

2017

## Hill V. State, 894 N.W.2d 208 (Neb. 2017)

Jeremy Frankel

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court agreed with the Water Master's finding that the City did not present evidence that it intended to increase the Rimini Pipeline's capacity from 13.15 cfs to the full water right capacity of 13.75 cfs. Although the 1948 conveyance had the capacity of 13.75 cfs, the Rimini Pipeline was restricting the new pipeline's water flow to 13.15 cfs. Skinner argued that the beneficial use requirement limits the City's water right to the amount of water actually used for a beneficial use. The water court held that the City did not present sufficient evidence to show intention to increase its diversion capacity to the full extent of the water right. The Court held the water court erred in upholding the Water Master's determination because the City took affirmative steps towards planning for the City's future water needs. The Court emphasized the importance of protecting a city's efforts to substantially utilize its water rights. The City met the statutory criteria for the presumption of nonabandonment of its water right as applied to the City's entire system of conveyances, including all pipelines. The Court held that despite the period of non-use, the City's construction of the 13.75 cfs capacity pipeline permitted an inference that the City sought to make use of its entire water right.

Montana law requires a final water right decree to include a place of use restriction. The statute for this place of use element is constitutionally protected. The City challenged the restriction, but failed procedurally to comply with the notice requirement when challenging a constitutionally protected statute.

Accordingly, the Court affirmed the water court's opinion that the presumption of nonabandonment applied to the City, reversed the water court's determination that the City abandoned 0.60 cfs of its water right, and remanded for the entry of an amended judgment awarding the City its entire 13.75 cfs water right in Tenmile Creek.

Justice Jim Rice, dissenting.

Justice Rice did not agree with the Court's finding that M.C.A. section 85-2-227 could be applied retroactively because the 2005 amendment to the statute was procedural. He argued the amendment was in fact substantive because the statute, as applied, produced a different legal result from the result that would have followed had the presumption of nonabandonment not been applied. He found the sixty year period of non-use by the City unfair to Skinner's claim, especially considering Skinner's four water rights dating back to 1865.

*Kate Mailliard*

#### NEBRASKA

**Hill v. State, 894 N.W.2d 208 (Neb. 2017)** (holding that: (i) an interstate compact is federal law and supersedes water appropriators' property interests; (ii) regulatory actions that limit water rights to ensure compliance with an interstate compact do not represent a physical permanent invasion; (iii) regulatory actions that limited water rights did not deprive farmers of all economically beneficial use of their property; and (iv) a state agency department's failure to curtail groundwater pumping does not result in a taking when the department has no jurisdiction to regulate groundwater).

The Republican River Compact ("the Compact") apportions Colorado,

Nebraska, and Kansas a supply of “virgin water” that is undepleted by human activity from the Republican River Basin (“the Basin”). Much of the water from the Basin passes through Nebraska before entering Kansas via the Republican River, and Nebraska must limit water consumption to comply with the state’s obligations to Kansas under the Compact.

To ensure that Nebraska remains in compliance, the Nebraska Ground Water Management and Protection Act (“the Act”) requires that the Nebraska Department of Natural Resources (“DNR”), in conjunction with the State’s three natural resource districts, develop an integrated water management plan. As part of this statutory scheme, DNR must make an annual forecast of the maximum amount of water available from streamflow as limited by Nebraska’s obligations under the Compact.

In 2013, and again in 2014, DNR forecasted that Nebraska’s water consumption would exceed its allocation under the Compact. In both years, DNR issued an order called a “Compact Call” and issued closing notices on all surface water permits for natural flow and storage in the Basin. As a result, farmers who held those permits did not receive their full water allocation supply and suffered diminished crop yields. Even though the affected farmers owned appropriations allowing for diversions of surface water from the Basin, all water in the Basin was simultaneously subject to Nebraska’s obligations under the Compact.

Affected farmers who irrigated with water delivered from Frenchman-Cambridge Irrigation District—water that is subject to Nebraska’s allocation under the Compact—filed a class action suit in the District Court in Furnas County alleging two inverse condemnation claims for both 2013 and 2014. The district court later consolidated these claims. The claim first alleged that, in both 2013 and 2014, surface water was available for the farmers within Nebraska’s allocated share under the Compact, yet DNR gave that available water to Kansas in excess of the state’s Compact requirements. The farmers argued that DNR’s actions constituted a regulatory taking under the Nebraska Constitution that gave rise to an inverse condemnation claim. The claim further alleged that DNR’s failure to reduce excessive groundwater pumping led to a depletion of the Basin’s surface water supply and thereby constituted a taking under Nebraska’s Constitution that also gave rise to a claim for inverse condemnation.

The district court dismissed the claim, holding that: (i) DNR’s administration of streamflow under the Compact did not interfere with a property right under the Nebraska Constitution and was therefore not a taking; and (ii) DNR did not have a duty to regulate groundwater so its failure to curtail excessive groundwater pumping did not constitute a taking.

On appeal, the farmers asserted that the district court erred in its legal conclusions, and the Nebraska Supreme Court reviewed the farmers’ claims *de novo*. First, the Court addressed whether the district court erred in determining that DNR’s streamflow administration did not result in a taking under the Nebraska Constitution. The Court recognized that the Compact is federal law and allocations under the Compact are the supreme law in Nebraska. Accordingly, the Court held that appropriators’ rights to use water in the Basin were subject to the superior obligation of Nebraska’s compliance with the Compact. Because the appropriators’ rights were subject to the Compact, the rights did not constitute a compensable property interest when they were limited to ensure

compliance, and thus the Court held that DNR's administration did not result in a permanent physical invasion. The Court also held that there was no deprivation of all economically beneficial use of property, as the farmers did not allege facts showing such deprivation from water shortages. A taking requires either a permanent physical invasion or the deprivation of all economically beneficial use, and the Court found neither to be present. Therefore, the Court concluded that DNR's actions were not a taking that could give rise to an inverse condemnation claim.

Second, the Court turned to whether the district court erred in finding that DNR's failure to act to curtail excessive groundwater pumping did not constitute a taking. The Court first recognized that Nebraska has two separate systems for the distribution of groundwater and surface water. Under the Act, DNR must ensure compliance with the Compact, but the Act specifically limits DNR's jurisdiction to surface water while granting jurisdiction over groundwater to Nebraska's natural resource districts. Because DNR did not have jurisdiction to regulate groundwater, the Court held that DNR had no duty or power to administer the Basin's groundwater for the benefit of surface water appropriators. The Court held that failing to curtail excessive groundwater pumping was a failure to exercise a power that DNR did not actually have, and therefore could not give rise to a regulatory taking.

Accordingly, the Court affirmed the rulings of the district court.

*Jeremy Frankel*

#### SOUTH DAKOTA

**Rumpza v. Zubke, 900 N.W.2d 601 (S.D. 2017)** (holding that: (i) Zubke's installation of drainage systems changed the natural flow characteristics of the water draining from the dominant landowner's property to the subservient landowner's property; and (ii) the relative-hardship test was irrelevant because Zubke willfully installed the drainage systems and Rumpza had no duty to clear naturally occurring obstructions in the watercourse).

On July 24, 2013, Robert and Nancy Rumpza ("Rumpza") and Zubke Brothers LLC ("Brothers") sued David and Marilyn Zubke ("Zubke") seeking an injunction and damages. The Zubke's property is dominant, draining onto the Rumpza's property in two areas and flowing further onto the Brothers' property. In 2012 and 2013, Zubke installed drainage systems that modified the established flow characteristics of the drainage areas. The modifications affected the amount of water discharged onto the Rumpza property and extended the time the properties stayed wet. Consequently, Rumpza and Brothers claimed they were unable to plant and harvest crops in previously usable areas. Zubke argued in response that they were compensating for an obstruction located on the Rumpza property that caused water to collect.

At trial, the court returned judgment in favor of Rumpza and Brothers and entered an injunction against Zubke, requiring them to stop the use of the drainage systems. Zubke appealed, arguing that the court erred in finding Zubke caused the damage and that the injunction created undue hardship for Zubke that outweighed any benefits received by Rumpza and Brothers.

First, Zubke contended that the modifications were necessary to overcome the obstruction on the Rumpza property. The Court rejected the argument