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## Middle Niobrara Natural Res. Dist. v. Dep't of Natural Res., 838 N.W.2d 242 (Neb. 2013)

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The Supreme Court therefore concluded that, by agreeing to the partition, Jack did not intend to give away his water rights used on land not included in the agreement. The Court remanded the issue to the lower court to determine the best and most equitable way to provide Jack access to Flatwillow Creek.

*Allison Robinette*

## NEBRASKA

**Middle Niobrara Natural Res. Dist. v. Dep't of Natural Res., 838 N.W.2d 242 (Neb. 2013)** (holding the Natural Resources Districts' allegations lacked standing because they did not allege any legal right, title, or interest in the subject water of the Niobrara River and Thomas Higgins' allegations lacked standing because the harm was speculative and not distinguishable from the harm that would be caused to any other landholder within the natural resources district).

The Middle and Lower Natural Resources Districts ("NRDs") and Thomas Higgins unsuccessfully appealed to the Supreme Court of Nebraska ("Court") the Department of Natural Resources' ("DNR") dismissal of their action for lack of standing. The purpose of the action was to object to Nebraska Public Power District's ("NPPD") application to appropriate an additional 425 cubic feet per second of natural flow from the Niobrara River. The NRDs are responsible for the management of ground water within their districts. Higgins is the owner of real property in the Niobrara River Basin who holds senior water rights and pending surface water appropriations from the Niobrara River. The DNR dismissed the appellant's objections sua sponte for lack of standing. According to DNR, NRD lacked standing because it did not allege any legal right, title, or interest in the subject water of the Niobrara River and their allegation of harm was based upon mere conjecture. Higgins did not fulfill the standing requirement because no legal right existed regarding a pending application. Further, if DNR granted the pending applications, Higgins rights would be senior to NPPD and there was no evidence of credible harm.

The Court considered four issues on appeal. First, whether the director erred when he determined that NRD did not have a cognizable interest to fulfill the standing requirement. Second, whether Higgins would be adversely affected in a manner sufficient to confer standing. Third, whether DNR applied an improper standard of review. Fourth, whether DNR failed to consider the impact of the decision on the public interest.

The Court affirmed DNR's assertion that the NRDs did not have standing. The NRDs failed to allege any legal right, title, or interest and their allegations were based on mere conjecture. The NRDs argued the granting of NPPD's application would cause a portion of the Niobrara River to be fully appropriated in the future, and a threatened injury would satisfy the standing requirements. The NRDs further argued they had standing because they were responsible for the management of ground water from the Niobrara River. The Court, in a previous case, determined that standing exists when duties are placed upon the NRDs when DNR makes a fully appropriated designation. In this case, how-

ever, the DNR made no fully appropriated designation; it was merely speculation that DNR would grant the application, which might lead to a fully appropriated designation. The NRDs also tried to argue that the appropriation would preclude the use of water for irrigation and limit their tax base. The Court ruled that the harm the NRDs suffered needed to be more specific with a more direct and identified interest.

Higgins also lacked standing because he did not allege sufficient harm. Higgins argued that the grant of NPPD's application might increase his property taxes and might affect his real property value. The Court held these allegations were both speculative and not actual or imminent. Higgins further argued the grant might affect his existing appropriations and increase the cost of his pending applications. However, Higgins failed to explain how the DNR's decision would affect his water rights when his rights were both upstream and senior to NPPD's rights.

The third issue the Court addressed was whether the DNR applied the correct standard of review. The appellants argued the DNR failed to assume all the allegations were true and view them in the light most favorable to the appellants. The Court found that the DNR used the correct standard of review because the allegations did not allege an interest or an injury sufficient enough to confer standing.

Finally, the Court addressed whether the DNR should deny an application if so demanded by the public interest. The Court concluded it did not matter whether NPPD's application was in the public interest or not because the appellants did not have standing. Neither NRD nor Higgins could assert the public interest.

Because neither the NRDs nor Higgins established an interest or injury sufficient to confer standing, the Court affirmed the decision of the DNR.

#### **Stephan, J., Concurring in Part and Dissenting in Part**

Justice Stephan concurred in the determination that NRD did not have standing. Justice Stephan asserted it was merely speculative that the grant of NPPD's application would lead to a determination that the water basin was fully appropriated. Further, no single appropriation causes a fully appropriated decision and one could argue that any appropriation would cause the basin to become fully appropriated. This would allow the NRDs to challenge any surface water appropriation.

However, Higgins' claim was based on his own water rights and he had a pending application for another appropriation. Higgins' allegations that the grant of NPPD's application might increase his taxes and affect the value of his property were not enough to confer standing. However, Justice Stephan determined that Higgins' allegations that the grant would adversely impact his existing appropriations or preclude or increase the cost of his pending application were enough to confer standing despite the fact that Higgins did not allege how the appropriation would adversely affect his water rights.

#### **Connolly, J., Dissenting**

Justice Connolly dissented because he believed the majority ignored evidence of imminent harm that would result from the approval of the application. The Administrative Procedure Act (APA) permits the hearing for a contested case- a proceeding where a state agency is required to determine a party's legal

duties, rights, or procedures. Further, the APA defines an interested person as one who is or could be adversely affected in a legally cognizable way. Justice Connolly found both the NRDs and Higgins to have alleged sufficient facts to show that they would be adversely affected by DNR's approval of the NPPD application. Thus, both the NRDs and Higgins have standing.

*Sarah Cassinis*

## NORTH DAKOTA

**Reep v. State, 2013 841 N.W.2d 664 (N.D. 2013)** (holding the anti-gift clause of North Dakota's constitution precludes construing a state statute as a grant of the State's equal footing mineral interests under the shore zone to private upland landowners).

Eleven named owners of land next to navigable waters in North Dakota ("upland owners") sued the State of North Dakota ("State"), seeking declaratory judgment that they, not the State, owned the minerals under the shore zone. The landowners appealed to the Supreme Court of North Dakota ("Court") from the district court's grant of summary judgment in favor of the State.

When North Dakota joined the Union in 1889, the equal footing doctrine conferred onto the State constitutional rights to the land and mineral interests under its navigable waters from high watermark to high watermark. Although this conferral included the right to allocate its property interests, the equal footing doctrine required North Dakota, by virtue of its sovereignty, to hold its shore zone interests in trust for the public. The anti-gift clause found in N.D. Const. art. X, § 18 further protected the public trust by precluding the State from gifting its mineral interests to any private entity.

At issue in this case was N.D.C.C. § 47-01-15, which provides that private landowners next to navigable waters "take to the edge of the lake or stream at low watermark."

The upland owners argued the district court's holding was contrary to the Court's decision in *State ex rel. Sprynczynatyk v. Mills*, which they construed as holding upland owners next to navigable waters have full interests in the shore zone under N.D.C.C. § 47-01-15. The upland owners further contended the State's public trust and equal footing obligations did not relate to the proprietary privileges of ownership of subsurface mineral interests under the shore zone. The upland owners further contended that the statute did not violate the anti-gift clause.

Conversely, the State argued that its rights to shore zone mineral interests extended from high watermark to high watermark under the equal footing doctrine. The State claimed N.D.C.C. § 47-01-15 was a rule for construction, clarifying the extent of a grantor's conveyance to the grantee, rather than granting public mineral interests to private entities. The State further contended that a construction of the statute as a grant of the mineral interests to private entities would violate the equal footing doctrine and the anti-gift clause of N.D. Const. art. X, § 18.