
LEGAL LANDSCAPE OF THE REPUBLICAN RIVER BASIN

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FIRST ANNUAL STATE OF THE BASIN WATER CONFERENCE

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KANSAS v. NEBRASKA (2010 - 2015)

In February 2015, the United States Supreme Court issued its final decision in *Kansas v. Nebraska*:

- 2008 – 2010 - Arbitration on Non-Compliance Pursuant to Final Settlement Stipulation
- May 2010 – Kansas Files Motion for Leave to File Petition with United States Supreme Court
- February 2015 – United States Supreme Court issues its Decision
- Kansas originally requested over \$72 million in damages and a shutdown of 500,000 ground water irrigated acres



KANSAS v. NEBRASKA (2015) – CONT.

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

LEADING UP TO LITIGATION...

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

HILL v. DNR

(“HILL I - 2013”)

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

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

Defendants: State of Nebraska and DNR

Claims

- Takings claims brought under both the United States and Nebraska Constitutions
 - **Closing notices** issued in 2013
 - DNR’s alleged failure to **regulate and curtail groundwater usage** causing harm to surface water users.
- **\$76 million** in claimed damages for the 2013 crop year
 - Plaintiffs value the water to Nebraska producers at \$2,000/AF
 - 38,379 af - number of af which Plaintiffs allege they were denied use of in 2013

HILL I – 2013 CONT.

Current timeline

- July 31, 2014 – Complaint filed in Furnas County District Court
- Sept. 22, 2014 – State filed Motion to Dismiss
- Dec. 17, 2014 – Hearing held on State’s Motion to Dismiss
- Mar. 24, 2015 – District Court grants State’s Motion to Dismiss and gives Plaintiffs leave to amend

- Apr. 10, 2015 – Amended Complaint filed in Furnas County District Court
- Apr. 30, 2015 – State filed Motion to Dismiss
- July 2, 2015 – Hearing held on State’s Motion to Dismiss the Amended Complaint
- Sept. 29, 2015 – District Court denied State’s Motion to Dismiss in part (Takings Claim) and granted State’s motion to Dismiss in part (Groundwater Pumping) – lawsuit to proceed
- Oct. 28, 2015 – State files Motion for Clarification and/or Motion for Reconsideration
- Jan. 14, 2016 – Hearing held on the State’s Motion for Reconsideration/Clarification
- Awaiting District Court’s decision

HILL v. DNR

(“HILL II - 2014”)

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

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

Defendants: State of Nebraska and DNR

Claims

- Takings claims brought under Neb. Const. Art. I, § 21
 - **Closing notices** issued in 2014
 - DNR’s alleged failure to **regulate and curtail groundwater usage**
- **\$143.31 million** in requested damages for the 2014 crop year
 - Plaintiffs value the water to Nebraska producers at \$2,000/AF
 - 71,655 af - number of af which Plaintiffs allege they were denied use of in 2014

HILL II – 2014 CONT.

Current timeline

- Oct. 30, 2015 – Complaint filed in Furnas County District Court
- Dec. 7, 2015 – State filed motion to dismiss
- Jan. 14, 2016 – Hearing held on the State's Motion to Dismiss
- Awaiting District Court's decision

CAPPEL v. DNR

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

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

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

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

CAPPEL CONT.

Current Timeline:

- Dec. 1, 2015 – Complaint filed in Hitchcock County District Court
- Dec. 18, 2015 – Amended Complaint filed in Hitchcock County District Court
- Jan. 11, 2016 – State files Motion to Dismiss
- April 7th – Hearing on MTD at Hitchcock County District Court

NEBRASKA BOSTWICK IRRIGATION DISTRICT v. DNR

(“NBID”)

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

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

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

Claims

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

Requested Relief

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

NBID CONT.

Current Timeline

- Jan. 11, 2016 – Complaint filed in Lancaster County District Court
- Feb. 24, 2016 – State files Motion to Dismiss
- June 28, 2016 – Hearing date on State's Motion to Dismiss

- **Possible Transfer of Case to Furnas County District Court

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

Plaintiff: Frenchman Cambridge Irrigation District

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

Claims

- Petition for review of IMP – Plaintiffs allege that the IMP is unconstitutional and should be declared null and void
- Plaintiffs also request that the orders of the NRDs and DNR implementing the IMP should be reversed and vacated

FCID CONT.

Current Timeline

- Jan. 7, 2016 – Petition for Review filed in Lancaster County District Court
- Mar. 3, 2016 – Defendants filed Motion to Dismiss
- June 2, 2016 – Hearing date on Defendants' Motion to Dismiss

- **Possible Transfer of Case to Furnas County District Court

POTENTIAL LITIGATION MOVING FORWARD

- Motions to Dismiss
 - Briefing / Hearings
- Discovery
 - Document Production / Depositions / Expert Reports
- Motions for Summary Judgment
 - Briefing / Hearings
- Trial
- Appeals
- Potential for 2 – 3 years left of litigation (conservative estimate)

QUESTIONS??

