

IN THE DISTRICT COURT OF HITCHCOCK COUNTY, NEBRASKA

RODNEY CAPPEL, STEVEN CAPPEL,
CAPPEL FAMILY FARM, LLC, a Nebraska
Limited Liability Company, C & D CAPPEL
FARMS, LLC, a Nebraska Limited Liability
Company, and MIDWAY IRRIGATION, INC.,
a Nebraska Corporation,

Plaintiffs,

vs.

STATE OF NEBRASKA DEPARTMENT OF
NATURAL RESOURCES, an executive
department and agency of the State of Nebraska,
and JEFF FASSETT, in his official capacity as
director of the Department of Natural Resources,

Defendants.

Case No. CH15-47

ORDER OF
DISMISSAL

On June 22, 2016, a hearing was held on the defendants' January 11, 2016 motion to dismiss. The plaintiffs, (hereinafter referred to collectively as the water users,) were represented by their attorney, Stephen D. Mossman. The defendants, the State of Nebraska and its agency, the Department of Natural Resources (hereinafter referred to as DNR or the Department) and Jeff Fassett in his official capacity as director of the Department of Natural Resources District, were represented by their attorneys, Justin D. Lavene and Emily K. Rose. The parties submitted briefs in support of their positions and further arguments were made. The motion was submitted and taken under advisement.

Now on this 5th day of October, 2016, the above motion came on for decision after the court's study of the briefs and the applicable law. After consideration of the motion, the court finds and orders as follows:

- I. *Factual and procedural setting*
- A. *Factual background as described in the amended complaint*

Under the rules applicable to §6-1112(b) motions, the court is required to take as true the factual statements set out in the water users' December 18, 2015 verified amended complaint. The facts accepted as true are the following: all of the water users own land in Hitchcock County and irrigate such land by "ground water wells located in the 'Rapid' or 'Quick' response areas designated in the MRNRD [Middle Republican Natural Resources District] IMP [integrated water management plan]" and all the water users allege their lands are "... subject to surface water appropriations from" Frenchman Valley Irrigation District (FVID).

With respect to FVID, the verified amended complaint states FVID is the holder of two natural flow water rights. Copies of the appropriation permits were attached to the amended complaint and show that the sources of the appropriation are the Frenchman River and the Stinking Water Creek. Both Frenchman River and Stinking Water Creek are tributaries to the Republican River.

The administration of water in the Republican River Basin is subject to the 1942 Republican River Compact, an agreement between Colorado, Kansas, and Nebraska to divide the water supply of the Platte River Basin between the three states. In early January of 2013, 2014, and 2015, the Department of Natural Resources District entered orders declaring a "compact call year in effect." As a result of the compact call, all surface water users above the Guide Rock Diversion Dam, which includes the plaintiffs, were issued closing notices on all natural flow and storage permits. As a result of the compact calls and closing notices, the water users were prohibited from using the water of the Republican River and its tributaries. The water users allege they were unable to irrigate their crops with surface water and as such, the water users "would have been unable to farm a portion of their land with surface water and those that they

have farmed would have resulted in drastically lower yield, except for drilling new irrigational (sic) wells and adding pivots and drip tape to disburse (sic) the water properly.”

The water users also alleged that pursuant to Neb. Rev. Stat. §§46-701, *et seq.*, the natural resource districts in the Republican River Basin, and the DNR were required to adopt integrated management plans to manage hydrologically connected ground and surface water. The plaintiffs further alleged the Department, in September of 2010, adopted the Middle Republican Natural Resources District Integrated Water Management Plan (MRNRD IMP) and the Upper Republican Natural Resources District Integrated Water Management Plan (URNRD IMP) and Associated Surface Water Controls. By reason of the DNR’s adoption of the integrated water management plans and associated surface water controls, the plaintiffs alleged that the actions of the DNR permitted groundwater users to continue to irrigate crops with groundwater, whereas, surface water users were prohibited from doing so. As a result, the water users alleged the DNR approved integrated water management plans “... inequitably place[d] Compact compliance entirely on surface water users.”

The water users conclude by alleging that because of the “mismanagement of the water supply in the basin by the DNR” Nebraska’s ability to comply with the Republican River Compact has been “jeopardized” and such mismanagement has “... caused a decline in the amount of surface water in the basin.” The plaintiffs alleged “... the DNR has allowed too many ground water wells to be drilled in the basin and currently allows certain ground water irrigators to over-pump, which has turned the Republican River and its tributaries from a gaining stream into a losing stream.”

B. Claims asserted by the water users

The water users assert five theories of recovery. The first is a claim under Title 42 U.S.C. §1983 wherein the water users alleged their “procedural due process rights and their substantive due process rights” under the Nebraska and United States Constitutions were violated by the actions of the defendants under the Ground Water Management Protection Act, Neb. Rev. Stat. §§46-701 *et seq.*

In their second theory of recovery, the water users set forth a claim for inverse condemnation. In support of their inverse condemnation claim, the water users alleged they have a “vested property right in the use of the waters of the Republican River and its tributaries pursuant to their various appropriations.” The water users further alleged the issuing of the closing notices effected a “... ‘physical taking’ of property without just compensation.” The water users further alleged they were deprived of their “vested property rights so that the State may comply with the Compact. Compact compliance is a ‘public use’ because such compliance is a state issue and to the benefit to all citizens of Nebraska.”

The plaintiffs also alleged the defendants effected a “regulatory taking” because the defendants caused the water users “to lose the economically viable use of their land and prevent[ed] Plaintiffs from realizing their reasonable, distinct investment-backed expectations and the use and enjoyment of their property.” According to the plaintiffs, the defendants actions were in violation of Article I, §§ 3 and 21 of the Nebraska Constitution and the Fifth and Fourteenth Amendments of the United States Constitution.

In their third theory of recovery, the water users alleged that by issuing closing notices, the defendants deprived the water users of the benefits of condemnation proceedings in violation of their procedural due process rights. The plaintiffs further alleged they did not receive just compensation as required by Article I, §21 of the Nebraska Constitution and the

Fifth Amendment of the United States Constitution. In addition, the plaintiffs alleged the defendants, by “allowing excessive ground water pumping throughout the Basin” deprived the water users of their procedural due process rights.

Under their fourth theory of recovery, the plaintiffs alleged they “... lost their vested property rights to the benefit of ground water users” who are not prohibited from removing groundwater despite the order of a compact call year. The plaintiffs alleged that as “surface water appropriators” they were “... forced to bear the entire burden of Compact compliance.” Plaintiffs allege that through the implementation of the surface water controls and the integrated water management plans, the plaintiffs’ substantive due process rights were violated. Finally, in this cause of action, the plaintiffs alleged that issuing closing notices to surface water users while allowing groundwater users to continue to “... pump ground water is arbitrary and capricious, and not conducive to long-term Compact compliance.”

In their fifth and final theory of recovery, the plaintiffs alleged that because they paid Occupation Taxes levied against their property pursuant to Nebraska law for the operation of the FVID but were not able to irrigate with surface water from the FVID, the water users were forced to pay taxes that violated their rights. The water users claim they are entitled to restitution for the taxes paid.

C. The defendants’ motions to dismiss

The defendants filed a motion to dismiss under Neb. Ct. R. Pldg. §§6-1112(b)(1) and (6). When a motion to dismiss raises claims under both §§6-1112(b)(1) and 6-1112(b)(6), the court is required to consider “... dismissal under §6-1112(b)(1) first and [] then consider §6-1112(b)(6) only if it determines it has subject matter jurisdiction.”¹

¹ *Schurman T. v. Karyn N.*, 286 Neb. 468 (2013).

II. Analyses, findings, and conclusions concerning the request for dismissal under §6-1112(b)(1) for lack of subject matter jurisdiction

Subject matter jurisdiction has been defined as the power of the court to "...hear and determine a case in the general class or category to which proceedings in question belong and to deal with the general subject involved in the action before the court in the particular question which it assumes to determine."² Cases where the lack of subject matter jurisdiction has resulted in dismissal involve cases where the plaintiff lacked standing³ or the claim was barred by sovereign immunity.⁴

The defendants' §6-1112(b)(1) motion presents a facial challenge because it is not based on evidence outside the pleadings. Because it is a facial challenge, the court must accept all of the allegations made in the plaintiffs' complaint as true and draw all reasonable inferences in favor of the plaintiffs. Neb. Ct. R. §6-1112(h)(3) provides "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

In support of their lack of jurisdiction claim, the defendants contend the water users' actions cannot continue because the State has not waived its sovereign immunity. The defendants' line of reasoning begins with the assertion that an inverse condemnation claim arises only when the State has exercised its power of eminent domain. The defendants next argue that DNR issued the closing notices pursuant to its police power to regulate the waters of the Republican River Basin and not under the power of eminent domain. According to the defendants, without the exercise of the power of eminent domain, the water users cannot use the

² *Rozsnyai v. Svacek*, 272 Neb. 567, 570 (2006).

³ *Rice v. Adams*, 254 Neb. 219, 224 (1998).

⁴ *Henderson v. Department of Correctional Services*, 256 Neb. 314, 316-317 (1999).

self-executing nature of §21 of article I of the Nebraska Constitution to avoid the State's sovereign immunity. The court considered such claim as follows:

A. Neb. Const. art. I, §21 and its self-executing nature

Article I, §21, of the Nebraska Constitution provides that the "property of no person shall be taken or damaged for public use without just compensation therefor." In addition, the Fifth Amendment to the U.S. Constitution, made applicable to the states by the Fourteenth Amendment, provides: "Nor shall private property be taken for public use without just compensation." Nebraska's constitutional right to just compensation, "... includes compensation for damages occasioned in the exercise of eminent domain. And therefore, is broader than the federal right, which is limited only to compensation for a taking."⁵ The words "or damaged" in Neb. Const. art. I, § 21 include, "... all actual damages resulting from the exercise of the right of eminent domain which diminished the market value of private property."⁶

Even though there is a difference between the federal and the state constitutions, the Nebraska Supreme Court analyzes the state constitutional issue of whether there has been a taking or damage "for public use" as the result of "... the exercise of eminent domain, as coterminous with federal constitutional law."⁷

Article I, § 21, of the Nebraska Constitution is self-executing, and therefore,

... a cause of action may be brought directly under that section. A litigant must simply "allege and prove facts constituting a cause of action' under the constitutional language." *Dishman v. Nebraska Pub. Power Dist.*, 240 Neb. 452, 453, 482 N.W.2d 580, 582 (1992) (quoting *Kula v. Prososki*, 219 Neb. 626, 365 N.W.2d 441 (1985)). "When a political subdivision with the power of eminent domain damages property for a public use, the property owner may seek damages in an action for tort, in a statutory action for inverse condemnation, or in a constitutional action for inverse condemnation." *Dishman v. Nebraska Pub.*

⁵ *Scofield v. Dep't of Natural Res.*, 276 Neb. 215, 231 (2008).

⁶ *Strom v. City of Oakland*, 255 Neb. 210, 216 (1998)

⁷ *Henderson v. City of Columbus*, 285 Neb. 482, 491 (2013).

Power Dist., 240 Neb. at 454, 482 N.W.2d at 582 (citing *Slusarski v. County of Platte*, 226 Neb. 889, 416 N.W.2d 213 (1987)).⁸

Thus, an action for inverse condemnation is specifically authorized by Nebraska law and the district court is the proper court within which to bring such an action.

B. DNR's closing notices were regulatory actions conducted under the police power

The State, "... in the exercise of its police power may supervise and control the appropriation, diversion and distribution of the public waters of the state, and impose that duty upon administrative officers..."⁹ Therefore, the court finds the issuance of the closing notices by DNR was a regulatory action under the exercise of the State's police power.

C. Principles governing regulatory takings

A regulatory taking occurs in the context of governmental regulation of the property allegedly taken.¹⁰ The Nebraska Supreme Court has followed the U. S. Supreme Court's decisions on regulatory takings claims and in doing so, it has described two types of regulatory actions that constitute takings. The first type has two categories: Categorical or per se takings: (1) where the government requires an owner to suffer a permanent physical invasion of his property, however minor; and (2) where regulations completely deprive an owner of all economically beneficial use of his property.¹¹

The second type of regulatory taking is outside these two "... relatively narrow categories, and the special context of land-use exactions ... [and is] governed by the standards set forth in *Penn Central Transp. Co. v. New York City (Penn Central)*."¹² Under *Penn*

⁸ *Western Fertilizer & Cordage Co. v. City of Alliance*, 244 Neb. 95, 99-100 (1993).

⁹ *State ex rel. Cary v. Cochran*, 138 Neb. 163, 168 (1940).

¹⁰ *Bargmann v. State*, 257 Neb. 766, 774 (1999).

¹¹ *Scofield v. Dep't of Natural Res.*, *supra*, note 5 at 231-232.

¹² *Id.* at 232, quoting from *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005).

Central,¹³ relief is possible "... from a regulatory taking which does not deprive the owner of all economic use of the property."¹⁴ The *Penn Central* analysis examines, among other considerations, the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests.¹⁵

In *Strom v City of Oakland*,¹⁶ a landowner was ordered by a natural resources district (NRD) to install terraces and construct a sediment and water control basin on a farm. The landowner asserted an inverse condemnation claim for his compelled contribution of 10 percent of the cost of such work and for removal of part of his land from crop production. The NRD moved for summary judgment claiming the land-use regulations were a valid exercise of the police power and no compensation was due the landowner. The trial court granted the NRD's motion for summary judgment.

The Supreme Court reversed and in doing so, held "... land-use regulations are not, in effect, an exercise of the power of eminent domain if (1) the regulations substantially advance legitimate state interests and (2) do not deny an owner economically viable use of his land."¹⁷ After finding the regulations advanced a legitimate state interest, the Supreme Court found there were genuine issues of material fact regarding whether the landowner had been denied "the economically viable use of his land." The case was remanded for further hearings.

Although, the court in *Strom* was addressing *land-use* regulation and compelled, affirmative conduct, i.e. imposing an affirmative obligation on a landowner to change the use of land, the holding addressing sovereign immunity from suit has application to this case. Under the

¹³ 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978).

¹⁴ *Scofield v. Dep't of Natural Res.*, *supra*, note 5 at 232.

¹⁵ *Id.* at 233.

¹⁶ *Strom v. City of Oakland*, *supra*, note 6.

¹⁷ *Id.* at 219.

ruling in *Strom*, sovereign immunity does not preclude an inverse condemnation action seeking redress for a governmental body's police-power-based regulatory action that affects a property right.

D. Conclusion

Using the rule that requires the court to consider the facts pleaded as true, the court finds DNR's closing notices were made under the police power and not eminent domain. Under *Strom* and *Penn Central*, the defendants' sovereign immunity claim does not deprive this court of subject matter jurisdiction over the questions of whether DNR's action advanced a legitimate state purpose and whether the regulatory action interfered with a legitimate property interest.

As a result, the court finds the defendants' claim that the doctrine of sovereign immunity bars the plaintiffs' claims and deprives the court of jurisdiction is not supported by the law. The defendants' rule §6-1112(b) (1) motion is overruled.

III. Analyses, findings and conclusions concerning defendants' request for dismissal under §6-1112(b)(6) for failure to state a cause of action.

A motion under Neb. Ct. R. §6-112(b)(6) tests the legal sufficiency of the petition, not the substantive merits of the claims; and as a result, a court may look only at the face of the petition to decide a motion to dismiss.¹⁸ To prevail against a motion to dismiss and the failure to state a claim, the plaintiff must allege sufficient facts to state a claim for relief that is plausible on its face.¹⁹ In cases in which a pleader does not or cannot allege specific facts showing a necessary element, the factual allegations are none-the-less plausible if they suggest

¹⁸ *DMK Biodiesel, LLC v. McCoy*, 285 Neb. 974, 978 (2013).

¹⁹ *Anthony K. v. Nebraska HHS*, 289 Neb. 540, 552 (2014)

existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element of claim.²⁰

When considering a plaintiff's complaint under a Rule 12(b)(6) challenge, the court is required to accept as true all facts which are well-pleaded and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the plaintiff's conclusions.²¹ For the purposes of a motion to dismiss, a court is not obliged to accept as true a legal conclusion couched as a factual obligation, and threadbare recitals of elements of a cause of action, supported by mere conclusory statements, do not suffice.²²

In their claim for inverse condemnation the water users claim to hold a "...vested property right in use of waters of the Republican River and its tributaries pursuant to their various appropriations." The water users further allege the closing notices were in violation "... of Article I, §§3 and 21 of the Nebraska Constitution and the Fifth and Fourteenth Amendments of the United States Constitution." The water users claim the closing notices "... effected a physical 'taking' of property without just compensation."

The Fifth Amendment to the United States Constitution describes the elements of a takings claim as follows: "Nor shall private property be taken for public use without just compensation." Similarly, but slightly more broadly, the Nebraska Constitution provides that the property of "... no person shall be taken or damaged for public use without just compensation therefor."

Under both constitutional provisions, before "property may be taken," there must exist a species of property capable of being taken. Thus, to validly assert a takings claim, the

²⁰ *Cent. Neb. Pub. Pow. & Irr. Dist. v. North Platte NRD*, 280 Neb. 533, 530 (2010).

²¹ *Martinosky v. Crossroads Coop Ass'n (In re Estate of Teague)* 286 Neb. 1,5 (2013).

²² *Id.*, at 8.

water users must first establish the existence of a legally sufficient property right. Therefore, the first question under this claim is whether the water users actually own a cognizable “property” right which was adversely effected by action of the defendants.

To define the water users’ property interest, the court examined the history of the Nebraska Supreme Court’s treatment of the nature of the appropriation rights held by the water users.

In *Nine Mile Irr. Dist. v. State*,²³ an irrigation district sued the State for compensation for the taking of property when the State constructed a bridge which caused the North Platte River to change its course away from the irrigation district’s headgate. In that 1929 case, the Nebraska Supreme Court stated “the right to appropriate water is a vested property right.”²⁴

Such declaration was clarified ten years later in *Enterprise Irrigation Dist. v. Willis*.²⁵ In *Enterprise Irrigation Dist. v. Willis*, the Nebraska Supreme Court held a statute that limited appropriations to three-acre feet per acre did not apply retroactively. The court stated that while the State may supervise and control the appropriation, diversion, and distribution of the public waters of the State under its police power, the statutory limitation could not be applied to an appropriation that vested prior to enactment of the statute. According to the court, “[t]o place any other construction upon the provision would make it inimical to applicable provisions in the state and federal Constitutions.”²⁶ The underpinning for this conclusion was the court’s explicit

²³ 118 Neb. 522 (1929).

²⁴ *Id.* at 528.

²⁵ 135 Neb. 827 (1939).

²⁶ *Id.* at 836.

statement that "... an appropriator of public water, who has complied with existing statutory requirements, obtains a vested property right..."²⁷

The nature and limits of the "vested property right" held by a water appropriator were discussed in the 2005 case of *Spear T Ranch, Inc. v. Knaub*²⁸ where the court said "[a] right to appropriate surface water however, is not an ownership of property. Instead, the water is viewed as a public want and the appropriation is a right to use the water."²⁹ These declarations recognized two elements of the property right in water. As stated by the Supreme Court, "... the first characteristic of the appropriative right is that the holder possesses merely a usufructuary right. The appropriator of the waters of a stream acquires a right to the use of such water for beneficial purposes, but does not acquire ownership of such water."³⁰ The second element of the nature of water rights is the public nature of the water rights, i.e., water is a "natural want" and the use of the water is dedicated to the public.³¹

In further describing such property right, the court said "[b]ecause Spear T does not have a property interest in its surface water appropriation and only has a right to use, it cannot state a claim for conversion or trespass."³² Under the common law, claims for conversion and trespass may only be asserted if a property interest is at stake.³³ Thus, by logical extension, if a claim for conversion does not lie under the *Spear T Ranch* definition, it is because the right to

²⁷ *Id.* at 831.

²⁸ 269 Neb. 177 (2005) (hereafter referred to as *Spear T Ranch*).

²⁹ *Id.* at 185.

³⁰ *In re Application 1-15738*, 226 Neb. 146, 154 (1987), citing *Frenchman Valley Irr. Dist. v. Smith*, 167 Neb. 78 (1958).

³¹ Neb. Const. art. XV §§ 4 and 5.

³² *Id.*

³³ See, *Zimmerman v. FirstTier Bank*, 255 Neb. 410, 418 (1998) (The plaintiff must establish a right to immediate possession of the property at the time of the alleged conversion. . . . In other words, "the essence of conversion is not acquisition by the wrongdoer, but the act of depriving the owner wrongfully of the property"); *Dugan v. Jensen*, 244 Neb. 937, 941 (1994) (The party bringing a trespass action has the burden of establishing that he had title or possession of the property before he can proceed with his trespass action).

appropriate water does not include incidents of an unqualified right or an exclusive right to possession of the water.

In 2012, in the context of a dispute between the holders of surface water appropriations, the Nebraska Supreme Court further described the nature of the right to appropriate water when it said:

[a] right of appropriation is not one of ownership of surface water prior to the capture. Although the interest does not equate to ownership, we have nevertheless recognized that an appropriation right is a property right which is entitled to the same protection as any other property right.³⁴

This 2012 decision recognizes two aspects fundamental to the administration of water rights between appropriators: the priority among appropriators and preference rights.³⁵ An appropriation right to divert surface water receives a priority date, which is the date an applicant files its appropriation permit application with DNR.³⁶ In times of water shortage, the senior appropriator has the right to continue diverting water, whereas, a junior upstream appropriator does not.³⁷ The effect of such rule is that junior upstream water users must allow sufficient water to pass their diversion point to fulfill the appropriation allotment granted to a senior downstream appropriator.

While an appropriator may have a senior appropriation right, a junior appropriator may have a superior preference right over a senior appropriator if such junior appropriator has a constitutionally preferred right. Therefore, in times of water shortage, the Nebraska Constitution

³⁴ *Bond v. Neb. Pub. Power Dist. (In the 2007 Admin. Of Appropriation of the Waters of the Niobrara River)* 283 Neb. 629, 644 (2012) (hereinafter *Bond v. N.P.P.D.*) referring to *Loup River P.P.D. v. North Loup P.P. & I.D.*, 142 Neb 141 (1942) (Compensation required of junior appropriator's taking of water otherwise deliverable to a senior appropriator under application of a superior constitutional preference).

³⁵ *Id.* at 632.

³⁶ Neb. Rev 46-205 (Reissue 2010)

³⁷ *Bond v. N.P.P.D.*, *supra*, note 34 at 632; Neb. Rev. Stat. § 46-203 (Reissue 2008) (As between appropriators, the one first in time is first in right).

gives superior preference rights to certain uses of surface water regardless of the appropriation date.³⁸ When an appropriator has a superior preference right, but a junior appropriation right, such appropriator can use the water "...to the detriment of a senior appropriator having an inferior preference right. But the junior appropriator must pay just compensation to the senior appropriator."³⁹

This rule was applied in *Loup River, P.P.D. vs. North Loup River P.P. & I.D.*⁴⁰, where a senior appropriator, using water for power purposes, was found to be entitled to compensation for the diminishment of the exercise of its senior appropriation rights for the benefit of a junior appropriator who held rights for irrigation. The irrigation user with a junior priority but a superior preference was required to pay compensation to the senior appropriator with the inferior preference right of water use for power generation.

The review of case law makes manifest a fundamental element of Nebraska water law, viz, the transient nature of the availability of water in the source of supply. The determination that water is available at a given time is the act which animates the property rights incident to surface water appropriation. The holder of a surface water appropriation has a state-granted right to *use* the water in a stream when it is declared to be available. But the usufructuary nature of the right does not grant an immediate right to use of the water because there is no discrete, continuously existing corpus or physical thing that can be possessed or used by the appropriator. The right to use the property rights incident to an appropriation only arises when there is water "subject to capture," i.e., *when* water is declared to be available.

³⁸ Neb. Const. art. XV, § 6.

³⁹ *Bond v N.P.P.D.*, *supra*, note 34 at 633.

⁴⁰ *Loup River P.P.D v. North Platte Loup P.P & I.D.* *supra*, note 34.

Thus, under Nebraska law, the property right in water is limited by a number of factors that are distinct from the factors that define and constitute real and other property. Such factors are unique to water property rights. The factors which limit the form of the property interest in water include: Hydrologic variability and uncertainties regarding the availability of water for diversion, storage, and use by water users;⁴¹ the shared nature of water, e.g., the right to use water is shared by water right holders and other consumptive users and is affected by fish and wildlife and water quality considerations;⁴² statutory and constitutional limitations on the nature of the property right in water including, reasonable and beneficial use considerations,⁴³ the preference system in the Nebraska Constitution; the limitation on the right to use water resulting from forfeiture or nonuse,⁴⁴ and the inherent balancing of interests between the private use of water and the constitutional declaration that water is a public necessity⁴⁵ and dedicated to the people for "beneficial purposes."⁴⁶

The right to use water is further limited by section 6 of article XV of 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."⁴⁷ This constitutional provision is not self-executing and the Nebraska legislature has the authority to define through statutes, the public interest.⁴⁸

⁴¹ State ex rel. Cary v. Cochran, *supra*, note 9.

⁴² See, e.g., In re Applications A-16027, A-16028, A-16031, A-16032, A-16033, A-16036, A-16038, A-16039, A-16600, A-16603, A-16606, 243 Neb. 315 (1993) *modified on an unrelated point*, 243 Neb. 419 (1993).

⁴³ See, e.g., *Cent. Platte NRD v. Wyoming*, 245 Neb. 439 (1994).

⁴⁴ See, e.g., *Bond v. Neb. Pub. Power Dist.*, *supra*, note 34.

⁴⁵ Neb. Const. art. XV, §4.

⁴⁶ Neb. Const. art. XV, §5.

⁴⁷ Neb. Const. art. XV, §6.

⁴⁸ *Supra*, note 42 (Constitutional provisions are not self-executing if they merely indicate a line of policy or principles, without supplying the means by which such policy or principles are to be carried into effect, or if the language of the constitution is directed to the legislature, or it appears from the language used and the circumstances of its adoption that subsequent legislation was contemplated to carry it into effect).

In summary, when considering whether a taking of property has occurred, the treatment of the property interest in water depends heavily on the context of the claim, the underlying constitutional and statutory provisions of Nebraska law, and the interpretations thereof by the Nebraska Supreme Court. As a result, determinations in the case law which bear whether a taking of real or other personal property has occurred under the Fifth Amendment to the United States Constitution or the corresponding provisions of the Nebraska Constitution cannot be directly applied to the property rights in water without proper consideration of the unique nature of the property interest in water.

The conclusion is, the water users cannot merely assert ownership of a "... vested property right" and without more, be entitled to pursue compensation for a "taking." Instead, the water users must allege facts which establish ownership of a specific interest in property that is capable of being taken by State action.

A. *Water users' claim of a physical taking of property.*

Under the *Spear T Ranch* definition, the property right in water under an appropriation right does not include the exclusive or the irrevocable right to physically possess water. The conclusion that the property right in water is not irrevocable is supported by Nebraska Statutes which provide for cancellation of water rights for nonuse.⁴⁹ Without the right to exclusively or irrevocably physically possess the water, water users do not have a basis to claim a physical taking of property in the manner claimed in the amended complaint.

The holding in *Spear T. Ranch* that the right to appropriate surface water is the ownership of property was not diminished by the Supreme Court's statement in *Bond v. N.P.P.D.* that an appropriation right "... is a property right which is entitled to the same protection as any

⁴⁹ See Neb. Rev. Stat. §46-229 (reissue 2010).

other right.”⁵⁰ Instead the holding in *Bond v. N.P.P.D.* demonstrates that context is of the utmost importance in defining the nature of the property interest in water.

The court’s description of the priority of water rights in *Bond v. N.P.P.D.* was made in the context of a contest between two holders of surface water appropriations where the court declared that compensation was required of junior water users for the taking of water which was otherwise deliverable to a senior appropriator. In *Bond*, the court applied the Nebraska constitutional preferences between water users⁵¹ to determine the nature of the property interests subject to protection.

The priority and reference rules do not apply to the context of this action where the water users are asking the court to declare a physical taking by the State. Unlike *Bond v. N.P.P.D.*, this case does not involve a contest between opposing or competing water appropriators for the use of water. Instead, this case involves the elemental determination by the State as to whether there is water available for appropriation. The determination of whether water is available for appropriation from a stream is the ultimate or basic constituent of the “water rights” held by the users. Unless and until the State declares that water is available for diversion, there is no property interest in water. If there is no water available for appropriation, there can be no use thereof and the water rights do not come into fruition. There can be no “physical taking” if the right alleged to have been taken does not exist.

The court finds the water users’ claims based on DNR’s “physical taking” of the water users’ water rights failed to state a plausible cause of action. The motion to dismiss the appropriators’ takings claims based upon a physical taking should be sustained and the claims dismissed.

⁵⁰ *Supra*, note 34 at 644.

⁵¹ *Neb. Const. art. XV, §6.*

B. Water users' claim of a regulatory taking of property.

In their amended petition, the water users alleged the defendants' "...effected a regulatory taking by causing plaintiffs to lose economically viable use of their land and preventing plaintiffs from realizing the reasonable, distinct investment-backed expectations in the use and enjoyment of their property." The language used by the water users to state their regulatory takings claim is derived from the Nebraska Supreme Court's holding in *Strom v. City of Oakland*.⁵²

In *Strom*, the Supreme Court reversed the trial court's grant of summary judgment against a taking claimant who had regulations imposed on the use of land which compelled the landowner to pay part of the costs of the installation of terraces and a sediment control and water basin. After finding the regulations advanced a legitimate State interest, the Supreme Court found there were genuine issues of material fact regarding whether the landowner had been denied "the economically viable use of his land." The case was remanded to the district court for further hearing.

The applicability of *Strom's* regulatory takings holding to the water users' water rights is limited. Unlike the real estate involved in *Strom*, the water users do not have exclusive, physical possession of property, and they do not own an existing, physical thing. Further, unlike the landowners in *Strom*, the water users are not being compelled to make a permanent change in their use of a property right. Finally, unlike the landowner in *Strom*, the water users are not being compelled to surrender the economically viable use of an existing, corporeal thing. In *Strom*, the terraces and basin will permanently change the land and render part of the land no

⁵² *Strom v. City of Oakland*, *supra*, note 6.

longer useable. In the case of the water users, they retain the essence of their property interest, without change, i.e., they retain the right to use water when it is subject to capture.

1. DNR's administrative duties

Under Nebraska law the “right to prescribe the manner of using the waters of the state and apportioning the use among the people of the state rests with the Legislature, and is a proper exercise of its general police powers.”⁵³ As a result, the vested property right of an appropriator is subject to the State's exercise of its police power in determining the available water in the stream and in allocating such water.⁵⁴ Further, the vested property rights are “subject to the law at the time the vested interest was acquired and such reasonable regulations subsequently adopted by virtue of the police power of the State.”⁵⁵ The State, through the DNR “...in the exercise of its police power may supervise and control the appropriation, diversion, and distribution of the public waters of the state...”⁵⁶

Pursuant to such police power, the Legislature has delegated to DNR “exclusive original” jurisdiction over all issues involving surface water rights.⁵⁷ DNR is charged with the duty to distribute “... water among different appropriators according to their respective priorities...”⁵⁸ DNR is “...given broad authority over the appropriation and use of water in Nebraska.”⁵⁹ Further, DNR has the duty “to administer the waters of streams and rivers to

⁵³ *Farmers' Irrigation Dist. v. Frank*, 72 Neb. 136 (1904).

⁵⁴ *State, ex rel. Cary v. Cochran, supra*, note 9 at 175 (The duty of the administrator, in administering the waters of a stream by virtue of the police power of the state, is to enforce existing priorities, not to determine change or amend them.)

⁵⁵ *In re Birdwood Irrigation Dist.*, 154 Neb. 52, 55, 46 N.W.2d 884, 887 (1951).

⁵⁶ *State, ex. rel. Cary v. Cochran, supra*, note 9 at 168.

⁵⁷ Neb. Rev. Stat. § 61-206(1) (Reissue 2008).

⁵⁸ *State, ex rel. Cary v. Cochran, supra*, note 9.

⁵⁹ *In re Application A-16642*, 236 Neb. 671, 705 (1990).

prevent waste, to protect prior appropriators against subsequent appropriators, and to enforce all adjudicated water rights in accordance with their terms.”⁶⁰

DNR supervises and controls the appropriation, diversion and distribution of the public waters of the State⁶¹ and has the duty “...to determine from all available means . . . whether or not a usable quantity of water can be delivered.”⁶² DNR’s exercise of this duty involves “very complicated question[s] of fact,”⁶³ and DNR’s determinations of matters within the expertise of the director involving judgment and policy determinations in the administration of streamflow and surface water are to be given deference.⁶⁴ A determination by DNR is “...final unless it appears that it was unreasonable or arbitrarily made.”⁶⁵

2. *The Republican River Compact and its effect on water administration*

The source of water which supply the water users’ surface water appropriations and groundwater wells are streams and the aquifer fed by such streams in the Republican River Basin. The use of water in the Republican River Basin is governed by the Republican River Compact.⁶⁶

The Compact apportions among the States of Colorado, Nebraska, and Kansas the ... virgin water supply originating in and, as we will later discuss, originating only in the Republican River Basin. Compact Art. III; ... Virgin water supply, as used in the Compact, means the water supply within the Basin, in both the River and its tributaries, undepleted by the activities of man. Compact Art. II. The Compact gives each State a set share of that supply roughly, 49% to Nebraska, 40% to Kansas, and 11% to Colorado for any beneficial consumptive use. *Id.*, Art. IV; see Art. II (defining that term to mean that use by which the water supply of

⁶⁰ *Id.* at 169.

⁶¹ *State, ex rel. Cary v. Cochran, supra*, note 9.

⁶² *Id.* at 173-74.

⁶³ *Id.* at 173.

⁶⁴ *Hitchcock and Red Willow Irrigation Dist. v. Lower Plate North NRD*, 226 Neb. 146, 152-53 (1987); *In re 2007 Administration of Appropriation of the waters of the Niobrara River*, 288 Neb. 497, 508-509 (2014).

⁶⁵ *State, ex rel. Cary v. Cochran, supra*, note 9 at 174.

⁶⁶ Pub. L. No. 78-60, 57 Stat. 86 (1943); 2A Neb. Rev. Stat. appx. §1-106 (Reissue 2008).

the Basin is consumed through the activities of man). In addition, the Compact charges the chief water official of each State with responsibility to jointly administer the agreement. See *id.*, Art. IX. Pursuant to that provision, the States created the Republican River Compact Administration (RRCA). The RRCA's chief task is to calculate the Basins annual virgin water supply by measuring stream flow throughout the area, and to determine (retrospectively) whether each States' use of that water has stayed within its allocation.⁶⁷

Beginning in 1998 and concluding in 2013, Kansas sued Nebraska and Colorado in original actions in the U.S. Supreme Court alleging violations by Nebraska of the Compact. Kansas complained about Nebraska's increased pumping of groundwater resulting from thousands of wells "hydraulically" connected to the Republican River and its tributaries. A Special Master was appointed, mediation took place, and the case settled in 2003 under what the parties labeled as the Final Settlement Stipulation (FSS).⁶⁸ The five-volume FSS, and the "RRCA accounting procedures" and "groundwater model" agreed upon under its terms, were attached to the Special Master's April 15, 2003, Second Report. On May 19, 2003, the Supreme Court approved the FSS and the Special Master's report, including the parties' agreement for the use of the RRCA accounting procedures and the groundwater model to determine Nebraska's compliance with the Compact.⁶⁹

The case was recommended in 2010 when Kansas filed suit in the U.S. Supreme Court to enforce the FSS. Nebraska filed a counterclaim and the court again appointed a Special Master. In its counterclaim, Nebraska asked for a reformation of the FSS, claiming the FSS' accounting procedures contained a mistake that it charged Nebraska for water imported from outside the Republican River basin.

⁶⁷ *Kansas v. Nebraska*, 574 U.S. _____, 135 S. Ct. 1042, 1049, 191 L. Ed 21 (2015).

⁶⁸ Final Settlement Stipulation vol. 1-5, *Kansas v. Nebraska*, No. 126, Original (U.S. Apr. 16, 2003).

⁶⁹ *Kansas v. Nebraska*, 538 U.S. 720, 123 S. Ct. 1898, 155 L. Ed 2951, 2003 LEXIS 4058 (2003).

On November 13, 2013, the Special Master issued his final report and found: (1) Nebraska had violated the Compact, entitling Kansas to damages of \$3.7 million; (2) Kansas was entitled to an additional \$1.8 million, to be disgorged from Nebraska's gains; (3) other remedies Kansas sought were either not available in the proceeding or not necessary; and (4) Nebraska should prevail on its counterclaim for reformation because the FSS included a mutual mistake that should be reformed by adopting Nebraska's proposed correction.

On February 24, 2015, the Supreme Court overruled the States' exceptions to the Special Master's Report and adopted the Special Master's recommendations.⁷⁰

One result from the litigation was the determination that all sources of groundwater are included in the allocation of the "virgin water supply" governed by the Republican River Compact. Under the FSS approved by the Supreme Court, Nebraska, Kansas, and Colorado must use specific accounting procedures and a groundwater model to determine the amount, timing, and location of the recharge and depletions of groundwater that accrue to the Republican River and its tributaries.⁷¹

In 2010, after the FSS was adopted, the Nebraska legislature enacted the "Ground Water Management and Protection Act."⁷² Under the act, DNR, along with the three Republican River Basin Natural Resource Districts (NRDs) are required to develop integrated management plans to establish, among other things, objectives for stating a balance between surface and groundwater uses, the supplies of water in such sources, surface and groundwater controls, and monitoring plans.⁷³ The act also required that the integrated management plans "...ensure that

⁷⁰ *Kansas v. Nebraska*, supra, note 64.

⁷¹ Final Settlement Stipulation Vol. 1 at 17 and App. C, *Kansas v. Nebraska*, No. 126, Original (U.S. Apr. 16, 2003).

⁷² Neb. Rev. Stat. §46-701 et. seq. (Reissue 2010 and 2014 Cum. Supp.)

⁷³ Neb. Rev. Stat. §46-715(2) (2014 Cum. Supp.).

the state will remain in compliance with applicable State and Federal laws and with any applicable interstate water compact or decree...”⁷⁴

The act also required that under the monitoring plans imposed by the act, DNR must consult with the NRDs to ensure compliance with the Compact. Further, DNR must “...forecast on an annual basis the maximum amount of water that may be available from streamflow for beneficial use in the short and long term in order to comply with the requirement of subdivision (4)(b) of this section [the Compact]. This forecast shall be made by January 1, 2008, and each January 1st thereafter.”⁷⁵

Determining the share of the water in the Republican River Basin allocable to Nebraska and Kansas is DNR’s first duty under the Compact and is independent of DNR’s administration of the water determined to be within Nebraska’s share of the virgin water supply. Further, in administering the flow in the Republican River, the Compact imposes a burden on DNR that is not typical of stream administration, i.e., the Compact’s requirement for calculating the effects of groundwater inflows, outflows, and the timing thereof on streamflow in the river.

To ensure compliance with the Compact, DNR must determine the allocation of water supply in the Republican River Basin each year using historical data and estimates of future use. Such analyses rely on data derived from measurements taken in preceding years, i.e., DNR conducts its river administration prospectively using historical data. Further, the Compact requires DNR to use an averaging process which varies from year to year based upon whether it is a “water short year” or a “nonwater short year.” A two-year-or three-year-averaging method is

⁷⁴ Neb. Rev. Stat. §46-715,(4)(b) (2014 Cum. Supp.).

⁷⁵ Neb. Rev. Stat. §46-715(6) (2014 Cum. Supp.).

employed in a water short year and a five-year-averaging method is employed in years which are not water short.⁷⁶

To ensure that Nebraska does not exceed its allocation of the basin's water supply each year, DNR uses estimates of prospective uses of surface water in the basin, estimates of expected rainfall, evaporation, groundwater depletion and recharge, consumptive use, and the timing of return flows and recharge to the Republican River. In calculating such effects, including the groundwater depletions, DNR must rely upon the RRCA accounting procedures and the groundwater model incorporated in the FSS.⁷⁷

In addition and pursuant to Nebraska statute,⁷⁸ DNR, in consultation with the three Republican River NRDs, must provide annual short-term and long-term forecasts of the maximum amount of water that may be available from streamflow for beneficial uses that will ensure compliance with the Compact. The forecast is first determined by the averaging period to be applied, i.e., a two-or three-year averaging or a five-year averaging. Next, DNR must determine account balances for the allocation of the water in the Republican River. Thereafter, DNR must forecast available water supplies and consumption within Nebraska for the next year, i.e., a prediction of the future. In order to make such a forecast, DNR must assess consumptive uses of surface water in Colorado, Kansas, and Nebraska and the surface flow of the river at the Nebraska-Kansas state line. In Nebraska, there are five reservoirs which provide stored surface water for irrigation in Nebraska; and DNR must make estimates concerning the prospective uses attached to such water. These efforts are highly technical and involve judgments within the expertise the director of DNR must possess to serve in such office.

⁷⁶ Report of the Special Master, *Kansas v Nebraska*, at, p. 85, No. 126, Original (U.S. Nov. 15, 2013).

⁷⁷ Final Settlement Stipulation, *supra*, note 10, at p. 17 and App. C.

⁷⁸ Neb. Rev. Stat. §46-715(2014 Cum. Supp.).

Once the forecast is made, DNR uses it to determine its administration of the “virgin water” supply in the Republican River Basin in Nebraska to ensure compliance with the Compact and to satisfy its duties to Nebraska water users. Such forecast is an administrative decision made before January 1st of each year and used by DNR to issue orders concerning the “supervision and control” of appropriations from the Republican River including closing notices and restrictions on the use of water from reservoirs. Thereafter, the Department administers the river based upon such forecast with the intention of providing sufficient flow in the river to satisfy the Compact’s allocation of the water supply to Kansas.

The forecast forms the basis for the DNR’s determination of whether water is available for in-state appropriations. DNR does not use an instantaneous criteria for determining on a day-by-day, or week-by-week, or month-by-month basis whether water is available for diversion by Nebraska water users from the Republican River. Instead, the method of stream administration of the Republican River Basin is dictated by the laws, decrees, and agreements which implement, interpret, and define Nebraska’s compliance duties under the Compact.

3. *The water users’ rights under stream flow administration*

The water users’ right to use water is determined by DNR administration of the water in the Republican River Basin under the Compact, Nebraska Constitution and statutes. If DNR determines there is water allocable to Nebraska under the Compact, and that such water is subject to capture, then under Nebraska Constitutional and statutory law, the water users’ rights to use the water come into fruition. Alternatively, if under the stream administration, DNR determines water is not allocable to Nebraska, there is no water subject to capture and the right to use the water cannot be realized.

The rights held by the water users are subject to the duties of the State of Nebraska under the Compact. Independent of the actual terms and mechanisms of the Compact, the holding in *Hinderlider v. La Platta River and Cherry Creek Ditch Co*,⁷⁹ dictates such result. In *Hinderlider v. La Plata River*, Colorado had adjudicated the water rights involved in the dispute in an 1898 water proceeding. In 1923, Colorado and New Mexico entered into a compact “rotating” the use of the waters of the La Plata River between appropriators in the two states. The holders of the 1898 water rights bought an action to obtain an injunction to protect its decreed rights to water for irrigation when the rights to use the water under the pre-compact rights were denied. The trial court dismissed the action. The Colorado Supreme Court held the State did not have the right by compact, without notice, hearing, or compensation, to take property from one of its citizens and give it to another state or its citizens in disregard of existing constitutional, statutory, and judicial law. The state supreme court relied on its finding that Colorado Const. art. II, § 25, under which no person could be deprived of property, without due process of law was violated. The decreed priority for use of water for irrigation was not only a property right, it was a freehold.

The U. S. Supreme Court overruled the Colorado Supreme Court, reasoning that because Colorado controlled only an equitable share of the La Plata River, the pre-existing right holders' interests could only be as large as the State's equitable interest.⁸⁰ The U. S. Supreme Court's rationale rested on its determination that the State's administration of the water in the stream to satisfy the compact did not effect a taking because the attribute of the right the water user alleged was taken was not a part of the water user's interest in property to begin with.

⁷⁹ 304 U.S. 92, 58 S. Ct. 803, 82 L. Ed. 1202 (1938).

⁸⁰ *Id.*, at 102.

Under *Hinderlider*, an appropriation of water cannot confer rights in excess of Nebraska's equitable share of the water in the stream governed by the interstate Compact because the Compact is "...binding on the citizens of each state and all water claimants, even where the State had granted the water rights before it entered into the compact."⁸¹ In effect, the Compact reinforces DNR's right under the Nebraska Constitution and statutes to declare when water is available to capture.

To administer the stream as demanded by the water users would require DNR to abandon the method DNR has determined it is required to follow under the Compact and Nebraska law. Under the water users' claim, DNR would be required to administer the water to first satisfy the water users' rights. If this claim was valid, it would render DNR's water availability forecast under the Compact and Nebraska law meaningless and would require DNR to abdicate the duty to use the streamflow analysis imposed by Nebraska statutes and the U.S. Supreme Court approved FSS, including the accounting procedures and the groundwater model. Such method was imposed to *ensure* the proper allocation of the water supply to Kansas, an obligation under the Compact.

The issue reduces down to a determination of whether DNR's use of the stream administration method imposed constitutes a regulatory taking upon which the water users can rely to assert their claims. The issue is resolved by applying the definition of the water users' property interest in the water. The water users' water rights only come into fruition when there is available water in the stream. DNR's determinations under the Compact of whether there is water allocable to Nebraska, i.e., its equitable share, and subject to diversion using the forecasting and analysis regimen imposed are within the "exclusive and original" jurisdiction of

⁸¹ *Id.* at 106

DNR. Such determination of available water defines whether the usufructuary rights of the water users can be realized.

When water is available in a stream, i.e., "subject to capture," an appropriator possesses the right to beneficial use to the extent of the appropriation and the right to preclude other junior water users from using the water.⁸² But such rights do not exist until the determination is made that water is subject to capture. There can be no regulatory taking of the water rights granted to the water users if there is no available water which can be used by the water users under such usufructuary rights.

DNR's fulfillment of its duties under the Compact and the Nebraska statutes enacted to ensure Nebraska's compliance with the Compact are within the reasonable exercise of the State's police power and are within DNR's jurisdiction over streamflow administration. At their essence, DNR's forecasting and other efforts to determine how to manage the surface water are the determination of whether water is available in the stream and subject to capture.

DNR's determination that water is not available for appropriation is an inherent element of the water users' property rights in water. DNR's action of defining the extent and limits of the water rights in each year is the action which determines whether the water rights held by the water users become subject to exercise. Such act of defining the rights cannot be a taking of the property interest, because the property interest in water, i.e., the right to appropriate, does not exist until the declaration is made that water is available for appropriation. When DNR determined in 2013, 2014, and 2015 there was no water available to satisfy the usufructuary rights of the water users, the rights did not come into fruition. Such regulatory action did not interfere with a property interest in water, instead such action defined the interest.

⁸² *Id.*

The court finds the water users' claims based on DNR's alleged regulatory taking failed to state a plausible cause of action. The motion to dismiss the appropriators' takings claims based upon the alleged regulatory taking should be sustained and the claims dismissed.

C. *The water users' claims based on groundwater depletions.*

In their second theory of recovery, the water users alleged the defendants allowed "... excessive ground water pumping." The water users alleged the failure to stop such groundwater pumping together with other action including the declaration of a compact call year led to a regulatory taking of the water users' property right in water. The water users further alleged that the defendants "[b]y allowing excessive ground water pumping throughout the basin to the detriment of Plaintiff's surface water appropriations, Defendants have deprived Plaintiffs of their procedural due process rights granted under Article 1, §§3 and 21 of the Nebraska Constitution and the Fifth and Fourteenth Amendments of the United States Constitution."

In their fourth theory of recovery for substantive due process, the water users complained the defendants, through the closing notices issued to surface water appropriators, forced the surface water appropriators to "... bear the entire burden of Compact compliance." The water users further alleged allowing "ground water users to continue to pump ground water is arbitrary and capricious, and not conducive to long-term Compact compliance." Finally, the water users appear to make an oblique reference to the defendants' lack of regulation of groundwater in the water users' first theory of recovery where the water users alleged the defendants, "... purporting to act under the GWMPA, Neb. Rev. Stat. §§46-701 *et seq.*, caused the deprivation of Plaintiffs' vested property rights, their procedural due process rights and their substantive due process rights, all in violation of the Nebraska and United States Constitutions."

The central premise of these allegations is that the defendants have the authority to regulate the use of groundwater. Although the Nebraska statutes, including the Groundwater Management and Protection Act, provide a basis for the integrated management of groundwater and surface water, the statutes do not grant the defendants any authority to control the use of groundwater and specifically do not provide any authority for the defendants to stop the extraction of groundwater.

In *In re complaint of Central Neb. Pub. Power*,⁸³ DNR dismissed a complaint brought by Central Nebraska Public Power and Irrigation District (Central) to obtain an order from the Department commanding groundwater users to stop diverting water from the Platte River Basin without first obtaining a permit from the Department. Central had claimed that the groundwater users were depleting the flows in the Platte River and claimed DNR was responsible for administering all of the waters in the state under Neb. Rev. §§46-226 and 61-2061 and Neb. Const. art. XV §6. DNR dismissed Central's complaint citing a lack of jurisdiction. The Department concluded its legal authority was limited to working cooperatively with the State's NRDs to resolve conflicts between surface water appropriators and groundwater users by jointly developing and implementing integrated management plans. The Department concluded it did not have independent authority to regulate groundwater users or administer groundwater rights for the benefit of surface water appropriators. The Supreme Court affirmed the Department's order which dismissed the complaint for lack of jurisdiction.

In ruling in favor of DNR, the Supreme Court determined Nebraska has two separate systems for administering its water resources. Specifically, the court stated DNR "... regulates surface water appropriators, see §61-201 *et seq.* and ground water users are statutorily

⁸³ 270 Neb. 108 (2005).

regulated by natural resource districts through the Nebraska Groundwater Management and Protection Act, see Neb. Rev. Stat. §46-701 *et seq.* (reissue 2004).”⁸⁴ In concluding DNR had no independent authority to regulate groundwater users or administer groundwater rights for the benefit of surface water appropriators, the Supreme Court stated that its decision was “... clearly supported by our decision in *Spear T Ranch v. Knaub, supra*, in which we declined to apply legislatively created surface water priorities to ground water use for the reason that no statutory authority or case law supported the rationale of applying the rules relating to surface water appropriation to ground water use.”⁸⁵

In the same year as *In re complaint of Cent. Neb. Pub. Pow. & Irr. Dist.*, the Supreme Court decided a second case involving Spear T Ranch. In *Spear T Ranch, Inc. v DNR*,⁸⁶ a surface water appropriator asserted DNR permitted the diversion of water from its lands by failing to control groundwater pumping, which the appropriator claimed resulted in a taking via inverse condemnation. The Nebraska Supreme Court rejected the appropriator’s takings claim by declaring that DNR “...does not have authority to regulate groundwater users or administer groundwater rights for the benefit of surface water appropriations.”⁸⁷ This holding affirmed the holding in *In re complaint of Central Neb. Pub. Power*,⁸⁸ that DNR had no authority to regulate groundwater.

In rejecting the groundwater claim in *Spear T Ranch v DNR*, the Supreme Court held DNR’s “...action or inaction did not amount to a taking or damages as alleged by

⁸⁴ *Id.* at 117.

⁸⁵ *Id.*

⁸⁶ 270 Neb. 130 (2005).

⁸⁷ *Id.* at 139.

⁸⁸ *Supra*, note 83.

[the appropriator]. Because [the appropriator] had no property that was damaged or taken by the Department, [the appropriator] could not assert a cause of action for inverse condemnation.”⁸⁹

The plaintiff in *Spear T Ranch v DNR*, alleged DNR had both a common-law and a statutory duty to protect the rights of surface water appropriators. The Supreme Court dismissed both claims and the Supreme Court noted that all of the appropriator’s

...causes of action are based upon the assumption that the Department has a duty to resolve conflicts between surface water appropriators and groundwater users. It is well-established that the Department has only that authority which the legislature has specifically conferred on it by statute or by construction necessary to achieve the purpose of the relevant act.⁹⁰

The Supreme Court concluded “...the Department has no common-law or statutory duty to regulate the use of groundwater in order to protect [the appropriator’s] surface water appropriations.”⁹¹ The court further stated that in the absence of “...independent authority to regulate the use of groundwater, the Department has no legal duty to resolve conflicts between surface water appropriators and groundwater users.”⁹²

The water users attempt in this case to overcome this rule of law by claiming DNR’s assent to or approval of the NRDs’ integrated management plans, in combination with DNR’s determination of the water supply allocable to Nebraska under the Compact, effected a regulatory taking because such actions disproportionately required the use of surface water instead of groundwater to comply with the Compact.

The method employed by DNR to account for groundwater use in the Republican River Basin is dictated by the Nebraska statutes, the FSS, the Supreme Court’s decree approving

⁸⁹ *Spear T Ranch, Inc. v. DNR*, *supra*, note 28 at 139.

⁹⁰ *Id.* at 137-138.

⁹¹ *Id.* at 138.

⁹² *Id.*

the FSS, and the accounting procedures and groundwater model incorporated in the FSS. DNR does not have a duty, nor does it have the authority to regulate groundwater. The administrative use of the method DNR is required to employ in determining Nebraska's compliance with the Compact does not equate to a grant to DNR of "independent authority to regulate the use of groundwater." In other words, the requirement imposed by the Compact on DNR to account for groundwater depletions and recharge in the basin to determine the water allocable to Nebraska under the Compact does not constitute a duty to regulate groundwater. Further, the statutes which require DNR to assent to or approve integrated management plans adopted by the Republican Basin NRDs do not grant DNR the power to regulate groundwater in the basin.

If DNR does not have the power or the duty to regulate groundwater, then an alleged failure to exercise such nonexistent power or duty does not give rise to a cause of action for inverse condemnation or a violation of due process rights. The court finds the water users' claims based on DNR's alleged failure to regulate groundwater failed to state a plausible cause of action. The motion to dismiss the appropriators' takings claims based upon the failure to regulate groundwater should be sustained and the claims dismissed.

D. Water users' claims based upon substantive and procedural due process violations.

The water users claimed their procedural and substantive due process rights were violated by the issuance of the closing notices and the Department's administration of the water in the Republican River Basin. According to the Nebraska Supreme Court, procedural due process "... limits the ability of the government to deprive people of interest that constitute 'liberty' or 'property' interest within the meaning of the due process clause."⁹³ Procedural due

⁹³ *Parker v. State ex rel Bruning*, 276 Neb. 359, 366 (2008).

process requires that the State provide “parties deprived of such interest adequate notice and opportunity for a hearing.”

The first step in the due process analysis is to identify a property or liberty interest entitled to due process protection.⁹⁴ From the preceding analysis, it is clear the water users hold a property interest in their water rights. But, it is also clear from the analysis that the scope of the property rights is limited, including the fact water rights are not exclusive, not irrevocable, and are subject to administration by the DNR to serve the public interest. The water users acknowledge they do not own the waters of the streams from which the appropriations are to be taken and that the water they are permitted to use is public property. Implicit in such acknowledgment is the acknowledgment that the property rights are in a special, unique category of property.

Among the limits imposed on the property interest the water users hold, is such rights are subject to regulation and supervision by the State of Nebraska under its police power via the actions of DNR.⁹⁵ Further, such regulation also includes “subsequently adopted” regulation under the exercise of the police power of the State.⁹⁶

The water users alleged they were deprived of their “vested property rights so that the State may comply with the [Republican River] Compact. Compact compliance is a ‘public use’ because such compliance is a state issue and to the benefit of all citizens of Nebraska.” As a result, the water users alleged the defendants effected a “... regulatory taking” which violated their rights under Article I, §§ 3 and 21 of the Nebraska Constitution and the Fifth and Fourteenth Amendments of the United States Constitution.

⁹⁴ *Marshall v. Wimes*, 261 Neb. 846 (2001).

⁹⁵ *In re Water Appropriation Numbers 442A, 461, 462 and 485*, 210 Neb. 161 (1981) (Citing Neb. Const. art. XV §§ 4, 5.)

⁹⁶ *State v. Birdwood Irrigation District*, 154 Neb. 52 (1951).

In examining whether the defendants deprived the water users of their property rights, the court first observed the water users cannot claim a deprivation has occurred because they still retain their appropriation permits and none of the actions of the defendants constitutes a revocation of the permits, a change in the amount of water the water users can appropriate, nor have the defendants eliminated the water users' ability to pursue administrative remedies. While the water which was claimed by the water users in 2013, 2014, and 2015 is forever gone, the water users did not "own" such water. Further, the property right held by the water users was unchanged by the closing notices in those years, that is, despite the closing notices, the water users continue to hold rights to appropriate water when it is available.

Further, the water users do not have property rights which are free from the Department's regulation of the waters in the stream. The defendant's regulation of the streams, including the regulation of surface water appropriation permits by issuing closing notices and taking the other actions described in the amended complaint, do not effect a deprivation of the water users' property interest in water. This is so because the property interest is defined and comes into existence by reason of the regulation, i.e., annually DNR determines whether water is available.

Under the Compact and applicable statutes, DNR is charged with administering the prior appropriation system which by necessity requires the Department to determine the yields of the streams, i.e., available water, to determine compliance with the Republican River Compact and to determine how to administer the water to serve the Compact and all the users who may have appropriative rights to the water. These duties are the foundation of the Department's duties under the appropriation system and DNR's obligation to determine when and to what extent water is subject to capture in the streams.

Attached to the amended complaint of the water users is Permit No. 9802.

Paragraph 12 of the permit provides as follows:

The records show that there are periods during some years when the supply of water in the Republican River Basin, which includes the Frenchman River [and the Stinking Water Creek], is not sufficient to meet the requirements of all those having appropriations for its use. The applicant under this permit is hereby given notice that he (sic) may be denied the use of water during times of scarcity.

As a result, the rights held by the water users under Permit No. 9802 are expressly conditioned on the defendants' determination of available water in the basin.

Even if it were assumed a deprivation of property has occurred, the water users' due process rights are protected by post-deprivation procedures available under the statutes as well as applicable provisions of the Nebraska Administrative Code. Upon the issuance of the closing notices, the water users have the right to a hearing on the decision as long as the request is made within 30 days after the decision was rendered.⁹⁷ At such hearing, DNR is required to receive evidence relevant to the matter under investigation and is required to make a decision in writing after the hearing. Thereafter, an aggrieved party has the right to appeal the decision to the Court of Appeals.⁹⁸

Section 001.03 of Chapter 7, Title 454 of the Nebraska Administrative Code describes the complaint that can be filed by water users to allege a violation of statutes by the Department and to describe the relief requested. Similarly, Section 001.11L of Chapter 7, Title 454 provides a process for a hearing on actions by the Department under §61-206.

⁹⁷ Neb. Rev. Stat. §61-206(1) (reissue 2009) (If a final decision is made without a hearing, a hearing shall be held at the request of any party to the proceeding if the request is made within 30 days after the decision is rendered.)

⁹⁸ Neb. Rev. Stat. §61-207 (reissue 2009).

To avoid a prohibited deprivation of an interest in property, the State must provide a meaningful hearing, "... appropriate to the nature of the case."⁹⁹ A hearing appropriate to the case means providing the aggrieved party an opportunity to present evidence concerning the matter at a hearing before an impartial officer.¹⁰⁰ The statutes and the operation of the administrative code satisfy the due process requirements, i.e., the opportunity to be heard at a meaningful time and in a meaningful manner.¹⁰¹

As to the potential claim that the statutory and administrative code procedures occur only post-deprivation, due process requirements only require that a hearing be granted "at a meaningful time." The U. S. Supreme Court has held that when the necessity of quick action by the State or the impracticality of it providing any meaningful pre-deprivation process exists, the availability of a meaningful means by which the propriety of the State's actions can be assessed at some time after the initial action, can satisfy the requirements of procedural due process.¹⁰²

Therefore, assuming DNR's regulating conduct constituted a deprivation of a protected property right, the post-deprivation procedures set forth in the statutes and administrative code provide an adequate process which protects both the procedural and substantive due process rights of the water users. The court finds the water users' claims based upon a denial of procedural or substantive due process failed to state a cause of action.

E. Water users claim under 42 U.S.C. §1983

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Marshall v. Wimes, supra*, note 94 at 851.

¹⁰² *Parratt v. Taylor*, 451 U.S. 527, 535-544, 68 L. Ed. 2d 420, 101 S. Ct. 1908 (1981), *overruled in part on other grounds, Daniels v. Williams* 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986).

In addition to their procedural and substantive due process claims, the water users asserted in their first cause of action that they were entitled to damages under 42 U.S.C. §1983 because their procedural due process and substantive rights were violated.

To determine whether a valid 42 U.S.C. §1983 claim is presented, the court is required to initially focus on whether the two essential elements of a §1983 action are present. Specifically, the court is to determine whether: (1) the conduct complained of was committed by a person acting under the color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States.¹⁰³

In determining whether a claimant under §1983 has a claim, the court must examine the nature of the property interest upon which the claim is grounded.¹⁰⁴ The nature and dimensions of the property interest subject to the §1983 action are "... defined by existing rules or understandings that stem from an independent source such as state law – rules of understandings that secure certain benefits and that support claims of entitlement to those benefits."¹⁰⁵

The nature of the water users' property interests and their procedural rights thereunder have been previously discussed. Further, the preceding analysis established there is no infringement or interference with either the water users' property rights in water or their procedural or substantive due process rights associated with such water rights. Consequently, having defined the nature of the interests the water users have by virtue of their water rights, and the procedural due process protections associated therewith, and that the water users were deprived of neither, the court finds the complaint fails to state a cause of action under 42 U.S.C.

¹⁰³ *Brock v. Dunning*, 288 Neb. 909, 921 (2014)

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*, quoting *Board of Regents v. Roth*, 408 U.S. 564, 577, 92, S. Ct. 2701, 33 L Ed. 2d 548 (1972).

§1983. The court's analysis of the procedural due process protections afforded the water users' water rights applies under the §1983 analysis. The court finds the procedures afforded the water users comply with constitutional requirements for procedural and substantive due process, the water users did not assert a cause of action for violation of such rights or their property rights, and the water users failed to state a claim for relief under 42 U.S.C. §1983 for damages.

F. Water users claim for restitution

In their fifth theory of recovery, the water users alleged they paid occupation taxes levied on their property which taxes were authorized for the operation and maintenance of the Frenchman Valley Irrigation District. Because the plaintiffs were not able to irrigate in 2013, 2014, and 2015 due to the closing notices issued by the defendants, the water users alleged the defendants should be required to restore to the water users the occupation taxes paid for those years.

When considering and defining a cause of action based on restitution, the Nebraska Supreme Court has cited the Restatement of the law (Third), Restitution and Unjust Enrichment.¹⁰⁶ According to the Restatement, a person "... who is unjustly enriched at the expense of another is subject to liability in restitution."¹⁰⁷ The Restatement states the law of restitution is "predominately the law of unjust enrichment..."¹⁰⁸ but the Restatement also states the word "restitution" can also refer to restoring "... someone to a previous position."¹⁰⁹ The Restatement also notes restitution is sometimes confused with a "remedy in damages."¹¹⁰

¹⁰⁶ See, e.g., *City of Scottsbluff v. Waste Connections of Nebraska, Inc.*, 282 Neb. 848, 866 (2011) (Restatement of the law (Third), Restitution and Unjust Enrichment categories of unjust enrichment do not constitute an exclusive list but a bedrock principle of restitution is that unjust enrichment means "transfer of a benefit without adequate legal ground.")

¹⁰⁷ Restatement of the law (Third) Restitution and Unjust Enrichment, §1 (2011).

¹⁰⁸ *Id.* at comment b.

¹⁰⁹ *Id.* at comment e(1).

¹¹⁰ *Id.* at comment e(2).

The water users' restitution theory of recovery fails to set forth a factual basis for a claim of restitution based upon unjust enrichment. There are no facts stated to show the defendants in any way were enriched or benefited by reason of the payments made by the water users. Further, to the extent that the water users attempt to assert an unjust enrichment claim, there are no facts which allege the defendants, by reason of their regulatory activities, received a benefit and were "unjustly enriched."

If, in the alternative, the water users intended the use of the term "restitution" to mean "restoration" of the water users to "a rightful position," then the water users are seeking damages against the defendants. But the water users did not allege any connection or basis upon which they can claim the defendants breached any obligation or duty to the water users in relation to the tax payments, nor do the water users allege any fact or circumstance by which the water users can rely to assert a quasi or implied contract claim concerning the tax payments. After consideration of all aspects of the fifth theory of recovery based on restitution, the court finds the amended complaint failed to state a claim for relief.

IV. Consideration of leave to amend

The court considered whether to grant the water users leave to amend their complaint. The standard applicable to such decision is a court should not grant leave to amend if the proposed amendment would be futile. Leave to amend should be denied as futile only if the proposed new claim cannot withstand a Rule 12(b)(6) motion to dismiss.¹¹¹ In other words, if it appears beyond a doubt that the plaintiff can plead no set of facts that would entitle the plaintiff to relief, the court should find that amendment would be futile.

¹¹¹ *Bailey v. First Nat'l Bank*, 16 Neb. App. 153, 168-169 (2007).

After consideration of the nature of the claims for inverse condemnation, both the physical taking and the regulatory taking claims, the claims under the procedural and due process claims, and the claim under restitution, the court finds it appears beyond a doubt that the water users can plead no set of facts that would entitle them to relief under such claims. Further, with respect to their claims based upon the failure of DNR to regulate groundwater, any efforts by the appropriators to set forth a general scenario based on a duty on the part of the Department to regulate groundwaters would be futile. As a result, the court finds leave to amend the complaint shall not be granted.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED:

1. The above and foregoing findings are so found and ordered accordingly;
2. The defendant's January 11, 2016 Motion to Dismiss under Rule 12(b)(1) is overruled and denied;
3. The defendant's January 11, 2016 Motion to Dismiss under Rule 12(b)(6) is granted and all claims made by the plaintiffs in their December 18, 2015 verified amended complaint be and hereby are dismissed with prejudice and without leave to amend;
4. Each party shall bear their own costs and attorney fees incurred in this action.

BY THE COURT:



James E. Doyle, IV
District Judge