

1-1-2004

Dep't of Natural Res. v. Bose, 267 Neb. 430 (Neb. 2004)

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the trial court erred by considering the circumstances surrounding Crane's deed because the easement's language was unambiguous. The court had to determine whether, if the easement's language was unambiguous, the trial court could consider surrounding circumstances. In *Little v. Kin* the Michigan Supreme Court held that when the language of a legal instrument is plain and unambiguous, the court must enforce it as written and inquire no further. Lennox argued that the easement language "to the water's edge" created ambiguity because it was traditional language for creating riparian rights. Lennox failed to support his claim of ambiguity, and the court of appeals found the easement was unambiguous; hence, the trial court could not inquire into circumstances surrounding the easement grant or the time of grant.

The court then had to determine whether the deed's unambiguous language gave rise to riparian rights. According to the court's interpretation of *Thies v. Howland*, the terms "ingress" and "egress to the water's edge" did not demonstrate intent to grant riparian rights. Prior Michigan case law established that permanently mooring a boat and erecting and maintaining a dock near the water's edge are riparian rights. Since the easement's plain and unambiguous language did not permit Lennox to erect and maintain a dock or permanently moor a boat, and since Lennox could not expand the easement, the court held the trial court erred by granting Lennox summary disposition and denying the Dyballs's motion to declare the easement for access, and ingress and egress only.

Elizabeth Frost

NEBRASKA

Dep't of Natural Res. v. Bose, 267 Neb. 430 (Neb. 2004) (holding the cancellation of a water appropriation right was proper where the appropriators received sufficient notice, had not used the appropriation for more than three consecutive years, and did not demonstrate sufficient cause for nonuse).

The Nebraska Department of Natural Resources ("DNR") notified Lee and Craig Bose, holders of a water appropriation right on the Republican River, of a hearing to determine whether DNR would cancel all or part of their water appropriation because of nonuse for more than three consecutive years. The Boses attended the hearing at which Lee Bose testified. Following the hearing, DNR's director canceled the Boses' appropriation, concluding the testimony established that the Boses' had not irrigated the land subject to the appropriation from the River for more than three consecutive years. The Boses appealed the DNR ruling to the Nebraska Supreme Court contending (1) DNR did not provide adequate notice of the hearing;

(2) DNR did not support its finding by competent and relevant evidence and its finding was arbitrary, capricious, and unreasonable; and (3) DNR erred by failing to find sufficient cause for the Boses' nonuse. The court ultimately rejected each of the Boses' arguments and affirmed DNR's cancellation of the appropriation.

The supreme court, based on its own precedents, concluded the hearing notice issued by DNR provided adequate notice of the relevant issues and met statutory requirements. Additionally, the court addressed whether DNR supported its factual determination of nonuse by competent and relevant evidence. At the hearing, DNR presented a field investigator's report, which advised canceling the appropriation because of nonuse for three consecutive years. The court concluded this field report constituted prima facie evidence of the Boses' forfeiture of the appropriation and shifted the burden to the Boses to demonstrate beneficial use. The court agreed with DNR's director that the Boses' testimony failed to establish beneficial use within the past three consecutive years. Therefore, the court concluded DNR's director supported his determination of nonuse by competent and relevant evidence and his determination was not arbitrary, capricious, or unreasonable.

Once DNR establishes that a water appropriation has not been used for more than three consecutive years, the Nebraska abandonment statute places the burden on the holders of the water appropriation right to present evidence of sufficient cause for nonuse. Specifically, the statute provides that sufficient cause for nonuse exists when the water source is inadequate to support beneficial use or in circumstances where a prudent person would not have been expected to use the water. As holders of the water appropriation right, the Boses had the burden of demonstrating sufficient cause for nonuse. Specifically, Lee Bose testified that his nonuse was a matter of convenience, rather than supply or practicability. The court concluded, as did the DNR director, that this testimony did not establish a sufficient cause for nonuse as defined by the relevant statute. Therefore, the court held the director did not err in failing to find sufficient cause for nonuse. Because the evidence demonstrated nonuse during the past three consecutive years and because the Boses' failed to allege a sufficient cause for the nonuse, the court affirmed DNR's order canceling the Boses' water appropriation right.

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