

STATE SUPREME COURT UPHOLDS DISMISSAL OF WATER SUIT AGAINST DNR

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In an opinion released Friday, March 10, the Nebraska Supreme Court upheld the district court dismissal of two water suits brought against the Nebraska Department of Natural Resources (DNR).

Water users in the Frenchman Cambridge Irrigation District (FCID) lost their appeal of the dismissal of the suits by Furnas County District Court Judge James E. Doyle IV in May 2016.

The suits were filed by four water users in the FCID as a class action suit—one for 2013 and one for 2014.

The complaints claimed the surface water users in the district were harmed when DNR issued closing notices on river flows for compact compliance purposes in 2013 and 2014.

In their appeal, they contended their water rights were superior to those of the Republican River Basin Compact.

They also added that DNR's failure to regulate groundwater depleted available stream flow, which represented a "taking" of water.

Compact counts as federal law

Writing for the court, Chief Justice Michael Heavican said the surface water rights do not supersede the Compact.

"We conclude that the appropriators' rights to use the water are subject to the Compact and are thus not a compensable property interest when the right to use is limited to ensure Nebraska's compliance under the Compact," Heavican wrote.

He continued, "The U.S. Supreme Court held that the Compact, having received Congress's blessing, counts as federal law.

"As federal law, the allocations set forth under the Compact are the supreme law in Nebraska and the DNR must ensure Nebraska remains within its allocation under the Compact. Therefore, the appropriators' right to use water is subject to the superior obligation of the state to ensure compliance with the Compact."

The water users, who are represented by David Domina of Omaha, contended DNR's closings represented a permanent physical invasion of their property.

They also claimed DNR's regulation "deprives them of all economically beneficial use of that property."

The justices ruled the case law cited by Domina was inapplicable in trying to show DNR's actions amounted to a permanent physical invasion.

Second, Heavican acknowledged the producers suffered a loss in production during 2013 and 2014.

However, he said there was still production on the land. "It does not appear, as the appropriators allege, that the farmland has been converted into permanent 'dryland' because of a 'total deprivation of beneficial use of land for irrigation purposes,'" Heavican wrote.

As a result, the high court ruled that DNR's regulation did not deprive them of all economically beneficial use of their property.

Not a taking of property

In the appeal, the users argued that DNR's failure to regulate ground water pumping that depletes streamflow amounts to a "taking."

"This court has consistently held that the DNR has no authority to regulate ground water for the benefit of surface water users," the chief justice wrote.

State law assigns the regulation of surface water to DNR and the regulation of ground water to natural resources districts.

The court cited a 2005 landmark water case, Spear T Ranch vs. Nebraska Department of Natural Resources, that defines DNR's duties over surface water but not ground water.

In that ruling, the Supreme Court said DNR "has no common-law or statutory duty to regulate the use of ground water in order to protect Spear T's surface water appropriations.

"Therefore, we held that the DNR's 'action or inaction did not amount to the taking or damages as alleged by Spear T.'"

While the compact settlement agreement stipulates ground water pumping must be accounted for, it did not grant DNR jurisdiction to do so.

Without any power to regulate ground water pumping, DNR's actions could not be ruled as a "taking," Heavican concluded.

Several other suits appealed

Two other suits dismissed by Judge Doyle have been appealed to the state's Court of Appeals and will likely be decided by the Nebraska Supreme Court.

One involves a lawsuit filed by Frenchman Cambridge Irrigation District (FCID) against DNR and the Upper, Middle and Lower Republican Natural Resources Districts.

FCID challenged water-management plans approved by the Nebraska Department of Natural Resources (DNR) and NRDs in the Republican Basin.

Another lawsuit filed by the Cappel family and surface water irrigators in the McCook area claimed they were harmed by DNR's administration of surface water for compact compliance was also dismissed.

The plaintiffs argued, among other points, that water administered away from them for compact compliance was their property.

The Nebraska Bostwick Irrigation District also filed suit against DNR and the three Republican Basin NRDs over the IMPs adopted by the three districts.

The district court did not dismiss this case and it's proceeding at the district court level.