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## Keating v. Beb. Pub. Power Dist., 660 F.3d 1014 (8th Cir. 2011)

Lauren Varner

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Keating v. Beb. Pub. Power Dist., 660 F.3d 1014 (8th Cir. 2011)

Because Donovan did not present any evidence showing a genuine issue of material fact, the court affirmed the district court's grant of summary judgment in favor of the Government and denied Donovan's motion for judgment on the pleadings.

*John Lahner*

## UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

**Keating v. Neb. Pub. Power Dist.**, 660 F.3d 1014 (8<sup>th</sup> Cir. 2011) (holding that junior permit holders did not have a property right in watershed entitling them to a predeprivation hearing where the officials authorized to administer water use determined that the supply was insufficient and the use permits provided notice of discontinuation under such circumstances).

When water levels in the Niobrara River fell in 2006, the Nebraska Department of Natural Resources ("officials") issued Closing Notices to hundreds of holders of junior surface water appropriation permits, ordering them to discontinue the drawing of water from the Watershed. However, the officials did not first grant the permit holders a hearing on the matter. A group of farmers who had received the Notices ("farmers") filed a § 1983 suit against the state officials, claiming that the order deprived them of their property without procedural due process. The United States District Court for the District of Nebraska ("district court") held that, while the farmers possessed a property right that entitled them to use of the water, it was subject to administration by the officials. Furthermore, the district court concluded that the issuance of the Closing Notices was an administrative act that did not constitute a property deprivation. Accordingly, the district court entered summary judgment in favor of the officials.

Applying a *de novo* standard of review, the Eighth Circuit Court of Appeals ("court") first considered the existence of the farmers' property rights. The parties agreed that the farmers had property rights to surface water appropriation, which according to the court, allowed only for use of the water subject to restrictions set forth by the permit. The permits belonging to the farmers provided that they could use specified amounts of surface water where supply allowed.

The farmers argued that, when water levels were insufficient and required discontinuation of use, they were entitled to a predeprivation hearing during which they could challenge: (1) the validity of the Nebraska Public Power District's senior appropriation permits that entitled it to surface water rights before the farmers; and (2) the purported insufficiency of water levels in the Niobrara River.

The court rejected these arguments holding that, once the officials identified a water shortage, the farmers and other junior permit holders

were no longer entitled to its use, and therefore suffered no property deprivation when ordered to discontinue using water. The court also reasoned that the permits provided to the farmers gave notice that officials could discontinue use rights during periods of water shortage and that officials had authority to make a scarcity determination.

Accordingly, the court affirmed the district court's grant of summary judgment for the defendant officials.

*Lauren Varner*

## UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

**Ctr. for Envtl. Law & Policy v. United States Bureau of Reclamation**, 655 F.3d 1000 (9th Cir. 2011) (holding that the U.S. Bureau of Reclamation's Environmental Assessment and its consideration of the cumulative effects, future impacts, and alternatives to the proposed drawdown project from Lake Roosevelt was adequate to comply with NEPA).

Lake Roosevelt ("Lake") is located above the Grand Coulee Dam on the Columbia River in Washington State. The U.S. Bureau of Reclamation ("Reclamation") manages the Lake in conjunction with various other Federal and State agencies. The Lake typically holds about 5 million acre-feet of water and the consortium of agencies responsible for managing water levels lower the Lake twice a year, once in the spring for flood control, and once in the summer to increase stream flows in the Columbia River. The State and Federal governments also divert 2.65 million-acre feet of water from the Lake to provide water to irrigate Washington farmland.

Due to increased water needs in the Columbia River Basin, Reclamation and various State agencies decided to evaluate options for increasing the water supply. In 2004, these groups entered into a memorandum of understanding to divert an additional 82,500 acre-feet of water from the Lake for municipal and industrial use, groundwater replacement, and increased flows downstream to benefit fish populations. The groups also agreed that an additional 50,000 acre-feet could be diverted in drought years to prevent water shortages.

In 2006, the Washington State Legislature passed the Columbia River Water Management Act ("CRWMA"). The CRWMA, recognizing the State's need to aggressively pursue development of the State's water supplies, provided for the release of the additional acre-feet of water listed in the 2004 memorandum. In accordance with the CRWMA the Washington State Environmental Policy Act, the Washington State Department of Ecology ("Ecology") prepared an environmental impact statement ("EIS"), which considered the environmental consequences of the draw-down project and alternatives to the project.