriate was not arbitrary, capricious, or unreasonable).

Joe McClaren Ranch ("McClaren") applied for an appropriation to divert water from the Niobrara River in 2006. Weinreis Brothers Partnership ("Weinreis") held five water rights with priority dates between 1969 and 2006. The Nebraska Public Power District ("NPPD") held three water appropriations for hydropower generation at its Spencer plant with priority dates of 1896, 1923, and 1942. The NPPD's three appropriations for the Spencer plant amounted to a total water discharge of 2,035 cubic feet per second ("cfs"). The Spencer plant is located approximately 145 miles downstream from the McClaren and Weinreis properties.

In early 2007 the water resources manager at NPPD placed a call for administration on the Niobrara because he learned that the Nebraska Department of Natural Resources ("Department") was not proactively administering the portion of the Niobrara near Spencer. On April 30, 2007, the Department took a measurement roughly ten miles upstream from the Spencer plant showing a discharge of only 1,993.73 cfs.

On May 1, 2007, the Department issued closing notices to approximately 400 junior appropriators, including McClaren and Jack Bond (Weinreis's successor in interest) directing them to cease water diversions from the Niobrara. The junior appropriators filed a request for a hearing with the Department. After the hearing, the Department found that the administration of the Niobrara was proper.

The junior appropriators appealed to the Nebraska Supreme Court ("Court"). The Court reversed and remanded, holding that the Department had improperly excluded the issues of abandonment and statutory forfeiture from nonuse. After the second hearing on remand, the Department again found that the administration of the Niobrara was proper, and NPPD had not abandoned or statutorily forfeited its appropriations. The junior appropriators appealed once again.

On appeal, the Court first considered whether the Department erred by relying on evidence from the hearing officer, who took judicial notice of an amendment to Nebraska Revised Statute section 46-229. First, the Court noted that the state Administrative Procedure Act permits agencies to take judicial notice of legislative history. For a court or agency to inquire into a statute's legislative history, the statute must be open to construction. The Court had previously held that the amendment was unambiguous and that, by its plain language, it addresses only the procedure by which the Department must abide in order to terminate an owner's appropriation right and does not address the common law theories of abandonment or nonuse. Therefore, the legislative history was irrelevant to the issues being considered on remand. However, because no relevant evidence was excluded and the Department made findings of

fact supported by other relevant evidence, the Court concluded that the decision to admit the legislative history was harmless.

Next, the Court considered whether the Department erred in finding that the junior appropriators failed to prove NPPD abandoned its appropriations in whole or in part. The junior appropriators argued that NPPD failed to call for administration of the river or to enter into more subordination agreements before 2007, demonstrating intent to abandon its appropriations. The Court found no Nebraska case law establishing that a failure to call for administration demonstrates intent to abandon. Instead, the Court found persuasive a Colorado Supreme Court case that held there is no requirement that a senior appropriator place a call for administration of the river in order to effectuate its water rights. The Court explained that the emphasis is on whether there is evidence demonstrating intent to abandon a right rather than on whether there is evidence showing that the user acted to preserve its rights. In finding that NPPD did not intend to abandon its appropriations, the Department noted that the Spencer plant had been in operation since 1927; that NPPD spent a significant amount of funds to staff, operate, and maintain the facility; and that the water resources manager at NPPD was under the assumption that the Niobrara was proactively administered by the Department.

The Court then considered whether the Department erred in finding the junior appropriators failed to prove NPPD statutorily forfeited its appropriations in whole or in part. The Department applied the cancellation proceedings in Nebraska Revised Statutes sections 46-229 through 46-229.05. The Court stated that the issue on appeal was common law nonuse, which is governed by the period of statutory limitations relating to real estate in section 25-202. Under section 25-202, a lack of beneficial use for over ten years may result in the loss of an appropriation. The Court concluded that though the Department relied on the incorrect statute, it made factual findings that did not support a finding of nonuse. For example, in 2006 NPPD used its full 2,035 cfs. Based on the factual findings, the Court concluded that there was no ten-year nonuse period and NPPD did not statutorily forfeit its appropriations.

The Court next considered whether the Department erred in issuing closing notices without taking into account the subordination agreements and express limitations in NPPD's appropriations. A subordination agreement allows junior appropriators to pay a fee to the senior appropriator in exchange for the right to continue to divert water out of priority. The junior appropriators argued that the Department's policy of allowing a senior appropriator to place a call for its full amount of water while the appropriator has subordination agreements with junior appropriators allows senior appropriators to collect both money and water. However, a field office supervisor for the Department testified that the Department accounted for NPPD's subordination agreements, and that its policy was to not send closing notices to junior appropriators who have a subordination agreement. Therefore, "a senior appropriator is not allowed to simultaneously enforce its right against, and collect compensation from, the same junior appropriator." Accordingly, the Court held that the Department's policy was not arbitrary, capricious, or unreasonable, and the Department was entitled to deference for its technical expertise in this area.

Finally, the Court considered whether the Department erred in failing to conduct a futile call analysis. The junior appropriators asserted that it is the

duty of the administrative officers, prior to issuing closing notices, to determine whether or not a usable amount of water can be delivered. In this case, the evidence showed that the Department did not conduct a futile call analysis because the Niobrara is a “wet river.” The Court held that the Department is entitled to deference in this area, and the Department’s determination that it conducted futile call analyses where appropriate was supported by competent evidence.

Accordingly, the Court upheld the Department’s determination that administration of the Niobrara was proper and that NPPD had not abandoned or statutorily forfeited its appropriations in whole or in part.

In dissent, Justice Connolly argued that the Niobrara has too many appropriations and that the Department’s method of administration is fundamentally flawed. Connolly noted that, based on recorded historical flows, the Department would be able to shut down junior appropriators about ninety-seven percent of the time from July to January, and almost eighty-seven percent of the time from February to June. He argued that to permit NPPD to shut down these junior appropriators in 2007, after not having done so for sixty years, would be unjust and contrary to the nature of its permits.

Connolly also argued that NPPD forfeited the right to demand 550 cfs under its 1942 appropriation. NPPD’s 1942 appropriation had a limitation in it allowing for water to be denied during times of scarcity. Connolly noted that since 1942 the Department had approved over four hundred new surface appropriations. NPPD failed to object to the majority of the applications, despite its knowledge that the river was over appropriated and despite the conditional clause contained in its permit. Accordingly, Connolly argued that NPPD’s acquiescence to the Department’s activities should have constituted a forfeiture of its right to demand the 550 cfs under the 1942 appropriation.

Victoria Hambley

OREGON

Noble v. Dep’t of Fish & Wildlife, 326 P.3d 589 (Or. 2014) (holding that the Department of Fish and Wildlife implausibly interpreted the fish passage rule, which requires that fishways provide fish passage at all flows within the design streamflow range, and erroneously decided that it was unnecessary to calculate the design streamflow range for channel-spanning fishways).

Property owners (“Petitioners”) expended significant resources improving fish habitat on their portion of a stream feeding into Beaver Creek, which historically supported cutthroat trout and other migratory fish. Petitioners challenged the Oregon Department of Fish and Wildlife’s (“ODFW”) approval of “channel-spanning fishways” associated with two dams downstream from their property. The dams at issue, constructed long ago without any water rights or permits, obstructed the stream, creating small ponds. The dam owners later obtained permits through the state Water Resources Department (“WRD”), allowing them to store up to one acre-foot of water during certain months of the year. The permits required that the owners (i) pass all live flow outside of the defined storage season; (ii) not appropriate water for any out-of-reservoir uses, or for the maintenance of water levels or freshwater conditions; and (iii) install