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337 N.W.2d 733

Page 1

215 Neb. 152, 337 N.W.2d 733  
(Cite as: 215 Neb. 152, 337 N.W.2d 733)

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Northport Irr. Dist. v. Jess  
Neb., 1983.

Supreme Court of Nebraska.  
NORTHPORT IRRIGATION DISTRICT,  
Appellee,

v.

J. Michael JESS, Director, Department of Water  
Resources, et al., Appellants.  
No. 82-378.

Aug. 12, 1983.

Irrigation district sought to enjoin Department of Water Resources from requiring that district obtain an appropriation permit to pump water from creek into its canals for irrigation. The District Court, Morrill County, Robert R. Moran, granted the injunction, and Department appealed. The Supreme Court, White, J., held that: (1) Upper Dugout Creek comports with statutory definition of a watercourse; (2) irrigation district, by bringing canal seepage water into watershed of Upper Dugout Creek did not become entitled to use of that excess water for the district; (3) cases involving different canals and different watercourses were not res judicata as to the issues; (4) appropriation permit listing only North Platte River as source of water did not entitle irrigation district to appropriation from waters in Upper Dugout Creek; and (5) even if irrigation district had a valid appropriation permit, it would have terminated from nonuse.

Reversed and dismissed.

West Headnotes

[1] Appeal and Error 30 ¶893(2)

30 Appeal and Error

30XVI Review

30XVI(F) Trial De Novo

30k892 Trial De Novo

30k893 Cases Triable in Appellate

Court

30k893(2)

k.

Equitable

Proceedings. Most Cited Cases

An action in equity is reviewed de novo without reference to findings of fact made by trial court.

[2] Waters and Water Courses 405 ¶38

405 Waters and Water Courses

405II Natural Water Courses

405II(A) Riparian Rights in General

405k38 k. What Constitutes a Water

Course. Most Cited Cases

A "watercourse" is defined by statute as any depression or draw two feet below surroundings lands and having a continuous outlet to a stream of water, or river or brook. Neb.Rev.St. § 31-202.

[3] Waters and Water Courses 405 ¶38

405 Waters and Water Courses

405II Natural Water Courses

405II(A) Riparian Rights in General

405k38 k. What Constitutes a Water

Course. Most Cited Cases

To constitute a "watercourse," it must appear that the water usually flows in a particular direction and by regular channel, having a bed with banks and sides, and usually discharging itself into some other body or stream of water; it may sometimes be dry; it need not flow continuously, but it must have a well-defined and substantial existence. Neb.Rev.St. § 31-202.

[4] Waters and Water Courses 405 ¶38

405 Waters and Water Courses

405II Natural Water Courses

405II(A) Riparian Rights in General

405k38 k. What Constitutes a Water

Course. Most Cited Cases

In order for a "watercourse" to exist there must be a permanent supply of water from similar conditions, such as rainfall or snowmelt, which will always

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337 N.W.2d 733

Page 2

215 Neb. 152, 337 N.W.2d 733  
 (Cite as: 215 Neb. 152, 337 N.W.2d 733)

produce a flow of water in the same channel and these conditions must reoccur with some degree of regularity. Neb.Rev.St. § 31-202.

**[5] Waters and Water Courses 405 ↪38**

405 Waters and Water Courses  
 405II Natural Water Courses  
 405II(A) Riparian Rights in General  
 405k38 k. What Constitutes a Water Course. Most Cited Cases  
 A natural stream or watercourse does not lose its natural character as such merely by artificial improvements.

**[6] Waters and Water Courses 405 ↪38**

405 Waters and Water Courses  
 405II Natural Water Courses  
 405II(A) Riparian Rights in General  
 405k38 k. What Constitutes a Water Course. Most Cited Cases  
 Upper Dugout Creek comports with statutory definition of a watercourse and subsequent cases of Supreme Court which have interpreted the statute. Neb.Rev.St. § 31-202.

**[7] Waters and Water Courses 405 ↪40**

405 Waters and Water Courses  
 405II Natural Water Courses  
 405II(A) Riparian Rights in General  
 405k40 k. Nature and Extent of Rights in General. Most Cited Cases  
 Corpus of running water in a natural stream is not the subject of private ownership; such water is classed with light and air in the atmosphere as being publici juris, or as belonging to the public; a usufructuary right, or right to use it exists, and corpus of any portion taken from stream and reduced to possession is private property so long as the possession continues.

**[8] Waters and Water Courses 405 ↪44**

405 Waters and Water Courses  
 405II Natural Water Courses  
 405II(A) Riparian Rights in General  
 405k41 Extent of Right to Use of Water

405k44 k. Irrigation and Agricultural Purposes. Most Cited Cases  
 Irrigation district, by bringing canal seepage water into watershed of creek, did not become entitled to use of excess water for the district, as exception to general public ownership rule that an appropriator who by his own exertions increases available supply of water has right to appropriate it does not contemplate accessions to a stream through process of nature, as by percolating waters.

**[9] Judgment 228 ↪585(3)**

228 Judgment  
 228XIII Merger and Bar of Causes of Action and Defenses  
 228XIII(B) Causes of Action and Defenses Merged, Barred, or Concluded  
 228k585 Identity of Cause of Action in General  
 228k585(3) k. What Constitutes Distinct Causes of Action. Most Cited Cases  
 Where different proof is required, judgment in one action does not preclude another action.

**[10] Judgment 228 ↪586(2)**

228 Judgment  
 228XIII Merger and Bar of Causes of Action and Defenses  
 228XIII(B) Causes of Action and Defenses Merged, Barred, or Concluded  
 228k586 Identity of Subject-Matter  
 228k586(2) k. What Constitutes. Most Cited Cases  
 Action which involved a different canal at a different watercourse was not res judicata upon issues in injunction action by irrigation district seeking to enjoin Department of Water Resources from requiring that irrigation district obtain an appropriation permit to pump water from creek into its canals for irrigation.

**[11] Waters and Water Courses 405 ↪128.5**

405 Waters and Water Courses  
 405VI Appropriation and Prescription  
 405k128.5 k. What Law Governs. Most Cited Cases

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337 N.W.2d 733

Page 3

215 Neb. 152, 337 N.W.2d 733  
 (Cite as: 215 Neb. 152, 337 N.W.2d 733)

(Formerly 405k1281/2)

Federal law specifically defers to state appropriation laws in determining right of the United States to appropriate water within a state. 43 U.S.C.A. § 371 et seq.

**[12] Waters and Water Courses 405 ↻78**

405 Waters and Water Courses

405II Natural Water Courses

405II(D) Diversion

405k78 k. Rights as to Quantity of Water and Liability for Diversion in General. Most Cited Cases

**Waters and Water Courses 405 ↻142**

405 Waters and Water Courses

405VI Appropriation and Prescription

405k141 Nature and Extent of Rights Acquired

405k142 k. In General. Most Cited Cases

Appropriation permit which listed only North Platte River as source of water and which made no mention of diversion or appropriation from waters in Upper Dugout Creek did not entitle irrigation district to diversion or appropriation from waters in Upper Dugout Creek. Neb.Rev.St. § 46-231.

**[13] Waters and Water Courses 405 ↻142**

405 Waters and Water Courses

405VI Appropriation and Prescription

405k141 Nature and Extent of Rights Acquired

405k142 k. In General. Most Cited Cases

Notice of appropriation filed by United States did not entitle irrigation district which obtained rights of the United States through contract, to appropriate water from Upper Dugout Creek, since no statute permitted United States to appropriate water merely by filing a notice of an intent to do so and posting said notice by several creek beds.

**[14] Waters and Water Courses 405 ↻151**

405 Waters and Water Courses

405VI Appropriation and Prescription

405k151 k. Abandonment or Forfeiture of

Rights. Most Cited Cases

Even if irrigation district had a valid appropriation permit to appropriate the canal seepage waters from lands under an irrigation canal, which drained into a natural watercourse, it would have terminated from nonuse, since waters from canal had seeped into watershed of watercourse for over 55 years without recapture. Neb.Rev.St. § 25-202.

**\*\*735 Syllabus by the Court**

**\*152** 1. Equity: Appeal and Error. An action in equity is reviewed de novo without reference to the findings of fact made by the trial court.

2. Waters. A watercourse is defined by statute as any depression or draw 2 feet below the surrounding lands and having a continuous outlet to a stream of water, or river or brook.

3. Waters. To constitute a watercourse it must appear that the water usually flows in a particular direction and by a regular channel, having a bed with banks and sides, and usually discharging itself into some other body or stream of water. It may sometimes be dry. It need not flow continuously, but it must have a well-defined and substantial existence.

4. Waters. In order for a watercourse to exist there must be a permanent supply of water from similar conditions, such as rainfall or snowmelt, which will always produce a flow of water in the same channel and that these conditions will reoccur with some degree of regularity.

5. Waters. The corpus of running water in a natural stream is not the subject of private ownership. Such water is classed with light and the air in the atmosphere. It is publici juris, or belongs to the public. A usufructuary right, or right to use it, exists, and the corpus of any portion taken from the stream and reduced to possession is private property so long only as the possession continues.

6. Res Judicata: Proof: Judgments. Where different proof is required, a judgment in one action does not preclude another action.

Paul L. Douglas, Atty. Gen., and G. Roderic

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337 N.W.2d 733

Page 4

215 Neb. 152, 337 N.W.2d 733  
(Cite as: 215 Neb. 152, 337 N.W.2d 733)

Anderson, Asst. Atty. Gen., Lincoln, for appellants. Winner, Nichols, Meister, Douglas & Kelly, Scottsbluff, for appellee.  
Carol E. Dinkins, Asst. Atty. Gen., Jacques B. Gelin and David C. Shilton, Washington, D.C., for amicus curiae United States of America.

KRIVOSHA, C.J., and BOSLAUGH, McCOWN, WHITE, HASTINGS, CAPORALE, and SHANAHAN, JJ.

\*153 WHITE, Justice.

This is an appeal of a permanent injunction against the director and division engineer of the Nebraska Department of Water Resources (State) from requiring the plaintiff, Northport Irrigation District (Northport), to obtain an appropriation permit to pump water from the Upper Dugout Creek into its canals for irrigation. In granting \*\*736 the injunction the trial court found that (1) the United States of America was granted the right under its appropriation No. 768 from the State of Nebraska to recapture seepage and return flow from its project lands; (2) the decision in *United States v. Tilley*, 124 F.2d 850 (8th Cir.1941), recognized that this appropriation entitled the United States to recapture seepage and return flow before it reaches the North Platte River and that this decision is res judicata as to the issues in this case; and (3) pursuant to contract, Northport is entitled to the rights of the United States under appropriation No. 768.

Northport installed a pump in the Upper Dugout Creek near Bridgeport, Nebraska, and began pumping water from Upper Dugout Creek into canal laterals to serve its district on July 21, 1981. No right of appropriation had been granted to Northport to the waters flowing in the Upper Dugout by the State. The State issued an order to Northport to stop pumping without an appropriation permit on July 22, 1981. Northport complied and filed this action seeking an injunction against the State.

The primary issue in this case is whether seepage waters from lands under an irrigation project or canal, which drain into a natural watercourse, may be collected by the appropriator from the natural watercourse and be applied to further beneficial use

by the project or canal, or whether once the waters have returned to a natural watercourse they become public waters and are subject to administration by the State. We will first discuss whether Upper Dugout is a natural watercourse, and then whether all \*154 waters contained in Upper Dugout are public waters.

[1] This action is an action in equity which is reviewed de novo without reference to the findings of fact made by the trial court. *Barry v. Wittmersehouse*, 212 Neb. 909, 327 N.W.2d 33 (1982).

The Northport Canal crosses the top one-third of Upper Dugout Creek in an east-west direction. Upper Dugout Creek itself flows in a north-south direction and empties into the North Platte River to the south. The stream is approximately 11 miles long, and is fed by a spring in the north that directs the flow to the south but is only large enough to supply the top 4 miles of Upper Dugout Creek with a constant flow of water. Prior to the start of construction on the Northport Canal in 1920, the remaining southern portion of Upper Dugout Creek contained water only after a rainfall, although there was testimony that another small spring from Bratten or Braddon Creek formerly flowed into the center of Upper Dugout before it was artificially dammed. Since the canal began flowing in 1926, the lower portion of Upper Dugout Creek has never had a dry measurement and flows year round. The evidence was quite clear that the only reason for the increased flow was due to seepage waters from lands irrigated by the canal which, through percolation or drainage, had found their way into Upper Dugout Creek.

Northport concedes that "there's no question here about whether there's a reasonably definite channel."

Upper Dugout Creek flows in a well-defined channel cut in the soil by the action of the water. The creek has 2- to 3-foot-high natural banks and a 2- to 3-foot-wide bed consisting largely of gravel and sand. On all the maps and plats introduced into evidence, which varied from those originally surveyed and platted in 1877 until the present, Upper Dugout Creek is clearly shown as a creek in a well-defined channel. The photographs offered

*define  
Creek*

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337 N.W.2d 733

Page 5

215 Neb. 152, 337 N.W.2d 733  
(Cite as: 215 Neb. 152, 337 N.W.2d 733)

further serve to \*155 illustrate the well-defined and substantial existence of the watercourse.

[2] A watercourse is defined by statute as "Any depression or draw two feet below the surrounding lands and having a continuous outlet to a stream of water, or river or brook shall be deemed a watercourse." Neb.Rev.Stat. § 31-202 (Reissue 1978).

[3] " " "To constitute a water course, it must appear that the water usually flows in a particular direction; and by a regular channel, having a bed with banks and sides; and (usually) discharging itself into some other body or stream of water. It may \*\*737 sometimes be dry. It need not flow continuously; but it must have a well defined and substantial existence. \* \* \* there is a broad distinction between a stream and brook, constituting a water course, and occasional and temporary outbursts of water occasioned by unusual rains or the melting of snows, flowing over the entire face of a tract of land, and filling up low and marshy places, and running over adjoining lands, and into hollows and ravines which are in ordinary seasons destitute of water and dry." ' ' " *Barry v. Wittmersehouse, supra* at 912-13, 327 N.W.2d at 35, quoting from *Mader v. Mettenbrink*, 159 Neb. 118, 65 N.W.2d 334 (1954).

The de novo review reveals that Upper Dugout Creek had permanent source headwaters in the north and possibly another in Bratten Creek before its flow to Upper Dugout Creek was dammed. The Upper Dugout Creek headwaters flowed in a southerly direction, with a final discharge into the North Platte River. While the lower portion of Upper Dugout Creek was often dry except for rainfall before the building of the canal, we do not believe that this fact alone negates the existence of a natural watercourse. " "Those who are acquainted with the streams and water courses of the arid Rocky Mountain region of this country, draining as they do to steep, mountainous areas, with their swift currents running over gravelly and rocky bottoms, know that \*156 often in the dry summer months many of them are entirely dry, at least upon the surface. All of them, nevertheless, have well-defined beds, channels, banks, and currents of

water, at least the greater portion of the year, and are in every respect water courses to which water rights may attach. But it would be plainly impracticable in this western part of the country to require that, in order to constitute a water course upon which rights may attach, there must be a continuous, uninterrupted, and perennial flow of water during the entire year, and from year to year. Hence the requirement of the law is that in order to constitute a water course the stream need not flow all of the time.'

....

" " "Where water, owing to the hilly or mountainous configuration of the country, accumulates in large quantities from rain and melting snow, and at regular seasons descends through long, deep gullies or ravines upon the lands below, and in its onward flow carves a distinct and well-defined channel, which even to the casual glance bears the unmistakable impress of the frequent action of running water, and through which it has flowed from time immemorial, such a stream is to be considered a water course, and to be governed by the same rules." ' ' " *Hoefs v. Short*, 114 Tex. 501, 273 S.W. 785, 787-88 (1925).

[4][5] In order for a watercourse to exist there must be a permanent supply of water from similar conditions, such as rainfall or snowmelt, which will always produce a flow of water in the same channel and that these conditions will reoccur with some degree of regularity. 1 Kinney, *A Treatise on the Law of Irrigation and Water Rights* § 302 (2d ed. 1912). This court is not concerned by the evidence which indicated that a portion of the banks of Upper Dugout Creek had been repaired. A natural stream or watercourse does not lose its natural character as \*157 such merely by artificial improvements. 1 Kinney, *supra* at § 301.

[6] We therefore find that Upper Dugout Creek comports with the statutory definition of a watercourse and subsequent cases of this court that have interpreted said statute.

The issue remains as to whether waters which have returned to a natural watercourse become public

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337 N.W.2d 733

Page 6

215 Neb. 152, 337 N.W.2d 733  
(Cite as: 215 Neb. 152, 337 N.W.2d 733)

waters subject to administration by the State.

The right of Nebraska citizens to use the waters flowing in this State is protected by §§ 4, 5, 6, and 7 of article XV of the Constitution of Nebraska, which state as follows: "Sec. 4.... The necessity of water for domestic use and for irrigation purposes in the State of Nebraska is hereby declared to be a natural want. (Adopted, 1920.)

\*\*738 "Sec. 5. ... The use of the water of every natural stream within the State of Nebraska is hereby dedicated to the people of the state for beneficial purposes, subject to the provisions of the following section. (Adopted, 1920.)

"Sec. 6. ... The right to divert unappropriated waters of every natural stream for beneficial use shall never be denied except when such denial is demanded by the public interest. Priority of appropriation shall give the better right as between those using the water for the same purpose, but when the waters of any natural stream are not sufficient for the use of all those desiring to use the same, those using the water for domestic purposes shall have preference over those claiming it for any other purpose, and those using the water for agricultural purposes shall have the preference over those using the same for manufacturing purposes. Provided, no inferior right to the use of the waters of this state shall be acquired by a superior right without just compensation therefor to the inferior user. (Adopted, 1920.)

"Sec. 7. ... The use of the waters of the state for power purposes shall be deemed a public use and shall never be alienated, but may be leased or otherwise\*158 developed as by law prescribed. (Adopted, 1920.)"

Neb.Rev.Stat. § 46-203 (Reissue 1978) establishes a "first in time is first in right" seniority system for water appropriations. Priority of appropriations dates from the filing of the application in the office of the Department of Water Resources, under Neb.Rev.Stat. § 46-205 (Reissue 1978).

Appropriation by the public requires an application to the Department of Water Resources setting forth

certain information, such as the applicant's name, the source from which the water shall be appropriated, the amount of water for which appropriation is desired, the location from which the diversion will be made, the estimated time for completion of the diversionary structure, the point in time at which beneficial application of the water will be made to the land, the purpose for which the diverted water will be applied, and any additional facts required by the department. Neb.Rev.Stat. § 46-233 (Reissue 1978). The Department of Water Resources must then record the application, examine it for sufficiency, and either deny or approve it with or without conditions. Neb.Rev.Stat. §§ 46-233 and 46-235 (Reissue 1978). The applicant is given 6 months after approval of an application to file a plat of the area and to commence construction of the diversion works. Failure to comply with these requirements of Neb.Rev.Stat. §§ 46-237 and 46-238 (Reissue 1978) works a forfeiture of the appropriation and all rights thereunder.

[7] "The corpus of running water in a natural stream is not the subject of private ownership. 'Such water is classed with light and the air in the atmosphere. It is *publici juris* or belongs to the public. A usufructuary right or right to use it exists, and the corpus of any portion taken from the stream and reduced to possession is private property so long only as the possession continues. These principles were borrowed by the common law from the civil law and \*159 in turn were borrowed by the law of appropriation from the common law.' " *Rock Creek Ditch etc. Co. v. Miller*, 93 Mont. 248, 258, 17 P.2d 1074, 1076 (1933). In accord, see, *Rogers v. Petsch*, 174 Neb. 313, 117 N.W.2d 771 (1962), and *Slattery v. Dout*, 121 Neb. 418, 237 N.W. 301 (1931), which hold that a landowner does not have an exclusive right to use waters to the injury of senior appropriators. There are approximately 20 senior appropriators downstream from Upper Dugout Creek who would be adversely affected by the issuance of an injunction in this case. This court is concerned that these prior appropriators should have been joined as necessary parties to this lawsuit. This issue was neither briefed nor argued by counsel for either side. However, we find it unnecessary to comment further in view of our

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337 N.W.2d 733

Page 7

215 Neb. 152, 337 N.W.2d 733  
 (Cite as: 215 Neb. 152, 337 N.W.2d 733)

ruling in this case.

[8] Northport's contention that, by bringing canal seepage water into the watershed of Upper Dugout Creek, it has become\*\*739 entitled to the use of that excess water for the district is simply untenable. While the *Rock Creek* case cites an exception to the general public ownership rule for an appropriator who by his own exertions increases the available supply of water in a stream and therefore has the right to appropriate it, the exception "contemplates the increase of a stream occasioned through the exertions of man directed to that end, and does not contemplate accessions to the stream through the process of nature, as by percolating waters." 93 Mont. at 262, 17 P.2d at 1078. This argument is without merit.

Northport's arguments that the case of *United States v. Tilley*, 124 F.2d 850 (8th Cir.1941), is res judicata upon the issues in this case, or that Northport was a privy to a prior appropriation, are also without merit. To provide water for Northport and other irrigation districts in Nebraska, the United States applied for and obtained water appropriation permit No. 768 from the State of Nebraska in 1904, \*160 which permitted the diversion of 230 cubic feet per second of water from the North Platte River. In 1912 the United States posted and recorded a notice of appropriation which claimed "all unappropriated surface, surplus, waste, seepage, return, drainage or developed waters flowing in any and all of said streams, creeks, arroyos, gulches, ravines, depressions and drainage channels within the limits of the North Platte Project of the United States Reclamation Service." In 1918 the United States entered into a contract with the Northport Irrigation District. Under the contract the United States claimed all waste, seepage, spring, and percolating water arising within the district. In 1941 the United States appealed a decision of the U.S. District Court for the District of Nebraska in which one of the defendants was A.C. Tilley, state engineer and head of the Department of Roads and Irrigation of the State of Nebraska. The Eighth Circuit Court reversed the District Court and found that certain drains below the Tri-State Canal were "developed for the express purpose of collecting and removing the seepage," *United States v. Tilley*,

*supra* at 861, and therefore the United States should be able to collect that seepage and reapply it to the land without a new appropriation. The decision was based upon the previous case of *Ramshorn Ditch Co. v. United States*, 269 F. 80 (8th Cir.1920), in which the Eighth Circuit Court held that the United States was entitled to collect seepage in a particular drain without a new appropriation if it was within a reasonable time after the seepage began. Northport claims to be in privity with the United States by virtue of its contract for the purchase of the Northport Canal and therefore the *Tilley* and *Ramshorn* cases are res judicata on the instant issues.

We do not find either the *Tilley* or *Ramshorn* cases to be controlling or dispositive of the issues before this court.

[9][10][11] Where different proof is required, a judgment in \*161 one action does not preclude another action. *Suhr v. City of Scribner*, 207 Neb. 24, 295 N.W.2d 302 (1980). The present case involves a different canal and a different watercourse. The *Ramshorn* case also relied upon Rev.Stat. §§ 3426 and 3427 (1913), which statutes have since been repealed. Federal law specifically defers to state appropriation laws in determining the right of the United States to appropriate water within a state. National Irrigation Act of 1902, 43 U.S.C. §§ 371 et seq. (1976); *California v. United States*, 438 U.S. 645, 98 S.Ct. 2985, 57 L.Ed.2d 1018 (1978).

[12] The appropriation permit granted by the State of Nebraska to the United States defines the appropriation rights which Northport possesses in natural flow waters within the State of Nebraska. Neb.Rev.Stat. § 46-231 (Reissue 1978). Appropriation permit No. 768 lists only the North Platte River as the source of the water. No mention was made in the appropriation permit of diversion or appropriation from the waters in Upper Dugout Creek. A change of point of diversion was sought by Northport in 1979 and no mention was made in the application, order, or map that Northport\*\*740 considered Upper Dugout Creek as a source of water.

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337 N.W.2d 733

Page 8

215 Neb. 152, 337 N.W.2d 733  
(Cite as: 215 Neb. 152, 337 N.W.2d 733)

[13] Northport also relies on the notice of appropriation filed by the United States, which it maintains is support for its right to appropriate water from Upper Dugout Creek. We are unable to find any Nebraska statute, past or present, which has permitted the United States to appropriate water merely by filing a notice of an intent to do so and posting said notice by several creek beds. Further, while the notice mentions other creeks by name, it fails to refer to Upper Dugout Creek or even the range or township within which it is located.

[14] Even assuming arguendo that Northport did have a valid appropriation permit, it would have terminated from nonuse. The waters from the Northport Canal have seeped into the watershed of Upper Dugout\*162 Creek for over 55 years without recapture. As mentioned previously, there are now several downstream appropriators with senior rights to the water. These water users have been granted appropriation permits based on the seniority appropriation system. A filing date must be supported by use. Neb.Rev.Stat. § 46-229 (Reissue 1978). Nonuse for over 3 years terminates the right by statutory cancellation proceedings. Neb.Rev.Stat. § 46-229.02 (Reissue 1978). In *State v. Nielsen*, 163 Neb. 372, 79 N.W.2d 721 (1956), this court held that where the evidence shows that irrigation rights have not been used for more than 10 years, the provisions of Neb.Rev.Stat. § 25-202 (Reissue 1979) cause the clear loss of the appropriation right, independent of any cancellation proceeding.

For all of the above reasons the judgment is reversed and the cause dismissed.

REVERSED AND DISMISSED.

Neb., 1983.  
Northport Irr. Dist. v. Jess  
215 Neb. 152, 337 N.W.2d 733

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