

IN THE DISTRICT COURT OF FURNAS COUNTY, NEBRASKA

Greg Hill of Furnas County,)
Brent Coffey of Harlan County,)
James Uerling of Red Willow County,)
Warren Schaffert of Hitchcock County,)
Each Individually and on behalf of a)
Class of Similarly Situated Persons,)

Plaintiffs,)

v.)

State of Nebraska and the)
Nebraska Department of Natural)
Resources, a State Agency,)

Defendants.)

Case Nos. CI14-68 and
CI15-80



ORDER OF DISMISSAL

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on May 19 20 16

By: ☐ Overnight Courier ☐ FAX ☒ E mailed
☐ Hand Delivered ☐ U.S. Mail ☐ Other
☐ Certified Mail ☐ Scanned

Signature Domina

Clerk, District Court

Lavene
Rosa

On January 14, 2016, a hearing was held on the defendants' October 28, 2015 motion for clarification and/or motion for reconsideration, the plaintiffs' December 22, 2015 motion to compel filed in case No. CI14-68 and the defendants' December 7, 2015 motion to dismiss in CI15-80 (all dates are filing dates). The plaintiffs, hereinafter referred to as the appropriators, were represented by their attorney, David Domina. The defendants, the State of Nebraska and its agency the Department of Natural Resources, (hereinafter referred to as DNR or the department) were represented by their attorneys, Justin Lavene and Emily Rose. The parties submitted briefs in support of their positions and further arguments were made. The motions were submitted and taken under advisement.

Now on May 19, 2016, the above matters came on for decision after the court's study of the briefs and the applicable law. After consideration of the motions, the court finds and orders as follows.

I. Two cases presenting the same issues

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DISTRICT COURT
FURNAS COUNTY

Clerk, District Court

The parties in Furnas County District Court Case Nos. CI14-68 and CI15-80 are identical. The legal basis for the claims asserted in the first amended complaint in CR14-68 and the claims asserted in the complaint in CI15-80 are the same and the facts pleaded are identical with one exception. In CI14-68, the appropriators assert claims which relate to crops grown in 2013, and in CI15-80 the appropriators assert claims which relate to crops grown in 2014. DNR's motions to dismiss in both cases raised the same issues in each case.

The one difference between the cases does not preclude the simultaneous consideration and disposition of the motions filed in both cases and, because of the identity of the parties, facts, and the issues, the court resolves the motions filed in each case by this order.

II. Procedural histories

A. Case No. CI14-68

The appropriators filed their complaint on July 31, 2014. DNR filed a motion to dismiss on September 22, 2014. On April 24, 2015, the court sustained the DNR's rule 12(b)(6)¹ motion and granted the appropriators leave to amend.

On April 10, 2015, the appropriators filed their first amended complaint. On April 30, 2015, DNR filed a motion to dismiss under rule 12(b)(6). On September 28, 2015, the court entered an order denying in part and sustaining in part the DNR's rule 12(b)(6) motion. The part of the motion that was sustained related to the appropriators' claim that DNR failed to regulate groundwater. Relying on the Supreme Court's decision in *Spear T Ranch Inc. v. Neb. Dep't of Nat. Res.*,² the court determined DNR did not have authority to regulate groundwater. This court found the appropriators' takings claims based upon the failure to regulate groundwater failed to state a cause of action. Further, the court denied the appropriators the right to amend their

¹ Neb. Ct. R. Pldg. §6-1112 (b)(6) (hereinafter rule 12(b)(6)).

² *Spear T Ranch Inc. v. Neb. Dep't of Nat. Res.*, 270 Neb. 130 (2005).

complaint to assert such claim again because the court determined the appropriators' attempts to amend would be futile under the law concerning DNR's duties and the regulation of groundwater.

On October 28, 2015, the DNR filed a motion for clarification and/or a motion for reconsideration, and a motion to extend the time to answer. Such motion was directed to that part of the court's September 28, 2015 order which denied the DNR's April 30, 2015 motion to dismiss. DNR's October 28, 2015 motion for clarification and/or reconsideration is resolved by this order.

B. Case No. CI15-80

On October 30, 2015, the appropriators filed their complaint in CI15-80. In the Complaint, the appropriators asserted the same claims as those made in the complaint filed in Case No. CI14-68. Specifically, the appropriators asserted two claims, one based upon a regulatory taking resulting from the DNR's administration of the flow in the Republican River and a second claim based upon an alleged failure by DNR "...to curtail groundwater pumping as required to assure that the Plaintiffs [] bear only their proportionate share of Compact compliance requirements....[and such failure] constitutes a taking of water in the stream...[depriving] the plaintiff[s] of water to which they had usufructuary rights in 2014."

On December 7, 2015, the DNR filed a motion to dismiss under rules 12(b)(1) and 12(b)(6). Such motion to dismiss is a subject of this order and is resolved herein.

III. Reconsideration of the September 28, 2015 order overruling the DNR's April 30, 2015 motion to dismiss in Case No. CI14-68

In the October 28, 2015 motion for clarification and/or reconsideration, DNR asked the court to reconsider its September 28, 2015 order that denied the DNR's motion to

dismiss the appropriators' first claim in their first amended complaint which alleged a regulatory taking via streamflow administration.

A. Applicable principles

The court's September 28, 2015 order did not dispose of the whole merits of the case and left other things for further consideration by the court. As such, the September 28, 2015 ruling was interlocutory and was merely a step or proceeding within the overall action. For such reasons, the order overruling the defendants' pretrial motion to dismiss pursuant to rule 12(b)(1) and (6) was not a final order.³

The Supreme Court has recognized a motion for reconsideration as the invocation of an appropriate exercise of the court's inherent power to vacate or modify its own judgments.⁴ Further, the Supreme Court has likened a "motion for clarification" to a motion for reconsideration.⁵

By reason of the forgoing, the court finds it has the authority and power to reconsider, clarify, modify or vacate its prior interlocutory orders. The court grants DNR's October 28, 2015 motion for reconsideration and/or clarification.

B. September 28, 2015 order in CII4-68 reconsidered and vacated in part

In reaching its September 28, 2015 decision, the court found the appropriators alleged a plausible takings claim relating to the DNR's streamflow administration. The court reconsidered such ruling and has determined that it made such ruling under a misapprehension of the nature of the appropriators' claims, the factual assertions in the first amended complaint, and the law invoked by DNR's motion to dismiss in response to this claim.

³ *Qwest Bus. Res. v. Headliners-1299 Farnam*, 15 Neb. Ct. App. 405 (2007); *StoreVisions, Inc. v. Omaha Tribe of Neb.*, 281 Neb. 238 (2011).

⁴ *Kinsey v. Colfer, Lyons*, 258 Neb. 832 (2000); *Bechtold v. Gomez*, 254 Neb. 282 (1998).

⁵ *Maxwell v. Montey*, 262 Neb. 162 (2001).

The DNR's October 30, 2015 motion to reconsider is granted; the court's September 28, 2015 order in CI14-68 relating to the appropriators' first claim is vacated and set aside, i.e., part A of the September 28, 2015 order, found on pages 3, 4 and 5 thereof and that part of paragraph 2 on page 7, which denied in part DNR's April 30, 2015, motion to dismiss are vacated. DNR's April 30, 2015 motion to dismiss shall be reconsidered and resolved by this order.

Thus, this order resolves DNR's April 30, 2015 motion to dismiss filed in Case No. CI14-68 and DNR's December 7, 2015 motion to dismiss filed in Case No. CI15-80.

IV. Factual and legal background

A. The Republican River Compact

The following excerpt from *Kansas v. Nebraska and Colorado*⁶ succinctly describes the Republican River and its compact:

The Republican River originates in Colorado; crosses the northwestern corner of Kansas into Nebraska; flows through much of southwestern Nebraska; and finally cuts back into northern Kansas. Along with its many tributaries, the river drains a 24,900-square-mile watershed, called the Republican River Basin.

....

The Compact apportions among the three States 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 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

⁶ *Kansas v Nebraska*, 574 U.S. _____, 135 S. Ct. 1042, 191 L. Ed. 21, 2015 U.S. LEXIS 1501 (2015).

throughout the area, and to determine (retrospectively) whether each States use of that water has stayed within its allocation.⁷

B. Original actions, special master, and a court approved settlement

In 1998 Kansas sued Nebraska and Colorado in an original action 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).⁸ 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.⁹

Nebraska had difficulty complying with the FSS and in 2010, 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.

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

⁷ *Kansas v. Nebraska*, 135 S. Ct. at 1049.

⁸ Final Settlement Stipulation vol. 1-5, *Kansas v Nebraska*, No. 126, Original (U.S. Apr. 16, 2003).

⁹ *Kansas v. Nebraska*, 538 U.S. 720, 123 S. Ct. 1898, 155 L. Ed 2951, 2003 LEXIS 4058 (2003).

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.¹⁰

One of the most significant results 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.¹¹

C. Nebraska's response to the inclusion of groundwater in Compact compliance

After the FSS was adopted, the Nebraska legislature enacted the "Ground Water Management and Protection Act."¹² 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.¹³ The act also required that the integrated management plans "...ensure that the state will remain in compliance with applicable State and Federal laws and with any applicable interstate water compact or decree..."¹⁴

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

¹⁰ *Kansas v. Nebraska*, supra, note 6.

¹¹ Final Settlement Stipulation vol 1 at 17 and App. C, *Kansas v Nebraska*, No. 126, Original (U.S. Apr. 16, 2003).

¹² Neb. Rev. Stat. §46-701 et. seq. (Reissue 2010 and 2014 Cum. Supp.)

¹³ Neb. Rev. Stat. §46-715(2) (2014 Cum. Supp.).

¹⁴ Neb. Rev. Stat. §46-715,(4)(b) (2014 Cum. Supp.).

“...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.”¹⁵

V. The appropriators' claims

A. Factual background

The appropriators are farmers who irrigate with water delivered to their fields by the Frenchman-Cambridge Irrigation District (FCID) under contracts with FCID. FCID was organized in 1946 by the Red Willow County, Nebraska, board of county commissioners¹⁶ under the predecessor statutes to Nebraska's current irrigation district laws,

... Neb. Rev. Stat. §§ 46-101 to 46-1,163 (Reissue 2010). As noted, FCID owns water rights for surface water natural flow within the Republican River Basin for irrigation purposes and receives supplemental stored water from federal reservoirs. As an irrigation district, FCID provides surface water for irrigation purposes and is dependent upon the surface water supply of the basin.¹⁷

According to the appropriators, FCID and all the appropriators “own surface water appropriations in order to divert surface water from the Republican River basin for beneficial use.” The appropriators alleged DNR issued orders which closed natural flow permits and precluded the release or storage of water for irrigation from storage reservoirs, collectively referred to as a “Compact Call.”

The appropriators further alleged DNR issued an order by which it stated it “would regulate and administer surface water in the [Republican River] basin as it deemed necessary for... compliance with the Republican River Compact.” According to the appropriators, DNR's order closed “all surface water appropriations in the Republican River

¹⁵ Neb. Rev. Stat. §46-715(6) (2014 Cum Supp).

¹⁶ *Smith v. Frenchman – Cambridge Irr. Dist.*, 155 Neb. 270, 272 (1952).

¹⁷ *Frenchman-Cambridge Irrigation Dist. v. Dep't of Natural Res.*, 281 Neb. 992, 996 (2011).

Basin above the Guide Rock diversion dam... and [all appropriators] were denied any benefits or use from their surface water allocations...” The appropriators alleged that as a result of DNR orders, “... the entirety of FCID’s surface water appropriation bypassed [the appropriators] and was diverted for the public use of satisfying Nebraska’s obligation to the state of Kansas under the Compact.”

B. The appropriators allege two regulatory takings claims

1. Taking of water in the stream

Under these claims the appropriators alleged:

[¶s 24.10 and 25.10] ¹⁸ At all relevant times in [2013 and 2014] , water was allocated, and was available, to the State under the Compact. During relevant times in [2013 and 2014], water that was not appropriated existed in the stream or was diverted from the stream and held in upstream reservoirs, and only intermittently released, for and at the direction of the State and DNR for delayed release, after capture, into the stream. This water was not needed for Compact compliance. [] this water was classified by the State and DNR as “Compact Water” and not “Federal Project Water” (Federal Project Water is not Compact Water or water needed for Compact compliance). Plaintiffs and the Class Members had, in [2013 and 2014], the right to preclude junior appropriators from using water. They are entitled to compensation because water subject to capture was ordered withheld from them and from the stream by the State and DNR for the sole purpose of delaying its release. A substantial portion of this water was also actually captured, but it was all subject to capture or captured and was denied to Plaintiffs and their Class by Defendants in [2013 and 2014].

[¶s 24.11 and 25.11] Water so captured but ordered withheld, delayed and denied to Plaintiffs and Class Members, and later released by the State and DNR, was not needed to satisfy the Kansas allotment under the Compact; it was within Nebraska’s allotment. This means that in [2013 and 2014], Plaintiffs’ and Class Members’ rights were not subject to action taken by the State and the DNR under the Compact as the water denied to them was not needed, or used, for Compact compliance.

[¶s 24.12 and 25.12] The water allocated and available as alleged above was in sub-basins and the mainstream of the Republican River Basin providing water to FCID and its water users. This water included water available in reservoirs that hold water for FCID’s canals and ditches. This water was impounded and ordered

¹⁸ Paragraph numbers are from the April 10, 2015, First Amended Complaint and the October 30, 2015 Complaint respectively, filed in Cases. No. CI14-68 and CI15-80.

held by DNR though it was subject to capture. It was released by DNR and was not needed or used for Compact compliance for [2013 and 2014]. The releases occurred too irregularly or in amounts too small, or too late to be used for their crops, and too late for them to plan for a reasonable way to beneficially use this water.

[¶s 24.14 and 25.14] DNR and the State have broad powers to regulate all waters of the Basin to comply with the Compact. Those powers may not be exercised a) without a foundation in fact, b) in excess of authority conferred by the Compact and Nebraska law, c) arbitrarily or capriciously, or d) on terms that deny Nebraskans with senior water rights the right to preclude others junior appropriators from using the water, unless they are paid just compensation for the water subject to capture but ordered withheld from them and from the stream by the State and DNR.

[¶s 24.15 and 25.15] Plaintiffs and their Class Members had a superior preference under Neb. Const. Art.15, § 6 to the water denied by Defendants in [2013 and 2014], as it constituted water in the stream subject to capture and within Nebraska's Compact allotment. Though the DNR withheld this water from Plaintiffs and Class Members, it did not do so because the water was unavailable for appropriation in Nebraska.

The appropriators claimed the actions of DNR constituted an inverse condemnation of their rights to use surface water from the Republican River, viz., that their

[¶s 44 and 45] [p]rivate rights, those of surface water appropriations for each Plaintiff and Class Member, were taken by the State of Nebraska and Nebraska Department of Natural Resources without a formal condemnation proceeding and without the opportunity to receive just compensation for the taking. The private landowners have the right to bring this action as part of the self-executing character of the Takings Clauses of the Nebraska and United States Constitutions.

As a result of such taking of their water rights, the appropriators alleged they lost money by reason of curtailed or diminished crop production.

2. Appropriators' claims concerning the alleged failure of the DNR to regulate groundwater

In their complaint in CI15-80, the appropriators' asserted a second claim which claim is the same as the second claim the appropriators asserted in the complaint in CI14-68. In both second claims, the appropriators alleged DNR effected a taking of their property rights by

reason of DNR's failure to regulate groundwater. The appropriators claimed DNR permitted groundwater to be "intercepted in its subterranean flow to the stream that would have been subject to capture if it had not been intercepted in the natural course of the hydrologic interconnected flow of waters in the Republican River basin." The appropriators alleged the DNR did not curtail "excessive groundwater pumping of hydrologically interconnected ground and surface water," which required DNR to take water which would have otherwise been allocated to the appropriators and DNR used such water to comply with the Compact. According to the claim, DNR has used a disproportionate amount of surface water to comply with the Compact instead of regulating the withdrawal of groundwater to comply with the Compact. According to the appropriators, such disproportionality constitutes a taking.

C. The nature of the appropriators' rights to appropriate water

In *Nine Mile Irr. Dist. v. State*,¹⁹ 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 case, the Nebraska Supreme Court stated "the right to appropriate water is a vested property right."²⁰

Ten years later such declaration was clarified in *Enterprise Irrigation Dist. v. Willis*.²¹ In *Enterprise Irrigation Dist. v. Willis*, the Nebraska Supreme Court held that 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

¹⁹ 118 Neb. 522 (1929).

²⁰ *Id.* at 528.

²¹ 135 Neb. 827 (1939).

state and federal Constitutions.”²² The underpinning for this conclusion was the court’s explicit statement that “... an appropriator of public water, who has complied with existing statutory requirements, obtains a vested property right...”²³

The treatment of a water appropriation as a “vested property right” in *Enterprise Irrigation Dist. v. Willis*, was relied upon by the Supreme Court in 1952 when it invalidated a city ordinance that declared open irrigation canals to be “public nuisances,” and required the canal owners to fill the canals or replace them with pipes. In *City of Scottsbluff v. Winters Creek Canal Co.*,²⁴ the court found that the ordinance was an arbitrary exercise of the police power. In reaching its decision, the court stated the ordinance would impose financial burdens on the canal company and would effect a “...confiscation of the company's property without due process or payment of just compensation.”²⁵

The nature of the “vested property right” held by a water appropriator was discussed in the 2005 case of *Spear T Ranch, Inc. v. Knaub*²⁶ 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.”²⁷ In further describing the 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.”²⁸ Under the common law, claims for conversion and trespass may only be asserted if a

²² *Id.* at 836.

²³ *Id.* at 831.

²⁴ 155 Neb. 723 (1952).

²⁵ *Id.* at 728.

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

²⁷ *Id.* at 185.

²⁸ *Id.*

property interest is at stake.²⁹ Thus, by logical extension, if a claim for conversion does not lie under the *Spear T Ranch* definition, it is because the right to appropriate water does not include in it incidents the *unqualified* nor the exclusive right to possession of the water.

In 2012, 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.³⁰

The nature of a water right also includes recognition of two aspects fundamental to the administration of water rights: the right to appropriate and preference rights.³¹ An appropriation right is a right to divert unappropriated surface water and such appropriation receives a priority date, which is the date an applicant files its appropriation permit application with DNR.³² In times of water shortage, the senior appropriator has the right to continue diverting water, whereas a junior upstream appropriator does not.³³ The effect of such rule is that junior upstream appropriators must allow sufficient water to pass their diversion point to fulfill the appropriation allotment granted to a senior downstream appropriator.

²⁹ See, *Zimmerman v. First Tier 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).

³⁰ *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).

³¹ *Id.* at 632.

³² Neb. Rev. Stat. § 46-205 (Reissue 2010)

³³ *Bond v. N.P.P.D.*, *supra*, note 41 at 632; Neb. Rev. Stat. § 46-203 (Reissue 2008) (As between appropriators, the one first in time is first in right).

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 gives superior preference rights to certain uses of surface water regardless of the appropriation date.³⁴ 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."³⁵

This rule was applied in *Loup River, P.P.D. vs. North Loup River P.P. & I.D.*³⁶, 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 physical 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 available water in a stream. 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

³⁴ Neb. Const. art. XV, § 6.

³⁵ *Bond v N.P.P.D.*, *supra*, note 41 at 633.

³⁶ 142 Neb. 141 (1942).

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.

D. Inverse condemnation and takings

1. Article I, § 21, of the Nebraska Constitution is self-executing

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 5th Amendment to the U.S. Constitution, made applicable to the states by the 14th 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.”³⁷ 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.”³⁸

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.”³⁹

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

³⁷ *Scofield v. Dep’t of Natural Res.*, 276 Neb 215, 231 (2008).

³⁸ *Strom v. City of Oakland*, 255 Neb. 210, 216 (1998).

³⁹ *Henderson v. City of Columbus*, 285 Neb. 482, 491 (2013).

constitutional action for inverse condemnation." *Dishman v. Nebraska Pub. 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)).⁴⁰

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.

2. Principles governing regulatory takings

The appropriators claimed DNR's Republican River streamflow administration amounted to a regulatory taking of their property rights. 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.⁴¹

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)*." ⁴² Under *Penn Central*,⁴³ relief is possible "... from a regulatory taking which does not deprive the owner of all economic use of the property."⁴⁴ 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.⁴⁵

⁴⁰ *Western Fertilizer & Cordage Co. v. City of Alliance*, 244 Neb. 95, 99-100 (1993).

⁴¹ *Scofield v. Dep't of Natural Res.*, *supra*, note 7 at 231-232.

⁴² *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).

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

⁴⁴ *Scofield v. Dep't of Natural Res.*, *supra*, note 7 at 232.

⁴⁵ *Id.* at 233.

In *Strom v City of Oakland*,⁴⁶ a landowner was ordered by a NRD to install terraces and construct a sediment and water control basin on a farm. The landowner asserted an inverse condemnation claim against the city and the NRD for his compelled contribution of ten 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."⁴⁷ After finding the regulations advanced a state legitimate 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.

Thus, under rule set out in *Strom v. City of Oakland*, even though the exercise of eminent domain is absent, a claim for inverse condemnation may be allowed to proceed under a "regulatory taking" theory if a denial of the economically viable use of a property interest can be shown.

3. The appropriators' claims are based on regulatory takings

In both CI14-68 and CI15-80, the appropriators alleged water was "allocated, and available, to the State under the Compact," that such water existed in the stream, the water "was not needed for the Compact compliance," and despite such alleged facts, DNR, through its regulatory actions deprived the appropriators of their rights to divert such water. The

⁴⁶ 255 Neb. 210 (1998).

⁴⁷ *Id.* at 219.

appropriators did not allege DNR used the power of eminent domain. Thus, the appropriators alleged a regulatory action that infringed on their economically beneficial or productive use of property rights, i.e., rights to appropriate water.

VI. Republican River Administration and the Compact

A. Streamflow administration delegated to DNR

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.”⁴⁸ 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.⁴⁹ 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.”⁵⁰ 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...”⁵¹

Pursuant to such police power, the Legislature has delegated to DNR “exclusive original” jurisdiction over all issues involving surface water rights.⁵² DNR is charged with the duty to distribute “... water among different appropriators according to their respective priorities...”⁵³ DNR is “...given broad authority over the appropriation and use of water in Nebraska.”⁵⁴ Further, DNR has the duty “to administer the waters of streams and rivers to

⁴⁸ *Farmers' Irrigation Dist. v. Frank*, 72 Neb. 136 (1904).

⁴⁹ *State, ex rel. Cary v. Cochran*, 138 Neb. 163 (1940).

⁵⁰ *In re Birdwood Irrigation Dist.*, 154 Neb. 52, 55, 46 N.W.2d 884, 887 (1951).

⁵¹ *State, ex. rel. Cary v. Cochran*, 138 Neb. 163, 168 (1940).

⁵² Neb. Rev. Stat. § 61-206(1) (Reissue 2008).

⁵³ *State, ex rel. Cary v. Cochran*, 138 Neb. 163 (1940).

⁵⁴ *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.”⁵⁵

DNR supervises and controls the appropriation, diversion and distribution of the public waters of the state⁵⁶ and has the duty “...to determine from all available means . . . whether or not a usable quantity of water can be delivered.”⁵⁷ DNR’s exercise of this duty involves “very complicated question[s] of fact,”⁵⁸ 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.⁵⁹ A determination by DNR is “...final unless it appears that it was unreasonable or arbitrarily made.”⁶⁰

B. Compact compliance

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

⁵⁵ Id. at 169.

⁵⁶ *State, ex rel. Cary v. Cochran*, 138 Neb. 163 (1940).

⁵⁷ Id. at 173-74.

⁵⁸ Id. at 173.

⁵⁹ *Hitchcock and Red Willow Irrigation Dist. v. Lower Platte 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).

⁶⁰ *State, ex rel. Cary v. Cochran*, 138 Neb. at 174.

requires DNR to use an averaging process which varies from year to year based upon whether it is a “water short year” or a “non-water short year.” A two-year or three-year averaging method is employed in a water short year and a five-year averaging method is employed in years which are not water short.⁶¹

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, consumption 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.⁶²

Pursuant to Nebraska statute,⁶³ 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.

⁶¹ Report of the Special Master, *Kansas v Nebraska*, at, p. 85, No. 126, Original (U.S. Nov. 15, 2013).

⁶² Final Settlement Stipulation, *supra*, note 10, at p. 17 and App. C.

⁶³ Neb. Rev. Stat. §46-715(2014 Cum. Supp.).

These efforts are highly technical and involve judgments within the expertise the director of DNR must possess to serve in such office.

Once the forecast is made, DNR uses it to determine its administration of the water supply in the Republican River Basin in Nebraska to ensure compliance with the Compact and to satisfy its duties to Nebraska appropriators.

C. Nebraska appropriators are subject to the Compact administration

The rights held by the appropriators are subject to and subordinate to the rights and 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.*⁶⁴ dictates such result. 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."⁶⁵ In effect, the existence of the Compact subordinates the appropriators' rights to DNR's duties to satisfy the Compact compliance requirements.

The right to realize on the appropriators' water rights is determined by the decisions of DNR in its administration of the water in the Republican River basin under the Compact. That is, if DNR determines there is water allocable to Nebraska under the Compact, and that such water is subject to capture, the appropriators' rights to use the water come into fruition. Alternatively, if under Compact 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.

D. Forecasting vs. instantaneous water availability

⁶⁴ *Supra*, note 29.

⁶⁵ *Id.* at 106

In order to comply with the Compact, Nebraska statutes require DNR to forecast the water allocable to Nebraska and to Kansas before the beginning of the irrigation season. Such forecast is designed to determine the portion of the “virgin water supply” allocable to Nebraska to *ensure* that Kansas receives its share of such water supply. 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 appropriators 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.

VII. Resolution of the motions to dismiss

A. DNR’s streamflow administration under the Compact is not a taking

The gravamen of the appropriators’ claim of a regulatory taking of water in the stream rests on the averment that at the time the appropriators sought to appropriate water from the Republican River, DNR’s records allegedly showed water “was available” both in storage and in the flow of the river to satisfy the appropriations. According to the appropriators’ claims, despite such circumstances, DNR did not permit the diversions of water to fully satisfy the water rights held by the appropriators.

The appropriators' complaint is grounded on the implied requirement that the department has an obligation to administer the water in "real time" and not under its forecast. In effect the appropriators claim, because water "actually existed" in the stream at the time they wanted to exercise their appropriation rights, and because such water was, in the appropriators' opinions, in excess of the water supply allocable to Kansas, the forecast should have been ignored and the DNR should have delivered the water to the appropriators.

To administer the stream as demanded by the appropriators would require DNR to administer in a manner different from the method DNR has determined it is required to follow under the Compact. Under the appropriators' claim, DNR would be required to administer the water on a real time basis. Specifically, if water was in the river or stored in the reservoirs in an amount sufficient to provide Kansas with its share and simultaneously was sufficient to satisfy at that moment in time the appropriators' water rights, the appropriators claim DNR must permit the appropriators' diversion of the water. If this claim was valid, it would render DNR's forecast under the Compact and Nebraska law meaningless and would require DNR to abandon the prescribed method of Compact compliance imposed by Nebraska statutes and the Supreme Court approved FSS, including the accounting procedures and the groundwater model, which method was imposed to *ensure* the proper allocation of the water supply to Kansas.

The issue reduces down to a determination of whether DNR's use of the stream administration method imposed results in a regulatory taking upon which the appropriators can rely to assert their claims. The issue is resolved by applying the definition of the appropriators' water rights. The appropriators' water rights only come into fruition when there is available water in the stream. The determinations by DNR under the Compact of whether there is water allocable to Nebraska and subject to diversion using the forecasting regimen and method

imposed are within the “exclusive and original” jurisdiction of DNR. Such determination of available water defines whether the usufructuary rights of the appropriators become subject to realization.

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 appropriators from using the water.⁶⁶ 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 appropriators if there is no available water which can be used by the appropriators under such usufructuary rights.

Under the complex mechanisms of the Compact and the Nebraska statutes, DNR determined, as of January 1st of 2013 and 2014, that water was not available for appropriation from the stream. If, an after-the-fact evaluation of the actual hydrologic and other conditions in the river basin showed, in the appropriators’ opinions, that water was available for use under their water rights, such evaluation does not mean such water, in the context of streamflow administration, was “available for appropriation.”

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 water rights held by the appropriators. 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

⁶⁶ *Id.*

the appropriators become subject to exercise. Such act of defining the rights cannot be a taking of the property interest, because the property interest, i.e., the right to appropriate, does not exist until the declaration is made that water is available for appropriation. When DNR determined there was no water available to satisfy the usufructuary rights of the appropriators, the rights did not come into fruition and the regulatory action did not interfere with a legitimate property interest.

B. Alternative remedy

The appropriators are not without a remedy. When DNR issued the closing notices the appropriators had the right to a hearing on the decision so long as the request was made within 30 days after the decision was rendered.⁶⁷ 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.⁶⁸ The appropriators made no allegations that they pursued such remedy.

During the arguments on the motions to dismiss and the motion for reconsideration, appropriators' counsel advised the court the appropriators' claims were not grounded upon an arbitrary, capricious or unreasonable action by DNR. Instead, the appropriators' claims are grounded on inverse condemnation effected by the regulatory action of DNR, viz., DNR's use of the Compact method to determine the available water supply.

The appropriators' complaint concerning the efficiency, fairness, and validity of *the method* used to determine the allocation of water to Nebraska under the Compact does not state a cognizable cause of action. The remedy for the problem the appropriators have with the method by which water is allocated to Nebraska under the Compact is to seek a change in the

⁶⁷ Neb. Rev. Stat. §61-206(1) (Reissue 2009).

⁶⁸ Neb. Rev. Stat. §61-207 (Reissue 209).

Compact through the DNR and other members of the executive branch of the Nebraska's government or to petition the legislature to change the method to address the claimed deficiency.

C. The appropriators' Constitutional preference claim

The appropriators contend DNR's regulatory action of determining that water was not available violated their preference rights under Section 4, 5, and 6 of Art. XV of the Nebraska Constitution. This argument treats the allocation of water under Compact as if it were an allocation of water to another water user, which the court refers to as the "Compact user." Under this claim, the appropriators argued that the Compact user has to have a constitutionally preferred right under Section 6, Article XV of the Nebraska Constitution that is superior to the appropriators before the DNR can "pass" water to such user without compensating the appropriators. According to the appropriators' claims, because such Compact user does not have a preferred right under the Nebraska Constitution, the State, as the proxy for the Compact user, was required to condemn the appropriators' water so that it could be passed to the "junior preferential" user, i.e., the Compact user.

This argument fails because the characterization of the State of Nebraska as a water user for the purpose of applying the preferential rules found in the Nebraska Constitution for domestic, agricultural, and manufacturing users is not supported by applicable law. Under the method employed by DNR, water is not allocable to Nebraska under the Compact unless DNR can ensure Kansas receives its share of the virgin water supply. The allocation of water to the Compact to be protected from appropriators in Nebraska is a precedent step to determining the water available to Nebraska appropriators. To assert that the allocation of the water to the Compact is equivalent to an allocation of water to an appropriator with equal or junior status to

that of the appropriators is a fiction which ignores the Compact and the duties imposed on Nebraska under the Compact.

The appropriators' water rights are subject to the Republican River Compact and its later interpretations by the parties including the FSS approved by the Supreme Court and the Nebraska statutes that implemented such interpretation. As such, the appropriators' rights are subject to DNR's administration of the Republican River Basin using the methodology prescribed by the Compact, the FSS approved by the Supreme Court, and as implemented by Nebraska statutes. Using the required allocation methodology, DNR allocated water to the Compact on the date required by law. Later hydrologic events beyond the control of DNR, which may, under a real-time evaluation appear to show the presence of water available to appropriators, do not provide a basis to support a "regulatory taking" or a violation of Nebraska's constitutional scheme for water use preferences.

D. Claims concerning DNR's failure to regulate groundwater

In their second claims, the appropriators alleged DNR effected a taking of their property rights by reason of DNR's failure to regulate groundwater. Specifically, the appropriators alleged:⁶⁹

DNR consciously and knowingly took action in 2010 and 2011 to approve local compliance standards modestly reducing groundwater pumping. This was done for the nominal purpose of assuring that groundwater and surface water irrigators would each bear their proportionate, but only their proportionate, shares of the burden of Compact compliance. DNR's action, taken by assenting to or approving "integrated management plans" initially approved by political subdivisions, but without validity or force until approved by the DNR, have consistently proven to be inadequate to protect the proportionality of the Compact compliance burden to be borne by groundwater and surface water irrigators. Instead, disproportionality has been created, and Plaintiffs and their Class Members have been deprived of water within Nebraska's allotment of Basin water and subject to capture in the natural course of events as described above.

⁶⁹ Paragraphs 53 and 54 and 55 and 56, appropriators April 10, 2015, First Amended Complaint and October 30, 2015, Complaint respectively, filed in Cases No. CI14-68 and CI15-80.

....

This disproportionality constitutes a taking. It deprived the Plaintiffs and their Class Members the use of water they had a prior right to use.

DNR contended these claims failed to state a cause of action because DNR does not have the authority nor the duty to regulate groundwater.

In *Spear T Ranch, Inc. v Neb. Dep't of Nat. Res.*,⁷⁰ 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."⁷¹ This holding followed the earlier decision of the court that DNR had no authority to regulate groundwater when the court rejected the claim of an irrigation district that the Department had allowed unpermitted groundwater use to harm surface water appropriation in the Platte River basin.⁷²

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 [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."⁷³

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 the common-law and statutory duty claims made by the appropriator. In doing so, the Supreme Court noted that all of the appropriator's

⁷⁰ *Spear T Ranch, Inc. v Neb. Dep't of Nat. Res.*, 270 Neb. 130 (2005).

⁷¹ *Id.* at 139.

⁷² *In re complaint of Cent. Neb. Pub. Pow. & Irr. Dist.*, 270 Neb. 108 (2005).

⁷³ *Spear T Ranch, Inc. v. Neb. Dist. Of Nat. Res.* 270 Neb. at 139.

...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.⁷⁴

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."⁷⁵ 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."

The appropriators attempt to overcome this rule of law by claiming that DNR's assent to or approval of NRD's integrated management plans in combination with its determination of the water supply allocable to Nebraska 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 to it by the Nebraska statutes, the FSS, the Supreme Court's decree approving the FSS and the accounting procedures and groundwater model incorporated in the FSS. The appropriators have mounted an attack on the method employed by the DNR and not the manner in which DNR employed the method.

Under the case law cited above DNR does not have a duty to regulate groundwater. While the method DNR is to employ in determining Nebraska's compliance with the Compact is dictated to it, the imposition of such method does not equate to the grant of "independent authority to regulate the use of groundwater." In other words, the requirement

⁷⁴ *Id.* at 137-138.

⁷⁵ *Id.* at 138.

imposed by the Compact on DNR to account for groundwater depletions and recharge in the basin to determine the water applicable 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 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. The court finds the appropriators' 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.

E. Consideration of leave to amend.

The court considered whether to grant the appropriators' leave to amend the complaints. 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.⁷⁶ 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.

As previously stated,⁷⁷ the appropriators' claims are not grounded upon an arbitrary, capricious or unreasonable action by DNR in the employment of the method imposed on it for determining the water allocable to the state of Nebraska under the Compact and whether water is available for Nebraska appropriators. Instead, the appropriators' claims are grounded on

⁷⁶ *Bailey v First Nat'l Bank*, 16 Neb. App. 153, 168-169 (2007).

⁷⁷ *supra*, pages 25-26

an inverse condemnation by an alleged regulatory taking effected by DNR's use of the imposed method of streamflow administration.

After consideration of the nature of claims for inverse condemnation, i.e., the type of alleged regulatory takings, the court finds it appears beyond doubt that the appropriators can plead no set of facts that would entitle them to relief under their streamflow claims. In addition, under the state of the law as announced by the Supreme Court in *Spear T Ranch v DNR*., any efforts by the appropriators to set forth a general scenario based on a duty on the part of DNR to regulate groundwater would be futile.

As a result, the court finds leave to amend the complaints shall not be granted.

It is therefore ordered, adjudged, and decreed;

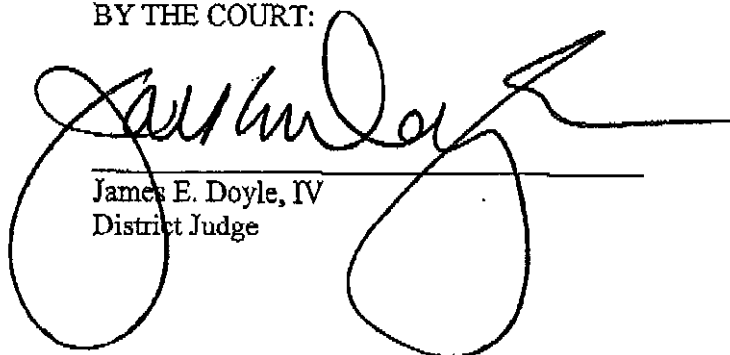
1. The above and foregoing findings are so founded and ordered accordingly;
2. The court's March 24, 2015 order filed in Case No. CI14-68 is superseded by this order.
3. Part A, pages 3, 4, 5, and that part of paragraph 2 on page 7 of the court's September 28, 2015 order filed in Case No. CI14-68 which overruled and dismissed the defendants' April 30, 2015 motion to dismiss are vacated and set aside. Part B of such order is amended to incorporate the reasoning and rationale in this order and to incorporate this order of dismissal concerning the groundwater regulation claims.
4. The defendants' April 30, 2015 motion to dismiss under Rule 12(b)(6) in Case No. CI14-68 is granted and the plaintiffs' April 10, 2015 first amended complaint filed in Case No. CI14-68 is dismissed with prejudice and without leave to amend;

5. The defendants' December 7, 2015 Rule 12(b)(6) motion to dismiss filed in Case No CI15-80 is granted, and the plaintiffs' October 30, 2015 complaint filed in Case No. CI15-80 is dismissed with prejudice and without leave to amend;

6. The plaintiffs' December 22, 2015 motion to compel filed in Case No. CI14-68 is rendered moot by the dismissal of the plaintiffs' first amended complaint and such motion is dismissed;

7. Each party shall bear their own costs and attorney's fees incurred in this action.

BY THE COURT:



James E. Doyle, IV
District Judge