

**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,**

**Plaintiffs,**

**v.**

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

**Defendants.**

**Case No. CI \_\_\_\_\_**

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

Plaintiffs allege:

**Case Overview**

1. Plaintiffs, individual 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.

2. Damages are sought for the allocations and rights to water taken, misappropriation of water, and the consequential damages caused by water deprivation. This occurred when Defendants caused naturally occurring stream flow to be interrupted through diversion and groundwater pumping, and when they 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 has a usufructury right 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. This is an action for inverse condemnation. Damages are sought. Trial by jury is demanded. Plaintiffs sue on the basis that a constitutional tort was committed against them.

### **Jurisdiction, Venue, Parties**

5. 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.<sup>1</sup> This action seeks a declaratory judgment and damages for the victims of this constitutional tort.

6. 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 members, reside in, own land in, farm in or 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 geography of the Frenchman Cambridge Irrigation District (FCID).<sup>2</sup> Venue is authorized by *Neb Rev Stat* §§ 25-402 & 403.01(2) & (3).

7. 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

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<sup>1</sup> *Dishman v Nebraska PPD*, 240 Neb 452, 482 NW2d 580 (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.*

<sup>2</sup> 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.

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.

8. The Plaintiffs and class representatives are:

- 8.1. Greg Hill, a resident of Furnas County, Nebraska.
- 8.2. Brent Coffey, a resident of Harlan County, Nebraska.
- 8.3. James Uerling, a resident of Red Willow County, Nebraska.
- 8.4. Warren Schaffert, a resident of Hitchcock County, Nebraska.

9. Each Plaintiff is a FCID water user, and 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 United States Department of Interior, Bureau of Reclamation, as water necessary to produce corn, soybeans, and other crops. Without this water, the essential character of Plaintiffs' surface water irrigated 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 by reduced crop production.

10. The Defendants are:

- 10.1. State of Nebraska; and
- 10.2. Nebraska Department of Natural Resources ("DNR")

#### **The Class**

11. 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 2013 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 furnished to Defendants and their counsel upon request; the list is not appended to this Complaint but the Class consists of more than 150 Members.

12. The questions presented in this action are of common or general interest to many persons, including all members of the 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.<sup>3</sup> A class action is a superior method for resolution of the issues presented.

13. 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. Accordingly, the numerosity requirement for a class action is satisfied.<sup>4</sup>

14. 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.<sup>5</sup> These questions include:

14.1. 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

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<sup>3</sup> *Hoiengs v. County of Adams*, 245 Neb 877, 903, 516 NW2d 223, 242 (1994)

<sup>4</sup> *Neb Rev Stat* § 25-319.

<sup>5</sup> *Id.* 245 Neb at 901-902, 516 NW2d at 241

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.

14.2. Has a compensable taking occurred?

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

Accordingly, the commonality required for a class action is satisfied. These questions predominate over other questions.

15. Plaintiffs are proper class representatives. They have no interests adverse to any other class members. Instead, each Plaintiff is an 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.<sup>6</sup> The number of Class Members exceeds 150. All members of the class seek the same outcome of this action as Plaintiffs, i.e., a judgment of liability against the Defendants requiring that just compensation damages be paid, calculated on an

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

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.

16. 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.<sup>7</sup>

### General Allegations

17. 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 2013:

<b>2013</b>	
<b>Crop</b>	<b>Corn</b>
Acres	74.4 A
Potential Yield	167 Bu/A ( <i>if irrigated</i> ) (Furnas Co av)
Actual Yield	201 Bu/A
Price/Bushel	\$4.39/Bu (Furnas Co price under crop ins)
<b>Crop</b>	<b>Corn</b>
Acres	43.1 A
Potential Yield	167 Bu/A
Actual Yield	15.9 Bu/A
Price/Bushel	\$4.39/Bu
<b>Crop</b>	<b>Feed Cane – Alternative Crop</b>
Acres	22.2 A
Potential Yield	NA (Planted to mitigate)
Actual Yield	2.62 T/A
Price/ac	\$30 / ton x 2.5 ton / ac = \$75/ac

18. 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

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

County where he resides. Mr. Coffey's crop production was, and should have been, as follows for the affected irrigation season in year 2013:

<b>2013</b>	
<b>Crop</b>	<b>Soybeans</b>
Acres	54.0 A
Potential Yield	58.0 Bu/A ( <i>if irrigated</i> )(Harlan Co av)
Actual Yield	28.1 Bu/A
Price/Bushel	\$12.87/Bu (Harlan Co price under crop ins)
<b>Crop</b>	<b>Soybeans</b>
Acres	66.5 A
Potential Yield	58.0 Bu/A
Actual Yield	32.5 Bu/A
Price/Bushel	\$12.87/Bu
<b>Crop</b>	<b>Corn</b>
Acres	68 A
Potential Yield	189.0 Bu/A
Actual Yield	123 Bu/A
Price/Bushel	\$4.39/Bu
<b>Crop</b>	<b>Corn</b>
Acres	96.4
Potential Yield	189.0 Bu/A ( <i>if irrigated</i> )
Actual Yield	12.3 Bu/A
Price/Bushel	\$4.39/Bu
<b>Crop</b>	<b>Oats – Alternative Crop</b>
Acres	8.8 A
Potential Yield	NA Raised to mitigate
Actual Yield	4.0 Bu/A
Price/Bushel	\$2.64

19. **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 2013:

2013	
<b>Crop</b>	<b>Alfalfa</b>
Acres	6.95 A
Potential Yield	5.78 T ( <i>if irrigated</i> ) ( <i>Red Willow Co Av</i> )
Actual Yield	3.7 T
Price Per Ton	\$250/T
<b>Crop</b>	<b>Alfalfa</b>
Acres	4.5 A
Potential Yield	5.78 T
Actual Yield	4.0 T
Price Per Ton	\$250/T
<b>Crop</b>	<b>Corn</b>
Acres	185.6 A
Potential Yield	174.0 Bu/A
Actual Yield	116.7 Bu/A
Price/Bushel	\$4.39/Bu (Red Willow Co crop ins)
<b>Crop</b>	<b>Corn</b>
Acres	21.85 A
Potential Yield	174.0 Bu/A ( <i>if irrigated</i> )
Actual Yield	51.5 Bu/A
Price/Bushel	\$4.39/Bu
<b>Crop</b>	<b>Corn</b>
Acres	95.4 A
Potential Yield	174.0 Bu/A
Actual Yield	0 (Left fallow)
Price/Bushel	\$4.39/Bu

20. 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 2013:

2013	
<b>Crop</b>	<b>Corn</b>
Acres	59.7 A
Potential Yield	175.0 Bu/A
Actual Yield	0
Price/Bushel	\$4.39/Bu (Hitchcock Co crop ins)
Mitigation	None possible.



21. Each and all individual class members suffered 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 Plaintiff and each class member as both price and yield potential are determined from USDA and Public compilation or crop insurance data.

22. 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.

23. Prior to 2013, each Plaintiff and class member used surface irrigation water from FCID. 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 water to produce growing crops. Plaintiffs and the class members are, or should have been, recipients of this water,

24. Prior to and during the 2013 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:

- 24.1 Trenton Dam and Swanson Lake – providing flow into Meeker-Driftwood Canal System, Bartley Canal System and Cambridge Canal System
- 24.2 Red Willow Dam and Hugh Butler Lake– providing flow into Red Willow Canal System, Bartley Canal System and Cambridge Canal System
- 24.3 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.

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

- 25.1. “Compact call” declaring water-short conditions and commanding shut downs
- 25.2. Natural flow shut down order
- 25.3. Reservoir inflow bypass order
- 25.4. Contact with US Dept of Interior Bureau of Reclamation

26. 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.

27. The dams involved are described as follows:

- 27.1. 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.
- 27.2. 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 cubic feet per second. The Meeker-Driftwood Canal has 62.9 miles of canal and approximately 43 miles of buried pipe laterals.

27.3. 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.

28. The Frenchman Cambridge Irrigation District 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 Frenchman Cambridge Irrigation District is separate from the Frenchman Valley Irrigation District.

29. 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.<sup>8</sup> They were constructed commencing in 1947 with total completion, in all respects, not later than 1964, when Red Willow Canal was concluded.<sup>9</sup> 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 years at issue in this litigation.

#### **Nature of Claims**

30. Each Plaintiff, and each member of Plaintiff's class, suffered a loss of crop production in each of the claimed years 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

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<sup>8</sup> 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]

<sup>9</sup> No federal claim is asserted in this Complaint.

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.

31. 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:

- 31.1. The number of acres that should have received water is determined;
- 31.2. 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;
- 31.3. The actual crop for each producer is determined and subtracted from the expected crop, leaving a balance for each producer Plaintiff, or class member;
- 31.4. 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
- 31.5. 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.

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

33. Certain class members suffered damages due 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:

- 33.1. The number of acres of perennial crop, namely alfalfa or other hay as determined;
- 33.2. The value of the hay as determined on a market basis;
- 33.3. The actual amount of the hay harvested in each claim year 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;
- 33.4. The number of tons lost is multiplied by the county average price for the claim year; and
- 33.5. 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.

34. 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.

### **2013 Damages Claims**

35. 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.<sup>10</sup> Water included involves the usufructury 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 usufructury right of each Plaintiff and each class member.

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<sup>10</sup> *Spear T Ranch v Knaub*, 269 Neb 177, 691 NW2d 116 (2005).

36. Defendants issued a Compact Call Advisory on FCID, and all class members, on December 10, 2012 stating that the Department of Natural Resources would issue a Closing Notice in January and prohibit all members from diversion or storage of surface water rights unless otherwise subsequently noticed. The Advisory does not disclose any plan by the Defendants of initiating formal condemnation proceedings. No notice of such proceedings has been received by the Class Representatives.

37. The Department of Natural Resources issued an Order declaring a Compact Call Year in Effect on January 1, 2013 against surface water users in the Republican River Basin for the alleged purpose of state compliance with the Republican River Compact (“Compact”). Under the terms of the Order, the DNR regulated and administered surface water in the basin as it deemed necessary for Compact compliance with, and the public benefit of, the state of Kansas.

38. The Order closed all surface water appropriations in the Republican River Basin above the Guide Rock Diversion Dam. All FCID users are located upstream from the Guide Rock Diversion Dam. All users, and all class members, were denied any benefits or use from their surface water allocations of eighteen (18) acre inches per acre permitted.

39. The Call on the Republican River Basin was ordered prior to, and without, any condemnation proceedings for any FCID user, including 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.<sup>11</sup> As a result, the entirety of FCID’s surface water appropriation bypassed the class members and was diverted for the public use of satisfying Nebraska’s obligations to the state of Kansas under the Compact. All FCID users and class members were injured.

40. 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, two (2) inches per acre permitted for Cambridge Canal and 1.5

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<sup>11</sup> *Krambeck v City of Gretna*, 198 Neb 608, 254 NW2d 691 (1977)

inches per acre permitted for Meeker-Driftwood Canal, diverted from the federal reservoirs. The Bartley Canal and the Red Willow Canal reach received an allocation of 0.0 inches. This allotment did not provide an adequate water supply to the class members for conducting farming operations. All suffered crop loss as a result of the Defendants' full diversion of FCID's surface water appropriation for 2013.

41. Plaintiffs and all class members initiate this cause of action as an inverse condemnation proceeding. Private rights, those of surface water appropriations for each 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.<sup>12</sup>

#### **Requests for Relief**

42. On the foregoing basis, Plaintiffs respectfully request:

- 42.1. 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.
- 42.2. Plaintiffs seek judgment against Defendants for a determination that Defendants are liable for depriving Plaintiffs of water and for consequential damages to their annual and perennial crops.
- 42.3. Plaintiffs request that after liability is determined, 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.

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<sup>12</sup> *NE Const Art I § 21; Dishman v Nebraska Public Power District*, 240 Neb 452, 453, 482 NW2d 580, (1992)

- 42.4. Upon completion of the submission of claims, Plaintiffs request that the Court review the claims and determine without a jury, the amount due to each class member.
- 42.5. 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. Judgment is also sought for all expert witness fees incurred by Plaintiffs.
- 42.6. The Court 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.
- 42.7. Prejudgment and post-judgment interest be awarded to the extent permitted by law, and costs be taxed to Defendants.

### **Demand for Trial by Jury**

43. As is provided by the Nebraska Constitution, and as was permitted in English Common Law prior Nebraska's statehood, Plaintiffs respectfully demand trial by jury<sup>13</sup> but do so only on the issue 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.<sup>14</sup>

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<sup>13</sup> *Dishman v Neb PPD*, 240 Neb 452, 482 NW2d 580 (1992); *Rose v City of Lincoln*, 234 Neb 67, 449 NW2d 522 (1989).

<sup>14</sup> The Court has power to use a claims procedure for administration of the outcome. Cf., *Watson v Shell Oil Co*, 979 F2d 1014, 1018 (5<sup>th</sup> Cir 1992).



### **Offer to Compromise Claims**

44. Notice is given that Plaintiffs hereby offer to settle and compromise the foregoing claims on this basis:

- 44.1. 2013 – for corn producers in Furnas County, a loss in production of 167 bushels per acre, minus the number of bushels actually produced as determined by the claim process, at a price of \$4.39 per bushel.
- 44.2. 2013 – for corn producers in Red Willow County, a loss in production of 174 bushels per acre, minus the number of bushels actually produced as determined by the claim process, at a price of \$4.39 per bushel.
- 44.3. 2013 – for corn producers in Hitchcock County, a loss in production of 175 bushels per acre, minus the number of bushels actually produced as determined the claim process, at a price of \$4.39 per bushel.
- 44.4. 2013 – for corn producers in Harlan County, a loss in production of 189 bushels per acre, minus the number of bushels actually produced as determined by the claim process, at a price of \$4.39 per bushel.
- 44.5. 2013 – for soybeans producers in Furnas County, a loss in production of 53 bushels per acre, minus the number of bushels actually produced as determined by the claim process, at a price of \$12.87 per bushel.
- 44.6. 2013 – for soybeans producers in Red Willow County, a loss in production of 58 bushels per acre, minus the number of bushels actually produced as determined by the claim process, at a price of \$12.87 per bushel.
- 44.7. 2013 – for soybeans producers in Hitchcock County, a loss in production of 52 bushels per acre, minus the number of bushels actually produced as determined by the claim process, at a price of \$12.87 per bushel.
- 44.8. 2013 – for soybeans producers in Harlan County, a loss in production of 58 bushels per acre, minus the number of bushels actually produced as determined by the claim process, at a price of \$12.87 per bushel.

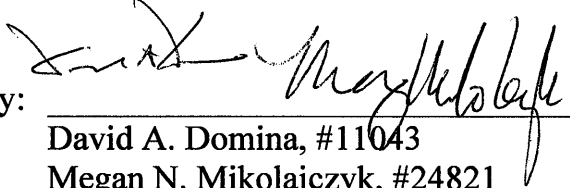
- 44.9. 2013 – for alternative crop producers in Furnas County, a loss in production of 167.0 bushels per acre of corn, minus the number of bushels actually produced as determined by the claim process, at a price of \$4.39 per bushel of corn and the county average price per bushel of the alternative crop.
- 44.10. 2013 – for alternative crop producers in Red Willow County, a loss in production of 174.0 bushels per acre of corn, minus the number of bushels actually produced as determined by the claim process, at a price of \$4.39 per bushel of corn and the county average price per bushel of the alternative crop.
- 44.11. 2013 – for alternative crop producers in Hitchcock County, a loss in production of 175 bushels per acre of corn, minus the number of bushels actually produced as determined by the claim process, at a price of \$4.39 per bushel of corn and the county average price per bushel of the alternative crop.
- 44.12. 2013 – for alternative crop producers in Harlan County, a loss in production of 189.0 bushels per acre of corn, minus the number of bushels actually produced for the alternative crop, as determined by the claim process, at a price of \$4.39 per bushel of corn and the county average price per bushel of the alternative crop.
- 44.13. 2013 – for alfalfa producers in Furnas County, a loss in production of 5.32 tons per acre, minus the number of tons per acre actually produced as determined by the claim process, at a price of \$250.00 per ton.
- 44.14. 2013 – for alfalfa producers in Red Willow County, a loss in production of 5.78 tons per acre, minus the number of tons per acre actually produced as determined by the claim process, at a price of \$250.00 per ton.
- 44.15. 2013 – for alfalfa producers in Hitchcock County, a loss in production of 4.89 tons per acre, minus the number of tons per acre actually produced as determined by the claim process, at a price of \$250.00 per ton.

44.16. 2013 – for alfalfa producers in Harlan County, a loss in production of 5.41 tons per acre, minus the number of tons per acre actually produced as determined by the claim process, at a price of \$250.00 per ton.

45. Pursuant to *Neb Rev Stat* § 45-103.02 notice is given that this offer to settle and compromise shall be withdrawn if not accepted within thirty (30) days. It shall be filed with the Clerk of the District Court and shall be used as a predicate for Plaintiffs' claim that prejudgment interest is due retroactive to the date of this offer to settle as provided by law.

July 31, 2014.

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

By:   
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