**District Court, Furnas County, Nebraska**

**CI 14-68**

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**Greg Hill et al. Plaintiffs**

**v**

**State of Nebraska and**
**Nebraska Department of Natural Resources,**
**Defendants**

**-------- / ~~~ / -------**

# Plaintiffs' Pre-Hearing Brief in Opposition to Defendant's Motion to Dismiss Their Amended Complaint

**June 2015**

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## I. Jurisdictional Statement

1. This Court overruled the Defendants' challenge to its jurisdiction in its March 24, 2015 Order disposing of the Defendants' Motion to Dismiss Plaintiffs' original Complaint. No new challenge to subject matter jurisdiction is mounted in this new Motion to Dismiss.

## II. Statement of the Case

2. **The Motion to be Decided.** The Court's first Order permitting Plaintiffs to amend their Complaint makes it clear that a plausible, viable claim for inverse condemnation lies against the Defendants if appropriate facts are pled and proven. Plaintiffs' Amended Complaint ("Complaint") timely filed on April 10, 2015, asserts two (2) distinct claims:

**1st Claim: Water In The Stream.** Complaint ¶23 et seq, p 9

**2nd Claim: Water Denied to Plaintiffs Through Denial to the Stream.** Id. ¶47, p23.

3. Both Claims arise from regulatory decisions, but physical Takings, of water that Plaintiffs have a prior right to use – not to own, but to use. The Plaintiffs' use right is to a physical asset, water, that is taken from them by the State's preference of a different, lower priority user. *Spear T Ranch v Knaub*, 269 Neb 177, 186-88 (2005). This is a physical Taking[1] case; it is not a "regulatory Taking" arising under the doctrine of *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978)(regulation of air rights above Grand Central Station held not severe enough to so limit use and fulfillment of investment based expectations as to constitute a constructive, regulatory Taking without physical occupancy or other Taking). The distinction between physical takings through regulatory decisions, and "regulatory takings", is difficult.

[1] "Taking" as contrasted with "taking" refers to the act of governmental appropriation of property or rights in property of a citizen for a public purpose. A "Taking" is compensable with just compensation. US Const *Amend V*; *Neb Const* Art I, § 21; *Neb Const* Art XV, §§ 4-6.

4. The case law addresses two general categories of Takings cases-physical and regulatory. This is discussed in the Argument, below. A trilogy of U.S. Supreme Court cases yield the conclusion that Taking water through governmental regulatory action is a physical taking. These cases, discussed at the outset of the Argument, below, make clear the conclusion that regulatory action produced a physical Taking of Plaintiff's water. The 2013 Taking of water within Nebraska's 49% of Basin waters under the Compact, subject to capture in the stream but for Defendants' actions, and to which Plaintiffs had priority use rights, is a compensable physical Taking. The 1st Claim is pled to satisfy each requirement of the Court's March 24 Order. It successfully states a claim.

5. The 2nd Claim pleads, distinctly, a claim for the Defendants' failure to manage the ground-to-surface water phenomenon through appropriate regulation of groundwater pumping. This failure robs the stream of water subject to capture in a natural and continuous sequence of interrelated water movements above and below the earth's surface. It deprives Plaintiffs of available water and constitutes a distinct Taking compensable with just compensation. The 2nd Claim also withstands §6 – 1112(b)(6) scrutiny.

6. The Defense Motion seeks dismissal on a single ground: failure to state a claim upon which relief can be granted. *Neb Ct R Plead* § 6-1112(b)(6). This Rule provides in its pertinent segment:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:
>
> *****
>
> (6) that the pleading fails to state a claim upon which relief can be granted…..

## III. Issues To Be Decided

7. These issues are presented by the Defense Dismissal Motion:

7.1. Does the 1st Claim pled by Plaintiffs allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face?

7.2. If the answer to this question is "no" should Plaintiffs be granted leave to amend?

7.3. Does the 2nd Claim pled by Plaintiffs allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face?

7.4. If the answer to this question is "no" should Plaintiffs be granted leave to amend?

## IV. How the Motion Should Be Decided

8. The Motion to Dismiss before the Court should be overruled and Defendants should be ordered to Answer. This decision should be reached with respect to both of Plaintiffs' Claims. The only ground for dismissal asserted turns on the plausibility of Plaintiffs' Amended Complaint's ("Complaint") claims.

> To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face. In cases in which a plaintiff does not or cannot allege specific 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.

*Bruno v Metro. Util Dist.*, 287 Neb 551, 558 (2014); *Doe v. Bd. of Regents of Univ. of Nebraska*, 280 Neb. 492, 788 N.W.2d 264 (2010).

9. The Motion for Dismissal has no merit. None of the repetitive arguments for dismissal are persuasive. Many have no application to the case; others recited rules of law applicable to other aspects of water litigation, and contested issues in the Kansas-Nebraska litigation, but are inapposite when juxtaposed to Plaintiffs' Claims for just compensation.

Defendants fail to recognize that Plaintiffs do not contest the *power or justification* of the State to take their water; instead they seek just compensation for what was taken from them.

10. The fact that the Plaintiffs' right is a use right does not change this outcome since the use right is to a physical asset, water, that is taken from them by the State's preference of a different, lower priority user. *Spear T Ranch v Knaub,* 269 Neb 177, 186-88 (2005); cases *infra.*

11. Under well-recognized rules governing the judicial process, the Motion to Dismiss lacks merit and should be overruled.

12. In the event the Motion is sustained, leave to amend is respectfully requested.

## V. Standard of Review

13. A Motion to Dismiss for Failure to State a Claim presents a question of law. The Court is called upon to evaluate a motion to dismiss by accepting all allegations in the Complaint as true and drawing all reasonable inferences in favor of the nonmoving party. *Doe v Board of Regents,* 280 Neb 492 (2010). To prevail against a such a motion, a plaintiff must allege sufficient facts to show that relief is plausible. *State v Mamer,* 289 Neb 92 (2014).

14. Special issues are presented when a motion to dismiss presents matters outside the pleadings. When this occurs, the Court must decide what notice is required, and whether the motion before it will proceed as one for summary judgment. Where the moving party does not give notice and a reasonable opportunity to present material outside the pleadings and the Court proceeds as on a summary judgment motion, error occurs:

> Because a rule 12(b)(6) motion tests the legal sufficiency of the complaint, not the claim's substantive merits, a court may typically look only at the face of the complaint to decide a motion to dismiss. Dismissal under rule 12(b)(6) should be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief. However, rule 12(b) provides that when matters outside the pleading are presented by the parties and accepted by the trial court with respect to a motion to

> dismiss under rule 12(b)(6), the motion "shall be treated" as a motion for summary judgment as provided in *Neb Rev Stat* §§ 25-1330 to 25-1336 (Reissue 2008) and the parties shall be given reasonable opportunity to present all material made pertinent to such a motion by statute.

*DMK Biodiesel, LLC v McCoy*, 285 Neb 974, 978-79 (2013), reversed & remanded for trial after subsequent summary judgment on remand, *DMK Biodiesel, LLC v. McCoy*, 290 Neb. 286, 859 N.W.2d 867 (2015). Accord, *Central Neb Pub Power & Irr Dist v Jeffrey Lake Dev, Inc*, 282 Neb 762, 764-65 (2011).

15. Well-pled facts are accepted as true when a trial court passes on a Motion to Dismiss. *Bradley Bros. v Kimball County Hosp*, 298 Neb 879 (2015); *Bruno v Metro. Util. Dist.*, 287 Neb 551, 558 (2014). Dismissal at the pleading stage is rare, and granted "only in the unusual case" where the Complaint discloses that the plaintiff has no chance to prevail because "some insuperable bar to relief" appears. *DMK Biodiesel, supra.* No such bar is present in this case.

16. Dismissal without leave to amend constitutes an abuse of judicial discretion if ordered without consideration of the request made by the pleading party to amend, or the possibility that amending can cure the apparent "insuperable bar" ailment in the pleading under consideration. *Neb Ct R Plead* §6-1115(a); *Gonzalez v Union Pacific RR Co.*, 282 Neb 47 (2011). Even at the summary judgment stage, leave to amend should be denied if further pleading would be futile. *InterCall, Inc. v Egenera, Inc.*, 284 Neb 801, 811 (2012).

17. The burden of proof and the standard for consideration of a Motion to Dismiss depends on how the trial court deals with the motion. Only a *prima facie* showing is required of the Plaintiffs to overcome a motion to dismiss. Absence of a genuine issue of material fact must be established by the moving party where the court treats a dismissal motion as one for summary judgment. *RFD-TV, LLC v WildOpenWest Finance, LLC*, 288 Neb 318, 323 – 24 (2014).

18. This case is before this Court on a § 6-1112(b)(6) dismissal motion, and not a motion for summary judgment under *Neb Rev Stat* § 25-1332 et seq. The Motion must be denied if the requisite *prima facie* showing is made by the Plaintiff farmers. *Id.*

## VI. Propositions of Law

19. The government has a "categorical duty" to pay just compensation after Taking property from a citizen for public use. *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 517, 184 L. Ed. 2d 417 (2012)– 18 (2012).

20. The Republican River Compact creates no exemption from the duty to comply with Nebraska's internal laws while dealing with the State's 49% allotment of Basin waters. *Republican River Compact*, 57 Stat 89, Art. IV & VIII. Also codified at *Neb Rev Stat* § A1-106.

## VII. Statement of Facts

21. All relevant facts are supplied by the First Amended Complaint ("Complaint"). It asserts class action allegations, ¶¶ 9-17, and defines the class as "[a]ll 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…." The individual Plaintiffs, and to their suitability to serve as class representatives, are described at ¶ ¶ 18 – 22. Substantive allegations describing the claims begin in earnest at ¶ 23, p9 of the Complaint.

**22. First Claim.** The 1st Claim pleads facts directly responsive to the Court's March 24 Order**.** It alleges that water in the stream, within Nebraska's 49% compact allotment, was subject to capture in 2013. Defendants captured it. But they withheld it from Plaintiffs who had priority rights to the water. The water was taken, and Plaintiffs are entitled to just compensation. The Complaint alleges:

| Element | ¶¶ | Allegations |
|---|---|---|
| Standing to Sue | 8-22 | Pltfs are farmers who are surface water users of Republican River waters supplied by FCID |
| Each Pltf used surface water with priority allocation rights | 24.9 | Pltfs' and FCID's rights predate the Final Settlement Stipulation and 2013 diversion decisions pursuant to 2003 FSS changes to the Rep R Compact |
| Rights to Water from Nebraska's allocation of Republican River Basin waters | 24.7-24.9 | Pltfs' and FCID's appropriation rights to divert unappropriated surface water as of dates preceding the Final Settlement Stipulation of 2003 and, in some cases, permits that pre-date the 1943 Compact. |
| Water Deprived within Nebraska's Compact water allotment | 24.4-24.7; 25-29 | 2013 was a Water Short Year, invoking 2 year averaging under the Compact. Nebraska's 49% allotment |
| Water was available in the stream | 24.10-24.15; 25 | Water within Nebraska's allotment was available in the stream and subject to capture in 2013. |
| Water was subject to capture and captured but withheld from Pltfs | 24.10-24.12; 25; 28-32 | In 2013, allocated surface water was available to Nebraska under the Compact. It was not appropriated, existed within the stream, was subject to capture, and was actually captured by Defendants but denied to Pltfs. The surface water was in subbasins & the main stem and was released too late to be used to farm. |
| Defendants took the water | 24.13-24.15; 28-32 | The status of Defendants and their authority to regulate waters are alleged. No challenge is mounted to the decision to take water, but Pltfs assert a right to just compensation and specify the precise amounts available but withheld from them. |
| Plfs and their Class had their water taken, sustained damages, and are entitled to compensation. | 18-22; 24.6-24.12; 25.8-27;34-46 | Pltfs are farmers and water users in the affected counties of Furnas, Harlan, and Red Willow & Hitchcock. Their crop production was short because water was withheld from them. The same is true for each class member. |

23. Claims for inverse condemnation are stated.

> …[I]nverse condemnation is a shorthand description for a landowner suit to recover just compensation for a governmental Taking of the landowner's property without the benefit of condemnation proceedings. *Strom v City of Oakland,* 255 Neb 210 (1998). Inverse condemnation has been characterized as an action or eminent domain proceeding initiated by the property owner rather than the condemnor, and has been deemed to be available where private property has been actually taken for public use without formal condemnation proceedings and where it appears that there is no intention or willingness of the taker to bring such proceedings. *Krambeck v City of Gretna,* 198 Neb 608 (1977).
>
> Because the governmental entity has the power of eminent domain, the property owner cannot compel the return of the property taken; however, as a substitute, the property owner has a constitutional right to just compensation for what was taken. *Id.* …[T]he threshold issue in an inverse condemnation case is to determine whether the property allegedly taken or damaged was taken or damaged as the result of the exercise of the governmental entity's exercise of its power of eminent domain; that is, was the Taking or damaging for "public use."

*Henderson v City of Columbus*, 285 Neb 482, 488 (2013). A respected treatise notes:

> Inverse condemnation has been characterized as an action or eminent domain proceeding initiated by the property owner rather than the public entity, and has been deemed to be available where private property has actually been taken for public use without formal condemnation proceedings and where it appears that there is no intention or willingness of the taker to bring such proceedings. Inverse condemnation is, therefore, a cause of action against a governmental defendant to recover the value of property which has been taken in fact by a governmental entity although not through eminent domain procedures.

11A McQuillin *Municipal Corporations* § 32:158 (WL 3d ed. Updated May 2015). Citing *Henderson,* the McQuillin's treatise says about Nebraska jurisprudence:

> A landowner is entitled to bring an action in inverse condemnation as a result of the self-executing character of the Takings clauses of the United States and Nebraska Constitutions. Nebraska's constitutional right to just compensation where property has been "taken or damaged" in the exercise of eminent domain is broader than the federal right for just compensation for property that has been "taken." The words "or damaged" in just compensation provision of state

> constitution include all actual damages resulting from the exercise of the right of eminent domain which diminish the market value of private property. Takings clause of state constitution is not a source of compensation for every action or inaction by a governmental entity that causes damage to property; instead, it provides compensation only for the Taking or damaging of property that occurs as the result of an entity's exercise of its right of eminent domain.

11A McQuillin *Municipal Corporations* § 32:158.

24. **Second Claim.** The 2nd claim incorporates the 1st but asserts, distinctly, that Plaintiffs were victimized by a Taking of groundwater authorized and permitted by Defendants for the benefit of water users with a lower priority rights. The groundwater taken was intercepted in its subterranean flow to the stream where it 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. These are the allegations made:

| **Element** | **¶¶** | **Allegations** |
|---|---|---|
| Standing, priorities, rights to waters taken, Taking | 47 | Incorporates ¶¶8-22; 24, 25. |
| Taking Committed 2013 | 48-50 | Defendants allow excessive groundwater pumping of hydrologically interconnected ground and surface water. |
| Taking through excessive groundwater pumping deprives water from streams | 51 – 52 | Fewer than 200 irrigations wells when Compact adopted (1943). Perhaps 18,000 wells by 2000. 75% decline in inflows to stream. Depletions to surface flows caused by groundwater use must be accounted for under the Compact as part of determining Nebraska's 49% allocation. Nebraska knowingly failed to comply with Compact obligations. |
| Defendants took action, but permitted excessive | 53-54 | Defendants took action to modestly reduce groundwater pumping but other actions that |

| | | |
|---|---|---|
| interception of groundwater through regulatory conduct though the law recognizes the ground and surface waters of the Basin as interconnected. | | disproportionately deprive Pltfs of surface water to which they have priority rights by preventing the water from reaching the stream. This disproportionality constitutes a constitutionally compensable Taking. |
| The Defendants' decision to use regulatory power to allow groundwater pumping at the expense of surface water users. | 53-54 | Causing water to be intercepted so it cannot reach the stream does not, in a hydrologically interconnected system of surface and groundwater in the Basin, avoid the occurrence of a constitutionally compensable Taking from Pltfs. |
| Damages and need for just compensation | 55 | Discovery is needed to ascertain how much water was denied to the streams and to Plaintiffs as a result of Defendants' Taking of surface water through interception of groundwater flow to the streams in the Basin. |

25. These allegations in the 2nd Claim are sufficient to demonstrate plausibility. A conscious regulatory decision to facilitate stream flow by properly regulating groundwater pumping would put water in the stream subject to capture. This would have happened in 2013. But, Defendants made the opposite choice. Choosing lower priority groundwater users over higher priority surface water users, Defendants permitted groundwater to be intercepted by wells and prevented from reaching the streams where it would have been subject to capture in the ordinary course of natural hydrology. This decision to prefer lower priority users over higher ones is a sufficient factual, and plausible, basis for just compensation. A claim is stated.

26. No ground advanced by the Defendants points of a deficiency in Plaintiffs' pleadings in either the 1st or 2nd Claims. Legal arguments are attempted, but they demonstrate neither deficiencies in the pleadings, nor any "insuperable bar" to recovery of just compensation.

Defendants can take the water from Plaintiffs, but must pay just compensation when they do so to benefit lower priority water users.

27. Defendants' Brief opens with these words in its "Background" section on p1. "Plaintiffs' surface water appropriations ***implicate*** the use of water within the Republican River Basin as allocated pursuant to an interstate compact…" Plaintiffs respectfully disagree. To "implicate" is to "accuse, admiscere, allege to be guilty, associate, brand, bring into connection with…. lodge a complaint… tangle…."[2] Plaintiffs' Claims do not accuse, or tangle with, or lodge a complaint against, the Compact. Plaintiffs concede the Compact, allege their water was within the 49% of Basin waters allocated by the Compact to Nebraska, and allege their water was taken for the benefit of inferior uses. The Compact's relationship to this case ends with the fact that the water taken from Plaintiffs is within Nebraska's Compact allocation.

28. Nothing about the Compact is germane once the Complaint (and at trial the evidence) establishes with well pled facts that the water taken is Nebraska's Compact water. The Defense Brief's 1st 16 pages are interesting but not germane to this case.

## VIII. Summary of Argument. Overview of Defense Positions

29. Defendants' arguments briefed to support dismissal of the Complaint each, and all, commence from the false factual predicate as demonstrated in the Statement of Facts above. Additional inaccurate legal predicates also launch Defense arguments into wide-of-the-mark orbits that generally circle from premise back to premise-expressed-as-conclusion. This occurs in each of the five arguments advanced for dismissal.

30. **First**, the Defense argues (Br 17) and incorrectly presumes that the State need not pay just compensation for water if it has the right to take the water. This first legal flaw

[2] http://legal-dictionary.thefreedictionary.com/implicate

permeates each Defense contention; the flaw is elementary. The State can always take private property for a public purpose. It can even do so using its police powers on an emergency basis, such as Taking over a hotel to suppress an insurrection in the street below, or even within the hotel. But, it must pay just compensation when this occurs because the entire public benefits from the action taken for everyone The Constitution does not impose the burden of public benefit on a single taxpayer who owned property situated in the wrong place at the wrong time.

31. **Second**, the State argues (Br 21, *passim*), *ad nauseum,* that it must comply with the Compact. And it must. But, the State controls its 49% of Basin water and must use it *within the bounds of State law and while respecting the rights of Nebraska citizens to its priority use* as the State achieves Compact compliance.

32. **Third**, the State argues (Br 30) it must not be held liable for inverse condemnation because it did not initiate a condemnation proceeding by exercising the power of eminent domain offense of life. It argues that DNR lacks statutory power to exercise eminent domain so it could not possibly have taken property from Plaintiffs. The argument reduces itself to this: "I did not break the law because it is against the law to break the law." Or "the State, through the DNR, did not condemn because it cannot condemn through the DNR." The logic of the law is linear, not circular. The argument fails. There is yet another way to view this flaw. Essentially, the State argues subject matter jurisdiction is absent "because the State of Nebraska has not waived its inherent sovereign immunity." The State overlooks the fact that two constitutions – of the United States and Nebraska respectively – prohibit the State, as a sovereign, from Taking private property for a public purpose *without just compensation for the property owner.*

33. In its **Fourth** Argument (Br p 34), the State contends it did not commit a regulatory Taking; the argument begins with the assumption "that Plaintiffs' allegations represent a regulatory inverse condemnation claim….". Not so. Plaintiffs claim a physical Taking of their 2013 water.

34. The **Fifth** Argument (Br p 40) asserts the State did not take water from Plaintiffs because it cannot regulate groundwater. This argument is directed to Plaintiffs' 2nd Claim. It, too, is circular. And the argument ignores the fact of Taking in 2013 of water with in Nebraska's allotment of total Basin waters, and in the stream or destined naturally for the stream in the ordinary course of hydrological and physical events, but permitted to be taken from the ground water portion of the total Basin waters and thereby prevented from becoming available for capture. The State did this by allowing excessive groundwater irrigation pumping, failing to balance all waters in the basin, interfering with the natural hydrologic process that prevented Plaintiffs from enjoying the surface water destined by nature to reach them, and affirmatively joining in this process by giving its imprimatur of approval to the prevention of stream streamflow by groundwater movement. Plaintiffs request that the Court overrule Defendants' motion to dismiss the Amended Complaint.

## IX. Argument

### 1. Nature of the Taking

35. Plaintiffs claim that the Taking of their water by the State in 2013 was a physical act produced by regulatory actions. A physical Taking occurs "when the government encroaches upon or occupies private land for its own proposed use." *Palazzolo v Rhode Island,* 533 US 606, 617 (2001). A physical Taking involves a "direct government appropriation or physical invasion of private property." Lingl v *Chevron,* 544 US 528, 537 (2005); *Sunrise Corp. of Myrtle*

*Beach v City of Myrtle Beach*, 420 F3d 322, 330 (4th Cir 2005).[3] When there is no physical invasion of private property, a regulatory Taking occurs "when a regulation … on land use interferes with a landowner's rights but does not deprive … all economically viable use." *Id.*

36. "Regulatory Takings" involve diminution in property value due to, generally, a) the economic impact on the property owner whose property is impacted financially but not Taken physically, b) the extent to which the impact interferes with distinct investment-back expectations, and c) the character of the government action. *Id.* A regulatory Taking occurs "when government action, although not encroaching upon or occupying private property, still affects and limits its use to such an extent that a Taking occurs." *Cienega Gardens v United States*, 265 F3d 1237, 1244 (Fed Cir 2001).

37. Diversion of water to which a property owner has a priority use right is a physical Taking. This conclusion was reached in an extensive opinion in *Casitas Muni Water Dist v United States*, 543 F3d 1276, 1288-89 (Fed Cir 2008). As the *Casitas* Court recognized, Supreme Court precedents "stake out two categories of regulatory action that generally will be deemed *per se* Takings." *Lingl v Chevron USA Inc.*, 544 US 528 538 (2005). Regulatory action is deemed a *per se* Taking when the government requires "an owner to suffer a permanent physical invasion of her property—however minor," *id.* (citing *Loretto v Teleprompter Manhattan CATV Corp.*, 458 US 419 (1982)). Such action effects a physical invasion of the property and therefore qualifies as a physical Taking. And, regulatory action can qualify as a *per se* Taking when the regulation "completely deprive[s] an owner of 'all economically beneficial use' of her property," I*d.* (quoting *Lucas v S.C. Coastal Council*, 505 US 1003, 1019 (1992)).

[3] Physical takings are sometimes called "categorical" as in *City of Myrtle Beach*. This causes confusion with the "categorical duty to pay just compensation" when a Taking occurs. This categorical duty is discussed below.

38. Regulatory Takings analysis outside the context of a physical or other *per se* Taking is "more complex." *Tahoe–Sierra Preservation Council, Inc. v Tahoe Regional Planning Agency,* 535 US 302,322(2002). "[R]egulatory Takings jurisprudence ... is characterized by 'essentially ad hoc, factual inquiries,' designed to allow 'careful examination and weighing of all the relevant circumstances.' " *Id.* at 321. (citations omitted). While there is no "set formula" for evaluating regulatory Takings claims, courts typically consider whether the restriction has risen to the level of a compensable Taking under the multi-factor balancing test articulated in *Penn Central,* 438 US at 124. *Lingl,* 544 US at 538–39.

39. A trilogy of Supreme Court cases involving water rights provides guidance on the demarcation between regulatory and physical Takings analysis with respect to these rights. They lead to the conclusion that the Taking present here is a physical one. 1st, in *International Paper Co. v United States,* 282 US 399 (1931), the United States, during World War I, issued a requisition order for all of the hydroelectric power of the Niagara Falls Power Company (Niagara Power). *Id.* at 405. At the time, Niagara Power leased a portion of its water to International Paper Co., which diverted the water with a canal to its mill. In response to the United States' direction to "cut off the water being taken" by International Paper to increase power production, Niagara Power terminated diversion of water to International Paper. *Id.* at 405–06. The termination made the mill inoperable for nearly nine months. *Id.* The United States did not take over either Niagara Power or International Paper, nor did it physically direct the flow of the water. Instead, the United States caused Niagara Power to stop International Paper from diverting water -- so the water would be available for third party use by "private companies for work deemed more useful [by the government] than the manufacture of paper." *Id.* at 404. This third party use served a

public purpose of supplying power for the war effort. The Supreme Court found direct government Taking of water that International Paper had a right to use – a physical Taking.

40. 2nd, in *United States v Gerlach Live Stock Co.,* 339 US 725 (1950), claimants held riparian water rights for irrigation of their grasslands by natural seasonal overflow of the San Joaquin River, The BOR built Friant Dam, a part of the Central Valley Project, upstream from the claimants' land. *Id.* at 730, 734. The Friant Dam was built to store high stage river flows which then were "diverted ... through a system of canals and sold to irrigate more than a million acres of land." As a result, "a dry river bed" was left downstream of the dam, and the overflow irrigation of the claimants' lands virtually ceased. *Id.* at 729–30. The United States caused water to be physically diverted away from the claimants for third party use under water contracts. The Dam served a public purpose of "mak[ing] water available where it would be of the greatest service." *Id.* at 728. The Supreme Court analyzed the government's action as a physical Taking.

41. *Third, Dugan v Rank*, 372 US 609 (1963), involved claims arising out of the United States' physical diversion of water for third party use with the Friant Dam. In *Dugan,* landowners along the San Joaquin River, owning riparian and other water rights in the river, alleged that the BOR's storage of water upstream behind the Dam left insufficient water in the river to supply their water rights. *Id.* at 614, 616. The Supreme Court agreed, and analyzed the government's physical appropriation of water as a physical Taking. *Casitas Mun. Water Dist. v United States*, 543 F3d 1276, 1288-90 (Fed Cir 2008).

42. These cases lead to the conclusion that regulatory action produced a physical taking of water from Plaintiffs in 2013. Other cases cited below provide more support.

## 2. Compact Superiority Does Not Trump The State Obligation To Pay Just Compensation When Surface Water Is Taken For A Lower Priority Use

41. The 1st Defense Argument (Br 17) urges that the obligation to comply with the Republican River Compact's justification for paying Plaintiffs nothing for their 2013 water. The State's position is incorrect. The Complaint concedes and presumes compliance with the Compact, and the legal right to comply. (Complaint ¶¶ 4, 15; 24, 24.14-.15, 25, 28, 29.) The Compact allots the water of the Basin among the States using a sub-basin by sub-basin allotment method. The Compact provides, at the end of its water allotments:

> The use of the waters hereinabove allocated shall be subject to the laws of the State, for use in which the allocations are made.

*Republican River Compact*, 57 Stat 89, Art. IV See also Art VIII for an additional expression of the duty of each State to comply with its internal laws. The Compact is also at *Neb Rev Stat* § A1-106 (Special Acts & Resolutions). This aspect of the Compact has not changed since 1943.

42. The Compact's key features were summarized earlier this year by the United States Supreme Court (Kagan, J. for the Majority):

> The Republican River originates in Colorado; crosses the northwestern corner of Kansas into Nebraska; flows through much of southwestern Nebraska; and finally cuts back into northern Kansas. Along with its many tributaries, the river drains a 24,900–square–mile watershed, called the Republican River Basin.
>
> …[The [federal] Government insisted that the three States of the Basin first agree to an allocation of its water resources. As a result of that prodding, the States negotiated and ratified the Republican River Compact; and in 1943, as required under the Constitution, Art. I, § 10, cl. 3, Congress approved that agreement. [It] thus became federal law….
>
> The Compact apportions among the three States the "virgin water supply originating in"—and, as we will later discuss, originating *only* in—the Republican River Basin. Compact Art. III; see *infra*, at 1059 – 1064. "Virgin water supply," as used in the Compact, means "the water supply within the Basin," in both the

River and its tributaries, "undepleted by the activities of man." Compact Art. II. The Compact gives each State a set share of that supply—roughly, 49% to Nebraska, 40% to Kansas, and 11% to Colorado—for any "beneficial consumptive use." *Id.,* Art. IV; see Art. II (defining that term to mean "that use by which the water supply of the Basin is consumed through the activities of man"). In addition, the Compact charges the chief water official of each State with responsibility to jointly administer the agreement. See *id.,* Art. IX. Pursuant to that provision, the States created the Republican River Compact Administration (RRCA). The RRCA's chief task is to calculate the Basin's annual virgin water … and to determine (retrospectively) whether each State's use of that water has stayed within its allocation.

All was smooth sailing for decades, until Kansas complained to this Court about Nebraska's increased pumping of groundwater, resulting from that State's construction of "thousands of wells hydraulically connected to the Republican River and its tributaries." …Kansas contended that such activity was subject to the Compact: To the extent groundwater pumping depleted stream flow in the Basin, it counted against the pumping State's annual allotment of water. Nebraska maintained …that groundwater pumping fell outside the Compact's scope, even if that activity diminished stream flow in the area. A Special Master we appointed favored Kansas's interpretation of the Compact; we summarily agreed, and recommitted the case to him for further proceedings. See *Kansas v Nebraska,* 530 US 1272 (2000). The States then entered into negotiations [ and eventually] …2002… the States signed the Final Settlement Stipulation (Settlement).

The Settlement established detailed mechanisms to promote compliance with the Compact's terms. The States agreed that the Settlement was not "intended to, nor could [it], change [their] respective rights and obligations under the Compact." Settlement § I(D). Rather, the agreement aimed to accurately measure the supply and use of the Basin's water, and to assist the States in staying within their prescribed limits. To smooth out year-to-year fluctuations and otherwise facilitate compliance, the Settlement based all Compact accounting on 5–year running averages, reduced to 2–year averages in "water-short" periods. *Id.,* §§ IV(D), V(B). That change gave each State a chance to compensate for one (or more) year's overuse with another (or more) year's underuse before exceeding its allocation. The Settlement further provided, in line with this Court's decision, that groundwater pumping would count as part of a State's consumption to the extent it depleted the Basin's stream flow. An appendix to the agreement called the "Accounting Procedures" described how a later-developed "Groundwater Model" (essentially, a mass of computer code) would perform those computations. *Id.,*

> App. C; *id.,* App. J1. And finally, the Settlement made clear, in accordance with the Compact, that a State's use of "imported water"—that is, water farmers bring into the area (usually for irrigation) that eventually seeps into the Republican River—would *not* count toward the State's allocation, because it did not originate in the Basin. *Id.,* §§ II, IV(F).
>
> But there were more rapids ahead: By 2007, Kansas and Nebraska each had complaints about how the Settlement was working. … After failing to resolve the disagreements in those forums, Kansas sought redress in this Court, petitioning for both monetary and injunctive relief. We referred the case to a Special Master to consider Kansas's claims. See 563 US ——, 131 S Ct 378….In that proceeding, Nebraska asserted a counterclaim requesting a modification of the Accounting Procedures to ensure that its use of Platte River water would not count toward its Compact allocation.
>
> After two years of conducting hearings….[t]he Master concluded that Nebraska had "knowingly failed" to comply with the Compact in the 2005–2006 accounting period, by consuming 70,869 acre-feet of water in excess of its prescribed share. Report 112. To remedy that breach, the Master proposed awarding Kansas $3.7 million for its loss, and another $1.8 million in partial disgorgement of Nebraska's still greater gains. The Master…thought that an injunction against Nebraska was not warranted. [T]he Master recommended reforming the Accounting Procedures in line with Nebraska's request, to ensure that the State would not be charged with using Platte River water.
>
> Kansas and Nebraska each filed exceptions in this Court to parts of the Special Master's report. …[W]e conduct an "independent review of the record," and assume "the ultimate responsibility for deciding" all matters. *Ibid.* Having carried out that careful review, we now overrule all exceptions and adopt the Master's recommendations.

*Kansas v Nebraska,* 135 S Ct 1042, 1049-51, 191 L Ed 2d 1 (2015).

43. The Defendants incorrectly presume that the State need not pay just compensation for water if it has the right to take the water. This first legal flaw permeates each Defense contention; the flaw is elementary. The State can always take private property for a public purpose. It can even do so using its police powers on an emergency basis,to provide public protection or discharge essential government functions. But, it must pay just compensation when

this occurs because the entire public benefits from the action taken for everyone; the Constitution does not impose the burden of public benefit on a single taxpayer who owned property situated in the wrong place at the wrong time.

44. The State concedes (Br 17) that certain surface users have preferential water use rights. They concede Plaintiffs properly plead such rights. *Id.* Complaint ¶¶ 3,4,15.1, 24.15. Defendants rely heavily on *Hinderlider v La Plata Riv & Cherry Creek Ditch Co,* 304 US 92 (1938) for the State's proposition that the Compact carves an exemption for compliance with State law. But the State's reliance on *Hinderlider* is misplaced. In the 1938 case, water outside the State of Colorado's Interstate Water Compact allotment was sought by a local user. The Supreme Court said the local user could not get more water than the State's total allotment, regardless of its priority use rights. Mr. Hill et al., here seek water *within* Nebraska's compact allotment to which they have priority water use rights. *Hinderlider* does not support the State's position; it is not germane to the facts presented by Mr. Hill and all Plaintiffs in this case.

45. *Badgley v City of New York*, 606 F2d 358 (2d Cir 1979), cited by the State (Br 18) is not persuasive either. In *Badgley v City of New York,* plaintiffs, who owned land along the Delaware River, complained that the City's diversion of water from the river (which was being done by order of the United States Supreme Court pursuant to an Amended Decree) interfered with their "right" to the "full natural flow of the Delaware River." 606 F2d 358, 365 (2d Cir 1979). Obviously, the plaintiffs had no right to the full natural flow of the Delaware River, because the Supreme Court had already decided, in the Delaware Watershed litigation, that the City of New York had the right to divert some of that "full natural flow" for its own use. The *Badgley* plaintiffs' claim was an attack on a Decree that New York State entered into on behalf of all its citizens. The Second Circuit held the plaintiffs had no standing to seek damages.. See, *Mei*

*v City of New York*, 2006 WL 2997111 (SD NY) (distinguishing *Badgley* as Plaintiffs do, here). The State seriously mis-cites *Badgley*. Cases from New Mexico and Colorado cited by the State (Br 19) are also not supportive of the State's position that the power to take yields immunity against payment of just compensation.

46. The State's argument that the State may administer waters of the Basin "to ensure Compact compliance" is also misplaced. Plaintiffs concede Compact compliance is necessary; they concede water can be taken by the State, and they concede it may be taken to assure delivery of Kansas' 40% of waters of the Basin under the Compact. These points are not at issue at all. Instead, Plaintiffs claim a) the water at issue is within Nebraska's 49% of waters of the Basin, b) in 2013, the water at issue was in the stream and subject capture, c) Plaintiffs have priority water use rights, d) the 2013 water in the stream, subject to capture and within Plaintiffs' priority use right, was taken by the State from Plaintiffs for another use that is not a priority use, and e) the State must comply with the Compact, which Plaintiffs concede, and it must comply with the State priority water use laws because the Compact does not create an exemption for the State from the State's internal water laws. As a result, the State committed a Taking and Plaintiffs are entitled to just compensation and damages.

47. Plaintiffs do not claim the State lacked a right to take the water for a public purpose. They contend they are entitled to be paid because the appropriation of water for the public purpose chosen is constitutionally and legally inferior to the Plaintiffs' usufructuary water right. The State's subject matter jurisdiction argument has been repeatedly rejected by the Supreme Court -- initially, at least as long as 70 years ago:

> The state is not liable for the torts, misfeasance, or the unauthorized exercise of power by its officers or agents, unless such liability exists by constitutional provision or statute….

> It is urged… that this suit is based on section 21, art. I of the Constitution, which provides: "The property of no person shall be taken or damaged for public use without just compensation therefor." We call attention to the fact that this is a self-executing provision of the Constitution, which requires no resolution waiving the immunity of the state from suit to authorize the commencement of action.

*Bordy v State*, 142 Neb 714, 717, 7 NW2d 632, 635 (1943). See also, *Wood v Farwell Irrig Dist*, 217 Neb 511, 516 (1984)(holding irrigation districts liable for seepage damages from ditches under *Neb Const* Art I § 21 without negligence or waiver of immunity because the Constitution's Taking's clause is self-executing.) Any doubt about this was eliminated by the Supreme Court in *Henderson v City of Columbus*, 285 Neb 482, 492 (2013). There, the Supreme Court held that the property owner suing for damages failed to prove a Taking for a public purpose occurred in a case alleging damages due to sewer backup problem.

48. Here, Mr. Hill and others allege the State took usufructuary rights to the water for the public purpose of complying with an interstate compact between the State of Nebraska and the State of Kansas. Plaintiffs can prevail only if the water they contend was deprived from them was within Nebraska's 49% Compact allocation for all waters in the Republican River Basin. The Complaint carefully and expressly alleges this is so. Plaintiffs' Claims *commence with the premise* that the Defendants had lawful authority to take the water in question – and to thereafter pay just compensation for it because the water was taken for a lower lawful use priority than the priority rights held by Plaintiffs and their Irrigation District.

49. The Defense misses a second basic point: Plaintiffs allege actual *physical* Takings of water in 2013, not regulatory Takings. See ¶¶38-45 above. The question here is not whether a statute or ordinance is a legitimate exercise of the police power or goes so far as to constitute a regulatory Taking. Regulatory Takings issues are not presented by the Complaint. Plaintiffs claim water was in the stream, subject to capture, and deprived from them though they held

priority rights to the water. This is their 1st Claim. They also contend, in their 2d Claim, that the State permitted interception of physical water under the ground through excess pumping and thereby physically deprived Plaintiffs of water that would have been in the stream in the natural course of the hydrologically interconnected flow of both surface and ground waters in the Republican River Basin.

50. "Quite simply, [i]f the exercise of police power results in property being actually taken and applied to public use, it will require compensation." R. Crow, *Municipal Regulation Of Groundwater and Taking*, 44 Tex Env L J 1 (WL May 2014).

> An otherwise valid exercise of police power constitutes a Taking for which compensation is due if the owner suffers a permanent, physical occupation of the property.

29A C.J.S. *Eminent Domain* § 8 (WL Updated Weekly). *Hoeck v City of Portland*, 57 F3d 781 (9th Cir 1995), as amended, (July 10, 1995).

51. The right to compensation when a physical Taking occurs, as in a physical occupancy of land, or the Taking of water in this case, is firmly established and unflinching. The Taking government's duty to pay is "categorical". *Loretto v Teleprompter Manhattan CATV Corp.* 458 US 419 (1982) held:

> This case presents the question whether a minor but permanent physical occupation of an owner's property authorized by government constitutes a "Taking" of property for which just compensation is due under the Fifth and Fourteenth Amendments of the Constitution. New York law provides that a landlord must permit a cable television company to install its cable facilities upon his property. N.Y. Exec. Law § 828(1) (McKinney)(McKinney Supp. 1981–1982). In this case, the cable installation occupied portions of appellant's roof and the side of her building. The New York Court of Appeals ruled that this appropriation does not amount to a *Loretto v. Teleprompter Manhattan CATV Corp.*, 53 N.Y.2d 124, 423 N.E.2d 320 (1981). Because we conclude that such a physical occupation of property is a Taking, we reverse.

*Loretto*, 458 U.S., 421. *Loretto* has been cited in 951 appellate cases since it was decided. It is a pivotal decision under discussion in a case pending in the United States Supreme Court right now. *Horne v US Dept of Agriculture*, 750 F3d 1128 (9th Cir 2014), cert granted, 135 S Ct 1039 (2015)(argued April 22, 2015).[4]

52. The State obligation to pay just compensation when it physically takes property has well-recognized federal (*US Const* Amend V) and State (*Neb Const* Art I, § 21 and Art XV §§ 4, 5 & 6) roots. And these roots are even deeper than these two Constitutions. The constitutional Framers were codifying an ancient right that had been accepted as a part of their legal tradition since before Magna Carta. Among the grievances of the barons who compelled King John to sign Magna Carta was the King's abuse of the royal prerogative of "purveyance." Purveyance was, as Blackstone explained, the right of the king to "bu[y] up provisions and other necessaries *** at an appraised valuation, in preference to all others, and even without consent of the owner." 1 William Blackstone, *Commentaries* *277.[5]

53. "Purveyance" was a species of what we now call eminent domain. See *Little Rock Junction Ry. v Woodruff*, 49 Ark 381, 381 (1887) ( "[Eminent domain] bears a striking analogy to the king's ancient prerogative of purveyance, which was recognized and regulated by the twenty-eighth section of *Magna Carta*"). This prerogative was important to English kings because the royal court in John's time was "very frequently" "removed from one part of the kingdom to another." 1 Blackstone *277. The king's right to purchase provisions at market rates ensured "that the work of government should not be brought to a stand-still for want of supplies." William Sharp McKechnie, *Magna Carta: A Commentary on the Great Charter of*

[4] Plaintiffs' counsel in *Hill* was trial counsel in the underlying USDA Administrative law litigation in *Horne.* Takings issues now before the Supreme Court were 1st raised at trial.
[5] A salute to the *Magna Carta* is hard to resist as counsel writes on its 800th anniversary.

*King John, with an Historical Introduction* 330 (1914). The *Magna Carta* contains several passages that support Plaintiffs here. Clause 28 states (in translation) that:

> No constable or other bailiff of ours shall take corn or other provisions from anyone without immediately tendering money therefor, unless he can have postponement thereof by permission of the seller.

Clause 30 states that:

> No sheriff, or bailiff of ours, or anyone else is to take any free man's horses or carts for transporting things, except with the free man's consent.

And Clause 31 states that:

> Neither we nor our bailiffs are to take another man's wood to a castle, or on other business of ours, except with the consent of the person whose wood it is.

54. The *Magna Carta's* theorem: the King must pay for what the King takes, applies here. Plaintiffs allege a plausible prior use right to surface water that their Complaint describes in precise measurements. This water was within Nebraska's allotment of Basin waters, in the stream, subject to capture, and taken from Plaintiffs by the Defendants for use by others with lower priority rights. This is the essence of a Taking; it commands the categorical duty of the State to pay just compensation. *Arkansas Game & Fish Comm'n*, 133 S. Ct., 517– 18 (2012). Nebraska courts consider Takings cases under the dual standards of the Federal and State Constitutions.

> We analyze such claims under Neb. Const. art. I, § 21 and the 5th Amendment to the US Constitution, made applicable to the states through the 14th Amendment.

*Rodehorst Bros. v City of Norfolk Bd of Adj*, 287 Neb 779, 795 (2014). Federal Takings jurisprudence is of value to analysis of legal issues before the Furnas County District Court, here.

55. The obligation of a government to pay just compensation when it physically takes possession or ownership of an interest in property from a private citizen for some public purpose

is a categorical duty. The United States Supreme Court expressly so held in *Arkansas Game & Fish Comm'n v United States,* __US__, 133 S Ct 511, 517 – 18 (2012). This is because the Takings Clause is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v United States,* 364 US 40, 49 (1960). And "[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner." *Tahoe–Sierra Preservation Council, Inc. v Tahoe Regional Planning Agency,* 535 US 302, 322 (2002) (citing *United States v Pewee Coal Co.*, 341 US 114, 115 (1951)). And, in *Arkansas Game & Fish Comm'n,* 133 S. Ct. at 518 the Supreme Court observed that "[t]hese guides are fundamental in our Takings Clause jurisprudence". Accord, *Henderson v City of Columbus,* 285 Neb 482, 492 (2013) (citing *Tahoe-Sierra.)*

56. Nebraska's Supreme Court observed that the State Constitution Takings clauses are broader than US Const *Amend V Rodehorst Bros v City of Norfolk Bd of Zoning Adj,* 287 Neb 779, 795 (2014) (dealing with *Neb Const* Art I § 21 and US Const *Amend V*). The Nebraska Supreme Court has cited *Loretto v Teleprompter, supra* favorably on four occasions. This principle is so well settled that it drew positive comments from the Commentators to the Nebraska Pattern Jury Instructions. *NJI 2d Civ* § 13.01 Cmt XV (WL Updated Oct 2014). See also, 31 Am Jur *Proof of Facts 3d* 563 (WL Updated April 2015).

57. The Republican River Compact obligates the State – the entire State – to comply with the Compact. Plaintiffs' claim that Taking water from a handful of property owners, representing a small fraction of all landowners in the River Basin, to fulfill the statewide obligation constitutes a Taking for a public purpose. This allegation (Complaint ¶¶ 35 et seq.) satisfies the requirement of *Neb Const* Art. I §21, and the Art XV §§ 4-6 criteria, and those of the

*Henderson* decision. The Compact must be complied with but not at the expense of a few for the many of the entire State. Just as Taking land for a highway is for a public purpose, Taking water rights to fulfill a State obligation to a sister State is also for a public purpose.

58. Defendants make much of accounting for water under the Compact, but they do not connect their description of the Compact or its accounting rules to this case. The contest here is not about the ability to take water for public purposes; it is about the duty to pay for the water taken by the State from those with priority water rights. This contest is framed by proper pleadings fully expressive of two Claims; both satisfy § 6-1112(b)(6) and state claims on which relief can be granted. Argument I, Defense Brief 16 *et seq.*, is a toothless dragon.

59. Plaintiffs concede the Compact binds Nebraska and limits her share of Basin water to 49%. Plaintiffs' prior usufructuary rights are to water within that 49%. Such water existed in the stream (1st Claim) or was intercepted and prevented from reaching the stream (2d Claim) in 2013 because Nebraska appropriated the water for inferior uses and those with inferior rights. Plaintiffs did not get their water, could not grow crops, and suffered damages. They successfully pled claims for Inverse Condemnation.

### 3. State & DNR Authority To Take Plaintiffs' Surface Water Does Not Alter The Obligation To Pay Just Compensation

60. A second argument, and another dragon poseur, surfaces at Br p 21 in the State's 2nd argument. The Defense seeks to avoid the duty to pay compensation because it claims the right to take the water at issue. Specifically, the State says it has the right to determine what water is available for use in the Basin, and, therefore, Plaintiffs cannot prevail.

61. But the right to regulate water, and even to take it, does not resolve, or even address, the just compensation issue. The question is not whether the State has the power to take the water; the question is whether the State *did take* water within Nebraska's 2013 Compact

allotment, in the stream and subject to capture, from Plaintiffs who held priority water use rights. The right to take the water is not contested. It is the obligation to pay for the water taken, and recover judgment for damages caused by the Taking, that Plaintiffs seek to enforce. Where the government effects "a permanent physical occupation of property," this Court's "cases uniformly have found a Taking." *Loretto v Teleprompter Manhattan CAPV Corp*, 458 US 419, 434 (1982). Accord, *Rodehorst Bros. v City of Norfolk Bd. of Adjustment*, 287 Neb 779, 795 (2014); *Henderson v City of Columbus*, 285 Neb 482, 492 (2013).

62. Property rights in a physical thing have been described as the rights "to possess, use and dispose of it." *United States v General Motors Corp.*, 323 US 373, 378 (1945). To the extent that the government permanently occupies physical property, or as with the water at issue, takes it away for others, it effectively destroys *each* of these rights. First, the owner has no right to possess the occupied space, or in this case, the water, himself, and also has no power to exclude the occupier or user from possession and use of the space or water. The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights. See *Kaiser Aetna v United States*, 444 US 164, 179–180 (1979). See also *Restatement of Property* § 7 (1936). Second, the permanent physical occupation or Taking of water forever denies the owner any power to control the use of the water; he not only cannot exclude others, but can make no nonpossessory use of the property. Although deprivation of the right to use and obtain a profit from property is not, in every case, independently sufficient to establish a Taking, it is clearly relevant. See *Andrus v Allard*, 444 US 51, 655-66 (1979).

63. *Loretto* reaffirmed the rule that a Taking unquestionably occurs - "*per se*" - when government action directly appropriates or causes a physical invasion of property. As the Court explained in *Loretto*, "[p]roperty rights in a physical thing have been described as the rights 'to

possess, use and dispose of it.'… To the extent that the government permanently occupies physical property [or takes it and gives it to another], it effectively destroys *each* of those rights." 458 US at 435. Such physical Takings are recognized to be "perhaps the most serious form of invasion of an owner's property interests," *Id.* at 435. *Loretto's* categorical rule applies "however minor" a physical invasion. *Lingl v Chevron USA Inc.*, 544 US 528, 538 (2005). The Nebraska judiciary follows *Lingl* and *Loretto's* categorical Takings rule. *Scofield v State DNR,* 276 Neb 215, 231-232 (2008)("First, where government requires an owner to suffer a permanent physical invasion of her property—however minor—it must provide just compensation." Compensation is required for physical Takings "however minimal the economic costs [they] entail," because they "eviscerate[ ] the owner's right to exclude others from entering and using her property—perhaps the most fundamental of all property interests.") In this case the "physical invasion" in the Taking of Plaintiffs' water is within the power of the State, but subject to the constitutional duty to pay just compensation. Plaintiffs' Complaint makes this case in two viable, plausible, claims.

64. The permitting process is an exercise of State police powers. (State Br 22). But the Taking of water within the 49% Compact allotment from priority water users for lower priority users is a Taking for which just compensation is required. The physical Taking of water in this setting deprives Plaintiffs of essential property rights, priorities and interests. The State's arguments (Br 21-29) lack merit. The fact that the Plaintiffs' right is a use right does not change this outcome since the use right is to a physical asset, water, that is taken from them by the State's preference of a lower priority user. *Spear T Ranch v Knaub,* 269 Neb 177, 186-88 (2005).

65. Certainly, the permits held by Plaintiffs are subject to State Regulation. But the State has not taken the *permits* or changed their priorities. It took water (committed a Taking of water) subject to the permits and deprived Plaintiffs' priority use of the water for a lesser use.

*Neb Const* Art XV §§ 4-6. Nebraska's duty is to administer the waters within Nebraska's allotment in accord with State law… including laws recognizing Plaintiffs' surface water priority usage rights. The 2nd argument advanced by the State lacks merit.

**4. State & DNR Action Without Initiation Of Eminent Domain Proceedings Does Not Alter The Obligation To Pay Just Compensation**

66. Proving only that arguments merely puffing fumes and looking superficially like dragons come in families and have cousins, a cousin superficial argument presents itself at p30 of the Defense brief. This argument urges that there is no statutory authority for DNR to exercise eminent domain so it could not have done so. The argument advanced by the Defense ignores basics: "A rose by any other name, would smell as sweet." Wm Shakespeare, *Romeo & Juliet* II sc 2. A government Taking by any other name is still a Taking.

67. Taking by the State without eminent domain proceedings is the predicate for an inverse condemnation action. Sometimes this has to occur due to exigencies facing government. In light of pragmatic considerations, however, the Supreme Court of the United States long ago held that the government may take property with compensation to follow, so long as the procedures for obtaining compensation are reasonable, certain, and adequate. *Cherokee Nation v S. Kansas Ry.*, 135 US 641, 659 (1890). This rule did not change the nature of the claim, which *ripens* at the time of the Taking. It changed only the nature and availability of the remedy.

68. That is still the way this Court treats the issue today. For example, in *San Remo Hotel, L.P. v City & County of San Francisco*, 545 US 323 (2005), the Court held that a property holder may pursue a state court section 1983 claim that denial of just compensation would violate the Fifth Amendment simultaneously with a state-law action seeking compensation. *Id.* at 346. A physical Taking of private property by government is a *per se* Taking and requires just compensation. *Lingl v Chevron USA, Inc.*, 544 US 528, 546-547 (2005):

> The Takings Clause of the Fifth Amendment, made applicable to the States through the Fourteenth, see *Chicago, B. & Q.R. Co. v Chicago,* 166 US 226 (1897), provides that private property shall not "be taken for public use, without just compensation*." As its text makes plain, the Takings Clause "does not prohibit the Taking of private property, but instead places a condition on the exercise of that power." First English Evangelical Lutheran Church of Glendale v County of Los Angeles*, 482 US 304, 314 (1987). In other words, *it "is designed not to limit the governmental interference with property rights per se, but rather to secure* compensation *in the event of otherwise proper interference amounting to a Taking." Id.,* at 315 (emphasis in original). While scholars have offered various justifications for this regime, we have emphasized its role in "bar[ring] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v United States*, 364 US 40, 49 (1960)….

*Lingl*, 544 US at 536-537 (Emphasis added.) Water is viewed this way; so is a usufructuray right to use water. In this case, the private property taken is Plaintiffs' prior usufructuary right to surface water in the stream, subject to capture in 2013 and within Nebraska'a 49% allotment of Republican River Basin waters under the Compact. *Lingl's per se* rule applies categorically to Takings in Nebraska and by Nebraska. The State Supreme Court wrote, in a DNR case in 2008:

> The US Supreme Court in *Lingl v Chevron U.S.A. Inc.* 544 US 528 (2005) clarified the law surrounding regulatory Takings claims and provided a framework under which such claims are to be addressed. The Court identified two types of regulatory actions that constitute categorical or *per se* Takings: "First, where government requires an owner to suffer a permanent physical invasion of her property—however minor—it must provide just compensation." *Id.*at 538. Compensation is required for physical Takings "however minimal the economic costs [they] entail [ ]," because they "eviscerate[ ] the owner's right to exclude others from entering and using her property—perhaps the most fundamental of all property interests." *Lingl,* 544 US at 539.
>
> The "second categorical rule applies to regulations that completely deprive an owner of '*all* economically beneficial us[e]' of her property." *Id.* at 538. The complete elimination of a property's value is the determinative factor in this category because the total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation.

*Scofield v State, DNR*, 275 Neb 215, 231-232 (2008).

69. As illustrated at ¶¶38-45 above, the usufructuary right to water in a stream, when taken by the government, is compensable as a Taking:

> Water rights in Washington have long been understood to be usufructuary in nature—they only constitute a right to use water, not a possessory right in the actual water itself. … That said, water rights are nonetheless "property," and are thus protected in this state against unlawful deprivation absent due process and governmental "Takings" or "damaging" absent just compensation first made….
>
> A governmental abrogation of a preexisting, vested water right is an appropriation of that enhanced minimum flow to a public use and therefore is a Taking encompassed in the Fifth and Fourteenth Amendments no matter how minimal the intrusion may be. …

*Pub. Util. Dist. No. 1 of Pend Oreille City. v State, Dep't of Ecology*, 146 Wash 2d 778, 835-36, 51 P3d 744, 772-73 (2002) (Citations omitted.). Accord, 9 Julius L. Sackman, *Nichols on Eminent Domain* § 34.05[4], at 34–77 (rev 3d Ed 1999).

70. The *per se* Takings and compensation rule has never been limited to instances in which the government seizes 100% of the value of property. If it were actually limited in that manner, the government could, for example, seize the right to earn interest on a bank account while leaving the bank account holder's principal intact. But the Court has expressly held that such seizures constitute *per se* Takings. *Brown v Legal Found. of Washington*, 538 US 216, 235 (2003). A *per se* Taking occurs whenever the government seizes any of the major sticks in the bundle of rights that constitute property - such as "the right to possess, use and dispose of" the property. *Phillips v Washington Legal Found.*, 524 US 156, 170 (1998). The Court found a *per se* Taking when the government interfered with a property owner's right to exclusive use of his property by requiring him to provide public access to his marina, even though the interference only slightly decreased the marina's value. *Kaiser Aetna v United States*, 444 US 164 (1979).

71. Plaintiffs are farmers who needed irrigation water to produce crops and get their water through ditches and canals. Without irrigation water, the essential character of their land is changed. (Comply ¶¶ 1,10). They have superior rights to the water. (Compl ¶¶2,24.8-9). The water taken in 2013 was within Nebraska's 49% allotment under the Compact. (Compl ¶¶ 24.5-7). In 2013, the water at issue was in the stream, subject to capture, but taken by the State. (Compl ¶¶ 24.10-15; 25.1-8, 28,29). Plaintiffs suffered damages due to the Taking. (Compl ¶¶25.8. 26, 27, 34-46).

72. Defendants also took water that would otherwise have been in the stream and subject to capture in 2013 by interception through excessive groundwater pumping with permits issued by Defendants. This also amounts to a Taking of Plaintiffs' water. (Compl ¶¶ 48-55).

73. These well pled facts state plausible, legally cognizable claims. The well pled facts, cited federal, state, scholarly authorities and *Scofield*, dispatch Defendants' Third Argument. It has no merit.

**5. Just Compensation Is Due When The State Exercises Its Police Power To Take Private Property For Public Use**

74. A 4th ghostly apparition of argumentation, again readily slain, makes its effort to misdirect the reader at Defense Br p34. This 4th Argument commences with the baseless assumption "*arguendo*, that the Plaintiffs' allegations represent a regulatory inverse condemnation claim." This assumption is incorrect. Plaintiffs do not allege a regulatory Taking. They allege a physical Taking of their 2013 water. Where a physical Taking occurs, the government has a categorical duty to pay just compensation. *Scofield v State, DNR,* 275 Neb 215, 231-232 (2008); *Lingl v Chevron USA, Inc.*, 544 US 528 (2005).

75. The Plaintiffs' use right is to a physical asset, water, that is taken from them by the State's preference of a different, lower priority user. *Spear T Ranch v Knaub,* 269 Neb 177,

186-88 (2005). This is a physical Taking case; it is not a "regulatory Taking" arising under the doctrine of *Penn Central Trans. Co. v Penn Cent. Transp. Co.*, 438 U.S. 104. See cases collected at ¶¶38-45 and Argument III, above.

76. Specifically, Plaintiffs claim: a) the 2013 water is within Nebraska's 49% of waters of the Basin, b) the water at issue was in the stream and subject capture, c) Plaintiffs have priority water use rights, and d) the water in the stream, subject to capture and within Plaintiffs' priority use right was taken by the State from Plaintiffs for another use that is not a priority use. Finally, e) the State must comply with the State priority water use laws because the Compact does not create an exemption for the State from the State's internal water laws. Instead, the Compact permits the States to manage its 49% of Basin waters in accord with its own law. *Kiplinger v Nebraska DNR*, 282 Neb 237, 240-41 (2011). The Compact provides:

> The use of the waters hereinabove allocated shall be subject to the laws of the State, for use in which the allocations are made.

*Republican River Compact*, 57 Stat 89, Art. IV & VIII. The Compact may also be read at *Neb Rev Stat* § A1-106 (Special Acts & Resolutions). The Compact creates no exemption to the State's duty to obey its internal laws in the governance of its 49% allotment of Basin surface and ground waters. *Kansas v. Nebraska*, 135 S. Ct., 1049-1050.

77. The legal authority cited above, including *Henderson* and *Scofield* from Nebraska's Supreme Court and *Lingl, Arkansas Fish, Loretto* and many others from the United States Supreme Court, rebut the Defense's position. *Hinderliter,* (apparently perceived by the Defense as its principal armament) has no role to play in this contest. This is a case about waters subject to Nebraska regulation and control, and entirely within Nebraska's allotment of waters in the Basin. This is not a contest like *Hinderliter* to try to allocate Basin waters. *Badgley v City*

*of New York,* 606 F2d 358 (2d Cir 1979) is distinguished, as noted above, in Argument I, and is mis-cited again in Defense Argument IV. The State's Argument IV is also rebutted in Arg I-III.

78. Defendant's 4th Argument (Def Br Argu IV, pp 34 -40) is without merit.

**6. The State Cannot Avoid Liability for Taking Private Property By Claiming It Lacks Regulatory Authority. The Taking Creates the Obligation to Pay Just Compensation. And, the State Has Power Over Water.**

79. The State's 5th and final argument (Br 40) asserts that the State lacks authority to regulate groundwater. The argument is disingenuous. This case is not about the authority to regulate water, or to take it. This is a Takings case involving the duty to pay just compensation. The State's 5th argument fails to come to grips with Plaintiffs' Claims. Arguments I – IV above.

80. An additional error or overstatement is present in the State's final argument. It contends the State lacks authority to regulate groundwater. This is not correct. *Neb Const* Art XV, §§ 4-6; *Kirk v State Bd of Irrig,* 90 Neb 627 (1912); The Legislature has control over it and chose to delegate partial control of groundwater to NRD's, but provided that the DNR must approve any NRD Integrated Management Plan affecting the Republican River Basin. *Neb Rev Stat* § 46-715 governing groundwater, and waters of over appropriated basins, including this one, compels joint adoption of an Integrated Management Plan by DNR and each NRD in the Basin.

> (1)(a) Whenever the Department of Natural Resources has designated a river basin, subbasin, or reach as overappropriated or has made a final determination that a river basin, subbasin, or reach is fully appropriated, the natural resources districts encompassing such river basin, subbasin, or reach and the department shall jointly develop an integrated management plan for such river basin, subbasin, or reach. The plan shall be completed, adopted, and take effect within three years after such designation or final determination unless the department and the natural resources districts jointly agree to an extension of not more than two additional years.

81. DNR has control over Integrated Management plans, and groundwater otherwise somewhat within the purview of NRDs. DNR has complete control of surface waters and their integrated management with ground waters. *Neb Rev Stat* § 46-716 provides:

> (1) The surface water controls that may be included in an integrated management plan and may be adopted by the Department of Natural Resources are: (a) Increased monitoring and enforcement of surface water diversion rates and amounts diverted annually; (b) the prohibition or limitation of additional surface water appropriations; (c) requirements for surface water appropriators to apply or utilize reasonable conservation measures consistent with good husbandry and other requirements of section 46-231 and consistent with reasonable reliance by other surface water or ground water users on return flows or on seepage to the aquifer; and (d) other reasonable restrictions on surface water use which are consistent with the intent of section 46-715 and … section 46-231.
>
> (2) If during the development of the integrated management plan the department determines that surface water appropriators should be required to apply or utilize conservation measures or that other reasonable restrictions on surface water use need to be imposed, the department's portion of the integrated management plan shall allow the affected surface water appropriators and surface water project sponsors a reasonable amount of time, not to exceed one hundred eighty days unless extended by the department, to identify the conservation measures to be applied or utilized, to develop a schedule for such application and utilization, and to comment on any other proposed restrictions.

*Neb Rev Stat* § 46-716.

82. Surface water and groundwater are hydrologically interconnected. A surface water user has a claim against groundwater users for interfering with stream flow. *Spear T Ranch, Inc.v Knaub*, 269 Neb 177, 193 (2005):

> [T]he common law should acknowledge and attempt to balance the competing equities of ground water users and surface water appropriators; the *Restatement* approach best accomplishes this. The *Restatement* recognizes that ground water and surface water are interconnected and that in determining the rights and liabilities of competing users, the fact finder needs broad discretion. Thus, when applying the *Restatement,* the fact finder has flexibility to consider many factors such as those listed in § 850A, along with other factors that could

affect a determination of reasonable use….Adoption of the *Restatement* is the modern trend. …

Accordingly, we adopt the *Restatement* to govern conflicts between users of hydrologically connected surface water and ground water. Specifically, we hold:

> A proprietor of land or his [or her] grantee who withdraws ground water from the land and uses it for a beneficial purpose is not subject to liability for interference with the use of water of another, unless ... the withdrawal of the ground water has a direct and substantial effect upon a watercourse or lake and unreasonably causes harm to a person entitled to the use of its water.

*Restatement (Second) of Torts* § 858(1)(c) at 258 (1979). Whether a ground water user has unreasonably caused harm to a surface water user is decided on a case-by-case basis. In making the reasonableness determination, the Restatement, *supra*, § 850A, provides a valuable guide, but we emphasize that the test is flexible and that a trial court should consider any factors it deems relevant.

*Spear T Ranch v Knaub,* 269 Neb 188, 195 (2005).

83. The disingenuity of the State's position may be understood by recalling that the United States Supreme Court had no patience for Nebraska's excuses:

> When they entered into the Settlement in 2002, the States understood that Nebraska would have to significantly reduce its consumption of Republican River water. See Report 106. The Settlement, after all, charged Nebraska for its depletion of the Basin's stream flow due to groundwater pumping—an amount the State had not previously counted toward its allotment. See *supra*, at 1049 – 1050. Nebraska did not have to achieve all that reduction in the next year: The Settlement's adoption of multi-year averages to measure consumption allowed the State some time—how much depended on whether and when "water-short" conditions existed—to come into compliance. See Settlement §§ IV(D), V(B)(2)(e)(i), App. B; *supra*, at 1050. As it turned out, the area experienced a drought in 2006; accordingly, Nebraska first needed to demonstrate compliance in that year, based on the State's average consumption of water in 2005 and 2006.[6] And at that initial compliance check, despite having enjoyed several years to prepare, Nebraska came up markedly short.
>
> Nebraska contends, contrary to the Master's finding, that it could not have anticipated breaching the Compact in those years. By its account, the State took "persistent and earnest"—indeed, "extraordinary"—steps to comply with the

agreement, including amending its water law to reduce groundwater pumping. …. And Nebraska could not have foreseen (or so it claims) that those measures would prove inadequate. First, Nebraska avers, drought conditions between 2002 and 2006 reduced the State's yearly allotments to historically low levels; the Master was thus "unfair to suggest Nebraska should have anticipated what never before was known." *Id.,* at 17. And second, Nebraska stresses, the RRCA determines each State's use of water only retrospectively, calculating each spring what a State consumed the year before; hence, Nebraska "could not have known" that it was out of compliance in 2006 "until early 2007—when it was already too late." …

But that argument does not hold water: Rather, as the Special Master found, Nebraska failed to put in place adequate mechanisms for staying within its allotment in the face of a known substantial risk that it would otherwise violate Kansas's rights. …. [T]he State's efforts to reduce its use of Republican River water came at a snail-like pace. The Nebraska Legislature waited a year and a half after signing the Settlement to amend the State's water law. See § 55, 2004 Neb Laws p. 352, codified at Neb Rev Stat § 46-715. And the fix the legislature adopted—the development of regional water management plans meant to decrease groundwater pumping—did not go into effect for still another year. Nebraska thus wasted the time following the Settlement—a crucial period to begin bringing down the State's consumption. Indeed, the State's overuse of Republican River water actually *rose* significantly from 2003 through 2005, making compliance at the eventual day of reckoning ever more difficult to achieve. …. And to make matters worse, Nebraska knew that decreasing pumping does not instantly boost stream flow: A time lag, of as much as a year, exists between the one and the other. …. So Nebraska's several-year delay in taking any corrective action foreseeably raised the risk that the State would breach the Compact.

Still more important, what was too late was also too little. The water management plans finally adopted in 2005 called for only a 5% reduction in groundwater pumping, although no evidence suggested that would suffice. The testimony presented to the Special Master gave not a hint that the state and local officials charged with formulating those plans had conducted a serious appraisal of how much change would be necessary. See *id.,* at 107–108. And the State had created no way to enforce even the paltry goal the plans set. The Nebraska Legislature chose to leave operational control of water use in the hands of district boards consisting primarily of irrigators, who are among the immediate beneficiaries of pumping. No sanctions or other mechanisms held those local bodies to account if they failed to meet the plans' benchmark. They bore no legal

> responsibility for complying with the Compact, and assumed no share of the penalties the State would pay for violations. …. Given such a dearth of tools or incentives to achieve compliance, the wonder is only that Nebraska did not still further exceed its allotment.
>
> Nor do Nebraska's excuses change our view of its misbehavior. True enough, the years following the Settlement were exceptionally arid. But the Compact and Settlement (unsurprisingly) contemplate wet and dry years alike. By contrast, Nebraska's plans could have brought it into compliance only if the Basin had received a stretch of copious rainfall. …. And Nebraska cannot take refuge in the timing of the RRCA's calculations. By the time the compliance check of 2006 loomed, Nebraska knew that it had exceeded its allotment (by an ever greater margin) in each of the three previous years. As Nebraska's own witnesses informed the Special Master, they "could clearly see" by the beginning of 2006 "that [the State] had not done enough" to come into compliance….Indeed, in that year, Nebraska began purchasing its farmers' rights to surface water in order to mitigate its anticipated breach. But that last-minute effort, in the Master's words, "fell woefully short"—as at that point could only have been expected. Report 109. From the outset of the Settlement through 2006, Nebraska headed—absent the luckiest of circumstances—straight toward a Compact violation.
>
> For these reasons, we agree with the Master's conclusion that Nebraska "knowingly exposed Kansas to a substantial risk" of receiving less water than the Compact provided, and so "knowingly failed" to comply with the obligations that agreement imposed. …. In the early years of the Settlement. Nebraska's compliance efforts were not only inadequate, but also "reluctant," showing a disinclination "to take [the] firm action" necessary "to meet the challenges of foreseeably varying conditions in the Basin." *Id.*, at 105. Or said another way, Nebraska recklessly gambled with Kansas's rights, consciously disregarding a substantial probability that its actions would deprive Kansas of the water to which it was entitled. See Tr. 1870 (Aug. 23, 2012) (Master's statement that Nebraska showed "reckless indifference as to compliance back in '05 and '06").

*Kansas v Nebraska*, 135 S Ct 1042, 1054-56, 191 L Ed 2d 1 (2015).

84. Simply, the Supreme Court found Nebraska was recklessly indifferent toward compliance with the Compact because it allowed excessive groundwater pumping. In 2013, the State chose to take Plaintiffs' surface water, located in the stream and subject to capture, and constituting water with in Nebraska's 49% allotment of all ground and surface Basin waters. It

did so while permitting excessive groundwater pumping to further deplete stream flows and disrupt natural phenomenon. This was an overt additional Taking. See, *Arkansas Game & Fish Comm'n*, 133 S. Ct. 511.

85. Interference with natural phenomenon which impairs the usefulness of property is a Taking within the meaning of the Constitution. This was the holding in *Pumpelly v Green Bay Co,* 13 Wall 166, 181,20 L Ed 557 (1872)("where real estate is actually invaded by superinduced additions of water, earth, sand, or other material… so as to effectually destroy or impair its usefulness, it is a Taking, within the meaning of the Constitution.")(cited with approval and quoted in *Arkansas Game*.) These cases and others cited by *Arkansas Game* make it clear that any induced-flooding situation constitutes a Taking. Here, the opposite is true – the State is inducing a reduced stream flow, depriving Plaintiffs of water. Just as excess water pollution onto Plaintiff's land in *Arkansas Game* and *Pumpelly* constituted compensable Takings, excess pumping, causing diminished stream flow and depriving Plaintiffs of surface water that would otherwise be in the stream and subject to capture, and be within Nebraska's 49% allotment, is a compensable Taking. Instead of invading land in this case, as in *Arkansas Game*, the State invades, and takes, water. Plaintiffs are the priority users of the water taken.

86. **The State Is Liable for Takings of Private Property.** Plaintiffs' Complaint categorically alleges that the State is responsible for Taking their 2013 surface water – water over which Plaintiffs had priority user rights. Complaint ¶¶ 24.10-24.12 & 28—32. These allegations are accepted as true for purposes of the Motion to Dismiss. Certainly the allegations are plausible. The Complaint alleges well-pled facts that constitute a Taking of water-- a physical Taking. Plaintiffs claim a) the water at issue is within Nebraska's 49% of waters of the Basin, b) in 2013 the water at issue was in the stream and subject capture, c) Plaintiffs have

priority water use rights, d) the 2013 water in the stream, subject to capture and within Plaintiffs' priority use right was taken by the State from Plaintiffs for another use that is not a priority use, and e) the State must comply with the Compact, which Plaintiffs concede, and it must comply with the State priority water use laws because the Compact does not create an exemption for the State from the State's internal water laws. Just compensation is due.

87. The Defense argues that the State lacks authority to regulate groundwater and, therefore, cannot be liable for a Taking under Plaintiffs' 2nd Claim. (Def Br pp 40-44). But, the Complaint alleges the State issued orders and gave the instruction's to shut off water. These allegations are quite specific. See ¶¶ 25, 29.2, 29.4 & 29.5. The Plaintiffs' Claim is that the State *took* surface water that was subject to capture, in the stream, and within the Nebraska allotment under the Compact. By doing so it deprived the Plaintiffs of their priority water use rights. Whether the State acted lawfully or not is of no moment. It is conduct by the State constituting a Taking that is the essence of the constitutional tort.

88. The duty to pay just compensation after an actual, physical Taking is not conditional; it is "categorical". The Supreme Court has not equivocated on this point. "When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner." *Tahoe–Sierra Preservation Council, Inc. v Tahoe Regional Planning Agency,* 535 US 302, 322 (2002). The Nebraska Supreme Court recognized this categorical duty in *Henderson v City of Columbus* with these direct words*:*

> The Court continued that " '[w]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner.' " *Id.* (quoting *Tahoe–Sierra Preservation Council, Inc. v Tahoe Regional Planning Agency*, 535 US 302….).

*Henderson*, 285 Neb. at 492. It is the Taking, not the power to take, that invokes the categorical duty to pay for what is taken. The State's contrary 5th Argument misses the mark.

89. **The State Has Power Over Water.** Plaintiffs contend that the State has a duty under the Compact to regulate all waters of the Basin to achieve Compact compliance. This mandates regulation within the State to meet lawful intrastate priorities while complying with the Compact. The State Constitution makes clear the public ownership of water. *Neb Const* Art XV, §§ 4-6. The Legislature has plenary authority to regulate water. "The Legislature is free to create and abolish rights as long as no vested right is disturbed. *Colton v Dewey,* 212 Neb 126 (1982)." *Spear T Ranch v Knaub,* 269 Neb 188, 195 (2005).

90. The Legislature chose to delegate part of that authority to NRDs. *Neb Rev Stat* §§ 2-3201 *et seq*., and 46-701 *et seq.* But this delegation does not relieve the State (while it might relieve the DNR) of the power to take prioritized water from citizens holding priority rights. The delegation to NRDs is not absolute. Instead, "integrated" management plans are required. State approval is essential before a NRD's proposed Integrated Management Plan can become effective. *Neb Rev Stat* §46-715 & 716, *supra.*

> A natural resources district, as a political subdivision, has only that power delegated to it by the Legislature, and a grant of power to a political subdivision is strictly construed. *In re Applications A–15145, A–15146, A–15147, and A–15148,* 230 Neb 580 (1988)

*Wagoner v Cent. Platte Natural Res. Dist.,* 247 Neb 233, 241 (1995).

91. The State has control over regulation of groundwater. The Legislature delegated, within the State and its political subdivisions, a portion of this control. *Neb Rev Stat* §2-3201 et seq. It is shared by and between NRDs and the State DNR. Just as the State did delegate to NRD's, it has the power to withdraw the delegated authority. *Wagoner v Cent Platte NRD.,* 247 Neb 233, 241 (1995). NRDs lacked standing to challenge an application for a permit to appropriate river water to induce groundwater recharge in a well field. *Metropolitan Util Dist. v Twin Platte NRD,* 250 Neb 442 (1996).

92. The Legislature directed that both surface and groundwater data be collected, maintained and studied together for the obvious reason that they are connected. *Neb Rev Stat* § 2-1569. The DNR is obligated to evaluate "expected long-term availability of hydrologically connected supplies for… surface water uses... in each of the state's river basins." *Neb Rev Stat* §46-713. Doubt about a hydrologic as between surface water and groundwater in a river basin has been eliminated by *Spear T Ranch v Knaub,* 269 Neb 188, 195 (2005). J David Aiken, *Hydrologically-Connected Groundwater,* 84 Neb L Rev 962 (WL 2006). Prof Aiken wrote:

> The DNR's role was broadened dramatically in 2004, with statutory authority to determine all or portions of river basins as being fully-appropriated. This new authority meant the DNR had automatic bans on new wells or surface water appropriations. The water quantity focus of the GWMPA had been on ground water depletion exclusively until 1996, when NRDs were given the option to regulate ground water withdrawals to protect streamflows. Now, however, the impact of tributary ground water depletions is considered in the DNR's designation of all or part of river basins as fully-appropriated.

*Id.,* at 978-979. While the State's argument about the limitations on DNR regulatory control are a misstatement of the scope of that control over surface water, the more fundamental point is that the State and DNR committed the Taking in 2013. The Taking gives rise to this litigation. The Republican River Basin NRDs did not issue the Orders directing that streamflow bypass intake points into federal lakes and reservoirs that feed the canals of the Frenchmen Cambridge Irrigation District and, in turn, Plaintiffs' Farms. Defendants did. It is this Taking that prevented the Plaintiffs from farming, took away their crops, destroyed their livelihoods for a year, and damaged them. The Taking ordered by the State commands payment of just compensation.

93. The State contends in its 5th argument that it must have latitude to "ensure" that Nebraska meets its delivery obligation, and that a positive average balance for water was necessary to assure Compact compliance. Plaintiffs do not quarrel with what the State must do to meet its delivery obligations, or how it does so, so long as they are paid just compensation

when their water is taken by the State from Plaintiffs as priority users for another, lesser use. The Compact does not grant the State an exemption from its internal laws as it goes about regulating Nebraska's 49% allotment of the Basin's surface and ground waters. Within the law, including the law of eminent domain, Nebraska may do what its officials in office at the time choose to have it do. But they are not exempt from the Constitution and the categorical duty to pay just compensation when private property, including priority surface water within Nebraska's 49% allotment, in the stream, and subject to capture, is taken for a use with a lower priority.

94. This final argument depends on persuading the court to ignore the fact that an NRD is a relatively new subdivision – a political subdivision – of the State. The State, through delegation to its NRDs and retention of Integrated Management Plan approval by the DNR, controls groundwater. The State is obligated to manage all waters – both surface and ground waters – to achieve Compact compliance. The State must manage its waters to achieve compliance with the lawful rights of priority users like Plaintiffs or pay them when it takes their water for a lower priority use. This precise Taking occurred in 2013. The 5th argument advanced by the State to avoid liability for the Taking lacks legal, logical, and historical merit.

95. The case is ready for discovery, then trial. The dismissal motion lacks merit.

## X. Conclusion

96. Defendants have not demonstrated insuperable bars to recovery by Plaintiffs for inverse condemnation. Their dismissal motion should be overruled and they should be ordered to Answer promptly. Plaintiffs' outstanding discovery should be answered. Plaintiffs request that the case proceed to trial.

June 22, 2015.

Greg Hill of Furnas County,
Et al., Plaintiffs,

By: _____

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**Certificate of Service**

On June 22, 2015, a copy of Plaintiffs' Pre-Hearing Brief in Opposition to Motion to Dismiss 1st Amended Complaint was served by email to:

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