

IN THE DISTRICT COURT OF FURNAS COUNTY, NEBRASKA

FRENCHMAN CAMBRIDGE IRRIGATION)
DISTRICT, by its Board of Directors, a)
Nebraska Political Subdivision and the)
Board thereof,)
Plaintiff/Appellant,)

Case No. CI16-25

vs.)

ORDER OF DISMISSAL

THE NEBRASKA DEPARTMENT OF)
NATURAL RESOURCES and its Director,)
Gordon W. "Jeff" Fassett in his Official Capacity,)
And)
MIDDLE REPUBLICAN NATURAL)
RESOURCES DISTRICT (MRNRD),)
A Political subdivision,)
And)
UPPER REPUBLICAN NATURAL)
RESOURCES DISTRICT (UPNRD),)
A political subdivision,)
And)
LOWER REPUBLICAN NATURAL)
RESOURCES DISTRICT (LRNRD),)
A Political Subdivision,)
Defendant/Appellee.)

DOUGLAS PETERSON, ATTORNEY)
GENERAL OF THE STATE OF NEBRASKA)
AND NEBRASKA DEPARTMENT OF)
JUSTICE)
Defendant/Appellee.)

Before the court are the defendants' motions to dismiss under
Neb. Ct. R. Pldg. §§6-1112(b)(1) and (6). All the defendants joined in the motions and all
asserted the same grounds for dismissal. A hearing was held on the motions on July 14, 2016.
Arguments and statements were made, briefs were submitted, no evidence was adduced and the
motions were submitted and taken under advisement.

Now on this 3rd day of November, 2016, the motions came on for decision after the court's consideration of the briefs submitted by the parties, the arguments of counsel and applicable law. The court finds and orders as follows:

Factual background

Frenchman Cambridge Irrigation District (FCID) is a political subdivision that owns and operates four different canal systems which serve forty-one direct surface flow permits with priority dates ranging from December 22, 1890 to November 13, 1987. Under the permits, FCID is authorized to divert up to 531.5 cubic inches per second of natural stream flow from the Republican River and its tributaries into its conveyances for delivery to its water users. The water users from FCID farm about 45,600 acres, relying upon contracts from FCID to deliver water to such acres.

The forks of the Republican River and its tributaries combine in Nebraska to form the Republican River which flows generally west to east through the southwestern counties in Nebraska leaving the state first near Superior, Nebraska thereafter meandering across the border into Kansas. The river is subject to a 1942 compact which allocates the "virgin water" supply in the river between the states of Nebraska, Kansas and Colorado. Kansas has twice sued the other compacting states in the Supreme Court concerning the compact. The first case resulted in a final settlement stipulation which was approved by the United States Supreme Court in 2003. Such settlement provided accounting procedures and other calculating methods the State of Nebraska is required to employ to ensure it is passing sufficient Republican River flows to Kansas.

Shortly after the final settlement stipulation was approved, and to provide additional means for Nebraska to comply with the compact and satisfy its obligations under the

accounting procedures and other obligations in the settlement, the Nebraska Legislature passed LB962¹ by which it amended the Groundwater Management and Protection Act, (GWMPA).² One of the amendments to the GWMPA was a requirement that the surface and groundwater managers in an affected river basin sustain a balance between water uses and supply by using surface and groundwater controls and management plans.³ The ultimate objective was to require the NRDs and DNR to manage the river basin's water supplies to "... ensure that the state will remain in compliance with applicable state and federal laws and with any applicable interstate water compact or decree."⁴

The GWMPA describes a procedure by which integrated management plans (IMP) are to be adopted, approved and implemented by DNR and the NRDs.⁵ The procedures for the adoption and approval of an IMP include a public hearing at which all interested "... persons may appear ... and present testimony and provide other evidence relevant to the issues being considered."⁶ The statutes require the DNR and the basin NRDs to "jointly decide" whether to implement the IMP.⁷

The intention behind the use of IMPs is to combine the authorities of the two entities authorized to govern the use of waters in the basin, i.e., DNR and the NRDs, to provide for the joint management of surface and groundwater to ensure Nebraska complies with "applicable state and federal laws and with any applicable interstate water compact or decree." Thus, under a Republican River basin IMPs, DNR, through the compact accounting procedures and the compact's groundwater model imposed by the final settlement stipulation, regulates and

¹ L.B. 962, Neb. Unicameral, 98th Leg. 2d Sess. (2004).

² Neb. Rev. Stat. §46-701 *et seq.* (Reissue 2010).

³ Neb. Rev. Stat. §46-715(2).

⁴ Neb. Rev. Stat. §§46-715(2), (4)(b), and (c).

⁵ Neb. Rev. Stat. §46-718.

⁶ Neb. Rev. Stat. §46-718(1).

⁷ Neb. Rev. Stat. §46-718(2)

administers surface water users in coordination with the basin NRDs' regulation of the groundwater users to ensure Republican River Compact compliance.

A mechanism the DNR and NRDs included in the IMP adopted for the Republican River Basin was the use of compact calls. Under the IMPs, DNR is to use its authority over surface water to issue a compact call to preclude the use of surface water in all or parts of the basin to ensure compliance with the compact. Under a compact call, the DNR issues "closing notices" which preclude the diversion of waters from the Republican River and its tributaries by water users including the FCID.

In early December 2015, the NRDs adopted the IMPs. Thereafter, the DNR approved the IMPs including the requirement imposed on DNR to issue closing notices when necessary to ensure compact compliance. The plaintiff contended the adoption of the IMPs and the DNR's approval of the same constituted an "order" setting in motion the potential for review under the Administrative Procedures Act [APA].⁸

DNR approved the IMPs on December 11, 2015 and the plaintiff filed its petition on January 7, 2016, which was within 30 days of the approval. In addition, the plaintiff obtained service on the appropriate parties and otherwise complied with the Administrative Procedures Act.⁹ Thus, the case is a challenge of the NRDs' and DNR's adoption and approval of rules and regulations, i.e., integrated management plans, for surface and groundwater use in the Republican Basin.

The defendants filed motions to dismiss under Neb. Ct. R. Pldgs., §§6-1112(b)(1) and (6). When motions to dismiss raise claims under both §§6-1112(b)(1) and 6-1112 (b)(6),

⁸ Neb. Rev. Stat. §§84-910 *et seq.*

⁹ The plaintiff cites Neb. Rev. Stat. §§46-750 and 84-917(1) in its petition to support its claim it properly commenced the case.

the court is required to consider the "... dismissal under §6-1112(b)(1) first and [] then consider §6-1112(b)(6) only if it determines it has subject matter jurisdiction."¹⁰

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 and the particular question which it assumes to determine."¹¹ Cases where the lack of subject matter jurisdiction has resulted in dismissal involve cases where the plaintiff lacked standing¹² or the claim was barred by sovereign immunity.¹³

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 plaintiff's complaint as true and draw all reasonable inferences in favor of the plaintiff. 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."

I. Motion to dismiss for want of jurisdiction.

A. Jurisdiction under §46-750, requirement of a contested case and the nature of the plaintiff's request.

Under section 46-750¹⁴, "[a]ny person aggrieved by any order of a natural resources district, the director of environmental quality, or the director of natural resources issued pursuant to the Nebraska Groundwater Management and Protection Act may appeal the

¹⁰ Anderson v. Wells Fargo Fin. Acceptance Pa., Inc., 269 Neb. 595 (2005).

¹¹ Rozsnyai v. Svacek, 272 Neb. 567, 570 (2006).

¹² Rice v. Adams, 254 Neb. 219, 224 (1998).

¹³ Henderson v. Department of Correctional Services, 256 Neb. 314, 316-317 (1999)

¹⁴ Neb. Rev. Stat. §46-750 (Reissue 2010).

order. The appeal shall be in accordance with the Administrative Procedure Act.” Section 84-917(1) provides in part that “[a]ny person aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in form, shall be entitled judicial review under the [APA].”¹⁵

The plaintiff contended this court has jurisdiction solely because of the application of §46-750 without regard to a contested case analysis. However §46-750 does not establish a separate basis for jurisdiction, it merely states an appeal may be taken and if an appeal is to be taken, the appeal must follow the APA procedures.

The defendants contended that because the adoption of the IMPs by the NRDs and the approval of the IMPs by DNR were not the product of a “contested case,” the APA does not apply and the court does not have jurisdiction.

The APA defines a “contested case” as “a proceeding before an agency in which the legal rights, duties or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing.”¹⁶ A “contested case” is required for jurisdiction in an APA case.¹⁷ The plaintiff contended that the NRD’s adoption of the IMPs and the Department’s approval of the same, which were preceded by a public hearing, constitute orders which satisfy the contested case requirement under the APA.

The procedures and steps taken by DNR and the NRDs to adopt the IMPs, although they included a public hearing, were not contested in the sense described by the APA. The term contested case has been interpreted by the Nebraska Supreme Court to mean a proceeding that requires the resolution of “... contested claims of rights between specific parties

¹⁵ Neb. Rev. Stat. §84-917(1) (Reissue 2010).

¹⁶ Neb. Rev. Stat. §84-901(3).

¹⁷ *Kaplan v. McClurg*, 271 Neb. 101(2006).

based on evidentiary facts.”¹⁸ In determining whether a proceeding was a contested case, the Supreme Court focused on “...the actual functions performed at the hearing under review...”¹⁹

The development, adoption, and approval of the IMPs was not a “contested” proceeding by which proponents and challengers adduced evidence to establish competing positions. Instead the process to propound the IMP was the exercise of a legislative process, i.e., the power “... to make rules and regulations to implement the policy of a statute.”²⁰

The proceedings to develop and implement integrated management plans pursuant to Neb. Rev. Stat. §46-701 *et seq.* were not quasi-judicial acts by the DNR or the NRDs. Such proceedings did not constitute a contested case as defined by the APA.

There is nothing in the GWMPA which states the proceedings to establish IMPs are anything other than a rule making activity conducted through coordination between the DNR, a state agency, and the NRDs, political subdivisions. The public hearing requirement for IMPs does not elevate the process of adopting the IMP rules into a “quasi-judicial” proceeding, i.e., nothing is being “tried,” evidence is not being adduced, oaths are not being administered, witnesses are not being subpoenaed or compelled to attend, nor is there any other judicial function exercised.²¹ Further, the activities of developing, adopting, and approving IMPs under the GWMPA are not quasi-judicial functions merely because a public hearing is required. The hearing required under the GWMPA does not determine the rights, duties or privileges of specific parties as required by law or constitutional right.²² The hearing requirement in §46-715

¹⁸ *Langvardt v. Horton*, 254 Neb. 878 (1998) at pg. 890.

¹⁹ *Id.*

²⁰ *Scofield v. D.N.R.*, 276 Neb. 215, 224-225 (2008).

²¹ *Cf., Langvardt v. Horton, supra*, note 18 (disciplinary proceedings against a professional licensee under Neb. Rev. Stat. §71-159 could be appealed “... in accordance with the APA” and the disciplinary proceeding was a contested case.

²² *Id.* at 890.

simply provides, “the basin-wide plan shall be adopted after hearings by the department and the affected natural resources districts.”²³

In contrast, to determine whether a river basin is fully or over appropriated, §46-714 provides specific requirements for how the hearings are to be conducted, i.e., notice is to be given and any “interested person” may appear at the hearing and present “written or oral testimony and evidence concerning the appropriation status of the river basin...” Further, §43-714 requires the examination of DNR’s “...preliminary conclusions about the extent of the area within which the surface and groundwater supplies ... are determined to be hydrologically connected, and whether the stays or new uses should be terminated.”²⁴

Based upon the foregoing, the court finds that §46-750 alone does not confer jurisdiction on the court. Instead, the description of the right to appeal in §46-750 together with the implementing provisions of the APA govern the action. By incorporating the reference to the APA, §46-750 made compliance with the APA rules an integral component of jurisdiction.

However, considering the contents of the petition and not the labels placed thereon or on the theories pursued, but instead considering the actionable facts pled, as well as the specific relief sought, the court finds that the requirement of a contested case does not apply to this action because the action is in its essence a request for a declaratory judgment concerning the validity of the IMPs.

In its petition, the plaintiff asked this court to “... find and declare that each order of the director of DNR, and the action of each NRD adopting a new IMP in 2015, which modifies the groundwater pumping standard previously in effect be declared null, void.”

Thereafter the plaintiff asked the court to reverse and vacate the orders and to remand the case

²³ Neb. Rev. Stat. §46-715(5)(a).

²⁴ Neb. Rev. Stat. §46-714(4).

“... to the DNR and NRD with the mandate of this court declaring the 2015 IMPs null and void to the extent of any changes in provisions that are inconsistent with requirements imposed upon Nebraska by the Republican River Compact, the requirements of *US Const. Art. I §10 cl. 3*, and decision of the United States Supreme Court.” The plaintiff also asked for a stay preventing the challenged IMPs from going into effect prior to issuance of a final order in this case.

Thus, the plaintiff asked for a declaratory judgment because it appears to the plaintiff that the IMPs or the “... threatened application [thereof] interferes with or impairs or threatens to interfere with or impair the legal rights or privileges of the petitioner.”²⁵ Thus, under §84-911 the plaintiffs have asked for a declaratory ruling and, while they have couched some parts of their claim as an appeal, the true office or purpose of their petition is to have the court issue a declaratory judgment. As a result, the absence of a contested case under the well pled facts of this case does not deprive the court of jurisdiction.

B. FCID as an aggrieved person.

Under §46-750 “any person aggrieved by any order of [a natural resources] district, the director of environmental quality, or the director of natural resources issued pursuant to the [GWMPA] may appeal the order. The appeal shall be in accordance with the [APA].” Section 84-917(1) provides in part that “[a]ny person aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in form, shall be entitled to judicial review under the [APA].” An irrigation district is a “person” within the meaning of §46-750.

The Nebraska Supreme Court has examined the term “aggrieved party” in terms of standing.²⁶ A party has standing to invoke a court’s jurisdiction if it has a legal or actual right

²⁵ Neb. Rev. Stat. §84-911 (Reissue 2014).

²⁶ *Cent. Neb. Pub. Pwr. & Irr. Dist. v. North Platte NRD*, 280 Neb. 533 (2010); *In re application of Metr. Util. Dist.*, 270 Neb. 494 (2005); *Stoneman v. United Neb. Bank*, 254 Neb. 477 (1998); *Karnes v. Wilkinson Mfg.*, 220 Neb. 150 (1985).

title or interest in the subject matter of the controversy.²⁷ The Nebraska Supreme Court cases on standing are fact specific as explained by the court:

These cases represent fact-specific iterations of basic standing principals. Standing relates to a court's power, that is, jurisdiction, to address issues presented and serves to identify those disputes which are appropriately resolved through the judicial process. Under the doctrine of standing, a court may decline to determine the merits of a legal claim because the party advancing it is not properly situated to be entitled to its judicial determination. The focus is on the party, not the claim itself. And standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify exercise of a court's remedial powers on a litigant's behalf. Thus, generally, a litigant must assert the litigant's own rights and interest, and cannot rest a claim on the legal rights or interest of third parties.²⁸

In examining this issue in the context of the motion to dismiss, the court is required to accept as true the facts declared by FCID. Of the facts pled by FCID in its petition, FCID has demonstrated that it has suffered "an injury in fact." Further, FCID's allegations show that its injury is concrete and qualitative in a temporal sense. Finally, FCID's allegations, accepted as true, show that the injury it suffered can be traced to the challenged actions of the adoption and approval of the IMP and that such action is subject to redress by a favorable decision of the court. Consequently, the court finds that under §§46-750 and 84-917(1), FCID is an aggrieved party.

The court finds that FCID has a personal stake in the outcome of the controversy which warrants invocation of the court's jurisdictions and justifies the court's exercise of remedial powers on the litigant's behalf. FCID has asserted its own legal rights and interest and does not rest this claim on the legal rights or interest of third parties.

C. Defendants' claims of sovereign immunity.

²⁷ *Id.* at 258.

²⁸ *Id.* at 541-542.

DNR contends that all the claims against the director of the Department of Natural Resources District in his official capacity are barred by sovereign immunity. However, the Nebraska Supreme Court has held §84-911 provides "... a limited waiver of sovereign immunity that permits a court to determine the validity of administrative rules and regulations."²⁹ Further, when the pleading puts the "... defendant on notice of the remedy sought, a court may order relief that is clearly within the scope of its declaratory judgment."³⁰ Enjoining a government entity or official from "... enforcing a regulation that the court has declared invalid would obviously be within the scope of the court's declaratory judgment."³¹ Based on the foregoing the court finds the defendant's claim that sovereign immunity bars the plaintiff's claims is without merit and does not preclude the court from exercising jurisdiction.

The court further finds the claims made by the defendants that the 11th Amendment to the United States Constitution bars the suit are likewise inapposite. Under the rules applicable to the 11th Amendment, a suit may not be maintained directly against the state itself or against an agency or department of the state unless the state has waived its sovereign immunity.³² The 11th Amendment claim does not apply because of the limited waiver of sovereign immunity that operates as part of the application of §84-911.

D. Lack of jurisdiction due to the plaintiff's failure to exhaust administrative remedies.

The defendants complained that the plaintiff failed to exhaust a specified administrative remedy and as a result this court cannot exercise jurisdiction over the case. The defendants' arguments under this claim are grounded on the lack of a contested case and the

²⁹ *Project Extra Mile v Neb. Liquor Control Comm'n*, 283 Neb. 379, 388 (2012).

³⁰ *Id.* at 388-387.

³¹ *Id.*

³² *Alabama v Pugh*, 438, US 781, 782, 98 S. Ct. 3057, 3058 (1978).

plaintiff's right to seek relief under Neb. Rev. Stat. §61-206 by which the plaintiff can request a hearing within 30 days of the issuance of an order by the DNR. The court finds this argument does not prevail.

The plaintiff asked the court to declare the IMPs invalid and the approval of the IMPs null and void. Thus, the plaintiff asked for declaratory relief. The action complained of, i.e., the adoption of the IMPs was the exercise of rule making or legislative authority delegated to DNR and the NRDs for the reasons previously stated. As such, the plaintiff had two avenues available to it to redress the problems it perceived in the rules and IMPs, an action under §84-911 or §61-206(1). The difficulty of 61-206(1) is such statute is specific to DNR and does not address rules and regulations adopted by the joint action of DNR and the NRDs. Section 84-911, although a part of the APA and thus applicable to administrative agencies and not NRDs, is included in §46-750 reference to the APA. The court finds the presence of a possible avenue of redress in §46-201(1) does not equate to a requirement that FCID has to first resort to such remedy before it can pursue other avenues of redress.

The action brought by the plaintiff is comparable to the action brought by the plaintiffs in *Scofield v. DNR*.³³ In *Scofield*, the plaintiff sued DNR alleging that boundaries DNR established for a state game refuge exceeded the statutory authority granted DNR, deprived the plaintiffs of the constitutional right to due process, and effected a taking of their property without just compensation. Although the Supreme Court affirmed the district court's dismissal of the first claim for relief wherein the plaintiff alleged the regulations were adopted in violation of the Nebraska and Federal Constitutions and exceeded the DNR's statutory authority, the Supreme Court did so only because the plaintiffs did not allege sufficient facts. The Supreme Court

³³ *Scofield v. DNR*, *supra* note 20.

upheld the lower court's decision that the complaint did not allege facts that if proved would be sufficient to carry the burden of showing DNR acted unreasonably or outside the authority delegated to it by the legislature. The court did not dismiss the plaintiff's claims *in toto*, instead the court found the plaintiffs stated a claim for relief under a unlawful taking claim. Thus, *Scofield* stands for the proposition that the district court had jurisdiction to consider the questions raised by the plaintiffs.

After consideration of all the elements of the defendant's Rule 6-1112(b)(1) motion to dismiss for lack of jurisdiction, the court finds the same should be and hereby is overruled and denied.

II. Motion to dismiss for failure to state a cause of action.

The scope of the court's authority under §84-911 is limited to declaring whether a rule or regulation is invalid only if the court finds it (a) violated constitutional provisions, (b) exceeded the statutory authority of the agency, or (c) was adopted without compliance with the statutory procedures. Thus, in order to state a cause of action, the plaintiff was required to state facts which would support an invalidity declaration under one of the three bases in §84-911.

The plaintiff did not allege that the actions of DNR and the NRDs exceeded the statutory authority granted under the GWMPA. Nor did the plaintiff allege the rules and regulations were adopted without compliance with the statutory procedures. Thus, the only remaining ground under §84-911 for a declaratory judgment was that the regulations violated constitutional provisions. The plaintiff made five claims based upon constitutional violations.

The plaintiff alleged:

1. The IMPs violated the provisions of US Constitutional Article 1, Section 10, Clause 3 of the Compact Clause by violating the Republican River Compact and permitting excessive consumptive use of waters of the basin upstream from intake points necessarily used to permit the plaintiff to obtain its prior

appropriation and that the IMPs further violated the compact clause by violating the mandates of the United States Supreme Court in *Kansas v Nebraska* by permitting excessive consumptive use of waters in the basin upstream from Kansas;

2. The IMPs are contrary to the provisions of Nebraska Constitution Article XV, Sections 4-6 because they permit excessive pumping of groundwater which would otherwise have flowed to the basin streams and provided water subject to capture under the plaintiff's water permits;

3. The IMPs deprive the plaintiff of "... equal protection of the law to which [the plaintiff] is entitled under US Constitution Amendment XIV and Nebraska Constitution Article XV, Section 6 and Nebraska Constitution Article I, Section 3.";

4. The IMPs deprived the plaintiff of "... due process of law to which [the plaintiff] is entitled under US Constitution Amendment XIV and Nebraska Constitution Article XV, Section 6 and Nebraska Constitution Article I, Section 3."; and,

5. The IMPs "... discriminate against surface water irrigators and downstream users of water, and burden interstate commerce impermissibly contrary to the commerce clause and dormant commerce clause theory of US Constitution Article I, Section 8, Clause 3."

In ruling on a petition to dismiss, the court is required to accept as true all facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn from those facts but not the plaintiff's conclusions.³⁴

As to the plaintiff's allegations concerning the compact clause and violation of the Republican River Compact and the decrees of the Supreme Court in *Kansas v. Nebraska*³⁵ and the allegations concerning the IMPs violation of Nebraska Constitution Article XV, Sections 4-6, the court finds there are no actual facts alleged by the plaintiff to support these claims. The claims made by the plaintiff are couched in terms of "excessive consumptive use of waters" and "excessive pumping of groundwater." Such claims are not statements of fact but are instead conclusions and opinions.

³⁴ *Cent. Neb. Pub. Power & Irr. Dist. v. Jeffrey Lake Dev., Inc.*, 282 Neb. 762 (2011).

³⁵ *Kansas v. Nebraska*, 547 US _____, 135 Sct. 1042 (2015).

The gravamen of the plaintiff's claims under the compact clause, Nebraska Const. Art. XV, §§4-6 and U.S. Supreme Court Republican River Compact decrees, all relate to the conclusory claims that the IMPs "permit excessive pumping of groundwater" or that the IMPs permit "excessive consumptive use of waters in the Republican Basin." Such claims are opinions and not factual allegations. Further, such claims overstep and ignore the purpose of the legislatively designed method for Nebraska's compliance with the Republican River Compact and the Supreme Court decrees enforcing the compact. The GWMPA is clearly designed to provide DNR and the NRDs with authorities to conjunctively manage surface and groundwater to comply with the compact requirements. Such management necessarily involves adjusting the regulation of Nebraska's uses of surface and groundwater to "... achieve and sustain a balance between water users and water supplies for the long term."³⁶ Further, the legislature specifically anticipated the need for changes in the IMPs to address new developments by providing DNR and the NRDs with authority to "... amend an integrated management plan ... as necessary based on an annual review of the progress made toward achieving the goals for that increment."³⁷

Adjustments in the IMPs are consistent with and do not contravene the underlying provisions of the compact which "... expressly reserve[] to the states the apportionment of water within the states."³⁸ The litigation with Kansas and Colorado which produced the final settlement agreement and the most recent Supreme Court decrees approving the settlement agreement and adjusting the same did not establish inflexible rules for river administration upon the State of Nebraska. Instead, a complex set of mechanisms, accounting procedures and models were agreed upon by the states as the means by which Nebraska could regulate the water users in

³⁶ Neb. Rev. Stat. §46-715(1)(b) (Reissue 2010).

³⁷ Neb. Rev. Stat. §46-7115(5)(d)(ii) (Reissue 2010).

³⁸ *Frenchman Cambridge Irr. Dist. v. Heineman*, 974 F. Supp. 2d 1264, 1280 (D. Neb. 2013).

its state to comply with the compact. A fair reading of those accounting procedures, models, and mechanisms show that each state, and particularly Nebraska, is entitled to use all lawful means necessary to satisfy the accounting procedure, forecasts, and other devices adopted by the states to ensure Nebraska's compliance. The adoption of IMPs and the amendments thereto to reflect changed hydrologic and other conditions bearing on water uses and supplies, are not forbidden by the compact, the final stipulation settlement or any court decree. The plaintiff did not allege any facts to sustain its burden of showing that the DNR and the NRDs acted unreasonably in their efforts to comply with the compact requirements or in the adoptions of the IMPs.

With respect to the plaintiff's claims that the IMPs deprive the plaintiff of equal protection of the law and of due process of law, the allegations made to support the claims are not factual allegations but are legal conclusions and as such the court is "... free to ignore sweeping legal conclusions that are cast in the form of factual allegations."³⁹ As a result, the court finds such legal conclusions fail to state a cause of action.

To sustain an equal protection challenge, the plaintiff was required to allege facts to show it was similarly situated to another group but was not treated the same as such other group.⁴⁰ The plaintiff's petition fails to allege any facts to show whether and how the plaintiff is similarly situated to another group for the purpose of the challenged IMPs. The arguments the plaintiff offered in support of its equal protection claim did not provide any factual basis for the court to find that a fundamental right was impaired by virtue of the IMPs adopted by DNR and the NRDs.

³⁹ Scofield v. DNR, *supra* note 20 at 230.

⁴⁰ See, *Hass v. Neth*, 265 Neb. 321 (2003) (The initial inquiry in an equal protection analysis focuses on whether the challenger is similarly situated to another group for the purpose of the challenged governmental action. Absent this threshold showing the challenger lacks a viable equal protection claim.)

The plaintiff also alleged that the IMPs deprived it of “due process of law.” The two forms of due process are substantive due process and procedural due process. When a party claims to have been denied substantive due process, the court is required to determine whether “... a right in which the plaintiff has a legitimate property interest is at issue and, if it is, whether that right was unconstitutionally taken from the plaintiff.”⁴¹ Procedural due process “... limits the ability of the government to deprive people of interests which constitute ‘liberty’ or ‘property’ interests within the meaning of the due process clause.”⁴² Procedural due process requires pre-deprivation “... notice and [the] opportunity to be heard.”⁴³

The property interest the plaintiff alleged was impaired by the IMPs was the right to appropriate water from the Republican River, but the plaintiff did not allege any facts to show that the adoption of the IMP deprived the plaintiff of its property interest in its water rights. IMPs, at their essence, are merely one aspect of DNR regulation and administration of the water supply to determine whether water is available for appropriation by the plaintiff and other surface water right holders in the Republican Basin. The plaintiff did not allege any facts which show it was deprived of the right to appropriate water when it is available.

Although the plaintiffs allege that surface water and groundwater are hydrologically connected and that use of groundwater effects the availability of surface water in the Republican River, the plaintiff did not allege facts to show the new IMPs actually deprive the plaintiff of the right to use water. Instead, the plaintiff supported its claim by alleging that the IMPs will permit the groundwater to the basin to be “over pumped” and thereby deprive the plaintiff of waters that “would otherwise be in the streams and subject to capture.” Such

⁴¹ *Lingenfelter v. Lower Elkhorn NRD*, 294 Neb. 46,74 (2016).

⁴² *Bond v. NPPD* (in re 2007 Admin. of appropriations of the Niobrara River), 283 Neb. 629, 244 (2012).

⁴³ *Benitez v. Rasmussen*, 261 Neb. 806, 814 (2001).

allegations are not allegations of fact but instead are the expression of opinions or, in the worst case, speculation. After consideration of all aspects of the plaintiff's claims for denial of procedural and substantive due process, the court finds the petition fails to state a claim upon which relief can be granted under §84-911.

The plaintiff alleged the IMPs burden interstate commerce impermissibly thus violating the commerce clause and the "... dormant commerce clause theory of US Const. Art. I, §8, Cl. 3." However, such claims are couched in the terms of legal conclusions and the plaintiff failed to allege facts to support such claim. To sustain a claim that a statute or rule or regulation violates the commerce clause there must be a showing that the statute discriminates against interstate commerce.⁴⁴ Impermissible discrimination is defined as "... differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."⁴⁵ The plaintiff did not allege any facts that identified an out-of-state interest allegedly burdened by the IMPs and did not allege any facts which support a showing that the IMPs resulted in a differential treatment of in-state and out-of-state economic interests. The court finds the plaintiff failed to state a claim for relief under the commerce clause theories.

The court finds the defendants' motion to dismiss under Rule 6-1112(b)(6) for failure to state a cause of action should be and hereby is granted. The plaintiff's petition should be and hereby is dismissed.

III. Consideration of leave to amend.

The court considered whether to grant the plaintiff leave to amend the petition. 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

⁴⁴ *Jones v. Gale*, 470 F 3d 1261, 1267 (8th Cir. 2006).

⁴⁵ *Id.*

proposed new claim cannot withstand a Rule 12(b)(6) motion to dismiss.⁴⁶ In other words, if it appears beyond a doubt the plaintiff can plead no set of facts that would entitle the plaintiff to relief, the court should find that amendment would be futile.

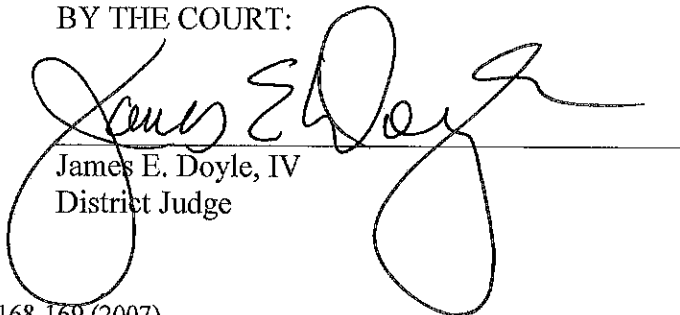
The plaintiff's claims are not grounded upon an arbitrary, capricious, or unreasonable action by DNR or the NRDs or a claim that the adoption of the IMPs exceeded the statutory authority of the NRDs or the agency or that the IMPs were adopted without compliance with the statutory procedures. Instead, the plaintiff's claims are based upon alleged violations of constitutional provisions.

After consideration of the nature of the claims of constitutional violations, the court finds it appears beyond doubt the plaintiff can plead no set of facts which would entitle it to relief under Neb. Rev. Stat. §84-911. As a result, the court finds leave to amend the petition 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 defendants' motion to dismiss for the lack of jurisdiction is denied;
3. The defendants' motion to dismiss for failure to state a cause of action is granted; and
4. The plaintiff's petition for review is dismissed with prejudice and without leave to amend.

BY THE COURT:



James E. Doyle, IV
District Judge

⁴⁶ *Bailey v. First Nat'l Bank*, 16 Neb. App. 153, 168-169 (2007).