

# **Bond Case Briefs**

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## **WATER LAW - NEBRASKA**

### **Prokop v. Lower Loup Natural Resources District**

**Supreme Court of Nebraska - January 11, 2019 - N.W.2d - 302 Neb. 10 - 2019 WL 168546**

Landowner sought judicial review of natural resources district board's issuance of a cease and desist order suspending landowner's access to ground water based on his failure to submit annual reporting related to water quality.

The District Court affirmed, but modified the penalty. Landowner appealed, and district and board cross-appealed.

The Supreme Court of Nebraska held that:

- District properly interpreted its rule governing annual reports to require actual crop yield data;
- District was not required to promulgate rule restating possibility of ground water restrictions;
- District's notice of proceeding against landowner comported with due process;
- Landowner was not deprived of competent judicial review;
- Issuance of cease and desist order was not a taking without just compensation;
- Trial court properly declined to supplement the record with exhibits offered by landowner; and
- Trial court properly reduced the duration of the suspension conditioned on landowner's future compliance.

Natural resources district properly interpreted the phrase "other field operations," as used in its rule requiring certain land operators to submit annual reports concerning water quality, to include actual crop yield data; district's agronomy technician testified at an administrative proceeding before district's board that requiring actual crop yield data was important to district's adopted goals of water quality and pollution control and district's obligations under the Ground Water Management and Protection Act to implement such goals, and technician further testified that the data were used as part of developing a plan to reduce nitrate contamination, because the data helped in determining how many pounds of nitrogen were removed from a field.

Natural resources district was not required to promulgate rules and regulations restating the potential for district to restrict ground water access for violations of the Ground Water Management and Protection Act or rules and regulations of the district; while the Act authorized the adoption and promulgation of rules necessary to discharge a district's administrative duties under the Act, the Act further established that the penalties for violations of the Act or district's rules and regulations included reducing a violator's ground water access in whole or in part.

Natural resources district's notice of proceeding to impose penalties based on landowner's failure to submit annual reporting related to water quality was sufficient to inform landowner of district's claims and supporting factual allegations and, thus, did not violate due process, where district's notice alleged that landowner failed to submit timely and complete annual reports, thereby informing landowner that his reports for the specified years were deficient and incomplete, and the deficiencies of missing annual yield data, nitrogen application, water applied, and landowner's signatures were apparent on the face of the reports listed in the notice.

Natural resources district's notice of proceeding to impose penalties based on landowner's failure to submit annual reporting related to water quality was sufficient to provide landowner a reasonable opportunity to confront and cross-examine adverse witnesses and present evidence and, thus, did not violate due process; notice was given 23 days before hearing and informed landowner of the time and location of the hearing, the potential penalties, and that he would have an opportunity to address the charges and present evidence, notice sufficiently informed him of the charges and factual allegations supporting the charges, and all the evidence provided by district was either a source of district's authority referenced in the notice or factual confirmation of specific allegations.

Landowner was not deprived of competent judicial review of a cease and desist order suspending access to ground water issued by natural resources district's board as result of any failure of the board to provide adequate notice of claims against landowner, in proceeding to impose penalties based on landowner's failure to submit annual reporting related to water quality; landowner was provided adequate notice of claims against him, was not entitled to notice of the specific evidence district intended to present, and was given opportunity to present his own evidence and call his own witnesses.

Natural resources district's issuance of a cease and desist order suspending landowner's access to ground water based on his failure to submit annual reporting related to water quality was an appropriate exercise of police power and did not amount to a taking without just compensation; district's reporting requirements were implemented, in part, to address the goals under the Ground Water Management and Protection Act of water quality and pollution control, district's rules and regulations and the Act required various data from operators, and, by failing to comply with reporting requirements, landowner prevented district from receiving information necessary to perform its duties under the Act.

Trial court properly declined to supplement the record with exhibits under exception to general prohibition of extra-record evidence for evidence of alleged procedural irregularities, on appeal from natural resources district's issuance of a cease and desist order suspending landowner's access to ground water based on his failure to submit annual reporting related to water quality, where landowner's exhibits were not relevant to whether there were procedural irregularities, but instead landowner claimed that the exhibits demonstrated what evidence he could have presented if the irregularities had not been present.

Trial court properly declined to remand to natural resources district's board for further proceedings to allow landowner to present additional evidence in the interest of justice, on appeal from board's issuance of a cease and desist order suspending landowner's access to ground water based on his failure to submit annual reporting related to water quality; contrary to landowner's argument, district's notice of proceeding against landowner was sufficient to inform landowner of the claims against him, and landowner was not entitled to notice of the evidence district planned to present.

Trial court properly modified a four-year suspension of landowner's ground water rights to a one-year suspension with possibility of three additional years if landowner continued to violate natural resources district's reporting requirements, on appeal from district's issuance of a cease and desist order suspending landowner's access to ground water based on his failure to submit annual reporting related to water quality; Ground Water Management and Protection Act did not limit the possibility of judicial review of the determination of penalties, trial court was required to make independent factual determinations and conclusions in reviewing an administrative order, and landowner's penalty was a matter at issue before the district's board.

