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The district court did not err in dismissing Doe's breach of contract claim.

VI. CONCLUSION

We conclude that the district court erred in dismissing Doe's lawsuit against the UNMC faculty members in their individual capacities without determining whether service by certified mail at UNMC's risk management office was reasonably calculated to notify the defendants, in their individual capacities, of the lawsuit.

Regarding the remaining defendants—the Board, UNMC, and the UNMC faculty members in their official capacities—we conclude that Doe's claims of fraudulent concealment, violations of his due process rights, and breach of contract fail to state a claim for relief that is plausible on its face. But regarding his claims under the ADA and the Rehabilitation Act, we find that the district court erred in dismissing the claims against the Board, UNMC, and the UNMC faculty members in their official capacities.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STEPHAN, J., not participating.

THE CENTRAL NEBRASKA PUBLIC POWER AND IRRIGATION DISTRICT, A PUBLIC CORPORATION AND POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLANT AND CROSS-APPELLEE, V. NORTH PLATTE NATURAL RESOURCES DISTRICT, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLANT.

788 N.W.2d 252

Filed August 27, 2010. No. S-09-727.

1. **Motions to Dismiss: Appeal and Error.** An appellate court reviews a district court's order granting a motion to dismiss de novo.
2. **Motions to Dismiss: Pleadings: Appeal and Error.** When reviewing a dismissal order, an appellate court accepts as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the pleader's conclusions.

3. **Motions to Dismiss: Pleadings.** To prevail against a motion to dismiss for failure to state a claim, the pleader must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face.
4. **Actions: Evidence.** In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.
5. **Attorney Fees: Appeal and Error.** On appeal, a trial court's decision allowing or disallowing attorney fees for frivolous or bad-faith litigation will be upheld in the absence of an abuse of discretion.
6. **Actions: Parties: Standing.** A party has standing to invoke a court's jurisdiction if it has a legal or equitable right, title, or interest in the subject matter of the controversy.
7. ____: ____: ____. A party must have standing before a court can exercise jurisdiction, and either a party or the court can raise a question of standing at any time during the proceeding.
8. **Standing: Jurisdiction.** Standing relates to a court's power, that is, jurisdiction, to address issues presented and serves to identify those disputes which are appropriately resolved through the judicial process.
9. **Standing.** Under the doctrine of standing, a court may decline to determine merits of a legal claim because the party advancing it is not properly situated to be entitled to its judicial determination. The focus is on the party, not the claim itself.
10. **Standing: Jurisdiction.** Standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify exercise of the court's remedial powers on the litigant's behalf.
11. **Claims: Parties.** Generally, a litigant must assert the litigant's own rights and interests, and cannot rest a claim on the legal rights or interests of third parties.
12. **Standing: Proof.** To have standing, a litigant first must clearly demonstrate that it has suffered an injury in fact. That injury must be concrete in both a qualitative and temporal sense.
13. **Complaints: Justiciable Issues.** A complainant must allege an injury to itself that is distinct and palpable, as opposed to merely abstract, and the alleged harm must be actual or imminent, not conjectural or hypothetical.
14. **Actions: Proof.** A litigant must show that its injury can be fairly traced to the challenged action and is likely to be redressed by a favorable decision.
15. **Actions: Motions to Dismiss.** For purposes of a motion to dismiss, threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. A court is not obliged to accept as true a legal conclusion couched as a factual allegation.
16. **Pleadings: Proof.** A pleader's obligation to provide the grounds of its entitlement to relief requires more than labels and conclusions. Nor does a pleading suffice if it tenders naked assertion, devoid of further factual enhancement.
17. **Actions: Waters: Words and Phrases.** A "harm" to a person entitled to the use of water implies a loss or detriment to a person, and not a mere change or alteration in some physical person, object, or thing. Physical changes may be either beneficial, detrimental, or of no consequence to a person.

18. **Words and Phrases.** "Harm" is the detriment or loss to a person which occurs by virtue of, or as a result of, some alteration or change in his person or in physical things.
19. **Attorney Fees.** Neb. Rev. Stat. § 25-824 (Reissue 2008) provides generally that the district court can award reasonable attorney fees and court costs against any attorney or party who has brought or defended a civil action that alleges a claim or defense that a court determines is frivolous or made in bad faith.
20. **Attorney Fees: Words and Phrases.** The term "frivolous" connotes an improper motive or legal position so wholly without merit as to be ridiculous.
21. **Actions.** Any doubt about whether a legal position is frivolous or taken in bad faith should be resolved in favor of the one whose legal position is in question.

Appeal from the District Court for Scotts Bluff County: RANDALL L. LIPPSTREU, Judge. Affirmed.

Michael C. Klein, Charles D. Brewster, and Jonathan R. Brandt, of Anderson, Klein, Swan & Brewster, for appellant.

Steven C. Smith and Lindsay R. Snyder, of Smith, Snyder & Pettit, and Peter W. Katt, Stephanie F. Stacy, and Derek C. Zimmerman, of Baylor, Evnen, Curtiss, Grimit & Witt, L.L.P., for appellee.

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

GERRARD, J.

The primary issue in this case is whether the appellant, a power and irrigation district that appropriates and stores surface water for the benefit of public users, may bring a judicial review proceeding under the Administrative Procedure Act (APA)[1] to challenge a natural resources district's ground water appropriation. Because we agree with the district court that the appellant lacks standing to do so, we affirm the court's dismissal of the appellant's complaint.

BACKGROUND

In 2008, the North Platte Natural Resources District (NRD) held a public hearing, pursuant to the Nebraska Ground Water

[1] Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 2008 & Supp. 2009).

Management and Protection Act (GWMPA),[2] regarding proposed rules and regulations for the Pumpkin Creek Basin Groundwater Management Sub-Area. The NRD proposed to lower the ground water allocation from 14 inches per acre to 12 inches per acre. Two people objected at the hearing: a representative of the Spear T Ranch, Inc. (Spear T), a Pumpkin Creek surface water irrigator, and the public relations manager of The Central Nebraska Public Power and Irrigation District (Central). Both objectors argued, generally, that a reduction to 12 inches per acre was insufficient to correct a significant decrease in surface water streamflow in the Pumpkin Creek basin. But the NRD decided to implement its proposed reduction.

Central filed a petition for judicial review pursuant to the APA.[3] Central alleged that it owns and operates a system of reservoirs, canals, and laterals used for several purposes, including irrigation, recreation, environmental protection, and powerplant cooling. Among other things, Central operates Lake McConaughy, a reservoir located on the North Platte River, and owns and operates hydroelectric facilities that use the waters of Lake McConaughy and the North Platte River. Central also stores and releases water to the Nebraska Public Power District for use in powerplant cooling, hydroelectric power generation, and the public power district's reservoirs and fishery. And Central alleged several other purposes for which the water it stores and releases is used, including streamflow and aquifer recharge.

Central alleged that ground water depletions in the NRD's jurisdiction had caused streamflow into Lake McConaughy to decline, substantially reducing the lake's level. Specifically, Central alleged that the NRD's ground water withdrawals were causing direct and substantial depletions of Pumpkin Creek, a tributary of the North Platte River—water which would, Central alleged, have been available for storage in Lake McConaughy. Central concluded that the NRD's ground water allocation was unreasonable and was causing harm to it and to the water uses it had described.

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[2] Neb. Rev. Stat. §§ 46-701 to 46-754 (Reissue 2004 & Cum. Supp. 2008).

[3] See §§ 46-750 and 84-917(1).

On that basis, Central asked the district court to enter an order reversing the NRD's ground water allocation and directing the NRD to adopt rules and regulations for ground water allocation in the Pumpkin Creek basin that would restore historic surface water flows to the North Platte River and its tributaries. The NRD moved the court to dismiss Central's petition pursuant to Neb. Ct. R. Pldg. § 6-1112. The NRD also moved for attorney fees because, according to the NRD, Central's petition was frivolous.[4]

The district court dismissed Central's petition. The court accepted the allegations of Central's petition as true, but found that Central was not a "'person aggrieved'" within the meaning of the APA.[5] The court reasoned that Central, because it was a surface water appropriator located entirely outside the NRD's jurisdiction, was not directly affected by the NRD's ground water appropriation. The court stated that under Central's allegations, the NRD's rules would adversely affect its surface water appropriations, "but would also adversely impact practically every irrigator, landowner, water user, recreationer, outdoorsman, and electric power consumer within the North Platte River Watershed between Wyoming and Iowa." On that basis, the court dismissed Central's petition for judicial review. But the court found that Central's petition was not frivolous and denied the NRD's motion for attorney fees. Central appeals, and the NRD cross-appeals.

ASSIGNMENTS OF ERROR

Central assigns that the district court failed to provide it with due process and erred in dismissing its petition for judicial review, because it has a real, direct, and substantial interest in the outcome of the litigation based, in part, upon its proprietary interest in, and the multitude of uses of, surface water. On cross-appeal, the NRD assigns that the district court erred by denying its motion for reasonable attorney fees and costs pursuant to § 25-824.

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[4] See Neb. Rev. Stat. § 25-824 (Reissue 2008).

[5] See §§ 46-750 and 84-917(1).

STANDARD OF REVIEW

[1-4] An appellate court reviews a district court's order granting a motion to dismiss de novo.[6] When reviewing a dismissal order, we accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the pleader's conclusions.[7] To prevail against a motion to dismiss for failure to state a claim, the pleader must allege sufficient facts, taken as true, to state a claim to relief that is plausible on its face.[8] In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim.[9]

[5] On appeal, a trial court's decision allowing or disallowing attorney fees for frivolous or bad-faith litigation will be upheld in the absence of an abuse of discretion.[10]

ANALYSIS

STANDING

We turn first to the issue of standing. Pursuant to § 46-750, "Any person aggrieved by any order of [a natural resources] district, the Director of Environmental Quality, or the Director of Natural Resources issued pursuant to the [GWMPA] may appeal the order. The appeal shall be in accordance with the [APA]." And § 84-917(1) provides in part that "[a]ny person

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[6] See *Kocontes v. McQuaid*, 279 Neb. 335, 778 N.W.2d 410 (2010).

[7] See *Doe v. Board of Regents, ante* p. 492, 788 N.W.2d 264 (2010). See, also, *In re Southern Scrap Material Co., LLC*, 541 F.3d 584 (5th Cir. 2008), *cert. denied* 556 U.S. 1152, 129 S. Ct. 1669, 173 L. Ed. 2d 1036 (2009).

[8] See *Doe, supra* note 7. See, also, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007); *In re Southern Scrap Material Co., LLC, supra* note 7.

[9] See *Doe, supra* note 7. See, also, *Twombly, supra* note 8; *In re Southern Scrap Material Co., LLC, supra* note 7.

[10] See, *Brummels v. Tomasek*, 273 Neb. 573, 731 N.W.2d 585 (2007); § 25-824.

aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in form, shall be entitled to judicial review under the [APA].” An irrigation district is a “person” within the meaning of § 46-750.[11] So, the first question we address in this appeal is whether Central was “aggrieved” by the NRD’s order within the meaning of §§ 46-750 and 84-917(1).

[6,7] Neither the APA nor the GWMPA defines “aggrieved,” but we have addressed the “aggrieved party” in terms of standing.[12] A party has standing to invoke a court’s jurisdiction if it has a legal or equitable right, title, or interest in the subject matter of the controversy.[13] A party must have standing before a court can exercise jurisdiction, and either a party or the court can raise a question of standing at any time during the proceeding.[14] The “party aggrieved” concept must be given a practical rather than hypertechnical meaning.[15]

We have addressed standing in the specific context of water law several times in recent years. To begin with, in *Metropolitan Utilities Dist. v. Twin Platte NRD*,[16] we held that a natural resources district did not have standing to appeal from an order of the then Department of Water Resources removing it as an objector to an application to withdraw water from the Platte River. We noted that the district did not have a water right that would be adversely affected by the application and concluded that “the fact that the water rights of the constituents of a natural resources district may be affected by an application to appropriate waters does not

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[11] See § 46-706(1).

[12] See, *In re Application of Metropolitan Util. Dist.*, 270 Neb. 494, 704 N.W.2d 237 (2005); *Stoneman v. United Neb. Bank*, 254 Neb. 477, 577 N.W.2d 271 (1998); *Karnes v. Wilkinson Mfg.*, 220 Neb. 150, 368 N.W.2d 788 (1985).

[13] *In re Application of Metropolitan Util. Dist., supra* note 12.

[14] *Id.*

[15] *Id.*

[16] *Metropolitan Utilities Dist. v. Twin Platte NRD*, 250 Neb. 442, 550 N.W.2d 907 (1996).

confer standing upon such natural resources district to object to the application."[17]

Shortly thereafter, in *Ponderosa Ridge LLC v. Banner County*,[18] we held that neither a county nor a natural resources district had standing to object to an application to transfer ground water that, according to the objectors, could have resulted in wastewater pollution. We found that two of the objectors had water use interests to protect but that others did not, including the county and district. The county argued that it was appearing on behalf of its residents, and the district argued that it was appearing to protect the public interest, but we found those interests—unlike those of the objectors who actually had water use interests—to be insufficient to establish standing.[19]

We distinguished *Ponderosa Ridge LLC* in *Hagan v. Upper Republican NRD*,[20] in which the plaintiffs, irrigators in a natural resources district, challenged the natural resources district's agreement with two other residents which, in effect, permitted a variance allowing the use of additional underground water. The trial court dismissed the action on standing, reasoning that the plaintiffs' status was no different than all the members of the general public living in the district. On appeal, we affirmed the Court of Appeals' reversal of the judgment, noting that the plaintiffs had alleged that their water use interests would be harmed because there would be less water available for their irrigation needs. Those allegations, we concluded, were sufficient to distinguish the plaintiffs' injuries from those of the general public.[21]

Finally, in *Spear T Ranch v. Knaub*,[22] we rejected Central's attempt to intervene in ongoing litigation between Spear T and

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[17] *Id.* at 449, 550 N.W.2d at 912.

[18] *Ponderosa Ridge LLC v. Banner County*, 250 Neb. 944, 554 N.W.2d 151 (1996).

[19] See *id.*

[20] *Hagan v. Upper Republican NRD*, 261 Neb. 312, 622 N.W.2d 627 (2001).

[21] See *id.*

[22] *Spear T Ranch v. Knaub*, 271 Neb. 578, 713 N.W.2d 489 (2006).

a number of ground water irrigators over an alleged loss of surface water in Pumpkin Creek. The issue in that case was not standing, precisely; instead, it was whether Central had proved that it had the "direct and legal interest in the subject matter of the action" required to intervene.[23] We concluded that it had not, because it had no legal interest in the Spear T litigation. We explained that none of Central's interests in the alleged diversion of water from Pumpkin Creek were common to Spear T's interests, so we reasoned that

> Central's interests do not factor into this equation. Central would gain or lose nothing by a damage award in favor of Spear T or a judgment in favor of the defendants. Because any injunctive relief would be tailored to redress a specific injury proved by Spear T, Central has nothing more than an indirect, remote, or conjectural interest in one possible result of the litigation between Spear T and the defendants. Indeed, the factual allegations of Central's motion to intervene would introduce an entirely new subject matter into this action: a claim by Central that the actions of ground water users caused harm to its own interests for which it would be entitled to injunctive relief. While it is free to pursue this claim in a separate action, Central has not shown that it has a direct and legal interest in the subject matter of the action asserted by Spear T, which is a prerequisite to intervention . . . .[24]

[8-11] These cases represent fact-specific iterations of basic standing principles. Standing relates to a court's power, that is, jurisdiction, to address issues presented and serves to identify those disputes which are appropriately resolved through the judicial process.[25] Under the doctrine of standing, a court may decline to determine merits of a legal claim because the party advancing it is not properly situated to be entitled to its judicial determination. The focus is on the party, not the

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[23] *Id.* at 584, 713 N.W.2d at 494.

[24] *Id.*

[25] *State v. Baltimore*, 242 Neb. 562, 495 N.W.2d 921 (1993), citing *Whitmore v. Arkansas*, 495 U.S. 149, 110 S. Ct. 1717, 109 L. Ed. 2d 135 (1990).

claim itself.[26] And standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify exercise of the court's remedial powers on the litigant's behalf.[27] Thus, generally, a litigant must assert the litigant's own rights and interests, and cannot rest a claim on the legal rights or interests of third parties.[28]

[12-14] Specifically, a litigant first must clearly demonstrate that it has suffered an "'"injury in fact."'"[29] That injury must be concrete in both a qualitative and temporal sense. The complainant must allege an injury to itself that is distinct and palpable, as opposed to merely abstract, and the alleged harm must be actual or imminent, not conjectural or hypothetical.[30] Further, the litigant must show that the injury can be fairly traced to the challenged action and is likely to be redressed by a favorable decision.[31]

The shortcoming in Central's petition is its failure to specifically allege how it has suffered an injury in fact. In this case, Central has alleged that it has water use interests (although its water uses primarily benefit others). And Central has alleged injuries that have occurred to its constituents in its jurisdiction from the use of ground water in the NRD's jurisdiction. But it has not connected the two. Specifically, Central has not alleged how its particular water use interests, to the extent it has any, have been injured by the NRD.

For instance, Central alleges that due to reduced water supply, only limited storage water from Lake McConaughy has been available for use by canal operators that contract with Central. And Central alleges that it has had to reduce the amount of water it delivers to irrigators. But those uses of

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[26] *Id.*

[27] See *id.*, citing *Warth v. Seldin*, 422 U.S. 490, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975).

[28] *Id.*

[29] *Id.* at 569, 495 N.W.2d at 926, quoting *Whitmore, supra* note 25.

[30] See *id.*

[31] See *id.* See, also, *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 130 S. Ct. 2743, 177 L. Ed. 2d 461 (2010).

water are quintessentially the legal rights or interests of third parties. Similarly, Central alleges that the NRD has caused Pumpkin Creek to run dry—but Central does not have a right to appropriate water from Pumpkin Creek. And while Central alleges that a percentage of Lake McConaughy's inflow is set aside to benefit endangered and threatened species, that interest is a public one and, in any event, is managed by the U.S. Fish and Wildlife Service, not Central.

Central's purported interests in water use are, for the most part, derivative of the interests of others. The interests at issue are actually those of the members of the public who use Lake McConaughy or rely on Central's distribution of water or production of power. While an irrigation district may hold a surface water appropriation in its own name, it holds that appropriation for the benefit of the owners of land to which the appropriation is attached.[32] In other words, generally speaking, Central is an agent for the purposes of diverting, storing, transporting, and delivering water,[33] and the injuries it has alleged are to the beneficiaries of those purposes, not Central's own interests. And it is well established, as discussed above, that Central cannot challenge the NRD's use of water based upon the interests of its constituents.

Nor, even in these instances, has Central consistently alleged particular injury. For example, even if we infer that less water is available to the U.S. Fish and Wildlife Service for endangered species, Central did not allege that the reduced amount of water fell short of what was required or even desirable for that purpose. Nor did Central allege that reduced water delivery to canal operators impaired the operation of their canals. Similarly, although Central alleges that it has its own interest in generating power with water from the North Platte River and Lake McConaughy, it did not allege that it was less able to generate power as a result of the NRD's conduct, nor did it allege that less power was available to its customers. It is axiomatic that any use of a limited resource necessarily results in

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[32] Neb. Rev. Stat. § 46-2,121 (Reissue 2004).

[33] See *Empire West Side Irrigation Dist. v. Lovelace*, 5 Cal. App. 3d 911, 85 Cal. Rptr. 552 (1970).

marginally less availability of that resource for potential use by others. An injury in fact, for standing purposes, requires a more particularized harm to a more direct, identified interest.

[15,16] And the failure to allege particular facts supporting its claimed injuries is also fatal to Central's broader allegations that the ground water use permitted by the NRD is causing the "destruction of Lake McConaughy" and "unreasonably causing harm to Central, and to all of the uses described in the [petition]." This is a legal conclusion more than a factual allegation. For purposes of a motion to dismiss, threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. A court is not obliged to accept as true a legal conclusion couched as a factual allegation.[34] A pleader's obligation to provide the grounds of its entitlement to relief requires more than labels and conclusions.[35] Nor does a pleading suffice if it tenders naked assertion, devoid of further factual enhancement.[36]

While Central's petition in this case contains pages of factual allegations, none of those allegations explain, particularly, how any water use interest of Central's has been harmed, as opposed to the water use interests of those on whose behalf Central manages water resources. And because all the facts supporting an allegation of an injury in fact to Central should already be known to Central, there is no basis to believe that discovery in this case, even if available in an APA judicial review proceeding, would reveal evidence of such an injury.

Nor is Central's allegation of the "destruction of Lake McConaughy" enough to "raise a right to relief above the speculative level."[37] To begin with, the more specific allegations in Central's pleading, while not benign, are inconsistent with Central's more apocalyptic rhetoric. The "destruction

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[34] See, *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009); *Twombly, supra* note 8.

[35] See *Twombly, supra* note 8.

[36] See, *Iqbal, supra* note 34; *Twombly, supra* note 8.

[37] See *Twombly, supra* note 8, 550 U.S. at 555.

of Lake McConaughy" is, while not inconceivable, more "'"conjectural"'" and "'"hypothetical"'" than "'actual or imminent.'"[38]

Central's allegation rests on the attenuated connection between the NRD's regulation, ground water use in the Pumpkin Creek basin, streamflows in Pumpkin Creek and the North Platte River, and the ultimate volume of Lake McConaughy. Harm to surface water irrigators on Pumpkin Creek could, potentially, be "'"fairly . . . traced"'" to the NRD's regulation.[39] Central's purported injury, however, is remote. There is no limiting principle on Central's expansive theory of causation of an injury in fact, which could conceivably involve the entire water cycle from the Continental Divide to the Gulf of Mexico.

We also note that while Central alleges that reduction of ground water use would increase the amount of water in Pumpkin Creek available to Lake McConaughy, any additional water in Pumpkin Creek would, first and foremost, be available to surface water irrigators in the Pumpkin Creek watershed. Central alleges on one hand that amending the NRD's regulations would avoid injury to the water use interests it represents, but concedes on the other hand that "an equitable reduction in ground water withdrawals in the Pumpkin Creek watershed cannot, in and of itself, prevent the ruination of [Lake McConaughy.]" Apart from the conjectural nature of the asserted injury, it is far from clear that any purported injury to Central is redressable by a favorable ruling.[40] And an unredressable injury does not support standing to seek a judicial determination.[41]

In arguing to the contrary, Central relies on our decision in *Spear T Ranch v. Knaub*,[42] in which we adopted the

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[38] See *Baltimore, supra* note 25, 242 Neb. at 569, 495 N.W.2d at 926.

[39] See *id.*

[40] See, *Monsanto Co., supra* note 31; *Whitmore, supra* note 25; *Baltimore, supra* note 25.

[41] See *Baltimore, supra* note 25.

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

Restatement (Second) of Torts to govern conflicts between users of hydrologically connected surface water and ground water.[43] Specifically, we held:

> "A proprietor of land or his [or her] grantee who withdraws ground water from the land and uses it for a beneficial purpose is not subject to liability for interference with the use of water of another, unless . . . the withdrawal of the ground water has a direct and substantial effect upon a watercourse or lake and unreasonably causes harm to a person entitled to the use of its water."[44]

Central contends that it is "untenable" that a property right could exist for purposes of tort law, but not for purposes of APA review of the NRD's order.[45]

[17,18] But Central overlooks some important distinctions. First, as discussed above, Central's "right" to use water is based in interests of others, unlike the Pumpkin Creek surface water irrigators who were the plaintiffs in *Spear T Ranch*. And Central's reliance on *Spear T Ranch* is undermined by the same shortcomings in its petition that were discussed above. The Restatement makes clear that a "'harm'" to a person entitled to the use of water "implies a loss or detriment to a person, and not a mere change or alteration in some physical person, object or thing. Physical changes . . . may be either beneficial, detrimental, or of no consequence to a person."[46] Thus, "harm," under the Restatement, "is the detriment or loss to a person which occurs by virtue of, or as a result of, some alteration or change in his person, or in physical things."[47] In other words, a change in streamflow, or the level of Lake McConaughy, is not necessarily a "harm" unless it has detrimental effects—and for standing purposes, those effects must be directly detrimental to Central's interests. And as explained above, Central's pleading is insufficient on that point.

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[43] See Restatement (Second) of Torts § 858 (1979).

[44] *Spear T Ranch, supra* note 42, 269 Neb. at 194, 691 N.W.2d at 132.

[45] Brief for appellant at 20.

[46] Restatement (Second) of Torts § 7, comment *b.* at 13 (1965).

[47] *Id.*

For the foregoing reasons, we conclude that Central did not allege injury to its water use interests, as opposed to the interests of others, sufficiently to confer standing to seek judicial review under the APA. Central's purported water use interests are actually public interests, and they are attenuated from the NRD's regulation. We also note, in passing, the claim in Central's assignment of error that "[t]he district court failed to provide Central with due process." Central's brief contains no separate due process argument, so we assume that any "due process" claim is subsumed in its more general standing argument. And, as explained above, we find that argument to be without merit. We also note that there is no suggestion, in the record or Central's brief on appeal, that Central should have been offered leave to replead. Thus, we affirm the district court's order dismissing Central's petition for judicial review.

Cross-Appeal

On cross-appeal, the NRD assigns that the district court erred in denying its motion for attorney fees. The NRD argues that Central's petition was frivolous.

[19-21] Section 25-824 provides generally that the district court can award reasonable attorney fees and court costs against any attorney or party who has brought or defended a civil action that alleges a claim or defense that a court determines is frivolous or made in bad faith.[48] The term "frivolous" connotes an improper motive or legal position so wholly without merit as to be ridiculous.[49] But any doubt about whether a legal position is frivolous or taken in bad faith should be resolved in favor of the one whose legal position is in question.[50]

Although Central has been a frequent visitor to this court,[51] we cannot say that the present proceeding was so wholly

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[48] *Lamar Co. v. City of Fremont*, 278 Neb. 485, 771 N.W.2d 894 (2009).

[49] *Cornett v. City of Omaha Police & Fire Ret. Sys.*, 266 Neb. 216, 664 N.W.2d 23 (2003).

[50] *Id.*

[51] See, *Spear T Ranch, supra* note 22; *In re Complaint of Central Neb. Pub. Power*, 270 Neb. 108, 699 N.W.2d 372 (2005).

devoid of legal merit that the district court abused its discretion in concluding that the action was not frivolous. Thus, we find the NRD's assignment of error to be without merit.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.