Nebraska Supreme Court Online Library
www.nebraska.gov/apps-courts-epub/
11/03/2026 10:36 PM CST



this court. Accordingly, respondent is directed to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2007) and Neb. Ct. R. §§ 3-310(P) and 3-323 of the disciplinary rules within 60 days after an order imposing costs and expenses, if any, is entered by the court.

JUDGMENT OF DISBARMENT.

---

# IN RE 2007 ADMINISTRATION OF APPROPRIATIONS OF THE WATERS OF THE NIOBRARA RIVER. JACK BOND AND JOE MCCLAREN RANCH, APPELLANTS, V. NEBRASKA PUBLIC POWER DISTRICT AND DEPARTMENT OF NATURAL RESOURCES, APPELLEES.

820 N.W.2d 44

Filed April 13, 2012. No. S-11-006.

1. **Administrative Law: Statutes: Appeal and Error.** In an appeal from the Department of Natural Resources, an appellate court's review of the director's factual determinations is limited to deciding whether such determinations are supported by competent and relevant evidence and are not arbitrary, capricious, or unreasonable; however, on questions of law, the appellate court is obligated to reach its conclusions independent of the legal conclusions made by the director.
2. **Actions: Appeal and Error.** The law-of-the-case doctrine reflects the principle that an issue litigated and decided in one stage of a case should not be relitigated at a later stage.
3. ____: ____. The law-of-the-case doctrine is a rule of discretion, not jurisdiction.
4. **Actions: Final Orders: Appeal and Error.** The law-of-the-case doctrine requires a final order. A party is not bound by a court's findings in an order that it was not required to appeal.
5. **Administrative Law: Parties.** When an administrative agency acts as the primary civil enforcement agency, it is more than a neutral fact finder and is a required party.
6. **Administrative Law: Waters.** The Department of Natural Resources is the official agency of the state in connection with water resources development and has the authority to resolve disputes, investigate the validity of water rights, engage in water administration, and issue and enforce orders.
7. **Administrative Law: Due Process.** In formal agency adjudications, as in court proceedings, due process requires a neutral, or unbiased, adjudicatory decisionmaker.
8. **Administrative Law: Presumptions.** Administrative adjudicators serve with a presumption of honesty and integrity.

9. **Administrative Law: Waters: Proof.** Neb. Rev. Stat. § 61-206(1) (Cum. Supp. 2006) states that the burden of proof in a hearing before the Department of Natural Resources shall be on the person making the complaint, petition, or application.
10. **Legislature: Administrative Law: Waters: Jurisdiction.** The Legislature has given the Department of Natural Resources jurisdiction over all matters pertaining to water rights for irrigation, power, or other useful purposes except as such jurisdiction is specifically limited by statute.
11. **Administrative Law: Waters: Jurisdiction.** The Department of Natural Resources has jurisdiction to hear and adjudicate all matters pertaining to water rights for irrigation and other purposes, including jurisdiction to cancel and terminate such rights.
12. **Administrative Law.** Administrative agencies have no general judicial powers, notwithstanding that they may perform some quasi-judicial duties.
13. **Administrative Law: Estoppel.** Normally, equitable estoppel has not been applied in administrative proceedings.
14. **Administrative Law: Waters: Time.** Two methods of loss of appropriation rights exist independent of statutory procedure for cancellation by the Department of Natural Resources. These two methods may be classified as abandonment of water rights or nonuser of such rights for the period of statutory limitations relating to real estate.
15. **Statutes: Legislature: Presumptions: Judicial Construction.** When the Legislature enacts a law affecting an area which is already the subject of other statutes, it is presumed that it did so with full knowledge of the preexisting legislation and the decisions of the Supreme Court construing and applying that legislation.
16. **Statutes: Intent.** Statutes which effect a change in the common law or take away a common-law right should be strictly construed, and a construction which restricts or removes a common-law right should not be adopted unless the plain words of the statute compel it.
17. **Administrative Law: Waters: Evidence.** In a proceeding before the Department of Natural Resources pursuant to Neb. Rev. Stat. § 61-206(1) (Cum. Supp. 2006), the department shall receive any evidence relevant to the matter and also has the discretion to conduct additional investigation to settle the issues raised by the parties.

Appeal from the Department of Natural Resources. Reversed and remanded with directions.

Donald G. Blankenau and Thomas R. Wilmoth, of Blankenau Wilmoth, L.L.P., for appellants.

Jon Bruning, Attorney General, Justin D. Lavene, and Marcus A. Powers for appellee Department of Natural Resources.

Stephen D. Mossman and Patricia L. Vannoy, of Mattson, Ricketts, Davies, Stewart & Calkins, for appellee Nebraska Public Power District.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

## I. NATURE OF CASE

Junior river water appropriators Jack Bond and Joe McClaren Ranch filed a request for hearing before the Nebraska Department of Natural Resources (Department), challenging the validity of the Department's administration of water in response to a call for administration placed by the Nebraska Public Power District (NPPD). The Department joined the matter as a party litigant against the junior appropriators. Following a hearing, the director of the Department determined that the water administration was proper and denied the junior appropriators' challenge to the sufficiency of the closing notices issued to upstream junior appropriators. The junior appropriators appealed. The main question on appeal is whether the issues of nonuse and abandonment alleged by the junior appropriators were properly before the Department. For the following reasons, we reverse the order and remand the cause with directions.

## II. BACKGROUND

### 1. OVERVIEW OF SURFACE WATER RIGHTS

Before setting forth the specific facts of this case, we begin with an overview of controlling Nebraska law. Nebraska's laws governing surface water management, regulation, and allocation present a mosaic of private and public rights.[1]

An appropriation right is the right to divert unappropriated streamwater for beneficial use.[2] Under the prior-appropriation system, each appropriator's right to divert unappropriated

---

[1] See *In re 2007 Appropriations of Niobrara River Waters*, 278 Neb. 137, 768 N.W.2d 420 (2009).

[2] Neb. Rev. Stat. § 46-204 (Reissue 2010).

waters from a stream for a beneficial purpose receives a date of priority. An appropriation's priority date is the date when the Department approves the appropriator's right to divert water.

In a perfect world, there would be sufficient water to satisfy all appropriations for a given stream.[3] But when a stream has insufficient water to satisfy all appropriation rights on it, the appropriator first in time is first in right.[4] That is, a senior appropriator with an earlier priority date has the right to continue diverting water against a junior appropriator with a later appropriation date when both appropriators are using the water for the same purpose.[5]

When the appropriators use the water for different purposes, however, a junior appropriator may nonetheless have a superior preference right over senior appropriators. Under the Nebraska Constitution and statutes, when there is insufficient water to satisfy all appropriations, certain water uses take preference over others, despite the appropriators' priority dates.[6] So, in times of shortage, aggrieved water users with superior preference rights may exercise their constitutional preference to obtain relief when the prior-appropriation system would otherwise deny such users access to water.[7]

Those using the water for domestic purposes have preference over those claiming it for any other purpose.[8] And those using water for agricultural purposes have preference over those using it for manufacturing and power purposes.[9] Thus, the junior appropriators' use of the diverted water for agricultural purposes took preference over NPPD's use of the water for power generation.[10]

---

[3] *In re 2007 Appropriations of Niobrara River Waters, supra* note 1.

[4] Neb. Rev. Stat. § 46-203 (Reissue 2010).

[5] § 46-204. See, also, *State, ex rel. Cary, v. Cochran*, 138 Neb. 163, 292 N.W. 239 (1940).

[6] See, Neb. Const. art. XV, § 6; § 46-204; Neb. Rev. Stat. § 70-668 (Reissue 2009).

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] See *id.*

Simply having a superior preference right does not give that appropriator unfettered use of the water. An appropriator having a superior preference right, but a junior appropriation right, can use the water to the detriment of a senior appropriator having an inferior preference right. But the junior appropriator must pay just compensation to the senior appropriator.[11] So, although NPPD's appropriation right was senior to that of the junior appropriators, the junior appropriators could continue to divert water if they compensated NPPD.[12]

Under Nebraska's statutes, if an irrigation district or appropriator with a superior preference right cannot agree with a power generator on the compensation for use of the water, then the appropriator can commence a condemnation proceeding in county court to determine the compensation.[13] In a condemnation proceeding, the county court appoints appraisers, who then return an award.[14] The compensation award cannot be greater than the cost of replacing the power that the power plant would have generated if it had retained use of the water.[15] For the Department, whether the parties agree on the compensation or the junior appropriators obtain a condemnation award, the result is the same. The Department cannot order the junior appropriators to cease diverting water to satisfy the senior appropriation for the period agreed to by the parties or contained in the condemnation award.

Additionally, in Nebraska, water rights may be lost by nonuse,[16] abandonment,[17] or statutory forfeiture.[18] The question presented in this appeal is whether, under the governing statutory scheme, a junior appropriator may allege abandonment

---

[11] Neb. Rev. Stat. § 70-669 (Reissue 2009).

[12] See *id.* See, also, Neb. Rev. Stat. § 76-711 (Reissue 2009).

[13] Neb. Rev. Stat. § 70-672 (Reissue 2009). See, generally, Neb. Rev. Stat. §§ 76-701 to 76-726 (Reissue 2009).

[14] § 76-706.

[15] § 70-669.

[16] See *State v. Nielsen*, 163 Neb. 372, 79 N.W.2d 721 (1956).

[17] *Id.*

[18] Neb. Rev. Stat. § 46-229 (Reissue 2010).

and statutory forfeiture to challenge the validity of a senior appropriator's rights before the Department.

### 2. Administrative Proceeding

We now turn to the specific facts presented in this appeal. The junior appropriators own real property in Cherry County, Nebraska. In 2006, the Department granted them surface water appropriation rights on the Niobrara River. The rights granted each junior appropriator the ability to divert certain quantities of water from the river for agricultural use.

NPPD owns and operates a hydropower facility on the Niobrara River near Spencer, Nebraska, which is located approximately 145 miles downstream from the junior appropriators' properties. NPPD's predecessor acquired certain appropriations of water from the Niobrara River, which NPPD currently holds. NPPD currently holds three appropriations, A-359R, A-1725, and A-3574, which amount to a total of 2,035 cubic feet per second (cfs).

On March 2, 2007, NPPD placed a written call for administration. NPPD claimed that the Niobrara River lacked sufficient water to satisfy all the appropriation rights and requested that the Department administer the water on the Niobrara River to satisfy NPPD's senior appropriations for the Spencer facility. When the Department determines water administration is necessary, the Department sends closing notices to individuals holding junior water rights upstream from the senior appropriator, which directs the individuals to cease diverting surface water so the water will reach the senior appropriator.

When a call for administration is received, the Department reviews its records to determine whether the calling appropriator is using water according to its permits. The Department then measures the riverflow at or near the calling appropriator's point of diversion to determine whether the calling appropriator is receiving the full allocation of surface water under the permits.

On March 12 and April 3, 5, and 23, 2007, the Department measured the flow of the Niobrara River to determine whether the Spencer facility was receiving flows sufficient to satisfy

its appropriations. The measurements taken on March 12 and April 3 and 23 established that no administration was required, as streamflows were high enough to satisfy NPPD's appropriations. The April 5 measurements revealed that flows were trending downward, but the Department determined that it was not necessary to administer water, because the Spencer facility was closed for maintenance and thus no beneficial use of water would be made.

On April 30, 2007, the Department conducted a stream measurement which indicated the total discharge of water to be 1,993.73 cfs, which was insufficient for the permits associated with the Spencer facility which allows NPPD to divert 2,035 cfs. The Department concluded that there was insufficient water for all appropriations. On May 1, the Department issued closing notices to individuals holding junior water rights upstream of the Spencer facility. The junior appropriators and about 400 other junior water users received closing notices. The closing notices directed them to cease water diversions for the benefit of NPPD's Spencer facility.

On May 11, 2007, the junior appropriators filed an administrative hearing request with the Department to determine whether the closing notices were validly issued pursuant to Neb. Rev. Stat. § 61-206(1) (Cum. Supp. 2006). The junior appropriators alleged that NPPD may have abandoned its appropriation rights, in whole or in part, and that if it had, then no valid appropriation right justified the closing notices. Alternatively, the junior appropriators alleged that they were not subject to the closing notices under the futile call doctrine—even if NPPD had a valid appropriation right, any call for water would be futile, because it would not result in additional water reaching NPPD's facility.

The Department appeared as a party in the proceeding to advocate for the validity of the closing notices issued. The junior appropriators objected to the Department's appearing as a party litigant. The Department then appointed an independent attorney to act as hearing officer in the matter, who ruled that the Department was a proper party.

The Department mailed opening notices in early May, allowing the junior appropriators to continue diverting water from

the river. And NPPD requested that the Department withhold water administration until August 1, 2007, "to allow time for NPPD to get in place Subordination Agreements with junior upstream irrigators, should they so desire."

On July 31, 2007, while the proceeding was still pending, the Department measured the flow of the Niobrara River near Butte, Nebraska, and determined the total discharge measurement was 902.72 cfs. The Department issued new closing notices to the junior appropriators on August 1.

On August 17, 2007, the junior appropriators filed a petition for condemnation of NPPD's water rights in the Boyd County Court. In their petition, the junior appropriators stated that they still disputed the validity of NPPD's appropriation right, but that "[b]ecause resolution of this issue may take several irrigation seasons," they elected to exercise their preference rights. The county court appointed appraisers who established a compensation award for NPPD for 20 years. NPPD appealed the appraisers' valuation of the condemnation award to the district court. That appeal has been stayed pending resolution of the present appeal.

On October 1, 2007, the Department informed the junior appropriators that the August 1 closing notices were lifted until further notice, due to maintenance at the Spencer facility. Based on the condemnation award, the junior appropriations have remained "open" and no further closing notices have been issued.

Following the condemnation proceeding, NPPD filed a motion to dismiss the administrative proceeding before the Department, arguing the condemnation award had mooted the appropriation controversy. The Department dismissed the proceeding for lack of jurisdiction, and the junior appropriators appealed. In a previous appeal in this case, we reversed the Department's order and determined that the case was not moot.[19]

We recognized that the junior appropriators' condemnation award provides them with a 20-year superior preference over NPPD. However, because the junior appropriators must

---

[19] *In re 2007 Appropriations of Niobrara River Waters, supra* note 1.

compensate NPPD for the water they divert from the river, a determination that NPPD had abandoned or forfeited its appropriations would immediately benefit the junior appropriators. Accordingly, the cause was remanded for further proceedings before the Department.

On remand, the junior appropriators objected to the reappointment of the independent attorney who conducted the original hearing. The Department appointed a second independent attorney to sit as hearing officer for the proceedings. The junior appropriators then moved for leave to amend their request for hearing. The junior appropriators sought to add a claim based on estoppel, and asserted that they had obtained information that established that NPPD had not called for water in over 50 years and that the Department had never issued a closing notice for NPPD's benefit. The hearing officer overruled the junior appropriators' motion to amend. Thereafter, NPPD filed a request to impose rules of evidence and a motion in limine seeking to preclude the introduction of evidence that the Spencer facility allegedly wastes water through leakage and disrepair. The hearing officer granted both of NPPD's motions, over the junior appropriators' objections.

The final hearing was held on the merits of the junior appropriators' original request in the administrative proceeding on July 27 and 28, 2010. The junior appropriators challenged the form of the proceeding, challenged the Department's administration of the call placed by NPPD which resulted in the issuance of the closing notices, and sought a determination of the validity of NPPD's water appropriations on the bases that NPPD had abandoned or statutorily forfeited all or a portion of its appropriations and that NPPD's appropriations do not form a legally sufficient foundation for the closing notices. The junior appropriators also argued that the Department's administration of NPPD's call was faulty, because the junior appropriators are not subject to the closing notices under the doctrine of futile call.

The hearing officer reserved ruling on exhibits 17, 18, 26, and 46, which were offered by the junior appropriators. Exhibits 17, 18, and 26 are copies of the 2006, 2007, and

2008 "Annual Evaluation of Availability of Hydrologically Connected Water Supplies," respectively. Exhibit 46 is a photograph of Spencer Dam. On August 10, 2010, the hearing officer issued a written order overruling the objections to the exhibits and received each into evidence. On December 20, the director issued his final order and found for the Department and NPPD. In the order, the director stated that the hearing officer had reserved ruling on exhibits 17, 18, 26, and 46; determined the exhibits were not relevant to the issues presented; and sustained the objections to their admission. The final order did not address the hearing officer's previous order which had received the exhibits into evidence.

The director determined that the junior appropriators had initiated a challenge to the Department's administration of their water rights pursuant to § 61-206. The director determined that the proceeding qualified as a "contested case" and assigned the burden of proof to the junior appropriators because they initiated the action by filing the request for hearing before the Department. According to the director, NPPD did not bear the burden of proof because the call for water administration was an informal request for Department investigation which did not initiate the proceeding. The director also determined that the Department was a proper party to the proceeding, because the junior appropriators' allegations challenged the Department's method of carrying out its ministerial duty of water administration as provided by § 61-206.

The director noted that the junior appropriators did not invoke the Department's jurisdiction over NPPD pursuant to Neb. Rev. Stat. §§ 46-229 to 46-229.05 (Reissue 2010). The director thus determined that the junior appropriators did not properly question NPPD's water rights as provided under §§ 46-229 to 46-229.05. A determination of whether NPPD's water rights should be canceled or modified was therefore deemed irrelevant to the action brought under § 61-206.

However, the director also stated that the junior appropriators failed to offer any evidence that NPPD or its predecessors had evidenced any intent to abandon the water rights. The director further noted that there was no limitation on appropriation A-359R due to NPPD's failure to obtain a lease

agreement with the State, because A-359R was issued prior to the statute requiring appropriators to enter into a contract with the State to lease the use of all water appropriated. The junior appropriators did not offer evidence to establish prescription, and the director stated that the doctrine of prescription has not been recognized in Nebraska. The director stated that had the junior appropriators sought a determination under §§ 46-229 to 46-229.05, their claims would have failed as a result of a lack of proof.

The director ultimately found that the junior appropriators failed to meet their burden of proof to challenge the Department's futile call analysis and denied their challenge to the propriety of the closing notices issued against them. The junior appropriators timely appealed.

## III. ASSIGNMENTS OF ERROR

The junior appropriators assign that the director erred in (1) aligning the Department as a party litigant; (2) assigning the burden of proof to the junior appropriators; (3) granting NPPD's motion in limine precluding evidence that part of the water called for was being wasted; (4) refusing to allow the junior appropriators to amend their request for hearing and refusing to hear evidence on the issue of whether the Department and NPPD should be estopped from calling for water administration; (5) "ejecting" certain exhibits from the record after the hearing officer had received them into evidence and the hearing had concluded; (6) ruling that the junior appropriators' claims directed at NPPD's rights were precluded because the junior appropriators did not independently initiate a proceeding pursuant to §§ 46-229 to 46-229.05; (7) ruling that NPPD had not lost a portion of its appropriations allowing it to call for water administration; (8) concluding that NPPD could call for the full amount of its appropriations without regard to subordination agreements, stream gauge error, and explicit limitations contained in A-359R; and (9) concluding that the Department conducted a proper futile call analysis to determine whether water used by the junior appropriators would reach the NPPD's Spencer facility in beneficially usable amounts.

## IV. STANDARD OF REVIEW

[1] In an appeal from the Department, an appellate court's review of the director's factual determinations is limited to deciding whether such determinations are supported by competent and relevant evidence and are not arbitrary, capricious, or unreasonable; however, on questions of law, the appellate court is obligated to reach its conclusions independent of the legal conclusions made by the director.[20]

## V. ANALYSIS

We first address the junior appropriators' procedural objections to the form of the proceedings below. The junior appropriators argue that the Department erred in aligning itself as a party litigant in the proceedings below, rather than acting as a neutral arbiter. The junior appropriators also claim that the Department erred in assigning the burden of proof to the junior appropriators below. The junior appropriators claim that the hearing officer erred in failing to allow them to amend their original petition. Finally, the junior appropriators assert that the Department inappropriately limited the scope of the proceeding to exclude the issues of nonuse and abandonment.

### 1. Law-of-the-Case Doctrine

NPPD asserts that the junior appropriators' assignments of error relating to the burden of proof and the Department's alignment as a party are barred under the law-of-the-case doctrine. NPPD argues that because there was an adverse decision prior to the original appeal, the junior appropriators were required to raise the issues at that time. Because the issues were not raised, NPPD contends both are barred and the determinations below must stand.[21]

[2] The law-of-the-case doctrine reflects the principle that an issue litigated and decided in one stage of a case should

---

[20] See *In re Applications T-851 & T-852*, 268 Neb. 620, 686 N.W.2d 360 (2004).

[21] See *County of Sarpy v. City of Gretna*, 276 Neb. 520, 755 N.W.2d 376 (2008).

not be relitigated at a later stage.[22] Under the law-of-the-case doctrine, an appellate court's holdings on questions presented to it in reviewing the trial court's proceedings become the law of the case; those holdings conclusively settle, for purposes of that litigation, all matters ruled upon, either expressly or by necessary implication.[23]

[3,4] However, the law-of-the-case doctrine is a rule of discretion, not jurisdiction.[24] And the doctrine requires a final order. A party is not bound by a court's findings in an order that it was not required to appeal.[25]

As a general rule, administrative determinations are not final when they are interlocutory, incomplete, provisional, or not yet effective.[26] And this court has recognized that in administrative proceedings, review of preliminary or procedural orders is generally not available, primarily on the ground that such a review would afford opportunity for constant delays in the course of administrative proceedings for the purpose of reviewing mere procedural requirements or interlocutory directions.[27]

During the proceedings that took place prior to the original appeal in this case, the junior appropriators objected to the form of the proceedings, asserting the arguments discussed above. The original hearing officer issued an "Order on Objection to Form of Proceedings" on July 25, 2007. In the order, the hearing officer determined that the Department was a proper party and that the junior appropriators bore the burden of proof. Following those determinations, the director dismissed the case for lack of jurisdiction. The junior appropriators timely appealed and assigned that the director erred in determining that the Department lacked subject matter jurisdiction in

---

[22] *Smeal Fire Apparatus Co. v. Kreikemeier*, 279 Neb. 661, 782 N.W.2d 848 (2010), *disapproved on other grounds, Hossaini v. Vaelizadeh, ante* p. 369, 808 N.W.2d 867 (2012).

[23] *Money v. Tyrrell Flowers*, 275 Neb. 602, 748 N.W.2d 49 (2008).

[24] *Smeal Fire Apparatus Co. v. Kreikemeier, supra* note 22.

[25] *Id.*

[26] *Chase v. Board of Trustees of Nebraska State Colleges*, 194 Neb. 688, 235 N.W.2d 223 (1975).

[27] *Houk v. Beckley*, 161 Neb. 143, 72 N.W.2d 664 (1955).

dismissing the case. The junior appropriators did not argue that the hearing officer erred in overruling its objections to the form of the proceeding. NPPD now asserts that the junior appropriators are bound by the hearing officer's procedural rulings. We disagree.

The hearing officer's "Order on Objection to Form of Proceedings" was not a final order from which the junior appropriators could appeal. The order was an interlocutory order limited to the junior appropriators' procedural objections. And the hearing officer's procedural rulings were not addressed by the director in the final order which dismissed the case. Nor were they relevant to the final order. Thus, the procedural rulings were not the subject of a final, appealable order at the time of the previous appeal. And our determination in the previous appeal did not conclusively settle these matters, either expressly or by necessary implication. Accordingly, the law-of-the-case doctrine does not apply to bar the issues. As the junior appropriators are not bound by the procedural rulings, we now address the merits of the procedural assignments of error.

### 2. Department as Proper Party

The junior appropriators first argue that the director erred in aligning the Department as a party litigant. In support of their argument, the junior appropriators rely on the plain language of § 61-206. Section 61-206(1) provides that when a hearing is requested following a Department decision, the Department "shall receive any evidence relevant to the matter under investigation." The junior appropriators argue that this indicates that the Department's role is limited to factfinding in the instant case.

[5,6] An administrative agency is a neutral factfinding body when it is neither an adversary nor an advocate of a party.[28] However, when an administrative agency acts as the primary civil enforcement agency, it is more than a neutral fact finder and is a required party.[29] The Department is the official agency

---

[28] *Metropolitan Util. Dist. v. Aquila, Inc.*, 271 Neb. 454, 712 N.W.2d 280 (2006).

[29] *Id.* (citing *Becker v. Nebraska Acct. & Disclosure Comm.*, 249 Neb. 28, 541 N.W.2d 36 (1995)).

of the state in connection with water resources development and has the authority to resolve disputes, investigate the validity of water rights, engage in water administration, and issue and enforce orders.[30]

In the final order, the director addressed the junior appropriators' continuing objection to the Department's acting as a party:

> [T]he Appropriators' Request challenged the facts found by the Department and the manner in which it carried out its ministerial duties. [T]he action filed by the Appropriators should have been labeled as a complaint against the Department. The substance of the original pleading is challenging the Department's method of carrying out its ministerial duty. Therefore, the Department is a proper party to this proceeding. NPPD may make a request for administration, but the Department determines when administration is to occur. NPPD would not have the facts gathered by the Department prior to initiating water administration—only Department employees have that knowledge. The [Administrative Procedure Act] and the Department's *Rules of Practice and Procedure* describe procedures to follow in those situations in which the Department may be both a party and a neutral fact finder.

The junior appropriators' request for hearing followed the Department's issuance of closing notices for the purpose of administering water. The junior appropriators challenged the validity of the closing notices and, necessarily, the validity of the Department's water administration. The Department is the primary civil enforcement agency charged with the administration and enforcement of water rights. Accordingly, it was proper for the Department to advocate for the validity of its administration. We agree with the director's determination that the Department is a proper party to these proceedings. The junior appropriators' arguments to the contrary are without merit.

---

[30] See § 61-206(2) and (3).

In addition, the junior appropriators appear to argue that the Department's alignment as a party amounts to a violation of due process. Procedural due process limits the ability of the government to deprive people of interests which constitute "'liberty'" or "'property'" interests within the meaning of the Due Process Clause.[31] A right of appropriation is not one of ownership of surface water prior to capture.[32] Although the interest does not equate to ownership, we have nevertheless recognized that an appropriation right is a property right which is entitled to the same protection as any other property right.[33] Thus, the adjudication proceedings below involved important property interests of the appropriators.

[7,8] In formal agency adjudications, as in court proceedings, due process requires a neutral, or unbiased, adjudicatory decisionmaker.[34] Administrative adjudicators serve with a presumption of honesty and integrity.[35] But combining prosecutorial and adjudicative functions presents a danger to the due process requirement of impartiality.[36] When advocacy and decisionmaking roles are combined, "'true objectivity, a constitutionally necessary characteristic of an adjudicator,'" is compromised.[37]

But the mere fact that investigative, prosecutorial, and adjudicative functions are combined within one agency does not

---

[31] *Murray v. Neth*, 279 Neb. 947, 955, 783 N.W.2d 424, 432 (2010) (citing *Stenger v. Department of Motor Vehicles*, 274 Neb. 819, 743 N.W.2d 758 (2008)).

[32] *Spear T Ranch v. Knaub*, 269 Neb. 177, 691 N.W.2d 116 (2005).

[33] *Loup River P. P. D. v. North Loup River P. P. & I. D.*, 142 Neb. 141, 5 N.W.2d 240 (1942).

[34] *Murray v. Neth, supra* note 31.

[35] *Id.*

[36] *Id.* (Miller-Lerman, J., concurring in part, and in part dissenting; Connolly, J., joins) (citing *Botsko v. Davenport Civil Rights Com'n*, 774 N.W.2d 841 (Iowa 2009)).

[37] *Murray v. Neth, supra* note 31, 279 Neb. at 963, 783 N.W.2d at 437 (Miller-Lerman, J., concurring in part, and in part dissenting; Connolly, J., joins) (quoting *Howitt v. Superior Court*, 3 Cal. App. 4th 1575, 5 Cal. Rptr. 2d 196 (1992)).

give rise to a due process violation.[38] In addition, the fact that an agency adjudicator has a supervisory role over agency actors involved in the investigatory or prosecutorial functions of the agency does not establish a procedural due process claim.[39] Such combinations inhere in the very nature of the administrative process before an agency.[40] In considering what due process requires, we must bear in mind "'the way particular procedures actually work in practice.'"[41]

The separation of functions within an administrative agency, allotting the prosecutorial function to a staff of attorneys or other personnel who will not participate in the eventual decision, is a common and recommended feature of administrative enforcement activity.[42] It has been recognized that there can never be a merger of prosecutorial and judicial functions in an administrative agency exercising quasi-judicial functions.[43] Further, it has sometimes been concluded that some mixture of judicial and prosecutorial functions is acceptable in administrative proceedings where the person performing the quasi-prosecutorial function is not also a member of the decisionmaking board or tribunal.[44]

---

[38] *Botsko v. Davenport Civil Rights Com'n, supra* note 36; *Morongo Band v. State Water Control Bd.*, 45 Cal. 4th 731, 199 P.3d 1142, 88 Cal. Rptr. 3d 610 (2009); *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827 (Tenn. 2008); *PERS v. Stamps*, 898 So. 2d 664 (Miss. 2005).

[39] *R. A. Holman & Co. v. Securities and Exchange Commission*, 366 F.2d 446 (2d Cir. 1966); *Botsko v. Davenport Civil Rights Com'n, supra* note 36.

[40] *Botsko v. Davenport Civil Rights Com'n, supra* note 36; *Alcoholic Beverage Control v. Appeals Bd.*, 40 Cal. 4th 1, 145 P.3d 462, 50 Cal. Rptr. 3d 585 (2006); *Martin-Erb v. MO Com'n on Human Rights*, 77 S.W.3d 600 (Mo. 2002).

[41] *Murray v. Neth, supra* note 31, 279 Neb. at 960, 783 N.W.2d at 435 (Miller-Lerman, J., concurring in part, and in part dissenting; Connolly, J., joins) (quoting *Withrow v. Larkin*, 421 U.S. 35, 95 S. Ct. 1456, 43 L. Ed. 2d 712 (1975)).

[42] *La Petite Auberge v. R. I. Com'n for Human Rights*, 419 A.2d 274 (R.I. 1980).

[43] *Phillips v. Bd. of Fire and Police Comm'rs*, 24 Ill. App. 3d 242, 320 N.E.2d 355 (1974).

[44] *Ladenheim v. Union County Hospital Dist.*, 76 Ill. App. 3d 90, 394 N.E.2d 770, 31 Ill. Dec. 568 (1979).

Here, the record does not indicate that the Department improperly combined the roles of advocate and adjudicator. The record shows that the proceedings were conducted by an independent attorney not employed by the Department. The director issued the final order in the case, and a Department staff member, who is an attorney, represented the Department at the hearing.

The record does not reflect, and the junior appropriators do not argue, that the director or the Department attorney had any communication regarding the outcome of these proceedings or that the director requested the attorney to gather or present specific evidence. Accordingly, the record does not reflect that the advocacy and adjudicatory roles were impermissibly combined below to affect the fairness and impartiality of the director in making the ultimate adjudication. The Department's alignment as a party thus did not violate the requirements of procedural due process.

### 3. Burden of Proof

The junior appropriators assert that NPPD should have the burden of proving the validity of its appropriations pursuant to § 61-206(1), because it initiated this action with its call for water administration. Because the junior appropriators raised issues outside the call for administration, we determine the junior appropriators bear the burden of proving their allegations.

[9] The Department is authorized to hold hearings on complaints, petitions, or applications, and if a final decision is made without a hearing, "a hearing shall be held at the request of any party to the proceeding."[45] Section 61-206(1) states that the burden of proof in a hearing before the Department shall be on the person making the complaint, petition, or application.[46]

The director determined:

> The proceeding before the Department was initiated by the Appropriators filing the May 11, 2007, Request[.]

---

[45] § 61-206(1).

[46] See, also, *In re Applications T-851 & T-852, supra* note 20.

> The contents of the Appropriators' Request, when read in full, is a complaint about the Department's factual determinations which led to water administration affecting the Appropriators. The bases of the Request concern facts that were investigated by the Department to determine whether water administration should occur. Those include, but are not limited to, whether the calling water rights exist and whether the doctrine of futile call when applied to NPPD's call would negate closing of Appropriators' rights. Thus, the Appropriators brought the action, the action is a complaint regarding the Department's administration of water rights on the Niobrara River, and the Appropriators bear the burden of proof.

Regarding the junior appropriators' argument that NPPD initiated the proceeding with its call for water administration, the director found:

> NPPD's letter . . . requesting the Department honor its "call" for water administration was not a complaint, petition, or application as defined in the statutes and rules governing the Department. Under the provisions of the Department's *Rules of Practice and Procedure*, 454 *Neb. Admin. Code* Chapter 7, a contested case proceeding would not have started with a letter asking for water administration. Under Chapter 7, § 003.02, informal proceedings are allowed. NPPD's letter . . . was an informal request that the Department conduct ongoing investigations relative to Spencer Hydropower Plant for purposes of determining when water administration should occur based upon the plant's surface water appropriations.

The term "application" has consistently been limited to circumstances where a party applies for a new right or seeks to modify existing rights. For example, in *Central Platte NRD v. State of Wyoming*,[47] this court determined that the applicant bore the burden of proof under the predecessor to

---

[47] *Central Platte NRD v. State of Wyoming*, 245 Neb. 439, 513 N.W.2d 847 (1994). See, also, *Ponderosa Ridge LLC v. Banner County*, 250 Neb. 944, 554 N.W.2d 151 (1996).

§ 61-206, where the party was applying for a new instream flow appropriation. We have also determined that NPPD bore the burden of proof when filing an application with the Department to transfer two existing water rights to new locations.[48] Surface water administration does not require a party's application, as administration is a ministerial duty of the Department.[49] That being the case, we agree that NPPD did not initiate the proceeding below.

Furthermore, as will be discussed fully below, because the junior appropriators sufficiently raised additional issues regarding the validity of NPPD's appropriations, the "request for hearing" was more akin to a petition in the general sense. Accordingly, we agree that the junior appropriators initiated the proceeding and thus bore the burden of proof on the issues raised in the request for hearing.

### 4. Request to Amend Pleading

The junior appropriators assert that the director erred in refusing to allow them to amend their request for hearing and refusing to hear evidence or argument that the Department and NPPD should be estopped from calling for water administration. We determine that the director correctly determined the Department is without general equitable jurisdiction, and the denial of the junior appropriators' request to amend therefore does not amount to an abuse of discretion.

The administrative regulations which govern the Department state that "[a] petition may be amended at any time before an answer is filed or is due if notice is given to the Respondent or his or her attorney. In all other cases, a Petitioner must request permission to amend from the Hearing Officer."[50] The hearing officer's grant of such a request is discretionary:

> A Hearing Officer may also allow, in his or her discretion, the filing of supplemental pleadings alleging facts material to the case occurring after the original pleadings were filed. A Hearing Officer may also permit

---

[48] See *In re Applications T-851 & T-852, supra* note 20.

[49] See *State, ex rel. Cary, v. Cochran, supra* note 5.

[50] 454 Neb. Admin. Code, ch. 7, § 007.04A (2005).

> amendment of pleadings where a mistake appears or where amendment does not materially change a claim or defense.[51]

On remand, the junior appropriators filed a "Motion for Leave to File First Amended Request for Hearing Concerning May 1, 2007 Closing Notices and Stay of Issuance of Future Closing Notices." With this motion, the junior appropriators sought to amend their original pleading to allege that "both [the Department] and NPPD should be equitably [e]stopped from issuing or requesting any further Closing Notices." The junior appropriators argued that the Department should be equitably estopped from issuing closing notices in favor of NPPD and that NPPD should be estopped from requesting any further closing notices.

NPPD objected to the junior appropriators' request to amend, which the hearing officer sustained. The hearing officer reasoned that an amendment would be futile, because the junior appropriators failed to allege sufficient facts to support a theory of equitable estoppel, the Department lacks the authority to grant equitable relief, and the Department cannot be estopped from performing its statutorily defined duties.

[10,11] The Legislature has given the Department jurisdiction "over all matters pertaining to water rights for irrigation, power, or other useful purposes except as such jurisdiction is specifically limited by statute."[52] In cases involving disputes arising under this statutory scheme, we have noted that the Department has jurisdiction to hear and adjudicate all matters pertaining to water rights for irrigation and other purposes, including jurisdiction to cancel and terminate such rights.[53] However, we do not read § 61-206(1) as authorizing the Department to exercise general equitable jurisdiction.

---

[51] *Id.*, § 007.04B.

[52] § 61-206(1). See *In re 2007 Appropriations of Niobrara River Waters, supra* note 1.

[53] *Koch v. Aupperle*, 274 Neb. 52, 737 N.W.2d 869 (2007); *State ex rel. Blome v. Bridgeport Irr. Dist.*, 205 Neb. 97, 286 N.W.2d 426 (1979); *Hickman v. Loup River Public Power Dist.*, 173 Neb. 428, 113 N.W.2d 617 (1962).

[12,13] The Department has no independent authority to regulate ground water users or administer ground water rights for the benefit of surface water appropriators.[54] As a general rule, administrative agencies have no general judicial powers, notwithstanding that they may perform some quasi-judicial duties.[55] Only a judicial tribunal, and not an administrative agency acting as a quasi-judicial tribunal, can provide relief that is "'within the general power of the court'" to provide.[56] Equity jurisdiction exists independently of statute and comes from the Constitution, a higher source than a legislative enactment.[57] And, normally, equitable estoppel has not been applied in administrative proceedings.[58]

Because we agree the Department lacks the authority to grant equitable relief, we determine that the junior appropriators' proposed amendment would have been futile and that therefore, the hearing officer did not err in denying the request. In addition to its futility, the amendment would have materially changed the claims raised in the original pleading. The junior appropriators' original pleading did not assert a theory of equitable estoppel, and the amendment was requested almost 3 years after the original pleading was filed. It was within the hearing officer's discretion to deny the junior appropriators' request to amend. The junior appropriators' arguments to the contrary are without merit.

### 5. Scope of Proceedings

The junior appropriators assert that the director erred in limiting the scope of the proceeding to exclude their claims that NPPD had abandoned or statutorily forfeited its appropriations. The director determined that the junior appropriators failed to

---

[54] *In re Complaint of Central Neb. Pub. Power*, 270 Neb. 108, 699 N.W.2d 372 (2005).

[55] *Stoneman v. United Neb. Bank*, 254 Neb. 477, 577 N.W.2d 271 (1998) (citing *Ventura v. State*, 246 Neb. 116, 517 N.W.2d 368 (1994)).

[56] *Id.* at 492, 577 N.W.2d at 281 (quoting *Ventura v. State, supra* note 55).

[57] *Hall v. Hall*, 123 Neb. 280, 242 N.W. 607 (1932).

[58] See *Furstenberg v. Omaha & C. B. Street R. Co.*, 132 Neb. 562, 272 N.W. 756 (1937).

properly initiate a cancellation proceeding to determine the validity of NPPD's appropriations pursuant to §§ 46-229 to 46-229.05 and that therefore, the proceedings were limited by the provisions of § 61-206(1). The director noted:

> [T]he modification of the adjudication statute § 46-229 in 1993 made the cancellation of an appropriation the sole authority of the Director of the Department and sets out the process that must be followed to cancel a water appropriation. Consequently, unlike in the past, no automatic loss of water rights occurs under the current statutory framework.

The director further stated:

> Had Appropriators requested an adjudication of NPPD's water rights by referencing §§ 46-229 through 46-229.05, then the Department would have followed the provisions the Legislature has prescribed. . . . However, that was not the process the Appropriators chose to pursue. Instead, they challenged the Department's administration of the call requested by NPPD.

We find no authority to support the director's determination that the junior appropriators' request for hearing pursuant to § 61-206(1) prevented the Department from determining the validity of NPPD's appropriations in regard to the allegations of abandonment and forfeiture. Furthermore, the statutory process for cancellation is not the sole method by which appropriations may be challenged. Thus, the director erred in refusing to address the issues raised by the junior appropriators in this regard.

(a) Methods of Cancellation

NPPD asserts that "Nebraska statutes clearly state that appropriations may be canceled only under the statutory procedure laid out in **Neb. Rev. Stat.** §§ 46-229.02 to 46-229.05, and recent case law uses the statutory procedure exclusively."[59] This is an incorrect statement of law. While the statutes do provide the Department with a cancellation procedure, the statutes do not abrogate the common-law methods of cancellation.

---

[59] Brief for appellee NPPD at 41.

[14] The current language of § 46-229 was amended in 1993. Prior to that amendment, in *State v. Nielsen*,[60] this court recognized two methods of loss of appropriation rights independent of statutory procedure for cancellation by the Department. "These two methods may be classified as abandonment of water rights, or nonuser of such rights for the period of statutory limitations relating to real estate."[61] *Nielsen* defined abandonment as "'"the relinquishment of a right by the owner thereof, without any regard to future possession by himself or any other person, but with the intention to forsake or desert the right."'"[62]

At the time *Nielsen* was decided, § 46-229 provided that in the event that an appropriation ceased to be used for a beneficial or useful purpose, that right ceased. Section 46-229.02 provided the cancellation procedure for the Department in the event of such statutory forfeiture. However, we stated that the procedure referred to in §§ 46-229 to 46-229.05 is not exclusive.[63] In addition, we noted that the common-law methods of canceling appropriation rights were independent of the statutory procedure for cancellation.[64]

In 1993, the Legislature amended § 46-229 to state:

> All appropriations for water must be for some beneficial or useful purpose and, except as provided in sections 46-290 to 46-294, when the appropriator or his or her successor in interest ceases to use it for such purpose for more than three consecutive years, the right may be terminated only by the Director of [the Department] following a hearing pursuant to sections 46-229.02 to 46-229.05.[65]

NPPD and the Department claim this amendment, because it states "only by the Director of [the Department] following a

---

[60] *State v. Nielsen, supra* note 16. See, also, *In re Applications T-61 and T-62*, 232 Neb. 316, 440 N.W.2d 466 (1989).

[61] *State v. Nielsen, supra* note 16, 163 Neb. at 381, 79 N.W.2d at 728.

[62] *Id.* (citing *State v. Oliver Bros.*, 119 Neb. 302, 228 N.W. 864 (1930)).

[63] *State v. Nielsen, supra* note 16.

[64] *Id.*

[65] 1993 Neb. Laws, L.B. 302, § 2 (codified at § 46-229 (Reissue 1993)).

hearing pursuant to sections 46-229.02 to 46-229.05," has abrogated the common-law methods providing the cancellation of appropriation rights. We disagree.

[15] When the Legislature enacts a law affecting an area which is already the subject of other statutes, it is presumed that it did so with full knowledge of the preexisting legislation and the decisions of the Supreme Court construing and applying that legislation.[66] As this court previously determined in *Nielsen*, because § 46-229 did not provide the exclusive method by which an appropriation could be lost, the Legislature is presumed to have had that knowledge when it enacted L.B. 302. We will not read the statute to effect a change in that interpretation absent specific language which compels it.

[16] Furthermore, statutes which effect a change in the common law or take away a common-law right should be strictly construed, and a construction which restricts or removes a common-law right should not be adopted unless the plain words of the statute compel it.[67] The plain and unambiguous language of §§ 46-229 to 46-229.05 merely provides the procedure by which the Department must abide when terminating an owner's or a successor's appropriation right. This language does not explicitly address the common-law theories of abandonment and nonuse. Absent express statutory provision, we must construe § 46-229 in a manner which does not restrict or remove the common-law method of cancellation. As such, we determine that § 46-229 is a procedural provision that does not abrogate the common law. NPPD and the Department's assertions to the contrary are without merit.

(b) Adjudicating Cancellation

The junior appropriators argue that § 61-206(1) does not limit the issues presented in their request for hearing to the

---

[66] *Dalition v. Langemeier*, 246 Neb. 993, 524 N.W.2d 336 (1994).

[67] *Stoneman v. United Neb. Bank, supra* note 55; *Popple v. Rose*, 254 Neb. 1, 573 N.W.2d 765 (1998), *abrogated on other grounds, A.W. v. Lancaster Cty. Sch. Dist. 0001*, 280 Neb. 205, 784 N.W.2d 907 (2010); *Guzman v. Barth*, 250 Neb. 763, 552 N.W.2d 299 (1996). See, also, *Tadros v. City of Omaha*, 273 Neb. 935, 735 N.W.2d 377 (2007); *Spear T Ranch v. Knaub, supra* note 32.

validity of the Department's water administration and related closing notices. They assert that §§ 46-229 to 46-229.05 were referenced throughout the proceeding and that the substance of the request effectively raised these issues before the Department and provided the requisite notice to the parties. The junior appropriators state that § 61-206(1) was utilized simply because the Department had already rendered a decision by issuing closing notices to the junior proprietors and that this procedure does not limit what issues the hearing may address.

Section 46-229.02 imposes procedural obligations by which the Department must abide prior to canceling appropriations sua sponte:

> (1) If, based upon the results of a field investigation or upon information, however obtained, the department makes preliminary determinations (a) that an appropriation has not been used, in whole or in part, for a beneficial or useful purpose or having been so used at one time has ceased to be used, in whole or in part, for such purpose for more than five consecutive years and (b) that the department knows of no reason that constitutes sufficient cause, as provided in section 46-229.04, for such nonuse or that such nonuse has continued beyond the additional time permitted because of the existence of any applicable sufficient cause, the department shall serve notice of such preliminary determinations upon the owner or owners of such appropriation and upon any other person who is an owner of the land under such appropriation.

When the Department makes a preliminary determination of nonuse for more than 5 years, the Department is then required to give notice to the appropriator, provide the appropriator reasons for the Department's preliminary determination, and allow the appropriator the opportunity to contest that determination.[68] Based on the appropriator's response, the Department may issue an order canceling the appropriation in whole or in part,[69] inform the appropriator that it has provided sufficient

---

[68] § 46-229.02(1).

[69] § 46-229.02(2).

information for the Department to conclude that the appropriation should not be canceled,[70] or issue an order canceling the appropriation in part, based on and to the extent of the owner's agreement.[71] If none of these foregoing circumstances apply, the Department must hold a hearing on the cancellation of the appropriation.[72]

But the junior appropriators' challenge is not predicated on a preliminary determination by the Department. The above procedural provisions thus are not binding on the junior appropriators here. The junior appropriators filed their request for hearing pursuant to § 61-206(1), which states in relevant part:

> The Department . . . is given jurisdiction over all matters pertaining to water rights for irrigation, power, or other useful purposes except as such jurisdiction is specifically limited by statute. . . . It may have hearings on complaints, petitions, or applications in connection with any of such matters. . . . Upon any hearing, the [D]epartment shall receive any evidence relevant to the matter under investigation and the burden of proof shall be upon the person making the complaint, petition, and application.

The director correctly stated that §§ 46-229 to 46-229.05 provide the procedure the Department must follow to cancel appropriations. But the statutes do not preclude a party from challenging the validity of an appropriator's rights before the Department, and there is no provision dictating how such challenge may be initiated.

Section 46-229.02 provides that the Department can raise the issue of whether a party's water rights should be canceled or modified sua sponte, "upon information, *however obtained*." (Emphasis supplied.) Thus, another landowner should be able to raise such an issue in hearings before the Department brought under § 61-206(1). When information regarding forfeiture has been obtained by the Department, the statutory

---

[70] § 46-229.02(3).

[71] § 46-229.02(4).

[72] § 46-229.02(5).

scheme directs the Department to make a preliminary determination as to whether such appropriations should be canceled pursuant to statute. In addition, when a party alleges abandonment, the Department should conduct proceedings to determine those issues.

[17] Moreover, § 61-206(1) plainly provides a method by which a landowner may request adjudicatory proceedings before the Department. The language of § 61-206(1) contains no limitation on the issues which may be raised at such proceedings. It states, "Upon any hearing, the [D]epartment shall receive any evidence relevant to the matter under investigation . . . ." Neb. Rev. Stat. § 61-201(1) (Reissue 2009) also allows the Department to conduct additional investigation on matters raised before rendering a final decision. Accordingly, in a proceeding before the Department pursuant to § 61-206(1), the Department shall receive any evidence relevant to the matter and also has the discretion to conduct additional investigation to settle the issues raised by the parties. In the final order, the director effectively concluded that forfeiture is irrelevant to priority. But common sense dictates that a right that has been abandoned cannot take priority over one that has not.

We see no reason why the Department should require appropriators to jump through additional hoops when seeking a determination of the status of this significant property interest. When relevant to a hearing before the Department, the issue of abandonment or forfeiture should be heard and decided. The manner in which the proceeding was initiated does not limit the Department's authority to do so.

In *In re Applications T-61 and T-62*,[73] we similarly held that it was improper for the Department to limit the scope of the issues determined based on the procedure used to initiate the proceeding. The appellant there contended that consideration of nonuse in a hearing on an application for transfer is not a proper procedure.[74] We disagreed:

> When an application is made to transfer water rights which no longer exist because of nonuse, the director may

---

[73] *In re Applications T-61 and T-62, supra* note 60.

[74] *Id.*

> cancel the rights in the transfer proceeding if the evidence shows that the rights have expired through nonuse. It should be obvious that a right which does not exist should not be transferred.[75]

We find no authority limiting the relevant issues raised in a hearing brought pursuant to § 61-206(1), as long as such issues fall under the Department's authority as provided by statute.

### (c) Pleading Abandonment and Statutory Forfeiture

There is no indication that §§ 46-229 to 46-229.05 have been applied or should be interpreted to impose special pleading requirements on a party. Sections 46-229 to 46-229.05 do not prohibit a junior appropriator from challenging the validity of a senior appropriation. The junior appropriators properly raised a challenge to NPPD's appropriations based on the common-law theory of abandonment. In addition, the junior appropriators properly raised a statutory challenge pursuant to § 46-229. Thus, we determine the director's decision to limit the scope of the proceeding to exclude the cancellation issue and any relevant evidence was contrary to law.

As Nebraska is a notice-pleading jurisdiction, the junior appropriators were not required to plead legal theories or cite appropriate statutes, so long as the pleading gave fair notice of the claims asserted.[76] The junior appropriators' request for hearing specifically alleged that NPPD had "abandoned or statutorily forfeited all or a portion" of its appropriations. Thus, because the Department and NPPD had notice of the issues of abandonment and forfeiture, the issues were sufficiently raised. Accordingly, it was error for the Department to refuse to determine the validity of NPPD's appropriations based on these allegations and any relevant evidence.

The final order notes that "[e]ven if the Appropriators brought this matter to the attention of the Department by challenging NPPD's appropriations instead of challenging the Department's administration, their claims would fail as a

---

[75] *Id.* at 324, 440 N.W.2d at 471.

[76] *Mahmood v. Mahmud*, 279 Neb. 390, 778 N.W.2d 426 (2010).

result of a lack of proof." It is unclear whether the director intended this statement to operate as a hypothetical determination of the issue or as a binding determination of the issue on the merits.

The Department is directed to fully address the issue on remand. Because the Department improperly limited this issue and excluded potentially relevant evidence, we are unable to address the merits of the junior appropriators' arguments that NPPD's appropriations should be terminated in whole or in part.

It should be noted that in a proceeding canceling water appropriations for statutory nonuse, the Department bears the burden to establish nonuse for the statutory period.[77] However, the proceeding below was not a proceeding canceling appropriations. The junior appropriators invoked the Department's authority to challenge the validity of NPPD's appropriations on the theories of abandonment and statutory forfeiture. The junior appropriators therefore bear the burden of proof to establish the allegations contained in their petition.

Our conclusion is dispositive of this appeal, and we decline to consider the remaining assignments of error.

## VI. CONCLUSION

We conclude the Department erred in refusing to determine the junior appropriators' challenge to the validity of NPPD's appropriations. On remand, the Department is directed to determine whether NPPD's appropriations have been abandoned or statutorily forfeited in whole or in part.

REVERSED AND REMANDED WITH DIRECTIONS.

GERRARD, J., not participating in the decision.

WRIGHT, J., not participating.

---

[77] *In re Water Appropriation A-4924*, 267 Neb. 430, 674 N.W.2d 788 (2004); *In re Water Appropriation A-5000*, 267 Neb. 387, 674 N.W.2d 266 (2004).