

District Court, 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 who
suffered losses in Crop Year 2014**

Plaintiffs,

v.

**State of Nebraska and
Nebraska Department of Natural Resources,
a State Agency,**

Defendants.

Case No. CI 15-_____

Judge: _____

**Complaint (Class Action)
and
Jury Demand**

Plaintiffs allege:

Case Overview

1. Plaintiffs are individual farmers who were farming during crop year 2014. They are farmers who produce crops with irrigation water necessarily supplied through the ditches and canals of Frenchman Cambridge Irrigation District (“FCID”), sue for allocations of water taken from them and damages caused by the takings. They sue on behalf of themselves and a group of persons similarly situated, all of whom are water users of FCID and who have consented to be members of the Class on whose behalf this action is brought. They seek damages for the 2014 crop year.

2. Damages are sought for the allocations and rights to water taken, misappropriation of water, and the consequential damages caused by water deprivation. These damages occurred when Defendants, in 2014 or affecting that year’s water supply, caused naturally occurring stream flow to be interrupted through diversion and groundwater pumping, and when Defendants issued orders causing bypass of inflows through political means, as well as physical ones, to prevent waters from reaching the reclamation projects of the Republican River Basin. Shutting off the water from the reclamation projects prevented inflows of water to fill

reclamation lakes and reservoirs, and caused or permitted water to be available to flow, and to actually flow, into FCID's ditches and canals.

3. Plaintiffs, and their Class Members, each have usufructuary rights to use the water taken from them; their usufructuary rights are superior to any right to use the water in the manner in which it was used after being taken from Plaintiffs and members of their Class.

4. The First Claims asserted are for water taken from Plaintiffs which was a) within Nebraska's allocation under the Republican River Compact for 2014, b) subject to capture in the Republican River Basin's streams, c) not required or used for Compact compliance, and d) not taken for consumptive beneficial use for any superior or prior legal use. The Second Claims are for all these same conditions and for excess groundwater pumping authorized and directed by Defendants. Defendants did so to permit other Nebraska farmers without superior rights or priorities to use the water. Defendants did so with the known and permitted impact of preventing capture of water for use by Plaintiffs and Class Members.

5. These are actions for inverse condemnation. Damages for the 2014 farming losses of Plaintiffs are sought. Plaintiffs sue on the basis that one or more constitutional torts were committed against them.

Jurisdiction, Venue, Parties

6. The District Court has subject matter jurisdiction of this action pursuant to *Neb Rev Stat* § 24-302, § 25-21,149, and *Neb Const* Art V, §§ 1 *et seq.* Inverse condemnation is a constitutional tort.¹ This action seeks a declaratory judgment and damages for the victims of this constitutional tort.

7. Venue is proper in Furnas County because one or more of the named Plaintiffs who are class representatives and individual Plaintiffs and one or more of the Class Members reside in, own land in, farm in, and receive, or should receive, water from FCID in this county. The real estate of Plaintiffs and their Class Members affected by Defendants' takings is situated in the Nebraska counties of Furnas, Harlan, Red Willow, and Hitchcock, and within the

¹ *Dishman v Nebraska PPD*, 240 Neb 452 (1992). Inverse condemnation is properly brought before this Court directly, and Plaintiffs are entitled to trial by jury. Political subdivision, or State, Tort Claim Act compliance is not required as no such tort claim is asserted. *Id.*

geography of the Frenchman Cambridge Irrigation District (FCID).² Venue is authorized by *Neb Rev Stat* §§ 25-402 & 403.01(2) & (3).

8. This action involves injuries to annual and some perennial crops upon real estate, and it involves real estate located in more than one county. The acts or omissions of Defendants, or some parts of those actions or omissions, occurred, and the claims asserted here arose, in whole or in substantial part, in this county.

9. The Plaintiffs and class representatives are:

9.1. Greg Hill, a resident of Furnas County, Nebraska.

9.2. Brent Coffey, a resident of Harlan County, Nebraska.

9.3. James Uerling, a resident of Red Willow County, Nebraska.

9.4. Warren Schaffert, a resident of Hitchcock County, Nebraska.

10. Each Plaintiff is a FCID water user. Each Plaintiff is a farmer engaged in farming operations who requires, and has traditionally received and used, irrigation water from FCID's ditches and canals and the reclamation dams of the United States, managed by the U.S. Department of Interior, Bureau of Reclamation. This water is necessary to produce corn, soybeans, and other crops. Without this water, the essential character of Plaintiffs' surface water irrigated land areas are changed to dryland, crop production potential is dramatically diminished, crops are lost, real estate values are adversely affected, and commerce in Nebraska is diminished.

11. The Defendants are: The State of Nebraska ("State"); and the Nebraska Department of Natural Resources ("DNR")

The Class

12. Plaintiffs bring this action on behalf of themselves individually and on behalf of a class of water users. The class of water users consists of:

All FCID water users in 2014 who did not receive their full water allocation supply due to the acts, omissions, and takings of Defendants and who suffered damages due to diminished or eliminated crop production yields of growing crops. This class includes only those persons who have consented to participate as members of the class and who are identifiable by their consents. A list of Class Members will be

² In the event the Court determines this case should be broken into multiple cases on a county-by-county or other geographic or nongeographic descriptive basis, Plaintiffs request leave to file separate complaints so dividing this case, and to docket them separately in accord with the Court's directions, without fee for additional filings. In the event the Court determines this Complaint, for any reason, is subject to dismissal pursuant to *Neb Ct R Plead* § 6-1112, leave to amend is respectfully requested.

furnished to Defendants and their counsel upon request; the Class consists of more than 150 Members.

13. Questions presented here are of common or general interest to all members of Plaintiffs' class. The number of persons interested is numerous, and it is impracticable to bring them all before the Court. Accordingly, Plaintiffs may sue for the benefit of all Class Members. *Neb Rev Stat* § 25-319. A class action is proper because Plaintiffs, and all members of the purported class, desire the same outcome in this action, i.e., a judgment against Defendants for the damages sustained by members of the class.³ A class action is a superior method for resolution of the issues presented.

14. While there is no mechanical test for determining whether the class is so numerous that a class action is proper, in this case separate and individualized adjudications of liability are not practicable. Questions of common interest predominate over individualized questions of law and fact. Individualized damages calculations can be made through a claims procedure. The liability and proximate causation of damages issues are best adjudicated in a single proceeding on behalf of all Class Members. Any alternative adjudication process would tax the judicial system substantially, present the risk of inconsistent outcomes, produce the need for, and demand of, duplicitous and multiple redundant judicial activities, and cause avoidable demand on public, judicial, and other governmental and financial resources. The numerosity requirement for a class action is satisfied.⁴

15. The questions presented are common to all Plaintiffs and all members of their class, except that the actual calculation of the amount of damages must occur on an individualized claim-by-claim basis after liability and causation are determined.⁵ These questions include:

15.1. Was water taken from Plaintiffs which was a) within Nebraska's allocation under the Republican River Compact for 2014, b) subject to capture in Republican River Basin's streams, c) not required or used for Compact compliance, and d) not taken for consumptive beneficial use for any superior or prior legal use?

15.2. Was water taken from Plaintiffs which was taken under some or all these same conditions and for excess groundwater pumping authorized and directed by

³ *Hoiengs v. County of Adams*, 245 Neb 877, 903(1994).

⁴ *Neb Rev Stat* § 25-319.

⁵ *Id.* 245 Neb at 901-902.

Defendants for other Nebraska farmers without superior rights or priorities, and did Defendants do so to permit other Nebraska farmers without superior rights or priorities to use the water, or did they do so with the known and permitted impact of preventing capture of water for use by Plaintiffs and Class Members.

- 15.3. Did Defendants take water that was otherwise available to the Plaintiffs and their Class Members to fulfill a State Compact, or contract, with another State, and thereby violate the priorities for water users established by *Neb Const* Art XV, §§ 4,5 & 6 which provide:

§ 4: The necessity of water for domestic use and for irrigation purposes in the State of Nebraska is hereby declared to be a natural want.

§ 5. The use of the water of every natural stream within the State of Nebraska is hereby dedicated to the people of the state for beneficial purposes, subject to the provisions of the following section.

§ 6: The right to divert unappropriated waters of every natural stream for beneficial use shall never be denied except when such denial is demanded by the public interest. Priority of appropriation shall give the better right as between those using the water for the same purpose, but when the waters of any natural stream are not sufficient for the use of all those desiring to use the same, those using the water for domestic purposes shall have preference over those claiming it for any other purpose, and those using the water for agricultural purposes shall have the preference over those using the same for manufacturing purposes. Provided, no inferior right to the use of the waters of this state shall be acquired by a superior right without just compensation therefor to the inferior user.

- 15.4. Have compensable takings occurred?

- 15.5. If so, what compensation is due for the asset(s) taken?

Question predominance and commonality prerequisites are satisfied.

16. Plaintiffs are proper class representatives. They have no interests adverse to other Class Members. Instead, each Plaintiff is a FCID water user, and each operates separate, distinct real estate and has suffered damages that do not conflict or overlap the damages claims of any other Plaintiff. No party included in the class upon whose behalf Plaintiffs sue stands to suffer

any economic loss as a result of his or her inclusion in the class, or as a result of the named Plaintiffs' service as class representatives.⁶

17. The number of Class Members exceeds 150. All class members seek the same outcome as Plaintiffs, i.e., a judgment of liability against the Defendants requiring that just compensation damages be paid. They desire to have damages reasonably calculated on an individualized basis for the number of acres and types of crop adversely affected, and using a uniform method of damages calculations, including actual crop losses calculated by using the US Federal Crop Insurance County Production Averages for the affected crop types in each relevant year. Agents of the State and DNR, acting within the scope of their authority to speak, have said the value of water to Nebraska water users is at least \$2,000 per acre foot per year.

18. A class action is superior to any other method for adjudicating Plaintiffs' claims and claims of their Class Members. A claim upon which relief may and should be granted for Plaintiffs and Plaintiffs' class is stated. This action is properly maintained and maintainable as a class action because all elements for a class action are satisfied.⁷

General Allegations

19. Plaintiff **Greg Hill** is a farmer whose farming operation consists of 139.7 permitted acres with surface water from FCID. His/her land is located in Furnas County where he resides. Mr. Hill's crop production was, and should have been, as follows for the affected irrigation season in year 2014:

2014	
Crop	Corn
Acres	51 A
Potential Yield	222 Bu/A
Actual Yield	222 Bu/A
Price/Bushel	\$4.62/Bu
Crop	Corn
Acres	9 A
Potential Yield	188.3 Bu/A
Actual Yield	110.8 Bu/A
Price/Bushel	\$4.62/Bu
Crop	Soybeans
Acres	14.1 A
Potential Yield	59.3 Bu/A

⁶ *Id.* 245 Neb at 905, 516 NW2d at 242, citing *Blankenship v. Omaha PP Dist*, 195 Neb 170, 237 NW2d 86 (1976)

⁷ *Neb Rev Stat* § 25-319; *Hoiengs v. County of Adams*, 245 Neb 877, 516 NW2d 223 (1994)

Actual Yield	26.95 Bu/A
Price/Bushel	\$11.36/Bu
Crop	Soybeans
Acres	47.7 A
Potential Yield	64.8 Bu/A
Actual Yield	64.8 Bu/A
Price/Bushel	\$11.36/Bu

20. Plaintiff **Brent Coffey** is a farmer whose farming operation consists of 294.90 permitted acres with surface water from FCID. His/her land is located in Harlan County where he resides. Mr. Coffey's crop production was, and should have been, as follows for the affected irrigation season in year 2014:

2014	
Crop	Corn
Acres	134.5 A
Potential Yield	213 Bu/A (<i>if irrigated</i>)(Harlan County)
Actual Yield	213 Bu/A
Price/Bushel	\$4.62/Bu
Crop	Wheat
Acres	75.6 A
Potential Yield	32.9 Bu/A
Actual Yield	13.4 Bu/A
Price/Bushel	\$6.51/Bu
Crop	Wheat
Acres	8.8 A
Potential Yield	32.9 Bu/A
Actual Yield	14 Bu/A
Price/Bushel	\$6.51/Bu
Crop	Fallow
Acres	59.7
Potential Yield	207 Bu/A (<i>if irrigated- corn</i>)
Actual Yield	0 Bu/A
Price/Bushel	\$4.62/Bu
Mitigation	None. No water.
Crop	Oats – Alternative Crop
Acres	10.9 A
Potential Yield	NA Raised to mitigate
Actual Yield	64.9 Bu/A
Price/Bushel	\$3.01/Bu

21. **James Uerling.** Plaintiff James Uerling, is a farmer whose farming operation consists of 314.30 permitted acres with surface water from FCID. His/her land is located in Red Willow County where he resides. Mr. Uerling’s crop production was, and should have been, as follows for the affected irrigation season in year 2014:

2014	
Crop	Corn
Acres	176.2 A
Potential Yield	193 Bu/A
Actual Yield	193 Bu/A
Price Per Bushel	\$4.62/Bu
Crop	Wheat
Acres	35.7 A
Potential Yield	41.5 Bu/A
Actual Yield	24 Bu/A
Price Per Ton	\$6.51/Bu
Crop	Wheat
Acres	59.2 A
Potential Yield	41.5 Bu/A
Actual Yield	20 Bu/A
Price/Bushel	\$6.51/Bu
Crop	Fallow
Acres	42.4 A
Potential Yield	122.5 Bu/A (<i>if irrigated-corn</i>)
Actual Yield	0 Bu/A
Price/Bushel	\$4.62/Bu
Mitigation	None. No Water.

22. Plaintiff **Warren Schaffert** is a farmer whose farming operation consists of 59.4 acres irrigated with surface water from FCID. His/her land is located in Hitchcock County where he resides. Historically, Warren Schaffert plants irrigated corn. The crop production was, and should have been, as follows for the affected irrigation season in year 2014:

2014	
Crop	Wheat
Acres	59.4 A
Potential Yield	37.2 Bu/A
Actual Yield	3.0 Bu/A
Price/Bushel	\$6.51/Bu

23. The production of irrigated wheat was undertaken by some Plaintiffs and Class Members to mitigate damages because there was insufficient water to grow irrigated corn. Financial losses due to inability to produce corn resulted.

24. Each and all individual Class Members suffered 2014 losses which may be calculated similarly for their separate and distinct acreages and crops. A claim procedure for submission of the losses and claims of each Plaintiff may be utilized following a determination of liability. Each claim may specify the claimant, number of acres for each affected crop in each year, actual yield achieved, and loss calculated, based upon a price for that crop, in each year to all Plaintiffs, and a per acre yield for the county in which each class member resides. The prices and yields are common to Plaintiffs and each Class Member as both price and yield potential are determined from USDA and public compilation or crop insurance data.

First Claims: Water In the Stream

The Republican River Basin; Water in the Stream Subject To Capture; Taking of Water by State

25. All allegations above are renewed here. These additional facts and all allegations below are germane to Plaintiffs' First Claims:

- 25.1. The State is a party to the Republican River Compact ("Compact"). So are the States of Kansas and Colorado, and the United States of America. The Compact constitutes the law of the United States and the apportionment of water made in the Compact binds Nebraska, its citizens, and all water claimants.⁸
- 25.2. The Compact first became effective in 1943; it has been modified from time to time. It exists primarily to provide the most efficient use, and an equitable division, of waters of the Republican River Basin, and to recognize beneficial consumptive use as the most efficient way to use the Basin's waters.
- 25.3. The Compact was modified during litigation before the United Supreme Court when the Court approved a "Final Settlement Stipulation" of the parties.⁹ Under the approved FSS, Nebraska has, and the parties agreed and became obligated, to use five year averaging in normal allocation years and two year averaging during Water Short Years. Under the Compact and its FSS, a Water Short Year is a year

⁸ *Garey v Neb Dept of Nat Res*, 277 Neb 149, 160 (2009).

⁹ *Kansas v Nebraska*, 538 U.S. 720 (2003).

when the irrigation supply in Harlan Count Reservoir is less than 119,000 acre-feet on June 30th.

- 25.4. In 2014, under terms of the FSS, the Basin was designated as a Water Short Year. During water short year administration Nebraska's compliance test is computed using two year averaging and is measured at Guide Rock, Nebraska, and not at Hardy, Nebraska as in non-Water Short Years.
- 25.5. Nebraska receives an annual allotment of 49% the Basin's waters. This allotment is measured by acre-feet of water for beneficial consumptive use. Nebraska is obligated by the Compact to limit its consumption of Basin waters to this amount. For 2014, Nebraska's Water Short Year compliance test under the Compact as modified by the Final Settlement Stipulation is computed adding the 2013 Compact balance at Guide Rock plus the 2014 balance at Guide Rock, and dividing this sum by two.
- 25.6. In 2014, the water denied Plaintiffs and their Class Members was within Nebraska's Water Short Year allotment of 49% of waters in the Basin.
- 25.7. Plaintiffs and their Class Members are water users of FCID and appropriators of public water. Plaintiffs and Class Members complied with statutory requirements and obtained vested property rights in Basin water within Nebraska's 49% Water Short Year allotment and water subject to capture in the stream of the Republican River and tributaries supplying surface water to FCID and Plaintiffs.¹⁰
- 25.8. Plaintiffs and their Class Members do not own surface water prior to capture but they have an appropriation right that is a property right entitled to the same protection as any other property right.¹¹
- 25.9. Plaintiffs, their Class Members, and their supplier FCID hold appropriation rights to divert unappropriated surface water as of a priority date(s) established by the filing of appropriation permit applications with DNR.¹² Plaintiffs, their Class Members, and FCID hold such permits. In Plaintiffs' case, some of these appropriation permit dates precede 1943 and all of these dates precede 1988; they

¹⁰ *Spear T Ranch, Inc. v Knaub*, 269 Neb 177 (2005); *City of Scottsbluff v Winters Creek Canal Co*, 155 Neb 723 (1952); *Enterprise Irrig Dist v Willis*, 135 Neb 827 (1939).

¹¹ *Bond v Neb PPD*, 283 Neb 629, 644 (2012)(compensation required when senior appropriator's water taken for a lesser constitutional preference).

¹² *Id* at 632. *Neb Rev Stat* § 46-205.

all precede approval of the Final Settlement Stipulation by the U. S. Supreme Court in 2003.¹³

- 25.10. At all relevant times in 2014, water was allocated, and was available, to the State under the Compact. During relevant times in 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 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 2014.
- 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 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.
- 25.12. The water allocated and available as alleged above was in sub-basins and the mainstem 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 held by DNR though it was subject to capture. It was released by DNR and was not needed or used for Compact compliance for 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.

¹³ *Kansas v Nebraska*, 538 US 720 (2003).

- 25.13. DNR is an administrative department of the Executive Branch of Nebraska's government, with certain statutory and legal authority¹⁴ over Nebraska's allotment of Basin waters. DNR must "...administer waters [of the Basin] to prevent waste, [and] protect prior appropriators...."¹⁵
- 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. The State and DNR allowed in excess of 29,000 acre-feet of Nebraska's water to flow into Kansas. Nebraska was entitled to consume 48.9% of this 29,000 acre feet for surface water irrigation or approximately 14,590 acre feet of water available for consumptive use by Nebraska. This water was derived in whole or in part from water Defendants caused to bypass FCID and used by Plaintiffs and their Class, as alleged in ¶ 26 of this Complaint.¹⁶
- 25.15. Plaintiffs and their Class Members had a superior preference under *Neb Const* Art 15, § 6 to the water denied by Defendants in 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.

¹⁴ *Neb Rev Stat* § 61-206(1); *Hickman v Loup River PPD*, 176 Neb 416, 431 (1964).

¹⁵ *State ex rel Cary v Cochran*, 138 Neb 163, 168 (1940).

¹⁶ In addition in 2014, 14,100 acre feet of excess water was stored at the Harlan County Reservoir, and was captured in the stream.

Quantity of Water Subject to Capture In Stream

26. The amounts of water subject to capture in 2014, denied to Plaintiffs' and their Class Member by Defendants, and locations where it was found was as follows:

First: A total of 31,705 acre feet of project water was bypassed from reservoirs (excluding Enders) serving FCID. This water was in the stream, subject to capture and available for use by Plaintiffs but denied to them by Defendants. This water was not required for compliance with the Republican River Compact.

Second: On December 31, 2014, water storage in Harry Strunk Lake increased 17,530 acre feet and in Swanson Lake it increased 4,640 acre feet for a total of 22,170 acre feet. As of December 31, 2014, the Defendants declared all water stored in these lakes to be "legally stored project water", i.e., water that, if not bypassed and held back by Defendants, would have been available to Plaintiffs. This water was not required for compliance with the Republican River Compact.

Total of First & Second Components:

$(31,705AF + 22,170AF = 53,875AF)$ 53,875 acre feet.

The quantities of water denied to Plaintiffs and their Class for 2014 is at least 53,875 acre feet. This water would have made 2014 a normal farming and irrigation season if it had been delivered to FCID and then to Plaintiffs and their Class Members.

27. Defendants issued these Orders regulating surface waters resulting in deprivation of waters to Plaintiffs:

27.1. January 1, 2014: All FCID Natural Flow Permits are closed.

27.2. January 1, 2014: All Federal Reservoir Permits are closed.

27.3. June 26, 2014: Stream flow was Regulated to the level of 38.7 cfs of flow.

27.4. October 24, 2014: All FCID natural flow permits were opened, after the crop seasons & periods of potential beneficial use by Plaintiffs concluded.

28. Each and all individual Class Members made reasonable efforts to mitigate damages and otherwise engaged in responsible farming operations. These operations were designed to permit each Plaintiff and Class Member to achieve a reasonable level of production and accomplish the goal of producing as much crop as possible under the circumstances. Each and all Plaintiffs and Class Members also mitigated damages in common ways after ascertaining that insufficient water was available to farm as planned and intended. By doing so each Plaintiff

and Class Member undertook to mitigate damages with alternate methods to utilize land where such methods were available.

29. Prior to 2014, each Plaintiff and Class Member used surface irrigation water from FCID except when Defendants denied them the water as occurred in 2013. Losses caused in 2013 are claimed in Case NO. CI 14-68, District Court, Furnas County. FCID was entitled to receive, and pass through and provide to each Plaintiff and Class Member an allocation of surface irrigation water equal to eighteen (18) acre inches per acre for each user, and FCID was under contract to utilize the facilities and assets of the United States of America, managed by the Department of Interior, Bureau of Reclamation, and constructed pursuant to the Reclamation Acts for this purpose. FCID is a lessee of certain federal assets, required to pay rent, construction costs and maintenance and to generate income to do so from its business of receiving, distributing through ditches and canals, and supplying to water users the water to produce crops. Plaintiffs and Class Members are, or should have been, recipients of this water.

30. Prior to and during the 2014 growing season, Defendants caused closing notices to be issued, requiring that water bypass inflow locations to the Reclamation dams and canals of the Republican River Basin, including those supplying water to FCID. These facilities include:

- 29.1 Trenton Dam and Swanson Lake – providing flow into Meeker-Driftwood Canal System, Bartley Canal System and Cambridge Canal System;
- 29.2 Red Willow Dam and Hugh Butler Lake – providing flow into Red Willow Canal System, Bartley Canal System and Cambridge Canal System;
- 29.3 Medicine Creek Dam and Harry Strunk Lake – providing flow into Cambridge Canal System;

all located on the Republican River, Red Willow Creek, a tributary of the Republican River, and Medicine Creek, also a tributary of the Republican River, respectively.

31. Defendants' action causing disruption of stream and water flow occurred through these singular, and collective, events:

- 31.1. Natural flow shut down order,
- 31.2. Reservoir inflow bypass order,
- 31.3. Contact with US Dept of Interior Bureau of Reclamation,
- 31.4. The acts and omissions described at ¶¶ 24 & 25 and above.

32. The lakes and reservoirs created by the dams identified above work in conjunction with the Canal System. The Plaintiffs and all Class Members farm land which is included within and among the 45,669 acres in the Frenchman Cambridge Irrigation District served by Meeker-Driftwood, Red Willow, Bartley, and Cambridge Canal Systems.

33. The dams involved are described as follows:

33.1. Trenton Dam is on the Republican River near Trenton, Nebraska. It is an earth-fill structure with a structural height of 144 feet. The reservoir behind the dam is called Swanson Lake.

33.2. Meeker Canal System begins at Trenton Dam. It extends along the south side of the Republican River to a point south of Culbertson to serve the canals of the Meeker-Driftwood unit. The system consists of one main canal including the Upper Meeker, the Meeker Extension Canal, and the Driftwood Canal. It has a capacity of 284 cfs. The Meeker-Driftwood Canal has 62.9 miles of canal and approximately 43 miles of buried pipe laterals.

33.3. Red Willow Dam is located on Red Willow Creek. This dam is 10 miles northwest of McCook and is an earthen embankment with a height of 126 feet. Hugh Butler Lake exists behind this dam.

34. The Frenchman Cambridge Irrigation District (“FCID”) operates and maintains the Bartley Diversion Dam, its canals and laterals; Cambridge Diversion Dam, its canals and laterals; Meeker-Driftwood Distribution System; and Red Willow Creek Diversion Dam, its canals, and laterals. The FCID is separate from the Frenchman Valley Irrigation District.

35. The dams, lakes, reservoirs, canals, and ditches at issue in this litigation were authorized by the *Pick-Sloan Flood Control Act* of 1944, a federal statute.¹⁷ They were constructed commencing in 1947 with total completion, in all respects, not later than 1964, when Red Willow Canal was concluded.¹⁸ Irrigation has occurred in and throughout these systems since at least 1961 and prior to that time. Plaintiffs, their Class Members, and the predecessors of Plaintiffs and their Class Members, farmed and utilized water from this system for many years prior to the year, 2014, which is at issue in this case.

¹⁷ The *Flood Control Act* is found at [16 U.S.C. 460d (and various sections of Titles 33 and 43 U.S.C); P.L. 78-534, December 22, 1944; 58 Stat. 887]

¹⁸ No federal claim is asserted in this Complaint.

Crops Damages; Losses Sustained

36. Each Plaintiff, and Class Member suffered a loss of crop production in 2014 because: (a) Defendants diverted water to prevent it from reaching the federal lakes and reservoirs mentioned above, (b) diminution of water to the federal lakes and reservoirs mentioned above prevented water from becoming available to, and reaching, the ditches and canals of FCID; and (c) FCID's ditches and canals did not receive water, therefore it could not deliver water to Plaintiffs under normal conditions as reasonably expected, and as Plaintiffs were entitled to receive, by virtue of their water allocations and those of FCID. Plaintiffs suffered losses to growing crops. The crops involved in this proceeding are corn, soybeans, alfalfa, and alternative crops planted to mitigate damages caused by loss of water. No damages for other crops are claimed by the Plaintiffs or their Class Members.

37. All the crops damaged, except alfalfa, are annual crops. The damages sustained by Plaintiffs for these annual crops are determined in accord with this formula which, except to the extent of the number of acres per crop per year, are common to all members of the class suffering damages to annual crops:

- 37.1. The number of acres that should have received water is determined;
- 37.2. The yield that was reasonably expected, derived from countywide averages used for the Federal Crop Insurance Program for the claim year are ascertained and are defined as the expected crop;
- 37.3. The actual crop for each producer is determined and subtracted from the expected crop, leaving a balance for each producer Plaintiff, or class member;
- 37.4. The price determined as the market price as of the time of harvest and as used by the Federal Crop Insurance Program in each county for each crop, is used as the value of the crop; and
- 37.5. The reasonably expected costs to harvest, transport, store, and sell each crop of each type in each county is subtracted from the damages where reduced crops diminished or eliminated these expenses.

38. All aspects of this formula, except the actual production for each producer, are common to all Class Members. These damage formula features, which are common, predominate over non-common features and permit a claims procedure to be used.

39. Certain Class Members suffered damages to a perennial crop, specifically alfalfa. Alfalfa is a crop that is planted and expected to produce, without replanting, for approximately five (5) years before its useful life is exhausted. Perennial crop producers' damages are measured in this way, involving steps common to all perennial crop producers or Class Members:

- 39.1. The number of acres of perennial crop, namely alfalfa or other hay as determined;
- 39.2. The value of the hay as determined on a market basis;
- 39.3. The actual amount of the hay harvested in 2014 by each producer or class member suffering a perennial crop loss is determined and subtracted from the number of ton per acre of expected crop production;
- 39.4. The number of tons lost is multiplied by the county average price for 2014; and
- 39.5. The costs of harvest, transportation, and sale of the harvested crop are subtracted, and the balance is the net loss for each perennial crop producer.

40. As in the case of annual crops, the damages elements for persons suffering losses to perennial crops are common to all such Class Members. They predominate over non-common damages formula components.

2014 Damages Claims

41. FCID, and all Class Members, own surface water appropriations in order to divert surface water from the Republican River Basin for beneficial use. These appropriations are limited to eighteen (18) acre-inches per acre annually. Each Class Member owns or has a right to beneficial use of, a water appropriation permit, and thus a right to use the water.¹⁹ Water included involves the usufructory right to use the waters of the Republican River basin, including those flowing in relevant streams, and those flowing into streams from groundwater locations. Compensation is sought for taking the usufructory right of each Plaintiff and Class Member.

42. None of the Defendants' actions set forth at ¶¶ 1-33 were required for Compact compliance, and the Defendants overreached their authority by these actions and took water to which Plaintiffs and the Class were entitled.

43. The Defendants closed all surface water appropriations in the Republican River Basin above the Guide Rock Diversion Dam for 2014. All FCID users are located upstream

¹⁹ *Spear T Ranch v Knaub*, 269 Neb 177 116 (2005).

from the Guide Rock Diversion Dam. All Class Members, were denied any benefits or use from their surface water allocations of eighteen (18) acre-inches per acre permitted.

44. Defendants' actions were taken without any condemnation proceedings against any FCID user including all Plaintiffs and all Class Members. The Defendants did not intend, nor were they willing, to institute condemnation proceedings to ascertain the value and compensation owed for the complete diversion and taking of the surface water flow rights.²⁰ As a result, the entirety of FCID's surface water appropriation bypassed the Plaintiffs and Class Members and was diverted for inferior uses. All Plaintiffs and Class Members were damaged.

45. The Plaintiffs were harmed by the Defendants' actions. So was each Class Member. The United States Bureau of Reclamations Plaintiffs provided a limited appropriation of water, 2 inches per acre permitted for Cambridge Canal and 1.5 inches per acre permitted for Meeker-Driftwood Canal, diverted from the federal reservoirs. The Bartley Canal and the Red Willow Canal each received an allocation of 0.0 inches. This allocation did not provide an adequate water supply to the Class Members for conducting farming operations. All Plaintiffs and Class Members suffered damages as a result of the Defendants' full diversion of FCID's surface water appropriation for 2014.

46. Plaintiffs and all Class Members initiate these claims as inverse condemnation proceedings. Private 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.²¹ They sue under the State Constitution.

47. Agents of Defendants have admitted in public comments that the value of water to Nebraska producers is at least \$2,000 per acre foot. Seventy-One Thousand Six Hundred Fifty-Five (71,655) acre feet denied Plaintiffs and their Class Members had a value, under this admission of value of at least \$143.31 million for the 2014 crop year.²²

²⁰ *Krambeck v City of Gretna*, 198 Neb 608 (1977).

²¹ *Neb Const* Art I § 21; *Dishman v Nebraska Public Power District*, 240 Neb 452, 453 (1992)

²² These statements were made by officials of DNR and by the Manager of NCORPE.

48. Plaintiffs claim for themselves and Class Members damages in the greater of the amount admitted by Defendants, or those amounts calculated as damages and determined on a claims basis and as set forth in descriptions of the Plaintiffs damages above.

**Second Claims: Water Denied
to Plaintiffs Through Denial to the Stream**

49. All allegations above are renewed to here. Plaintiff notes that this Second Claim is substantially similar to the Second Claim dismissed by this Court in CI14-68. This Second Claim is pled because Plaintiffs respectfully preserve their legal position, and do so because they seek to preserve issues for presentation to the Nebraska Supreme Court with their request that Nebraska law be modified to permit the recovery sought by Plaintiffs for themselves and their Class in this Second Claim. They submit that this request is made in good faith as they contend that the decisions of the United States Supreme Court in litigation involving the State of Nebraska and the Republican River Compact require Nebraska to recognize that the ground and surface waters of the Republican River Basin are hydrologically interconnected as matters of both physics and law. Law must follow physics. Furthermore, Nebraska law is superseded by federal law and the Compact is federal law. Plaintiffs contend Nebraska must regulate ground and surface water together to comply with the Compact and to avoid compensable taking of surface water from Plaintiffs.

50. Nebraska has permitted extensive groundwater pumping from the waters of the Basin for many years. The United States Supreme Court has determined that the waters of the Basin include hydrologically interconnected groundwater and surface water. The Supreme Court's approval of the Final Settlement Stipulation required adoption and implementation of a computerized groundwater Model that Nebraska helped to create. This Model calculates, among other things, the rates at which groundwater pumping depletes movement of groundwater to the streams of the Basin, and these calculations are binding on Defendants. This Model's calculation disclosed for periods prior to, and including 2014, that groundwater wells pumping water for agricultural purposes depletes surface flows in the Basin by nearly 225,000 af per year. This sum constitutes approx. 96% of Nebraska's approximate 49% allocation of all waters in the Basin.

51. The State and DNR have allowed excessive groundwater pumping to continue and by doing so it has persistently and continuously deprived the streams of the Basin of surface waters, and of waters subject to capture as unappropriated waters of the Basin. Defendants

permitted groundwater pumpers to deplete the Basin's streams by preventing water from reaching them. This enabled persons whose rights to water are not superior to those of Plaintiffs and their Class Members to wrongfully appropriate water properly available to Plaintiffs and their Class Members. The water so intercepted and misappropriated with the assent and approval of Defendants has not been necessary, or used, for Compact compliance. This water is within Nebraska's allocation of waters in the Basin, and it is water subject to capture upon arrival in the stream in the natural course of movement from the subterranean streams to the open, conventional streams of the basin.

52. Defendants did not curtail groundwater pumping as required to assure that Plaintiffs and Class Members bear only their proportionate share of Compact compliance requirements. Instead, Defendants authorized and allowed groundwater pumpers to use water in 2014 while they halted or substantially halted beneficial use of 2014 water subject to capture by Plaintiffs and Class Members. Instead, they took water subject to capture, and prevented water to be taken so it could not become subject to capture though it was destined to arrive in the stream and be subject to capture in the ordinary course of nature. This constitutes a taking of water in the stream and subject to capture and the taking of water destined for the stream and subject to capture in the ordinary course of nature had it not been taken by Defendants. The taking of this water deprived Plaintiffs and their Class Members of water to which they had usufructuary rights in 2014.

53. When the Compact was adopted in 1943, the Basin in Nebraska contained no more than 200 irrigation wells. By 1960, there were fewer than 4000 such wells in the Basin. By 2000 approximately 18,000 irrigation wells had been placed in the Nebraska portion of the Basin to draw water from the Basin as groundwater. As a result, average inflows into major reservoirs and lakes in the Nebraska portion of the Basin have declined by more than 75% as compared with inflows during the 1940s and 1950s. This decline exacerbated sharply after the United States of America invested hundreds of millions of dollars in dams, reservoirs, lakes, canals and ditches designed, in substantial part, to provide for surface water irrigation in the Basin.

54. Nebraska was compelled by the US Supreme Court's approval of the Final Settlement Stipulation to count depletions to surface flows caused by groundwater use in Nebraska as determined by the Model approved in the Stipulation. This accounting is required to

determine Nebraska's consumptive use to determine whether the State has complied with the Compact or overused its allocation of the waters of the Basin. Nebraska is allocated 234,500 acre feet of depletions annually to the Basin's virgin water supply. It has consistently used a disproportionate high fraction of the Nebraska allocation for groundwater pumping. In 2015, the United States Supreme Court ruled that Nebraska "knowingly failed" to comply with its Compact obligations.²³

55. 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.

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

57. Discovery is required to permit Plaintiffs to determine how much water was denied to them as a result of Defendants' authorization and allowance for groundwater pumpers to continue to take water through excessive pumping from the streams and from Plaintiffs and Class Members. The amount of damages caused by the actions giving rise to the Second Claims is believed to exceed the damages under the First Claim as additional and different water was taken under these Second Claims. This additional taking deprived Plaintiffs and Class Members of more water causing them to suffer more damages. This taking exceeds the amounts of water taken as alleged in the First Claim.

²³ *Report of the Special Master*, dated November 15, 2013; *Kansas v. Nebraska*, 574 U.S. ___, 135 S Ct 1043, Slip Op., Feb 24, 2015).

Requests for Relief

58. On the foregoing basis, Plaintiffs respectfully request that:
- 58.1. The Court determine that all elements for a class action have been satisfied and certify that the class of persons identified above in the Complaint is a lawful, proper class, and that Plaintiffs are proper representatives of the class. The Court is asked to declare and determine, as a first phase, that this action proceed as a class action.
 - 58.2. Plaintiffs be awarded Judgment on their **First Claims** against Defendants for a determination that Defendants are liable for depriving Plaintiffs of water and for consequential damages to their annual and perennial crops, and Plaintiffs' Class Members be awarded judgment on their claims submitted under a claims procedure to be determined by the Court.
 - 58.3. Plaintiffs be awarded Judgment on their **Second Claims** against Defendants for a determination that Defendants are liable for depriving Plaintiffs of water and for consequential damages to their annual and perennial crops, and Plaintiffs' Class Members be awarded Judgment on their claims submitted under a claims procedure to be determined by the Court.
 - 58.4. After liability is determined and damages for Plaintiffs as Class Representatives are determined in a manner that permits damages to be calculated on claims presented, the Court establish a claims procedure, give notice to the class, and require that a court approved form be completed certifying the number of affected acres and the amount of loss claimed by each claimant.
 - 58.5. Upon completion of submission of claims, Plaintiffs request that the Court review the claims and determine the amount due to each class member.
 - 58.6. Judgment for all taxable court costs and for fees for the services of their lawyers for establishing a common fund. They request that the fees be taxed in addition to the amount of Plaintiffs' damages and added to the Plaintiffs' recovery, and that the attorney's fees not be deducted from the common fund created to pay claims or that fees be assessed against Defendants in addition to the common fund as required by law.
 - 58.7. Judgment be rendered for all expert witness fees incurred by Plaintiffs.

58.8. The Court is asked to issue one or more orders directing the distribution of funds from the common fund to pay claims of Plaintiffs and their Class Members approved by the Court, court costs and attorney's fees as the Court authorizes and directs.

58.9. Prejudgment and post-judgment interest are requested to the extent permitted by law, and costs be taxed to Defendants.

58.10. Leave to amend is requested in the event a Motion for Dismissal under *Neb Ct R Plead* § 6-1112(2)-(6) is sustained as to the First Claim.

Demand for Trial by Jury

59. As is provided by the Nebraska Constitution, and as was permitted in English Common Law prior to Nebraska's statehood, Plaintiffs respectfully demand trial by jury²⁴ but do so only on the issues of liability and causation and common elements of necessary damages calculations. They ask the Court to employ a claims procedure for the submission of claims, determination of damages, establishment of the amounts to be awarded per claim, and for any additional sums or unique features affecting only an individual class member.²⁵

October 30, 2015.

Greg Hill, Brent Coffey, James Uerling ,
Warren Schaffert , et al, Plaintiffs,



By: _____

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²⁴ *Dishman v Neb PPD*, 240 Neb 452 (1992); *Rose v City of Lincoln*, 234 Neb 67 522 (1989).

²⁵ The Court has power to use a claims procedure for administration of the outcome. *Watson v Shell Oil Co*, 979 F2d 1014, 1018 (5th Cir 1992).