

Well Tampering

Natural Resources Districts

Certified Lands

Penalties

Notice of Intent

Certification Revoked

⚡️ **PENALTIES FOR WELL METER TAMPERING IN NEBRASKA** ⚡️

THEY COME AND GO AND, MAYBE, COME AGAIN

by Don Blankenau and Kennon Meyer (Woods Aitken LLP)

Introduction

Groundwater in Nebraska is regulated by natural resources districts, which are political subdivisions of the State of Nebraska. The State of Nebraska is divided into 23 natural resources districts, roughly structured around river drainage basins. Each district is governed by an elected board of directors and adopts its own rules and regulations, within the scope of authority granted by the Nebraska Legislature, to address groundwater issues unique to its jurisdiction. When interstate obligations are a factor, a district will work actively with the State of Nebraska, through the Department of Water, Energy, and Environment (DWEE), to develop an Integrated Management Plan (IMP) to conjunctively manage surface water and groundwater supplies and ensure compliance with interstate obligations. The district will incorporate the IMP into its rules and regulations, which will then have the force of statutory law.

The Lower Republican Natural Resources District (District), located in the Republican River Basin in southern Nebraska, is responsible for regulating groundwater use to protect streamflows, ensure the continued availability of groundwater for future users, and assist in Nebraska’s compliance with the Republican River Compact (Compact)—an interstate compact among the States of Nebraska, Colorado, and Kansas. The District has developed its management strategy with DWEE to establish a regulatory framework, through rules and regulations, to ensure that Nebraska does not consume more than its allocated share of water under the Compact.

To that end, the District’s rules and regulations require meters on all wells and allocate groundwater to individual operators. The allocated groundwater may be applied only to lands that have been “certified” by the District to receive groundwater. The certification of acres does not create a “water right” as traditionally conceived; rather, it is a license granted by the District to the landowner authorizing their access to and use of groundwater.

Notably, state law allows natural resources districts to penalize landowners who violate the rules and regulations. Any such penalties, however, may be imposed only following an evidentiary hearing before the district’s board of directors. The penalties can be as severe as permanent revocation of certified acres for irrigation. *State ex rel. Seeman v. Lower Republican Nat. Res. Dist.* (319 Neb. 681, 24 N.W.3d 874) begins against this backdrop.

Rule Violation and Penalty Proceeding

In the summer of 2016, District staff inspected irrigated lands farmed by Gerald Schluntz. Mr. Schluntz had previously violated various District rules and had been warned that he could be penalized for any future violations. This inspection revealed that multiple meters on actively irrigating wells had been sabotaged to prevent their operation, effectively allowing Mr. Schluntz to use more water than he had been allocated by the District. Mr. Schluntz’s hired hand admitted to the meter tampering and stated that he had done so at Mr. Schluntz’s direction.

On August 3, 2016, the District issued a Notice of Intent to Issue Cease and Desist Order and Impose Penalties, advising Mr. Schluntz that if his violation was confirmed, the District would seek relief that included the permanent loss of the certification to irrigate. On August 13, 2016, Mr. Schluntz died. The District Board of Directors nevertheless scheduled an evidentiary hearing and provided notice of the hearing to the Estate of Gerald Schluntz. Notice was also provided to all known heirs of Mr. Schluntz, and a public notice was printed in multiple newspapers, inviting anyone with a legal interest in the property subject to the proceeding to appear and provide testimony.

After several delays, the hearing was conducted before the District’s Board of Directors in January 2017. The District and the Estate’s legal counsel both presented evidence and argument to the Board pertaining to the meter tampering. Taking the matter under advisement, the Board issued its order in February 2017 (the “2017 Order”), finding that the violation had been willful and serious, and it ordered that the existing certification, covering the irrigation of 1,107.5 acres, be revoked.

The Estate appealed the Board’s decision, but the appeal was dismissed because it had been filed in the wrong state court. The appellate court’s decision was affirmed by the Nebraska Supreme Court in *Estate of Schluntz v. Lower Republican NRD* (300 Neb. 582, 915 N.W.2d 427 (2018)). At that point, it appeared the matter had concluded, but some five years later, in 2023, Mr. Schluntz’s heirs brought separate suits seeking a writ of mandamus compelling the District to recertify the acres for irrigation. The suits named not only the District but also its individual board members as defendants.

Well Tampering**District Appeal****Decisions****Paradox****Ownership Decision****Resurrection of Certified Acres and Appeal**

In one of the suits brought by Mr. Schluntz's heirs, Steve Seeman (Seeman), as plaintiff, alleged that at the time of the January 2017 hearing, he owned none of the lands at issue, and that he had acquired them only after the 2017 hearing. Accordingly, he argued that the Board's 2017 Order had imposed a penalty on him before he had ever held a property interest in the decertified lands. In the second suit brought by Mr. Schluntz's heirs, SBS Farms, Inc. (SBS), as a separate plaintiff, claimed that it was a Nebraska corporation that had owned some of the lands decertified at the time of the 2017 hearing. In its complaint, SBS alleged that while Mr. Schluntz had farmed SBS lands, he "was not a shareholder, director, officer, or authorized agent of SBS." SBS further alleged that it did not receive notice of the 2017 proceeding and, therefore, that the 2017 Order did not apply to it.

The state district court agreed with both plaintiffs and reasoned that the 2017 Order was void as to Seeman and SBS because the Board had never acquired jurisdiction over them due to a lack of notice of the hearing. This time, the District appealed both cases. On appeal, the cases were consolidated, and the consolidated case was elevated to the Nebraska Supreme Court by the Court's initiative.

Sovereign Immunity

On appeal, the District asserted multiple errors in the district court's orders and also, for the first time, alleged that it was immune from suit. Sovereign immunity is a jurisdictional matter that can be raised at any time by a party before the court, so this late assertion was allowed. In its decision, the Nebraska Supreme Court explained:

NRDs [natural resources districts] are political subdivisions of the state, and political subdivisions have subordinate powers of the sovereignty conferred by the Legislature. We have long held that no suit may be maintained against the State or its political subdivisions unless the Legislature, by law, has so provided (*Seeman* at 696-97, 886).

The Court noted, however, that the plaintiffs named the individual members of the Board of Directors as defendants, further explaining:

With respect to an action seeking a writ of mandamus, immunity does not apply if the mandamus action against a public officer or body is not in effect one against the sovereign. An action against a public officer to obtain relief from an invalid act or from an abuse of authority by the officer or agent is not a suit against the State and is not prohibited by sovereign immunity . . . To the extent the mandamus actions sought to stop public officials from enforcing a void order, there would be no immunity. But sovereign immunity would preclude relief compelling affirmative action (*Seeman* at 697, 886).

Because the relief sought as to the individual members of the Board was effectively relief against the District, the Nebraska Supreme Court held that sovereign immunity precluded relief reinstating the certified acres. However, if the 2017 Order was void, then the District could not enforce that order against Seeman or SBS.

The Court's reasoning here created a paradox because it failed to consider the legal effect of the District's 2017 Order on the land. Under undisputed state law, land cannot be irrigated unless it receives certification by the natural resources district. If the District's 2017 Order removed the certification—which was the subject of the 2018 appeal and was affirmed by the Nebraska Supreme Court—it is unclear by what authority the landowner could now irrigate. And in the absence of such authority, if irrigation were to occur, how could the District be precluded from taking legal action to prevent irrigation on lands no longer certified? After tying a regulatory Gordian knot, the Court then shifted to the key question: whether the District's 2017 Order was void, thus giving the District a sword to cut the knot.

2017 Order as to Seeman

The upshot of Seeman's position was that the 2017 Order operated as a penalty against him for a rule violation that had occurred before he held an ownership interest in the property. The Supreme Court rejected that position and found the 2017 Order to be valid as to him, explaining:

...Seeman does not, and could not, attack the validity of LRNRD's order as to Schluntz and his estate. By taking the position that he owned no interest before December 2018, Seeman effectively conceded that he lacked standing to challenge the order until after that date. Standing refers to whether a party had, at the commencement of the litigation, a personal stake in the outcome of the litigation that would warrant a court's exercise of its subject matter jurisdiction and remedial powers on that party's behalf. To have standing, the party must have some legal or equitable right, title, or interest in the subject

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matter of the controversy. Generally, a party has standing only if he or she has suffered or will suffer an injury in fact. By the time Seeman acquired his interest, the LRNRD proceedings had concluded, its order had issued, and the attempted appeals were dismissed (Seeman at 702-3, 889-90).

2017 Order as to SBS

SBS’s position was notably different from Seeman’s. SBS argued that it, as a corporation, owned some of the lands subject to the 2017 Order at the time of the violation, at the time of the proceeding, and up to the present. As the legal owner of the property, SBS claimed that it was entitled to receive separate notice of the 2017 proceedings and that, because it had not, the 2017 Order was void as to it and the lands it owned.

The District argued that SBS was a closely held corporation owned by Mr. Schluntz and his heirs and that Mr. Schluntz was the corporation’s president. The record from the trial court, however, did not support that position. Indeed, the current president of SBS asserted that Mr. Schluntz was nothing more than a tenant on the lands SBS owned. Based on that information, the Supreme Court held:

Where a corporation owns real estate having certified irrigated acres under the [Ground Water Management and Protection] Act, due process requires that the corporation be served with notice reasonably calculated to inform it of the subject and issues involved in the proceeding. SBS was a “person” under the Act who was affected by the contemplated cease-and-desist order; however, SBS was not given notice of it or of the hearing. We conclude that the 2017 order is void as to SBS. Because the order was void, the officers, directors, and employees of LRNRD had a ministerial duty not to enforce the order. This includes not enforcing the reduction in certified irrigated acres. But to the extent that the district court’s judgment can be read to compel affirmative acts, such relief is precluded by sovereign immunity (*Id.* at 701, 888).

The Court, however, then handed the District a sword, stating: “Nothing in this opinion should be read to preclude a proper administrative proceeding against SBS seeking reduction in certified irrigated acres. We express no opinion regarding the viability or merits of any such proceeding.” (*Id.* at 701, 889).

What is Next

Wasting little time after the issuance of the Nebraska Supreme Court’s opinion, the District promptly issued a Notice to Issue a Penalty to SBS. During the pendency of the appeal, the District learned that SBS was not a Nebraska corporation but, rather, a Delaware corporation, and that the lands it claimed were titled under corporate variations of the SBS name. Notice was nevertheless given to all known variants of SBS and served on the current president of the corporation, who brought the 2023 action against the District on behalf of SBS.

The District conducted the penalty hearing on January 8, 2026. At that hearing, the current president testified that at the time of the 2017 proceeding before the District, Mr. Schluntz was indeed the president and primary shareholder of SBS. He further testified that Mr. Schluntz solely directed farming operations on SBS lands until the time of his death. This testimony directly contradicted the allegations and representations made to the district court in the 2023 actions. The District took the matter under advisement and in February 2026 issued an order revoking the certification to irrigate the acres claimed by SBS. SBS has since appealed that order, and final disposition is not expected until late 2026 or early 2027. In the meantime, SBS is prohibited from irrigating its claimed lands.

Concurrent with these actions, both Seeman and SBS have brought additional actions against the District, seeking monetary damages arising from the inability to irrigate during the period from the issuance of the 2017 Order through 2025, as well as punitive damages and attorney fees. These actions are based on claims of inverse condemnation and violation of civil rights pursuant to 42 U.S.C. § 1983. Following the disposition of Seeman before the Supreme Court, Mr. Seeman voluntarily dismissed his suit against the District because the Supreme Court found the order revoking the certified acres valid as against him.

The District filed a motion to dismiss the claims in 2025, and a hearing was held in January 2026. That motion remains pending. If granted, an appeal is probable.

Conclusion

This case is instructive as to how natural resources districts must conduct penalty hearings in accordance with due process. Nebraska’s natural resources districts routinely issue penalties when rule violations occur. Penalties are the mechanism through which management tools are enforced.

SBS Penalty
Hearing

Contradictions

Well Tampering

Enforcement

Case Impact

Without the ability to issue penalties against rule violators, the rules have little bite, and natural resources districts cannot achieve their statutory purpose of managing groundwater. Although the most common penalties applied are reductions of allocation or temporary suspensions of the authority to irrigate, permanent revocation of certifications may be imposed for the most egregious violations.

Recently, the Nebraska Supreme Court has repeatedly emphasized the importance of ensuring that natural resources districts procedures provide due process to all affected parties, and this case falls within that body of law. As a result of *Seeman*, natural resources districts are expending resources to conduct title searches to ensure that all persons with a property interest in an affected property receive notice of hearings concerning violations and possible penalties. It is clear that the districts will need to devote additional resources to function more like true administrative courts than general tribunals of political subdivisions.

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Tribal Water

EXPLORING TRIBAL WATER RIGHTS IN CALIFORNIA

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With research support from Spencer Cole

Introduction

Tribal water rights are an important—and often poorly understood—component of California’s water rights system. They are as essential to the economy and well-being of Tribes as general water rights are for the state’s cities and agriculture. They also play an increasingly significant role in regional water management in California and on the Colorado River. Tribal nations inhabit nearly every watershed across the state; there are 109 federally recognized Tribes and more than 55 Tribes not currently recognized. These nations are diverse, and each has its own unique history, culture, economy, and uses of water.

General interest in Tribal water rights has increased as more Tribes have begun to participate in the co-management of rivers and coastal waters with all levels of government. State agencies have created Tribal liaison offices to work with Tribes and other parties to develop a common understanding of their rights and to ensure their interests are well represented in public decision-making. In addition, researchers, restoration practitioners, and state and federal agency staff are increasingly learning from the Tribes’ traditional ecological knowledge, which has been developed over thousands of years.

The goal of this article to elucidate the differences between water rights associated with Indian reservations and state water rights; to explain how the Tribal water rights settlement processes have benefited other water users within the same watershed or groundwater basin; to suggest how other Tribes might learn from the successful quantifications of Tribal water rights; and to articulate how challenging it can be for California’s Native American Tribes to secure and exercise their water rights.

To understand the current state of these rights, we provide an overview of their history, an analysis of the approaches that have helped Tribes succeed at quantifying their water rights, and a review of the contemporary exercising of these rights—including in basins where water is fully allocated.

Goal