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Bihuniak v. Roberta Corrigan Farm, 757 N.W.2d 725 (Neb. Ct. App. 2008)

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qualified as a “natural water body;” and (3) whether Mitchell Slough qualified as not merely a diversion of water “away from a natural water body -- one of the SAL’s exceptions.”

Under the SAL analysis, the court first addressed Mitchell Slough’s capacity for recreational use. It highlighted a history of hunting, boating, and fishing, with testimony establishing extensive fishing on Mitchell Slough as early as 1928. It held Mitchell Slough was capable of recreational use. Next, the court addressed whether Mitchell Slough qualified as a natural body of water under SAL. In review of the facts, the court highlighted evidence suggesting that Mitchell Slough once existed as a channel of the Bitterroot River. It also highlighted that Mitchell Slough included tributary groundwater, various surface water additions, and irrigation waste and return flows. In doing so, the court noted that although the Mitchell Slough is a diversion, the history and character of Mitchell Slough qualify it as a natural body of water under SAL. The court then discussed the final element, whether Mitchell Slough existed as a mere diversion from a natural body of water, which would preclude it from public access under SAL. Because of the same facts that indicate that Mitchell Slough qualifies as a natural body of water, the court held that this SAL exception did not apply to Mitchell Slough. Under the three elements of SAL, the court found that Mitchell Slough qualified for public access.

The court stated that, although the district court defined natural as “uninfluenced by man in any way,” a more appropriate analysis would focus “on how and to what extent man has impacted the waterway.” Under such an analysis, the Mitchell Slough existed as a natural body of water, not merely as a diversion. As such, the court held that SAL applied, allowing public access to Mitchell Slough. The court noted, however, that this ruling does not allow unfettered public access across private lands.

The court reversed and remanded for a judgment in favor of BCRP under 310 Law, and a judgment in favor of BCRP and FWP under SAL.

Ryan McLane

NEBRASKA

Bihuniak v. Roberta Corrigan Farm, 757 N.W.2d 725 (Neb. Ct. App. 2008) (holding that a lower landowner was not entitled to injunctive relief against an upper landowner, who caused increased amounts of surface water to drain onto the lower landowner’s land, because the upper landowner behaved reasonably and without negligence).

Marilyn Bihuniak and other owners of a quarter section of farmland in Buffalo County (jointly, “Bihuniak”) filed a complaint against Roberta Corrigan Farm and other owners (“Corrigans”) of land south of Bihuniak’s land. Bihuniak alleged that improvements Corrigans made to their land to construct a hardware store caused greater amounts of diffused surface water to drain onto Bihuniak’s lower land,

causing damage to the land and to crops on the land. Bihuniak sought an injunction against Corrigan ordering Corrigan to refrain from causing more diffused surface water to drain onto Bihuniak's land. Bihuniak also sought damages for the cost to repair Bihuniak's land and for crop losses. The trial court held that Bihuniak did not prove damages to the land or crops, and that Bihuniak was not entitled to injunctive relief because Bihuniak did not show that Corrigan acted negligently in causing an increase in surface water on Bihuniak's land. Bihuniak appealed the trial court judgment to the Court of Appeals of Nebraska.

The court reviewed this equity action *de novo* on the record. The court followed four long-standing rules. First, a landowner may protect his land from surface water, even to the damage of his or her neighbor, and the landowner is only responsible for negligence. Second, a landowner may deflect surface water by proper use and improvement and is not liable for consequential damage to his neighbor if he or she was not negligent. Third, an upper landowner, in the absence of negligence, may accelerate surface water in the natural course of drainage without liability to the lower landowner. Fourth, a landowner's right to discharge surface water does not allow him or her to collect and discharge water onto another's land by means of an artificial channel contrary to the natural course of drainage to the other landowner's damage and detriment. Here, even though there was an increase in the amount of surface water flowing across Bihuniak's land, the increased flow followed the same natural drainageway as before Corrigan's improvements to their land. Corrigan built a detention pond to reduce the flow of surface water; an engineer testified that the pond was too small but it met the city's requirements and the city approved the plans. Because the pond met those requirements, Corrigan did not behave negligently or unreasonably in dispersing water on Bihuniak's land. Thus, the court held that Bihuniak failed to both plead and prove negligence against Corrigan.

A grant of injunction is an extraordinary remedy that requires proving actual and substantial injury. Bihuniak presented evidence to show lost crop value in one year, but not in following years. In addition, Bihuniak did not present evidence of damage to the land. Consequently, the court held that Bihuniak did not show the requisite irreparable harm, so Bihuniak was not entitled to injunctive relief. The court affirmed the trial court's judgment that Bihuniak was not entitled to an injunction against Corrigan, and that Corrigan did not behave negligently.

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NEVADA

Howell v. Ricci, 197 P.3d 1044 (Nev. 2008) (holding that a letter written by the Nevada State Engineer is a decision subject to judicial re-