

9-1-2008

## Houghton v. Johnson, 887 N.E. 2d 1073 (Mass. App. Ct. 2008)

Heather Rutherford

Follow this and additional works at: <https://digitalcommons.du.edu/wlr>



Part of the [Law Commons](#)

---

### Custom Citation

Heather Rutherford, Court Report, Houghton v. Johnson, 887 N.E. 2d 1073 (Mass. App. Ct. 2008), 12 U. Denv. Water L. Rev. 282 (2008).

This Court Report is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Water Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact [jennifer.cox@du.edu](mailto:jennifer.cox@du.edu), [dig-commons@du.edu](mailto:dig-commons@du.edu).

---

Houghton v. Johnson, 887 N.E. 2d 1073 (Mass. App. Ct. 2008)

## MASSACHUSETTS

**Houghton v. Johnson, 887 N.E.2d 1073 (Mass. App. Ct. 2008)** (holding the previous owner of upland property did not expressly sever tidal flats from upland property, that the parties lacked the intent required to find an implied easement, and that beach users failed to prove prescriptive easements in tidal flats).

In August 2004, Linda Jean Johnson posted no trespassing signs on the beach frontage seaward of her property on Cape Cod Bay in Eastham, Massachusetts. Nancy J. Houghton and fifty-nine other plaintiffs (hereinafter "beach users") sought declaratory judgment on claims of implied and prescriptive easements to allow their continued use of the seaward portion of Johnson's property for customary beach activities. The Land Court granted Johnson's motion for summary judgment. The beach users appealed to the Appeals Court of Massachusetts, arguing that Johnson did not demonstrate ownership of the tidal flats, and that the trial court erred in concluding the beach users did not possess implied or prescriptive easements.

The court had to decide whether the previous landowner severed the tidal flats from the upland property. To determine whether a property owner severed tidal flats from the upland property in a conveyance, the court considered the presumed intent of the grantor, the written conveyance, and the attendant circumstances. Here, the court traced the title history of Johnson's property. A previous owner showed no intent to sever the tidal flats: the previous owner failed to reserve any right to the tidal flats in the deeds to later owners, and never claimed any interest in the flats. Because there was no evidence of an express severance of the upland property from the tidal flats, title to the tidal flats accompanied title to the upland property.

The court also addressed the issue of implied easement. An implied easement exists by the presumed intent of the parties, based on the language of the conveyance in light of the circumstances, the physical condition of the premises, and the knowledge of the parties. The court held that a 1924 plan for this subdivision did not indicate plans for the property to be part of a community beach, nor was there any evidence of a discernable pattern of language in the deeds to indicate prior owner Houghton's intent to create a community beach. In addition, the beach users claimed long-standing use of the property as support for an implied easement. However, without a finding of an existing implied easement, the court saw no need to consider that argument.

The beach users claimed a prescriptive easement based on their use of the property before Johnson owned the property. Each beach user had the individual burden of establishing a prescriptive easement. This required showing, by clear proof, that he or she used the property in a manner that has been open, notorious, adverse to the owner, and

continuous or uninterrupted over a period of no less than twenty years. Here, none of the beach users established a prescriptive easement in Johnson's property. The previous owner of Johnson's property allowed beach users to use the property, but exercised control in matters of importance and concern to her, including directing beach users to stay off the dunes. In addition, each beach user had to show more than a collective, but individually sporadic and nonexclusive, use of Johnson's property for the court to grant a presumptive easement. However, the beach users did not confine their use of the beach to Johnson's property; they used the seaward parts of many properties in the area. The court held that none of the beach users had any right to use Johnson's property seaward to the mean low water mark. However, the beach users still had the right to fish, fowl, or navigate between the mean high and mean low water marks of the property.

The court upheld the trial court's grant of summary judgment because Johnson owned the tidal flats and the beach users could not establish implied or prescriptive easements in the property.

*Heather Rutherford*

## NEBRASKA

**Upper Big Blue Natural Res. Dist. v. Neb. Dep't of Natural Res., 756 N.W.2d 145 (Neb. 2008)** (holding that a state agency did not exceed its authority in enacting a rule requiring consideration of hydrological connections when determining the appropriated status of a river basin).

In 2006, the Nebraska Department of Natural Resources ("DNR"), acting under authority of the Nebraska Ground Water Management and Protection Act (the "Act"), determined that the Upper Platte River Basin was fully appropriated. Such a determination imposed certain restrictions with respect to the use of surface water and groundwater in the affected geographic area. To reach this determination, the DNR included a small geographic area located in the Big Blue River Basin because there is a hydrological connection between its groundwater and the surface water in the Upper Platte River Basin. The geographic area located in the Big Blue River Basin was within the boundaries of the Upper Big Blue Natural Resources District ("District").

The District sued the DNR in the District Court of Lancaster County, alleging that the DNR exceeded its statutory authority under the Act when it considered a geographic area located in the Big Blue River Basin as part of the fully appropriated Upper Platte River Basin. The trial court found that the DNR did not exceed its authority and affirmed the actions of the DNR. The District appealed the trial court's decision and the Supreme Court of Nebraska granted bypass of the Court of Appeals.

The DNR adopted a rule that specified the method for determining areas within which the DNR considered surface water and ground-