
LAWSUITS AND LEGAL ISSUES IN THE REPUBLICAN RIVER BASIN

JUSTIN LAVENE

BUREAU CHIEF

AGRICULTURE ENVIRONMENT & NATURAL RESOURCES BUREAU

NEBRASKA ATTORNEY GENERAL'S OFFICE

2ND ANNUAL UPPER REPUBLICAN NRD WATER CONFERENCE

MARCH 27, 2017

KANSAS v. NEBRASKA (2010 - 2015)

- 2003 – Final Settlement Stipulation (1998 Litigation)
- 2005 – 2006 – Alleged Non-Compliance with Compact/FSS
- 2008 – 2010 – Arbitration on Non-Compliance Pursuant to Final Settlement Stipulation
 - Kansas originally requested over \$72 million in damages and a shutdown of 500,000 ground water irrigated acres
- May 2010 – Kansas Files Motion for Leave to File Petition with United States Supreme Court
- 2010 – 2014 – Litigation in front of Special Master of the United States Supreme Court



KANSAS v. NEBRASKA (2015) – CONT.

- In February 2015, the United States Supreme Court issued its final decision in *Kansas v. Nebraska*:
- Court ordered payment of **\$5.5 million**
 - **\$3.7 million** to Kansas for Nebraska's over use of water allocation (70,869 acre feet) in the 2005-2006 accounting period
 - **\$1.8 million** for disgorgement
 - Basically repayment of the benefit received by Nebraska as a result of our overuse
 - The Court noted that Nebraska has been in compliance since 2007
 - Nebraska passed new water laws and regulations to comply with the Compact
- The Court **rejected** Kansas' request for an **injunction** against Nebraska for future violations – No shutdown of 500,000 ground water irrigated acres
- The Court agreed to **reform the accounting procedures** of the Compact; Nebraska will no longer be charged with consuming water imported from the Platte River

LEADING UP TO LITIGATION...

- **2008 – 2011** – Average to above average precipitation
- **2012** – Extremely dry year
- **December 2012**
 - Integrated Management Plans (IMPs) jointly adopted by DNR and the Basin NRDs (Third Generation)
 - DNR forecasts the available water supply and uses for 2013
 - Projected shortfall is calculated which triggers a Compact Call Year for 2013
- **January 2013**
 - Compact Call Year Order issued by DNR
 - DNR administers Surface Water Rights for Compact Compliance and issues Closing Notices (First Time for Compact Compliance)
 - NRDs required to take actions to make up projected shortfall between supply and uses
- **January 2014 – 2016**
 - Compact Call Year Orders issued
 - DNR administers Surface Water Rights and NRDs make up forecasted shortfalls
- **January 2016**
 - Revised IMPs – (Fourth Generation)

LAWSUITS FILED AFTER 2013 ADMINISTRATION

- ***Hill et al. v. State of Nebraska and DNR*** (2014)
 - Takings Claim
- ***Hill et al. v. State of Nebraska and DNR*** (2015)
 - Takings Claim
- ***Cappel et al. v. DNR and Jeff Fassett, Director of DNR*** (2015)
 - Takings Claim
 - Procedural and Substantive Due Process Claims
- ***Frenchmen Cambridge Irrigation District v DNR, URNRD, MRNRD, LRNRD*** (2016)
 - Challenge to 4th Generation IMPs
- ***Nebraska Bostwick Irrigation District et al. v. DNR, URNRD, MRNRD, LRNRD and Attorney General*** (2016)
 - Takings Claim
 - Challenge to 4th Generation IMPs

HILL v. DNR

(“HILL I - 2013”) – (“HILL II – 2014”)

Plaintiffs: Greg Hill, Brent Coffey, James Uerling, Warran Schaffert, each individually and on behalf of a Class of Similarly Situated Persons

- Class Action – Plaintiffs are bringing this action on behalf of themselves and a class of water users.
 - The Class includes “All FCID water users in **2013** and **2014** who did not receive their full water allocation supply” and is made up of more than **150 members**

Defendants: State of Nebraska and DNR

Claims

- Takings claims brought under both the United States and Nebraska Constitutions
 - **Closing notices** issued in 2013 and 2014
 - Claimed water administered by DNR was within NE’s allocation
 - DNR’s alleged failure to **regulate and curtail groundwater usage** causing harm to surface water users.
- **\$76 million** in claimed damages for the **2013** crop year – (\$2,000/af x 38,379/af)
- **\$143.31 million** in claimed damages for the **2014** crop year – (\$2,000/af x 71,655 af)

(“HILL I - 2013”) – (“HILL II – 2014”) CONT.

■ **Hill I 2013**

- **July 31, 2014 – Complaint** filed in Furnas County District Court
- Sept. 22, 2014 – State filed Motion to Dismiss (MTD) – (Lawsuit Dismissed)
- Apr. 10, 2015 – Amended Complaint filed in Furnas County District Court
- Apr. 30, 2015 – State filed second MTD
- Sept. 29, 2015 – District Court denied State’s MTD in part (Takings Claim) and granted in part (GW Pumping) – lawsuit to proceed
- Oct. 28, 2015 – State files Motion for Clarification and/or Motion for Reconsideration
- **May, 19, 2016 – District Court Issues Order of Dismissal**
- May 31, 2016 – Appeal to Nebraska Supreme Court
- **March 10, 2017 – Opinion of the Nebraska Supreme Court – Affirming District Court’s Order of Dismissal**

■ **Hill II 2014**

- **Oct. 30, 2015 – Complaint** filed in Furnas County District Court
- Dec. 7, 2015 – State filed MTD
- **May 19, 2016 – District Court Issues Order of Dismissal**
- May 31, 2016 – Appeal to the Nebraska Supreme Court
- **March 10, 2017 – Opinion of the Nebraska Supreme Court – Affirming District Court’s Order of Dismissal**

(“HILL I - 2013”) – (“HILL II – 2014”) CONT.

Nebraska Supreme Court Opinion – Hill v. State, 296 Neb. 10 (2017)

- **DNR’s Administration for Compact Compliance is a Proper Exercise of the State’s Police Powers**
 - **Court rejected** Hill’s arguments that Compact was an inferior use to their permits
 - Held that **Compact** is federal law and thus the **supreme law** in Nebraska – The State must ensure Compliance
 - Therefore, appropriators right to use water is subject to the superior obligation of the State to ensure compliance with the Compact
 - While the right to use surface water is a “vested right” it is also inherently subject to the law at the time the vested interest was acquired and by such reasonable regulations subsequently adopted by virtue of the police power of the State
 - Held DNR’s **Closing Notices** were proper exercise of the **States police power**
 - That under the Compact, placing limitations upon withdrawals during a year which DNR predicted (forecasted) would be a water short year is a proper exercise of the State’s police powers.
 - DNR applied the limits under the Compact to the appropriators’ permits, which was a property interest subject to such reasonable regulations by the State
 - Therefore, the appropriators **have not been deprived** of a **compensable property interest** due to regulation by DNR

(“HILL I - 2013”) – (“HILL II – 2014”) CONT.

■ DNR’s Regulation Does Not Amount to a Permanent Physical Invasion

- **The Court rejected** appropriator’s cited case law supporting its argument that DNR’s regulation amounted to a physical taking, finding it inapplicable.
 - Instead, the Court held that **DNR did not appropriate “property”** by issuing Closing Notices
- Rather, the appropriators’ property rights to use the water are **subject to the DNR’s enforcement of compliance with the Compact**
- The Court further held that the appropriators had not been deprived of **“all economically beneficial use”** of their property
- The inability to withdraw enough water to grow a corn crop **does not** amount to being deprived of all economic use of the appropriator’s land
- The Court highlighted the appropriator’s Complaint, which showed that while there had been a decrease in production between 2013 and 2014, “the data indicates that 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 the beneficial use of land for irrigation purposes

(“HILL I - 2013”) – (“HILL II – 2014”) CONT.

- **DNR Does Not Have a Duty to Regulate Groundwater**
 - The Court noted that Nebraska has **two separate systems** for regulating water resources, and that DNR did not have a duty to regulate groundwater
 - *In re Complaint of Central Neb. Pub. Power*, 270 Neb. 108 (2005) and
 - *Spear T Ranch v. Neb. Dep’t of Nat. Resources*, 270 Neb. 130 (2005)
 - The Court found that while the FSS requires Nebraska to account for groundwater depletions under the Compact, **it does not impose a duty** on DNR to regulate groundwater
 - Therefore, because the DNR does not have jurisdiction to regulate groundwater, it does not have the power or duty to regulate groundwater

CAPPEL v. DNR

Plaintiffs: Rodney Cappel, Steven Cappel, Cappel Family Farm, LLC, C & D Cappel Farms, LLC, and Midway Irrigation, Inc.

Defendants: DNR and Jeff Fasset in his official capacity as director of DNR

Claims: Suit filed under 42 U.S.C. § 1983

- Takings Claim from the administration of their Surface Water Rights
- Alleging deprivation of Plaintiffs' property rights, procedural due process rights, and substantive due process rights under both the United States and Nebraska Constitutions for Closing Notices issued in 2013, 2014, and 2015
- Seeking monetary damages and restitution for taxes paid during 2013, 2014, and 2015
 - Occupation Tax
 - FVID Tax

CAPPEL CONT.

Current Timeline:

- Dec. 1, 2015 – Complaint filed in District Court
- Dec. 18, 2015 – Amended Complaint filed in District Court
- Jan. 11, 2016 – State files Motion to Dismiss
- April 7, 2016 – Hearing on Motion to Dismiss in District Court
- Oct. 6, 2016 – District Court Dismisses Case
- Nov. 1, 2016 – Notice of Appeal Filed
- April 6, 2017 – Appellate Briefing Complete
- Awaiting date for oral argument – Possibly at the end of May 2017

FRENCHMAN CAMBRIDGE IRRIGATION DISTRICT v. DNR *(“FCID”)*

Plaintiff: Frenchman Cambridge Irrigation District

Defendants: DNR, Jeff Fasset in his Official Capacity, Middle Republican Natural Resources District (MRNRD), Upper Republican Natural Resources District (URNRD), Lower Republican Natural Resources District (LRNRD), Douglas Peterson, Attorney General of the State of Nebraska, and the Nebraska Department of Justice

Claims

- Petition for review of IMP – Plaintiffs’ allege that the **IMP is unconstitutional** and should be declared null and void
- Focus of Petition on the alleged unconstitutionality of the change in pumping volume reductions by the NRDs from **25% to 20%**
- Plaintiffs also request that the orders of the NRDs and DNR implementing the IMP should be reversed and vacated

Current Timeline

- Jan. 7, 2016 – Petition for Review filed
- Mar. 3, 2016 – Defendants filed Motion to Dismiss
- June 2, 2016 – Hearing date on Defendants’ Motion to Dismiss
- Nov. 3, 2016 – District Court Order of Dismissal
- Nov. 28, 2016 – Notice of Appeal
- Feb. 21, 2017 – Appellate Briefing Complete
- Awaiting date for oral argument – Possibly at the end of May 2017 or August 2017

NEBRASKA BOSTWICK IRRIGATION DISTRICT v. DNR *(“NBID”)*

Plaintiffs: Bostwick Irrigation District, Scott Losey, Dan Shipman, Aaron Lewis, Gary Rasser, Robert F. Brown and William Wentwork, each individually and on behalf of a Class of Similarly Situated Persons.

- Class action claim of NBID water users and is made up of more than **162 members**

Defendants: DNR, Gordon W. Fasset in his capacity as Director of DNR and in his individual capacity, Upper Republican Natural Resources District (URNRD), Middle Republican Natural Resources District (MRNRD), and Lower Republican Natural Resources District (LRNRD).

Claims

- Challenging **IMPs** and **closing notices**
- Inverse condemnation (**takings**) claims from DNR issuing closing notices
- Alleged violation of **Due Process** of law and **Equal Protection**

Requested Relief

- Plaintiffs ask the Court to find the **Basin IMPs** and **Closing Notices unconstitutional**, and to award **damages** for the alleged takings claim

Current Timeline

- Jan. 11, 2016 – Complaint filed in District Court
- Feb. 24, 2016 – State files Motion to Dismiss
- Oct. 13, 2016 – Hearing on State’s Motion to Dismiss in District Court
- Feb. 1, 2017 – District Court Order Denying State’s Motion to Dismiss
 - Order for State to File an Answer
 - Order for NBID to complete discovery requests
- **March 24, 2017 – NBID voluntarily Dismisses their Complaint**

MOVING FORWARD

- FCID v DNR / NRDs
 - If Arguments at the end of May
 - Then Opinion from NE Supreme Court by August / September 2017
- Cappel v DNR
 - If Arguments at end of August
 - Then Opinion from NE Supreme Court by November / December 2017
- If Plaintiffs' prevail, cases will be remanded back to District Court with directions on how to Proceed
 - Possibly proceed with cases to trial
 - Further appeals of subsequent decisions

QUESTIONS??

