

U.S. COURT OF APPEALS RULES ON SURFACE WATER ADMINISTRATION ISSUE

(Lincoln, Neb.) The U.S. Court of Appeals for the Eighth Circuit ruled this week in favor of the Nebraska Department of Natural Resources' actions regarding administration of surface water rights in the Niobrara River Basin. The case Keating v. Nebraska Public Power District began in 2007 when the Nebraska Department of Natural Resources issued closing and regulating notices to junior surface water appropriators in the Niobrara River Basin so that a senior appropriation, held by Nebraska Public Power District, would receive the water it was entitled to under its senior appropriations.

Keating and other appropriators in the basin filed a lawsuit in the U.S. District Court for the District of Nebraska in May of 2007, claiming that the issuance of the closing notices was a deprivation of a property right and that they were entitled to the procedural due process protections of a "predeprivation hearing." The U.S. District Court dismissed the proceeding in August 2007 holding that the claim was not ripe and that appellants had not exhausted the administrative remedies prior to filing the complaint. That decision was appealed to the U.S. Court of Appeals for the Eighth Circuit. The Court of Appeals reversed the district court's dismissal and remanded the case back to the District Court with specific instructions to the court to determine whether: (1) a deprivation of a property right had occurred, (2) if a deprivation had occurred, whether the deprivation was subject to an exception to the requirement that a predeprivation process be provided, and (3) if the deprivation was not subject to such an exception, whether the Department of Natural Resources' declaratory order procedures were constitutionally adequate predeprivation procedures.

Following the remand, the U.S. District Court found that there was no deprivation of a property right. The opinion found that ". . . a water permit entitling the holder to use surface water within the capacity limits of the Niobrara Watershed represents a property right under Nebraska law." The court found that the holder of a surface water permit acquires the rights granted by the permit and is subject to constraints articulated by the permit. The appellants' permits allow them to use specific amounts of surface water so long as there is sufficient capacity, subject to the rights of senior appropriators and subject to regulation by the State through the Department of Natural Resources. The court rejected Appellants argument that a hearing should be conducted prior to issuing notices on the basis that when the Department determines that the watershed no longer has the capacity to supply all permit holders, appellants no longer have a legitimate claim of entitlement to use the surface water and thus do not suffer a deprivation of a property right.

Nebraska Department of Natural Resources Director, Brian Dunnigan, said in response to the ruling, "The Department and its predecessor agencies have issued surface water administration notices during times of shortage throughout the state for over 100 years. The Department's current processes are built upon decisions of past legal challenges, current Nebraska statutes, and existing surface water permits. This decision supports our methods and understanding of surface water administration. When shortages occur, there is a need for prompt administration."

The States of Colorado, Montana, Nevada, New Mexico, North Dakota, Wyoming and South Dakota filed briefs in the Court of Appeals supporting Nebraska's administration of water rights.