

IN THE DISTRICT COURT OF FURNAS COUNTY, NEBRASKA

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

Case No. CI14-68

Plaintiff,)

v.)

ORDER DENYING IN PART AND
SUSTAINING IN PART
DEFENDANTS' RULE 12(b)(6)
MOTION TO DISMISS

State of Nebraska and)
Nebraska Department of Natural)
Resources, a State Agency)
Defendant.)

On July 2, 2015, a hearing was held on the Defendant's April 30, 2015, Motion to Dismiss. The Plaintiffs were represented by their attorney, David A. Domina. The Defendants were represented by their attorney, Justin Lavene. Arguments were made and the parties were granted time to submit briefs in support of their positions. The motion was submitted and taken under advisement.

On September 28, 2015, the motion came on for decision after the court's consideration of the parties' arguments and briefs. The court finds and orders as follows:

The court incorporates herein by this reference the following parts of the court's March 24, 2015, order sustaining the defendant's Rule 12(b)(6) motion to dismiss and granting the plaintiff's leave to amend: all of the Section I of factual background, (pages 1 through 3 of the March 24, 2015 order,) Paragraphs A, and Subparagraphs 1, 2 and 3 under Paragraph B of Section II, (analyses, findings, and conclusions,) (pages 4 through 14 of the March 24, 2015 order.)

Principles governing motions to dismiss

The rule applicable to motions to dismiss under Rule 12(b)(6) has been stated by the supreme court as follows:

To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, which state a claim to relief that is plausible on its face. In cases in which a plaintiff does not or cannot allege sufficient facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.¹

Further, when considering a motion to dismiss, the court accepts as true all facts which were well pled by the plaintiff and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the plaintiff's conclusions.²

Statement of claims

In their first amended complaint, the plaintiffs made two claims both grounded on inverse condemnation. In their first claim, the plaintiffs assert that, despite the presence of water in the stream that was allocated to the State of Nebraska under the Republican River Compact, the defendants precluded the plaintiffs from exercising their water rights to capture said water and apply it to their fields. The plaintiffs claim such preclusion amounted to a taking for which they are entitled to compensation under the Nebraska and Federal Constitutions.

In their second claim, the plaintiffs alleged the defendants did not stop or curtail ground water pumping in the Republican River basin; and by reason of such failure, the defendants deprived the plaintiffs of water within Nebraska's allotment of Republican River basin water which would otherwise have been subject to capture by the plaintiffs under their surface water appropriation rights.

¹ *Bruno v. M.U.D.*, 287 Neb. 551 (2014).

² *Id.*

The defendants assert that neither of these claims state causes of actions under Nebraska law.

III. Analyses, findings, and conclusions

A. Plaintiff's claim under alleged improper stream flow administration.

The legislature delegated to the Department of Natural Resources (DNR) jurisdiction over all matters pertaining to water rights for irrigation, power, or other useful purposes.³ DNR's jurisdiction over all matters pertaining to water rights is exclusive and includes "...the duty of administering the waters in streams in accordance with adjudicated appropriations of water in order of priority."⁴

The administration of the waters in streams is the exercise of the police power; and in the exercise of such power, DNR is required to "...supervise and control the appropriation, diversion, and distribution of the public waters of the state..."⁵ Further, DNR has the duty to "...administer the waters of streams and rivers to prevent waste, to protect prior appropriators against subsequent appropriators, and to enforce all adjudicated water rights in accordance with their terms."⁶

The plaintiffs contend that despite the fact there was water available to Nebraska water users under the Republican River Compact, DNR precluded the plaintiffs from exercising their appropriation rights. In their Motion to Dismiss, the defendants contended such claim failed to state a cause of action for a taking for which the plaintiffs are entitled to compensation. The defendants contended the amended complaint failed to state a claim because the department's

³ Neb. Rev. Stat. §61-206(1) (Reissue 2009).

⁴ *Hickman v. Loup River Public Power Dist.*, 176 Neb. 416, 431 (1964).

⁵ *St ex. rel Cary v. Cochran*, 138 Neb. 163, 168 (1940).

⁶ *Id.* at 169.

stream administration was not made under the power of eminent domain but, instead, the administration was the valid exercise of the police power and was not a taking.

The question presently before this court is not whether the plaintiffs will be able to prove the allegations sufficient to establish a taking because the court is not testing the substantive merits of the claim under § 6-1112 (b)(6). Instead, the court must assume the allegations are true and construe them in the light most favorable to the plaintiffs.

In *Scofield v. Dep't of Nat. Res.*,⁷ the Supreme Court reversed the trial court which sustained a motion to dismiss a claim of an alleged taking that was the product of a regulatory action. The Supreme Court held that even though that there was neither a permanent nor physical invasion of the plaintiffs' property, nor a complete deprivation of all economically beneficial use of the property, the plaintiffs sufficiently alleged a cognizable claim of a regulatory taking.⁸ In *Scofield*, the plaintiffs alleged the DNR's adoption of regulations establishing the boundaries of a state game refuge constituted an unlawful taking of their property. The Supreme Court held the allegations stated a claim under the factors described in *Penn Central Transp. Co. v New York City*⁹.

After consideration of the plaintiffs' first claim under the analysis applied in *Scofield v. DNR*, the court finds the allegations made in the first claim set forth a claim for relief that is plausible on its face. Like the circumstances in *Scofield v. DNR*, the DNR in this case took an action which, accepting the plaintiffs' allegations as true, deprived the plaintiffs' of the right to use a property right. That is, the allegations that DNR's regulation of the use of Republican River water deprived the plaintiffs' of the use of their water rights when there was water available for use, are sufficient to make plausible a claim that the DNR's action amounted to a

⁷ *Scofield v. Dep't of Nat. Res.* 276 Neb. 215 (2008).

⁸ *Id.*, at 233.

⁹ *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S. Ct. 2646, 57, L. Ed. 2d631 (1978).

taking without just compensation. The defendants' motion to dismiss should be, and hereby is, overruled and denied as to such claim.

B. Plaintiffs' claims concerning the alleged failure of the defendants to regulate ground water.

In their second claim, the plaintiffs alleged the defendants effected a taking of their property rights by reason of the defendants' failure to regulate ground water. The plaintiffs claimed the defendants permitted ground water to be "intercepted in its subterranean flow to the stream that would have been subject to capture if it had not been intercepted in the natural course of the hydrologic interconnected flow of waters in the Republican River basin." Essentially, the plaintiffs alleged the defendants allowed "excessive ground water pumping of hydrologically interconnected ground and surface water." The defendants contended this claim fails to state the cause of action because the defendants do not have the authority nor the duty to regulate ground water.

In *Spear T Ranch, Inc. v Neb. Dep't of Nat. Res.*,¹⁰ a surface water appropriator asserted DNR permitted the diversion of water from its lands by failing to control ground water pumping, which the appropriator claimed resulted in a taking via inverse condemnation. The Nebraska Supreme Court rejected the appropriator's takings claim by declaring that DNR "...does not have authority to regulate ground water users or administer ground water rights for the benefit of surface water appropriations."¹¹ This holding followed the earlier decision of the court that DNR had no authority to regulate ground water when the court rejected the claim of an irrigation district that the Department had allowed unpermitted ground water use to harm surface water appropriation in the Platte River basin.¹²

¹⁰ *Spear T Ranch, Inc. v Neb. Dep't of Nat. Res.*, 270 Neb. 130 (2005).

¹¹ *Id.* at 139.

¹² *In re complaint of Cent. Neb. Pub. Pow. & Irr. Dist.*, 270 Neb. 108 (2005).

In rejecting the ground water claim in *Spear T Ranch v DNR*, the Supreme Court held DNR's "...action or inaction did not amount to a taking or damages as alleged by [the appropriator]. Because [the appropriator] had no property that was damaged or taken by the Department, [the appropriator] could not assert a cause of action for inverse condemnation."¹³

The plaintiff in *Spear T Ranch v DNR*, alleged DNR had both a common-law and a statutory duty to protect the rights of surface water appropriators. The Supreme Court dismissed both the common-law and statutory duty claims made by the appropriator. In doing so, the Supreme Court noted that all of the appropriator's

...causes of action are based upon the assumption that the Department has a duty to resolve conflicts between surface water appropriators and ground water users. It is well established that the Department has only that authority which the legislature has specifically conferred on it by statute or by construction necessary to achieve the purpose of the relevant act.¹⁴

The Supreme Court concluded "...the Department has no common-law or statutory duty to regulate the use of ground water in order to protect [the appropriator's] surface water appropriations."¹⁵ The court further stated that in the absence of "...independent authority to regulate the use of ground water, the Department has no legal duty to resolve conflicts between surface water appropriators and ground water users."

By force of logic, if DNR does not have a duty to regulate ground water, an alleged failure to exercise such nonexistent duty does not amount to a taking which would entitle the plaintiffs claim to proceed. The court finds the plaintiffs' claims based on DNR's alleged failure to regulate ground water fails to state a plausible cause of action. The motion to dismiss the plaintiffs' takings claims based upon the failure to regulate ground water should be sustained.

Under the state of the law as announced by the Supreme Court in *Spear T Ranch*

¹³ *Spear T Ranch, Inc. v. Neb. Dist. Of Nat. Res.* 270 Neb.

¹⁴ *Id.* at 137-138.

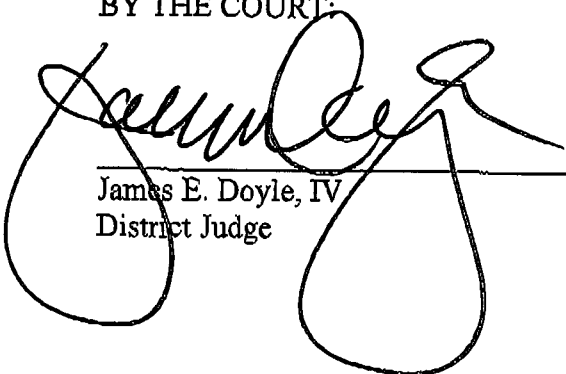
¹⁵ *Id.* at 138.

v. *DNR*, any efforts by the plaintiffs to set forth a general scenario based on a duty on the part of *DNR* to regulate ground water would be futile. As a result, the plaintiffs' second claim is dismissed with prejudice and without leave to amend.

It is therefore ordered, adjudged, and decreed:

1. The above and foregoing findings are so founded and ordered accordingly;
2. The defendants' April 30, 2015, Motion to Dismiss is denied in part and granted in part as set forth above;
3. The plaintiffs' second claim based upon the defendants' alleged failure to regulate ground water is dismissed with prejudice and without leave to amend; and,
4. The defendants are granted 30 days from the date file stamped on this order to file further pleadings in response to the remaining claim in the plaintiffs' first amended complaint.

BY THE COURT:



James E. Doyle, IV
District Judge