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In re Cent. Neb. Pub. Power and Irrigation Dist., 699 N.W.2.d 372 (Neb. 2005)

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damages for loss of water quality and quantity as a result of Musson's mining activities.

To establish scientific support, the Coxes had an environmental assessment performed, which concluded that the drop in the pond's water level and the supposed water quality diminution resulted from the mining activity. Dr. Huang, an environmental engineer, also performed an assessment and concluded the same. Ron Gallagher, a professor from the University of Toledo, performed a second assessment and found a minimal effect on the pond as a result of the mining activity and concluded the methodology employed by Huang was inaccurate. Based on testimony presented at trial, the trial court concluded the Coxes failed to prove causation and damages, and awarded costs and attorney fees to Musson. The Coxes appealed to the Michigan Court of Appeals.

The Coxes first alleged the trial court erred in dismissing the nuisance per se claim based on the erroneous belief that loss of water was not a real damage or injury. The court explained that it gives substantial deference to the trial court's findings of fact in a bench trial and reviews the finding for clear error, but it reviews conclusions of law de novo. Based on its review of the trial court's findings of fact and conclusions of law, the court held the Coxes' allegation was without merit. It noted the trial court never concluded that loss of water was not a compensable injury, and that the Coxes failed to correlate any purported losses in water quantity and quality to the mining activity.

Additionally, the Coxes alleged the trial court erred in failing to render an equitable decision regarding their environmental claim. Basing its holding on the trial court's findings, the court held the trial court did not err. The trial court found no correlation between Musson's property and the Coxes' water conditions. Furthermore, there was no current testimony from the Michigan Department of Environmental Quality regarding the status of Musson's property, and Musson did not attempt to seek remediation. Finally, at the time of trial, Musson was no longer conducting the mining activities. As a result, there was no need to order abatement.

Giving substantial deference to the trial court's findings of fact and finding no clear error on behalf of the trial court, the court of appeals affirmed the ruling of the trial court.

Kelly L. Snodgrass

NEBRASKA

***In re Cent. Neb. Pub. Power and Irrigation Dist.*, 699 N.W.2d 372 (Neb. 2005)** (holding the Nebraska Department of Natural Resources lacked jurisdiction because the legislature had not created an appropriation

system that addressed direct conflicts between users of surface water and groundwater that is hydrologically connected).

Central Nebraska Public Power and Irrigation District (“Central”) filed an amended complaint with the Nebraska Department of Natural Resources (“Department”) claiming that groundwater diversions by registered irrigation well owners in the Platte River watershed deprived Central of approximately 100,000 acre-feet in annual surface water appropriations. Central asserted that groundwater users were subject to prior appropriations and requested that the Department order the well owners to cease unappropriated diversions. The Department dismissed Central’s amended complaint for lack of jurisdiction to grant the relief requested.

On appeal to the Nebraska Supreme Court, Central argued that the Nebraska Constitution granted the Department jurisdiction to regulate groundwater users or administer groundwater rights for the benefit of surface water appropriators. The Department argued that the Nebraska Constitution limited its authority to the regulation of surface water and that the legislature statutorily delegated the regulation of groundwater to natural resource districts.

In rejecting Central’s argument, the court first noted that Nebraska had separate systems for distributing and regulating surface water and groundwater. The court recognized that the Department regulated surface water appropriators, while natural resources districts regulated groundwater users pursuant to the Nebraska Ground Water Management and Protection Act. Next, the court stated that the Nebraska Constitution did not address the use of groundwater and that the reasonable use rule historically governed groundwater regulation. Finally, the court reemphasized its finding in *Spear T Ranch v. Knaub* that the legislature had not created an appropriation system to address direct conflicts between users of surface water and groundwater that is hydrologically connected.

After reviewing the legislative and case law histories, the court found no authority or rationale for applying the rules of surface water appropriations to groundwater use. Therefore, the court held that the Department’s authority to regulate surface water appropriators did not give it authority to regulate groundwater users or administer groundwater rights for the benefit of surface water appropriators. The court affirmed the Department’s dismissal of Central’s amended complaint.

Jonathan P. Long

Spear T Ranch, Inc. v. Neb. Dep’t. of Natural Res., 699 N.W.2d 379 (Neb. 2005) (holding that the Nebraska Department of Natural Resources has no common law or statutory duty to regulate groundwater use or administer groundwater appropriations with respect to surface water appropriations).