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## Lingenfelter v. Lower Elkhorn Nat. Res. Dist, 881 N.W.2d 892 (Neb. 2016)

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that principles of claim preclusion estopped the County from contending that it was not required to release 1200 miner's inches of water at all times during irrigation season. The Water Court dismissed a *res judicata* argument on grounds that both parties agreed the point under dispute was the interpretation of rights the *Schuh* Decree already recognized, and interpreting a decree is not the same as re-litigating issues of fact already decided in it. The Water Court next considered McDonald's claim of judicial estoppel. The court dismissed the claim, finding her argument failed because she showed no evidence the County intended to commit fraud or abuse the judicial process, thus failing to demonstrate all the elements of judicial estoppel.

The Supreme Court affirmed the Water Court's dismissal of McDonald's estoppel argument, holding the Water Court properly applied the principles of claim preclusion upon which McDonald relied.

In a specially concurring opinion, Justice McKinnon agreed with the opinion of the court that downstream appropriators have no right to water stored behind an upstream dam as long as the dam operator releases that amount of water which would naturally flow through the stream without the interference of the dam. She concurred specially to opine that the *Schuh* Decree established a quantity of natural flow above the dam only, and this did not enjoin senior downstream appropriators from using in excess of 1200 miner's inches when the natural inflow of the Flint Creek exceeded 1200 miner's inches. Similarly, the Decree did not require the Company to draw from its reservoir to supplement inflow rates when they dropped below 1200 miner's inches.

*Megan McCulloch*

#### NEBRASKA

**Lingenfelter v. Lower Elkhorn Nat. Res. Dist.**, 881 N.W.2d 892 (Neb. 2016) (holding that (i) a farmer's uncontroverted claim that he had received approval to irrigate his land did not constitute approval by a Natural Resource District to irrigate those lands; (ii) a Natural Resources District's cease-and-desist order against the farmer was proper because the district created a rule that prohibited farmers from irrigating undesignated land without obtaining approval; and (iii) the district's rules of land designation were not arbitrary and capricious and did not violate the farmer's due process or equal protection rights).

The Nebraska Ground Water Management and Protection Act ("Act") created twelve Natural Resources Districts ("NRDs") within the state. NRDs have authority to regulate ground water. The NRDs' legislative purpose is to develop, manage, utilize, and conserve groundwater and surface-water. NRDs set limits on total ground water usage, require practices that promote the efficiency of ground water usage, and "limit or prevent the expansion of irrigated acres." This authority allows NRDs to protect groundwater quantity and quality. State legislators deemed this protection as "essential to the general welfare." Since the Act's adoption in 1975, NRDs have gained increasingly more authority to regulate Nebraska's groundwater. By 1996, the NRDs' authority was extended to regulate surface water that was hydrologically connected to groundwater.

The Lower Elkhorn Natural Resources District ("District") is the NRD that

regulates groundwater in northeastern Nebraska. The District has the authority to require reports and issue cease-and-desist orders in order to “administer and enforce” the Act and its goals. The District designates two types of lands that may be irrigated. First, it designates “Historically Irrigated Acres” as lands that were irrigated for at least one year between 1999 and 2008 or that are enrolled in a conservation plan. The second designation, “New Groundwater Irrigated Acres” covers other irrigated lands. The District sets rules that govern other irrigated lands. District Rules 13 and 15, promulgated in 2009, prohibited irrigators from receiving a certification for New Groundwater Irrigated Acres without a variance. Rule 14 outlines the certification process and requires either approval by the District’s board of directors or a “look-back” acknowledgement by the District that the land was irrigated between 1999 and 2008.

Lingenfelter, a farmer, purchased Rehfeld farm, located within the District, to use its well to irrigate the nearby Dunaway Farm. Prior to purchasing the farm, Lingenfelter met with a District employee. At this meeting, Lingenfelter and the employee calculated the amount of water available at the Rehfeld Farm. After purchasing the farm, Lingenfelter used the Rehfeld Farm well to irrigate the Dunaway Farm until 2013, when he received a cease-and-desist letter from the District. The letter explained that his irrigated land, which hydrologically connected ground water from the Rehfeld well to surface water on his other land, would likely be prohibited irrigation of New Groundwater Irrigated Acres under Rules 13 and 15.

Lingenfelter requested a hearing with the District over the cease-and-desist letter and sought the District’s certification of his water use. Before the hearing, he received a preliminary decision that the District would not approve his water use and that to continue irrigating, Lingenfelter had to obtain a variance. At the hearing, Lingenfelter could not show that he irrigated that land between 1999 and 2008, nor could he show that the land was certified. The District upheld the cease-and-desist demand, and Lingenfelter appealed to a district court.

Lingenfelter appealed under two causes of action. First, he requested judicial review of the District’s cease-and-desist order. Second, Lingenfelter requested a declaratory judgment that the District’s Rule 14, as well as its rule that defined Historically Irrigated Acres, violated his rights under the Nebraska Constitution and exceeded statutory authority.

Under the APA, the district court reviewed the District’s decision *de novo*. Under the first cause of action, Lingenfelter argued that the cease-and-desist order was not supported by the facts Lingenfelter presented. Lingenfelter first argued that he received approval to irrigate the Dunaway Farm in the meeting with a District employee and thus the district court should estop the District’s cease-and-desist order. He also argued that the District misapplied its own rules in determining the Dunaway Farm was not “irrigated acres.” Finally, he argued that Rule 14’s look-back provision was arbitrary and capricious.

The district court rejected all of these arguments. First, it stated that Lingenfelter could not prove that the District employee approved his project beyond his subjective assumption that irrigating the Dunaway Farm was “not an issue.” Second, the district court determined that the District did not misapply its own rules when it abstained from deciding whether Lingenfelter’s land constituted irrigated acres. The district court found that this analysis was not relevant because the District issued a cease-and-desist order because Lingenfelter

had failed to ask for a variance and not because he was irrigating an area without a Historic Irrigated Acres designation. Third, the district court rejected Lingenfelter's Rule 14 argument as convoluted and misplaced and because the record was insufficient for review of an administrative rule.

Under Lingenfelter's second cause of action, he requested that the district court issue a declaratory judgment that Rule 14 violated the Nebraska Constitution's equal protection and due process clauses. He claimed that because the rule was arbitrary and capricious, it violated his rights to due process. The district court ruled that the District's rules had a purpose of responding to recent drought conditions, and therefore they could not be arbitrary.

Lingenfelter appealed all of the district court's decisions to the Nebraska Supreme Court, arguing the district court failed to estop the District's cease-and-desist order, erroneously found his land to not be irrigated acres, and misunderstood his arbitrary and capricious argument, among other procedural complaints.

Lingenfelter argued to the Court that under the APA, the district court should have viewed the evidence in favor of the plaintiff and estopped the District's cease-and-desist order. To this point, Lingenfelter stated that if the district court had viewed the evidence in his favor then it would have understood his meeting with a District staff member as a confirmation that he could irrigate the Dunaway Farm with water from the Rehfeld Farm.

The Court disagreed and stated that because this was an administrative appeal, rather than a complaint to a district court, that the APA did not require the district court to view evidence in favor of the plaintiff. The Court also found that because Lingenfelter's belief that he could irrigate the Dunaway Farm using water from Rehfeld Farm was contradicted, the district court properly abstained from finding in his favor under Nebraska case law.

The Court also upheld the District's decision not to apply one of the two irrigation classifications, Historically Irrigated Acres and New Groundwater Irrigated Acres, to Lingenfelter's land. The Court concluded that because the District chose to not apply one of the designations to the land, it was likely forcing irrigators to seek certification so that it could ensure the water would be used properly. Furthermore, Lingenfelter never offered any evidence that his land had been irrigated between 1999 and 2008. Therefore, the District's decision was consistent with rules that prohibited New Groundwater Irrigated Acres and prevented any land that was not certified or Historically Irrigated from being irrigated.

The Court also addressed Lingenfelter's request under the APA for a declaratory judgment that Rule 14 was arbitrary and capricious, and therefore unconstitutional. The Court first noted that causes of action under the APA's declaratory judgment provision only apply to agencies. The APA's declaratory judgment provision was inapplicable here because NRDs were not agencies, but rather statutorily created as political subdivisions. Therefore, Lingenfelter could not use the APA to request a declaratory judgment against the District.

Instead of opining on constitutional issues through Lingenfelter's declaratory judgment, the Court reviewed the district court's summary judgment on constitutional issues in favor of the District. The Court first reviewed Lingenfelter's argument that Rule 14 violated his substantive due process rights.

Under the Nebraska Constitution, substantive due process inquiries require a determination of “whether a right in which the plaintiff has a legitimate property interest” was unconstitutionally taken from the plaintiff. A property interest is unconstitutionally taken if the government acted in a way that has no substantial relation to the general welfare. Lingenfelter argued that using water to irrigate the Dunaway Farm was a legitimate property interest and that Rule 14 arbitrarily and capriciously took that interest away. The Court rejected this argument, finding that Rule 14 was reasonably related to ensuring adequate groundwater supplies in Nebraska.

Lingenfelter’s next constitutional argument stated that violated his right to equal protection because it “divides landowners ‘into winners and losers based upon an arbitrary calendar date.’” Nebraska’s equal protection provision is identical to the United States Constitution’s provision. The Court approached this claim under a rational basis test because no suspect class was involved. The Court found Rule 14 was rational because it was driven by a policy that established a baseline of acres historically irrigated in order to conserve groundwater. Accordingly, the Court rejected both of Lingenfelter’s constitutional arguments.

Finally, the Court rejected Lingenfelter’s last three arguments that the District’s authority to make rules was “fundamentally unfair,” that there was insufficient evidence to determine whether Rule 14 was rationally related to the availability of groundwater, and that the district court misunderstood his arguments against the District’s adoption of Rule 14. The Court rejected the first argument because NRDs are statutorily authorized to make such rules. It rejected the second argument because it Act specifically refers to preventing droughts and because the Court properly reviewed the question *de novo*. The Court rejected the third argument because Lingenfelter did not explain how this error prejudiced the result.

Accordingly, the Court affirmed the district court’s decision and allowed the District to issue its cease-and-desist order without resistance.

*Travis Parker*

## NEVADA

**Rand Props., LLC v. Filippini, No. 66933, 2016 WL 1619306 (Nev. Apr. 21, 2016)** (holding that: (i) a person who has acquired a right to a quantity of water from a stream may take it at any point of the stream and may change the character of use as long as it does not affect the rights of others; (ii) stock water rights on public lands pass by chain of title in Nevada; and (iii) a private party may convey a stock water appropriation certificate).

On June 7, 2011, Daniel and Eddyann Filippini (“Filippini”) filed a complaint to adjudicate stock and irrigation water rights on Trout Creek against Julian Tomera Ranches, Inc. (“Tomera”), and Rand Properties, LLC. (“Rand”). The Sixth Judicial District Court, Lander County adjudicated the case on April 8, 2013, and established priority dates for each party’s stock and irrigation water rights. Rand appealed to the Supreme Court of Nevada on grounds that the district court erred in its finding of priority dates, stock water rights title passage, and conveyance of a stock appropriation certificate.

First, Rand asserted that its priority date began in 1869, and that the district court erred by finding that Rand’s priority date began in 1901. The district