
Judge dismisses case against DNR over surface water closings

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In a ruling released last week, Hitchcock County District Judge James E. Boyle, IV, dismissed a lawsuit filed by surface water irrigators claiming damage by the state from water closings in 2013, 2014 and 2015.

The Cappel family filed suit against the Department of Natural Resources (DNR) and director Jeff Fassett.

They claimed DNR unlawfully took their water and violated their rights by making surface water users bear the entire burden of complying with the compact.

In those years, DNR issued closing notices to surface water users under compact call provisions to keep the state in compliance with the compact settlement with Kansas.

The Cappels made six different claims in the suit, all of which were dismissed by Doyle.

They claimed they had the rights to the surface water and the closing represented both a physical and regulatory taking of their property.

They claimed this taking of the water caused them to “lose economically viable use of their land.”

They further claimed DNR allowed “excessive groundwater pumping” in the Republican Basin.

That, combined with the compact call closings, deprived them of their rights of due process under the Nebraska and U.S. Constitutions.

They contended that since their due process rights were violated, they were also entitled to damages and recovery of occupation taxes paid in those years.

Judge’s rulings

Boyle ruled the state lawfully administered surface water when it limited the irrigators’ access to surface water for Kansas’ benefit so that compact compliance would be achieved.

The Cappels claimed that water administered away from them by DNR was their property.

“The water users cannot merely assert ownership of a ‘... vested property right’ and without more, be entitled to pursue compensation for a ‘taking,’” Boyle wrote.

“The appropriator of the waters of a stream acquire a right to the use of such water for beneficial purposes, but does not acquire ownership of such water, he said.

He said water users have a right to use the water when it is available but that right can be taken away when it’s in the public’s best interest.

In this case the public interest was to maintain compliance with the Republican River Compact.

He cited the Nebraska Constitution which “provides that the right to divert unappropriated water shall never be denied ‘except... when such denial is demanded by the public interest.’”

It’s the Nebraska Legislature that has the authority to define, through statutes, the public interest. He said the public benefitted from Nebraska staying in compliance.

The Cappels claimed DNR allowed excessive groundwater pumping throughout the Basin. That forced surface water users to bear the entire burden of compact compliance, while groundwater users were allowed to continue pumping water.

In his opinion, Boyle stated the Supreme Court ruled that DNR regulates surface water while natural resource districts administer groundwater.

“DNR had no independent authority to regulate groundwater users or administer groundwater rights for the benefit of surface water appropriators,” Boyle said.

With no power or duty to regulate groundwater, he said an alleged failure by DNR to exercise such nonexistent power or duty does not represent a violation of due process rights.

“The right held by the water users are subject to the duties of the State of Nebraska under the Compact,” Judge Boyle ruled.

Since their rights to due process were not violated, Boyle said that provides the basis for denying any claim or damages.

As for the occupation tax recovery, Boyle said the Nebraska Supreme Court said there must first be unjust enrichment.

He said there were no facts to show that DNR was unjustly enriched by the payment of the occupation tax.

Boyle dismissed the case “with prejudice,” which bars the Cappel family from filing further suits on the same issue.

Boyle still has another suit before him which was filed by the Nebraska Bostwick Irrigation District against DNR over the closing orders on surface water.