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> to show how the charges have played out at trial works against the party alleging inadequate assistance. Counsel, too, faced that uncertainty. There is a most substantial burden on the claimant to show ineffective assistance. The plea process brings to the criminal justice system a stability and a certainty that must not be undermined by the prospect of collateral challenges in cases not only where witnesses and evidence have disappeared, but also in cases where witnesses and evidence were not presented in the first place.

In addition to making sufficient allegations to warrant an evidentiary hearing, defendants such as Yos-Chiguil must also bear "the substantial burden" to show that counsel was ineffective.

Middle Niobrara Natural Resources District et al., appellants, and Michael Jacobson, appellee and cross-appellant, v. Department of Natural Resources, appellee and cross-appellee.

799 N.W.2d 305

Filed June 3, 2011. No. S-09-1311.

1. **Administrative Law: Appeal and Error.** In an appeal from a Department of Natural Resources order, an appellate court reviews whether the director's factual determinations are supported by competent and relevant evidence and are not arbitrary, capricious, or unreasonable. The department's decision must also conform to the governing law.
2. **Administrative Law.** Agency action is arbitrary and capricious if it is taken in disregard of the facts or circumstances of the case, without some basis which would lead a reasonable and honest person to the same conclusion.
3. ____. Agency action taken in disregard of the agency's own substantive rules is arbitrary and capricious.
4. **Administrative Law: Appeal and Error.** An appellate court independently reviews questions of law decided by the director of the Department of Natural Resources.
5. **Jurisdiction: Judgments.** A jurisdictional issue that does not involve a factual dispute presents a question of law.
6. **Statutes.** The meaning and interpretation of a statute present a question of law.
7. **Judgments.** Whether a decision conforms to law is by definition a question of law.

8. **Standing: Jurisdiction.** Standing is fundamental to a court's exercising jurisdiction, so a litigant or court can raise the question of standing at any time during the proceeding.
9. **Administrative Law: Waters: Standing: Proof.** Generally, to be an "interested person" under Neb. Rev. Stat. § 46-713(2) (Cum. Supp. 2008), a litigant challenging a fully appropriated determination by the Department of Natural Resources must be asserting its own rights and interests, not those of a third party, and must demonstrate an injury in fact sufficient to confer common-law standing.
10. **Political Subdivisions: Public Officers and Employees: Standing: Constitutional Law: Statutes.** Unless an exception applies, state officials and political subdivisions generally do not have standing to challenge the constitutionality of statutes directing their duties.
11. **Political Subdivisions: Standing.** Political subdivisions have standing to challenge state action that adversely affects them or requires them to expend public funds.
12. **Administrative Law: Waters.** Because the director of the Department of Natural Resources cannot resolve a challenge to a call before the department issues its annual evaluations, the department cannot premise its annual evaluations upon a senior appropriator's call.
13. **Administrative Law.** Agency regulations properly adopted and filed with the Secretary of State of Nebraska have the effect of statutory law.

Appeal from the Department of Natural Resources. Reversed and vacated.

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

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

Michael Jacobson, pro se.

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

CONNOLLY, J.

I. SUMMARY

Under the Nebraska Ground Water Management and Protection Act (the Act),[1] the Department of Natural Resources (Department) designated the portion of the Lower Niobrara

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

River Basin upstream of the Spencer hydropower facility fully appropriated. The appellants are four natural resources districts (NRDs) that regulate ground water in the fully appropriated boundary. They appeal the Department director's 2009 order finding that in 2008, the basin was fully appropriated. Michael Jacobson cross-appeals. He owns and farms land in the basin.

A "fully appropriated" designation requires the NRDs to undertake significant and costly land management practices to sustain a balance between water uses and water supplies.[2] The overarching issue is whether the Department's 2008 order designating the basin fully appropriated was an arbitrary and capricious action. We conclude that it was and reverse and vacate.

II. BACKGROUND

1. Nebraska Public Power District's Appropriation Rights

Nebraska Public Power District (NPPD) holds three surface water appropriations in the Niobrara totaling 2,035 cubic feet per second. The State approved these appropriation rights in 1896, 1923, and 1942. NPPD uses its appropriations for producing electricity at the Spencer hydropower facility.

The Department's 2008 fully appropriated designation was triggered by a "call" for diversion rights by NPPD. A call by a senior appropriator, meaning an appropriator with an earlier-in-time right to use the water,[3] is a request that the Department close the rights to divert water belonging to junior appropriators upstream of the senior appropriator. Closures require junior appropriators to stop diverting water from a river or stream for the benefit of a senior appropriator.[4] This action increases the streamflow to satisfy the senior appropriator's right to divert water.

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[2] See § 46-715(2).

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

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

2. The Basin

The Lower Niobrara River Basin follows the Niobrara from Mirage Flats Diversion Dam in northwest Nebraska to the confluence of the Niobrara and Missouri Rivers in northeast Nebraska. It encompasses about 8,900 square miles. Spencer Dam is near Spencer in northeast Nebraska, close to the eastern edge of the river basin. The Department's fully appropriated designation for the portion of the river basin upstream of Spencer Dam includes most of the river basin.

3. The Act's Requirements and the Department's Regulations

Beginning in 2006, unless the Department has already determined that a river basin is fully appropriated or overappropriated, the Act requires the Department to complete, by January 1 of each year, an evaluation of the State's river basins. The Department must evaluate "the expected long-term availability of hydrologically connected water supplies for both existing and new surface water uses and existing and new ground water uses in each of the state's river basins."[5] Simplified, the Department can designate a river basin or one of its subparts as fully appropriated if its evaluation shows that current uses of hydrologically connected water will cause a river or stream to be insufficient to satisfy, over the long term, three specified purposes.[6]

Section 46-713(3) is stated in the alternative. It permits the Department to determine that a river basin or subpart is fully appropriated if any of three specified circumstances exist. One circumstance is present when the surface water is insufficient to sustain existing natural flow, storage, or instream appropriations.[7] The Department's reports show that it assumes that a basin's ground water and surface water are interconnected: i.e., insufficient streamflow to sustain surface water appropriations means that there is insufficient streamflow to sustain ground water wells built in aquifers dependent upon recharge from the

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[5] § 46-713(1)(a).

[6] See § 46-713(3).

[7] See *id.*

river. So in determining whether a river basin is fully appropriated, the Department focuses only on whether a river's surface water is sufficient to sustain existing appropriations.

The Act requires the Department, in preparing its annual report, to "rely on the best scientific data, information, and methodologies readily available to ensure that the conclusions and results contained in the report are reliable."[8] Also, the Act requires the Department to "provide [in the report] sufficient documentation to allow these data, information, methodologies, and conclusions to be independently replicated and assessed."[9]

But the Act does not set a standard for determining whether the surface water or streamflow of a river or stream is insufficient. The Department's regulations set the standard. The regulations and reports show that in setting the standard, the Department focuses solely on whether the surface water is insufficient to sustain existing surface water appropriations over the long term. The standard for determining the insufficiency of surface water is whether a surface water appropriator with the most junior right to divert water could divert sufficient water to meet the Department's specified irrigation requirements. And the irrigation requirements are set percentages of the Department's determination of the water needed to fully irrigate a 70-acre corn crop during two different periods in the upcoming year.[10] Summed up, if the most junior appropriator could not divert the amount required under the set percentages for either irrigation period, then the surface water, and thus the river basin, is fully appropriated. The NRDs dispute the Department's 2008 methodology for this calculation.

The Act also does not define hydrologically connected water supplies. To determine the boundary of the fully appropriated land area in the basin with ground water that is hydrologically connected to the river's surface water, the Department

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[8] § 46-713(1)(d).

[9] *Id.*

[10] 457 Neb. Admin. Code, ch. 24, § 001.01A (2006).

applies an analytical formula. The NRDs also challenge this methodology.

4. The Department's Actions From 2006 to 2008

In its 2006 and 2007 reports, the Department determined that the Lower Niobrara River Basin was not fully appropriated. In March 2007, NPPD "placed a call" with the Department, asking the Department to administer the Niobrara to satisfy its appropriation rights.[11] Before 2007, NPPD had not placed a call for water in 50 years.

In May 2007, the Department issued closing notices. The closing notices directed about 400 junior appropriators to stop diverting water for the benefit of NPPD's hydropower facility.[12] Two junior appropriators immediately petitioned for an administrative hearing to challenge the validity of NPPD's appropriations.[13] Soon after issuing the closing notices, the Department temporarily lifted them to allow time for the junior appropriators to enter into subordination agreements with NPPD. The Department reinstated the closings on August 1. Later, in county court, the two junior appropriators successfully condemned part of NPPD's appropriation rights under their constitutionally superior preference rights.[14] The director then dismissed as moot their petition challenging the validity of NPPD's appropriations.[15] This court reversed that decision and remanded the cause for further proceedings.[16]

Meanwhile, in October 2007, the Department issued its 2008 report. The 2008 report concluded that the portion of the Lower Niobrara River Basin upstream of Spencer Dam was fully appropriated. The Department based its decision on NPPD's call. The Department did not designate the small portion of the river basin downstream of Spencer Dam as fully

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[11] See *In re 2007 Appropriations of Niobrara River Waters, supra* note 4.

[12] See *id.*

[13] See *id.*

[14] See *id.*

[15] See *id.*

[16] See *id.*

appropriated. It applied its analytical formula to determine the boundary for the basin. In January 2008, the former director made final the Department's adjusted fully appropriated determination.

5. The NRDs' Petitions

In February 2008, each affected NRD filed a petition for a contested hearing. Each alleged that (1) it had provided information to the Department that the river basin was not fully appropriated; (2) the Department had failed to rely on the best scientific data, information, and methodologies available; and (3) the Department had failed to properly analyze whether the current uses of hydrologically connected water supplies, in the long term, would cause insufficient surface water or insufficient streamflow to recharge aquifers supporting ground water wells.

6. The Department's Hearing

To expedite the proceedings, the parties agreed to submit their experts' affidavits. The NRDs argued that the Department's order was unlawful or arbitrary and capricious, and therefore invalid. They presented their expert's affidavit, in which he stated that he could not replicate the Department's conclusions.

The Department conceded that the only change in its fully appropriated evaluation from January 2007 to January 2008 was NPPD's call. It presented the affidavit of its analyst who had performed the Department's evaluations. He stated that he prepared a spreadsheet of the mean daily streamflow values at the Spencer hydropower facility for the preceding 20 years (from 1987 to 2006). He compared these records against NPPD's total appropriations (2,035 cubic feet per second) and determined how many times the mean daily streamflow value fell below NPPD's appropriations. He assumed for those days that NPPD would have closed, or shut off, the most junior appropriator's diversion rights. He concluded that the most junior appropriator's rights would have been closed so often that it could not have diverted enough water to satisfy the Department's corn irrigation requirements.

The NRDs' hydrology expert had reviewed all the Department's data and methodologies and peer-reviewed literature. He stated that the Department failed to include essential streamflow data for the river, which data he retrieved from other sources. Even after retrieving this data, he could not replicate the Department's 20-year averaging. He also could not replicate its estimate of streamflow depletion because it was unclear what data the Department had used. Finally, he stated that it was impossible to assess the Department's conclusions because the Department had not verified its results with observed streamflow conditions.

The Department's analyst responded in a second affidavit that the Department does not include all of its data because if it did, it could not economically publish the report. Instead, the report states that the data is available upon request. The Department's analyst also did not estimate streamflow depletion or verify his results with observations of streamflow conditions. He stated that these measures were unnecessary when the Department's calculations showed an insufficient water supply without considering the lag effect of ground water pumping.

7. The Director's Order

In December 2009, the director rejected the NRDs' challenges. He concluded that under § 46-713(1)(d), the NRDs had failed to show that the Department's data, information, methodologies, and conclusions could not be independently replicated and assessed. He relied on the 2008 report's statement that the Department's data was available upon request.

The director rejected the NRDs' argument that the Department had failed to analyze whether the current uses of hydrologically connected water supplies would result in insufficient streamflow to recharge aquifers supporting ground water wells. He concluded that under § 46-713(3), the Department could focus solely on whether the surface water was insufficient to sustain existing surface water appropriations. He also concluded that the Department had properly applied its regulatory criteria for that determination. He stated, "[T]he process is based upon whether a senior appropriator makes a valid call, and whether

the affected junior appropriator's right is met [under the regulatory] criteria due to the call."

The director rejected the NRDs' argument that the Department could not rely on NPPD's call when a challenge to the call was still pending. He stated that he knew from personal knowledge that NPPD's call was valid. And he reasoned that the Department must timely issue its reports despite any pending litigation: "In any event, having determined the senior calling right valid for purposes of the call prior to issuing closing notices, no additional analysis is necessary by the Department for purposes of the annual evaluation."

In addition, the director concluded that the NRDs and Jacobson had failed to show that the Department had not used the best available scientific data and methodologies to determine the basin's fully appropriated boundary. He concluded that the analytical formula was the best method available to the Department. He also rejected Jacobson's chemical analysis test as a better methodology.

III. ASSIGNMENTS OF ERROR

The NRDs assign, restated and condensed, that the director erred in the following rulings:

(1) The Lower Niobrara River Basin is fully appropriated, despite a pending challenge to the appropriations that triggered the designation;

(2) the Department properly conducted its fully appropriated analysis, despite its use of a flow demand for the Spencer hydropower facility that failed to take into account subordination agreements, preference rights, and limitations on the face of the appropriations;

(3) in the Department's 2008 report concluding that the basin was fully appropriated, the Department provided sufficient documentation to allow for independent replication and assessment of its conclusions;

(4) section 46-713 permits land to be designated as fully appropriated even when ground water wells on such lands do not, or would not, withdraw water from the Niobrara River;

(5) the Department complied with § 46-713(1)(d), which requires the Department to use the best available scientific

data, information, and methodologies to prepare its annual report; and

(6) the Department properly delineated the areas of hydrologically connected water supplies within the basin.

Additionally, the NRDs assign that the Department should not have advocated for itself, instead of acting as a neutral fact finder.

IV. STANDARD OF REVIEW

[1] In an appeal from a Department of Natural Resources order, we review whether the director's factual determinations are supported by competent and relevant evidence and are not arbitrary, capricious, or unreasonable.[17] The Department's decision must also conform to the governing law.[18]

[2,3] Agency action is arbitrary and capricious if it is taken in disregard of the facts or circumstances of the case, without some basis which would lead a reasonable and honest person to the same conclusion.[19] Agency action taken in disregard of the agency's own substantive rules is also arbitrary and capricious.[20]

[4-7] We independently review questions of law decided by the director.[21] A jurisdictional issue that does not involve a factual dispute presents a question of law.[22] The meaning and interpretation of a statute present a question of law.[23]

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[17] See *id.*

[18] See *In re Application U-2*, 226 Neb. 594, 413 N.W.2d 290 (1987).

[19] *Fleming v. Civil Serv. Comm. of Douglas Cty.*, 280 Neb. 1014, 792 N.W.2d 871 (2011).

[20] See, *Sierra Club v. Van Antwerp*, 526 F.3d 1353 (11th Cir. 2008); *Miss. Dept. of Environ. Qual. v. Weems*, 653 So. 2d 266 (Miss. 1995); *Texas Mut. Ins. v. Vista Community Medical*, 275 S.W.3d 538 (Tex. App. 2008); *Guier v. Teton County Hosp. Dist.*, 248 P.3d 623 (Wyo. 2011).

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

[22] *Countryside Co-op v. Harry A. Koch Co.*, 280 Neb. 795, 790 N.W.2d 873 (2010).

[23] See *Travelers Indem. Co. v. Gridiron Mgmt. Group, ante* p. 113, 794 N.W.2d 143 (2011).

Whether a decision conforms to law is by definition a question of law.[24]

V. ANALYSIS

1. Jurisdiction

[8] Because standing is a component of jurisdiction, we first address the State's argument that the NRDs and Jacobson lacked standing to challenge the Department's order.[25] Standing is fundamental to a court's exercising jurisdiction, so a litigant or court can raise the question of standing at any time during the proceeding.[26]

After the director accepted the Department's fully appropriated determination in 2008, the NRDs petitioned for a contested hearing under the Administrative Procedure Act (APA).[27] In his 2009 order, the director treated the NRDs' petition for a contested hearing under the APA as a petition for a contested hearing under Neb. Rev. Stat. § 61-206 (Reissue 2009). That section gives the Department jurisdiction over all matters pertaining to water rights except as limited by statute. When the Department makes a decision affecting water rights within its jurisdiction, § 61-206 authorizes it to hold a postdecision hearing if the Department made its decision without a hearing. The director interpreted "without a hearing" to mean without a contested hearing and permitted the NRDs to challenge the decision under § 61-206.

But the director expressed doubt that the NRDs had standing to challenge the fully appropriated designation, even though he did not decide the issue. He doubted that the NRDs could show that the order adversely affected their interests merely because the designation triggered statutory duties for the NRDs under § 46-715. Section 46-715 requires the NRDs to participate in the development of an "integrated

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[24] *Id.*

[25] See *State ex rel. Reed v. State*, 278 Neb. 564, 773 N.W.2d 349 (2009).

[26] See *Mutual Group U.S. v. Higgins*, 259 Neb. 616, 611 N.W.2d 404 (2000).

[27] See Neb. Rev. Stat. § 84-913 (Reissue 2008).

management plan" for the river basin. It specifies the objectives that the plan must achieve and procedures that the NRDs must implement.

On appeal, the Department does not explicitly argue that the NRDs lacked standing. Instead, it concedes that complying with their duties under § 46-715 may impose costs on the NRDs. It asserts that whether these costs constitute an adverse impact for standing presents an issue of first impression.

Neither party has discussed the application of § 46-713(2) here, but we believe that it is relevant to whether the NRDs had standing. Section 46-713(2) requires the Department to reevaluate its fully appropriated designation if it believes that a reevaluation may lead to a different result. Its decision to reevaluate can be "in response to a petition filed with the [D]epartment by any interested person."[28] The petition is sufficient to trigger this reevaluation if it is "accompanied by supporting information showing that . . . (b) the [D]epartment relied on incorrect or incomplete information when the river basin, subbasin, or reach was last evaluated."[29]

The Legislature authorized an "interested person" to challenge the Department's determination by petitioning for a reevaluation. We believe that it would be inconsistent with this authorization for us to hold that an interested person could not challenge the determination by petitioning for a contested hearing on the same grounds under the APA or § 61-206(1). So we view the only standing issue as whether the NRDs are interested persons under § 46-713(2).

Section 46-706(1) defines "person" to include political subdivisions, which include NRDs.[30] But in *Metropolitan Utilities Dist. v. Twin Platte NRD*,[31] we held that an NRD does not have standing to object to an appropriation application when it does not have a water right that would be adversely affected by the

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[28] § 46-713(2).

[29] *Id.*

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

[31] *Id.*

application.[32] We recently reiterated our holdings that a political subdivision must be asserting its own interests, rather than a third party's interests, and stated that it must show an injury in fact.[33]

[9] The same standing rules apply to § 46-713(2): Generally, to be an "interested person" under § 46-713(2), a litigant challenging a fully appropriated determination by the Department must be asserting its own rights and interests, not those of a third party, and must demonstrate an injury in fact sufficient to confer common-law standing.

As in our earlier cases, the NRDs, as entities, did not claim to have water rights adversely affected by the Department's fully appropriated designation. But unlike our earlier cases, the Department's action triggers duties for the NRDs that will require them to spend public funds. Here, all of the NRDs alleged that because of the Department's order, they would be required to take regulatory measures that will be costly to taxpayers in their districts. And Neb. Rev. Stat. § 77-3442(4)(c) (Reissue 2009) supports this claim. It authorizes an NRD to levy taxes in this circumstance. Specifically, the taxes are used to "administer and implement ground water management activities and integrated management activities" if the NRD has land within a river basin, subbasin, or reach that the Department has determined to be overappropriated or fully appropriated.[34] So we consider whether the NRDs' duties or expenditures create an exception to the requirement that they assert their own rights and interests.

[10] Unless an exception applies, state officials and political subdivisions generally do not have standing to challenge the constitutionality of statutes directing their duties.[35] But the NRDs are not challenging the legislation directing their duties

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

[33] *Central Neb. Pub. Power Dist. v. North Platte NRD*, 280 Neb. 533, 788 N.W.2d 252 (2010).

[34] § 77-3442(4)(c).

[35] See, *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977); 16 Am. Jur. 2d *Constitutional Law* § 149 (2009).

in the event of the Department's action or any legislation. They are challenging the validity of the.Department's action that compelled them to spend public funds. Holding that the NRDs lacked standing here would leave political subdivisions at the mercy of superior agencies with no redress for actions that improperly or arbitrarily and capriciously require them to spend public funds.

[11] Moreover, in *Upper Big Blue NRD v. State*,[36] we implicitly concluded that an NRD had standing to challenge the Department's fully appropriated designation under the Uniform Declaratory Judgments Act. Our decision in *Upper Big Blue NRD* is consistent with the rule that political subdivisions have standing to challenge state action that adversely affects them or requires them to expend public funds.[37] We conclude that because the NRDs have fiduciary duties with regard to the public funds that they are charged with raising and controlling, they have standing to challenge state action that requires them to spend those funds.

For the same reason, the NRDs have standing to appeal under Neb. Rev. Stat. § 61-207 (Reissue 2009). That statute states in part, "If any county, party, or parties interested in irrigation or water power work affected thereby are dissatisfied with the decision or with any order adopted, such dissatisfied county, party, or parties may appeal to the Court of Appeals to reverse, vacate, or modify the order complained of." We recognize that § 46-750 provides that a person aggrieved by a Department order issued under the Act may appeal the order in accordance with the APA. But § 46-750 does not provide that an APA review is the exclusive means of appealing a Department order. Because the director permitted the NRDs' petition under § 61-206, we conclude that the NRDs could invoke appellate review under § 61-207 here.

Our conclusion that the NRDs have standing, however, does not apply to Jacobson. The Department's final fully

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[36] *Upper Big Blue NRD v. State*, 276 Neb. 612, 756 N.W.2d 145 (2008).

[37] See, e.g., *Pony Lake Sch. Dist. v. State Committee for Reorg.*, 271 Neb. 173, 710 N.W.2d 609 (2006); *Kenney v. East Brunswick Tp.*, 172 N.J. Super. 45, 410 A.2d 713 (1980).

appropriated designation requires the Department and an NRD with land within the river basin to continue the stays issued after the Department's preliminary designation on the issuance of increased or new water appropriations.[38] But these stays do not adversely affect existing rights to use ground water.[39] Because Jacobson failed to allege any actual or imminent harm that would satisfy the requirement of an injury in fact and no exception applies, we conclude that he lacked standing and we thus need not address his cross-appeal.

We turn now to the merits of the NRDs' challenge.

2. 2008 Fully Appropriated Designation

The NRDs contend that the Department failed to rely on the best information available by hinging its analysis on NPPD's call. They point out that in 2006 and 2007, the Department had found that the surface water was relatively abundant and that the river basin was not fully appropriated. They argued that the Department's analysis changed dramatically solely because of NPPD's 2007 call. They further contend that the director improperly assumed that NPPD's appropriations were valid despite pending legal challenges. And they contend that if that challenge results in a finding that NPPD has forfeited its appropriations, the Department's conclusion would likely be the same as it was in 2006 and 2007—a basin not fully appropriated.

[12] The Department counters that it cannot wait for the outcome of a legal challenge to make its preliminary determination whether the river basin was fully appropriated. That is correct. We recognize that the Act requires the Department to issue its annual report by January 1 of each year. But we reject the Department's contention that its investigation of NPPD's water use at the dam was based on the best information available to the Department for its 2008 analysis. It is precisely because the director cannot resolve a challenge to a call before the Department issues its annual evaluations that the Department cannot premise its annual evaluations upon a

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[38] See § 46-714.

[39] See *id.*

senior appropriator's call. We also agree with the NRDs that the director improperly assumed that NPPD's appropriations were valid. The director's reasoning that a challenge to a call is irrelevant after the Department has issued closing notices is incorrect. Until a challenge is decided, the director is not at liberty to conclude that it is without merit.

Furthermore, the Department could have avoided this dispute by simply following its own regulations. We agree with the director that § 46-713(3)(a) permits the Department to designate a river basin or subpart as fully appropriated by focusing solely on whether surface water appropriations are sustainable. But nothing in its regulations permits the Department to make that determination by comparing a senior appropriation right to the streamflow values at a specific diversion point or streamflow gauge.

(a) The Department's Failure to Follow Regulations

Although the Department provided a copy of its 2005 regulations in the 2008 annual report, the Department's 2006 regulations were in effect when it prepared that report. The relevant provision is found at 457 Neb. Admin. Code, ch. 24, § 001.01A and is known as the Department's 65/85 rule. Summarized, the 65/85 rule requires the Department to project whether the most junior surface water appropriator can divert sufficient water to satisfy two different standards: (1) 65 percent of the Department's calculated annual corn irrigation requirement from July 1 through August 31 and (2) 85 percent of the Department's calculated annual corn irrigation requirement from May 1 through September 30. If the most junior appropriator could not meet either one of these standards, then the Department determines that the river basin is fully appropriated.

But more important here, § 001.01A also specifies the information and fallback methodology that the Department must use to make its projection:

> The inability to divert will be based on stream flow data and diversion records, if such records are available for the most junior surface water appropriator. *If these records*

> *are not available,* the inability to divert will be based on the average number of days within each time period (May 1 to September 30 and July 1 to August 31) that the most junior surface water appropriation for irrigation would have been closed by the Department and therefore could not have diverted during the previous 20 year period. In making this calculation, if sufficient stream flow data and diversion data are not available, it will be assumed that if the appropriator was not closed, the appropriator could have diverted at the full permitted diversion rate. *In addition the historical record will be adjusted to include the impacts of all currently existing surface water appropriations and the projected future impacts from currently existing ground water wells.* The projected future impacts from ground water wells to be included shall be the impacts from ground water wells located in the hydrologically connected area that will impact the water supply over the next 25 year period.

(Emphasis supplied.)

This regulation requires in unmistakable terms that the Department use its streamflow data and diversion records to project the most junior appropriator's ability to divert sufficient water. Further, because its averaging method for the preceding 20-year period is a fallback methodology if the streamflow data and diversion records are not available, the regulation obviously requires the Department to use its current data and records. This interpretation of the regulation is supported both by its plain language and by changes made to the 2005 regulation.

Specifically, under the previous 2005 regulation—which was not in effect for these proceedings—the only method for projecting whether the most junior appropriator could divert sufficient water was to determine the percentage of time that the appropriator could divert water during the previous 20 years and then to project the lag impact of existing wells for the next 25 years. The Department's 2006 amendment to its regulation to make the averaging method the fallback method shows that before 2008, the Department had changed its methodology to use its current data and records. But in 2008, it did not use

its current data and records to determine that the basin was fully appropriated.

[13] Agency regulations properly adopted and filed with the Secretary of State of Nebraska have the effect of statutory law.[40] The 2006 regulation is substantive. It supplies the standard for determining whether the surface water in a river or stream is insufficient to sustain existing appropriations. So for a valid fully appropriated determination, the Department's action must conform to its rules which are in effect when the action is taken.[41] Nebraska's statutes require the Department to keep streamflow data and diversion records.[42] The Department's reports show that it has them. So without any explanation for its use of the fallback averaging methodology, we conclude that the Department has failed to follow the methodology required by its regulation.

Moreover, contrary to the director's statements in his order, even when the Department properly uses its 20-year averaging method, the methodology specified in the Department's regulation does not hinge upon a call. Instead, it specifically requires the Department to adjust the historical record "to include the impacts of all currently existing surface water appropriations and the projected future impacts from currently existing ground water wells." That is not what occurred in 2008.

As noted, the Department's analyst stated that he compared NPPD's total appropriations to the mean daily streamflow values at Spencer Dam for the preceding 20 years. But the regulation does not permit this comparison analysis at a specific diversion point. And that is not how the Department applied the 20-year averaging methodology in its 2006 and 2007 reports. A difference of 1 year (2006) in a 20-year average could not have varied the Department's results this much without a very significant drop in the 2006 streamflow rate. Nothing in the Department's report suggests that such a drop

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[40] *In re Interest of Jorge O.*, 280 Neb. 411, 786 N.W.2d 343 (2010).

[41] See, *Robbins v. Neth*, 273 Neb. 115, 728 N.W.2d 109 (2007); *Schmidt v. State*, 255 Neb. 551, 586 N.W.2d 148 (1998).

[42] See Neb. Rev. Stat. §§ 46-227, 46-230, and 46-235(1) (Reissue 2010).

occurred. Instead, the Department conceded that the difference was solely attributable to NPPD's call. A review of its previous results shows that even if the Department had properly used the fallback averaging methodology in 2008, it applied it in an arbitrary manner.

(b) The Department's Failure to Use Consistent Methodologies

The Department cannot square its 2008 methodologies and results with the results in its previous reports. Most important, they show that the Department has not applied its 20-year averaging methodology consistently. When using this method in 2006, the Department adjusted the river's historical streamflow values for the preceding 20 years by total appropriations existing at the start of the 20-year period. In 2007, the Department adjusted the river's historical streamflow values by total appropriations existing at the time of its analysis. And in neither year did the Department find that the basin was fully appropriated. But in 2008, it did not adjust the streamflow values for the upstream portion at all. Instead, it compared NPPD's appropriations to the average streamflow values at Spencer Dam for the preceding 20 years.

(i) 2006 Methodology for 20-Year Averaging

As discussed, the 2005 regulation required the Department to perform an averaging of the previous 20-year period to determine the percentage of time that the most junior appropriator could divert water. For the 2006 report, the Department analyzed the 20-year period from 1985 to 2004. The methodology statements in the 2006 report showed that if an appropriator with a priority date after the 20-year period began had made a call, the Department would reconstruct "the administrative record as if all the surface water appropriations that existed as of 2004 existed in 1985." In its chapter on the Lower Niobrara River Basin, the Department noted that a 1991 call had resulted in a 4-day closing of junior appropriation rights. But because the senior appropriator had a priority date before 1985, the Department stated that it was not required to reconstruct the administrative record.

Why are the 2006 methodology statements significant? They show that regardless of whether a call was made, the Department accounted for all appropriations that existed in 1985, at the start of the 20-year period. This shows that the Department accounted for all of NPPD's appropriations because they all existed before 1985. The 2006 methodology statements also show that the Department was not calculating the average number of days that water was available for diversion based upon what appropriators were actually diverting, but upon what appropriators were authorized to divert. In other words, for any days in which a senior appropriator could have made a call because the streamflow was insufficient to meet its diversion right, the Department would have assumed that the most junior appropriator's right to divert would have been closed.

(ii) 2007 Methodology for 20-Year Averaging

The 2006 regulations were in effect when the Department prepared its 2007 report. But the Department failed to explain why it did not use its current data and records to project whether the most junior appropriator would be able to divert sufficient water to meet the Department's irrigation requirements. Instead, it used the 20-year averaging method then also. In 2007, the Department analyzed the 20-year period from 1986 to 2005.

Yet the methodology statements in the 2007 report showed that the Department followed the 2006 regulation's requirement for adjusting the historical record when it used the averaging method. The 2007 report specifically stated that "[t]he historical record was adjusted to include the impacts of all currently existing surface water appropriations . . . ." Currently existing appropriations would have included all of NPPD's appropriations. So in 2007, the Department also accounted for all of NPPD's appropriations when it adjusted the historical record to calculate the average number of available days in which water was available for diversion in the preceding 20 years. In brief, the Department accounted for all of NPPD's appropriations in both 2006 and 2007 when adjusting the river's streamflow values. And yet, in both years, the Department concluded that the river basin was not fully appropriated.

(iii) 2008 Report

In contrast to the Department's previous reports, in the 2008 report, which is the subject of this appeal, the Department divided the Lower Niobrara River Basin into two sections: upstream and downstream of Spencer Dam. It appears to have applied its 2007 adjustment methodology to the downstream portion of the river basin because its results for that portion were identical to its previous results for the entire basin. But for the upstream portion, the Department compared NPPD's total appropriations to the mean daily streamflow values only at Spencer Dam for the preceding 20 years. We do not believe, however, that the variance in its methodology is justified simply by NPPD's call when both the 2006 and 2007 reports accounted for NPPD's appropriations.[43] Nor did the Department explain how the streamflow values at the dam related to streamflow values for other parts of the river or the river as a whole.

A table illustrates the wide variance in the Department's results before and after it divided the river into upstream and downstream portions. The variance exists because the Department had not previously applied its 20-year averaging methodology as a comparison of NPPD's total appropriations to the streamflow values at Spencer Dam.

Average Number of Days in Which Water Was Available for Diversion Based on 20-Year Averages

	July 1 to Aug. 31	May 1 to Sept. 30
2006 (1985-2004)	62	153
2007 (1986-2005)	61.9	152.9
2008 (1987-2006)		
Upstream	2.7	24.6
Downstream	61.9	152.9

As the table illustrates, using the Department's comparison analysis to perform its 20-year averaging dramatically reduced

[43] See *Girard v. City of Glens Falls*, 173 A.D.2d 113, 577 N.Y.S.2d 496 (1991).

the number of days in which water was available for diversion upstream of Spencer Dam.

Also, an unexplained difference exists in the Department's 2008 results for the number of days that an appropriator would need to divert water to meet the Department's calculated irrigation needs for a 70-acre corn crop. Remember that the Department concludes that a river basin is fully appropriated if the most junior appropriator could not meet the required percentages in either of two irrigation periods.

The Department did not change the number of acre-inches that a corn crop would require annually for the different irrigation zones in the river basin. Nor did it change its formula for converting the required acre-inches into the number of days that an irrigator would need to divert water to meet the 65-percent and 85-percent requirements in its two irrigation periods. But in 2008, the Department did not calculate a range of days to reflect the five different irrigation zones in the river basin's upstream portion. Instead, its calculation of the number of diversion days needed to irrigate for the entire upstream portion of the river basin equaled the number of days it had previously said were needed only in the basin's most western irrigation zone.

Diversion Days Needed to Meet Irrigation Percentages

	To Meet 65% From July 1 to Aug. 31	To Meet 85% From May 1 to Sept. 30
2006	23.9 to 37.2	31.3 to 48.6
2007	23.6 to 36.9	30.9 to 48.3
2008		
Upstream	36.9	48.3
Downstream	23.6 to 25.6	30.9 to 33.4

As the table illustrates, these variances in the Department's results show that it has not applied its methodologies in a consistent manner to the upstream portion of the river basin. And the Department failed to account for these variances under its stated methodologies and regulations to show that the change was not arbitrary.[44] The Department may not apply

[44] See *Girard, supra* note 43.

a particular methodology one year and arbitrarily decide to ignore it the next. Nor is it free to disregard its own substantive rules.

We conclude that the Department's 2008 fully appropriated designation is arbitrary and capricious. The Department failed to follow its own regulations to conclude that the basin was fully appropriated. It also failed to apply its methodologies in a consistent manner.

(c) The Department's Failure to Comply With § 46-713(1)(d)

The NRDs also contend that the Department failed to comply with § 46-713(1)(d). That section requires the Department to use the best available scientific data, information, and methodologies to prepare its annual report. Even if the Department could in hindsight offer a reasonable explanation for the variances in its results, § 46-713(1)(d) requires it to "provide [in the report] sufficient documentation to allow these data, information, methodologies, and conclusions to be independently replicated and assessed."[45] We agree with the NRDs that many of the Department's conclusions could not be replicated and assessed even if the Department had provided its raw data, because methodology information is missing.

First, the report does not explain how the Department projects whether the most junior appropriator can divert sufficient water based on its current streamflow data and diversion records. We assume that the river's streamflow rates would be crucial to whether water is available for diversion. But nothing in the report provides the Department's determination of the river's streamflow rates. And even if the Department does not rely on this information, it has failed to provide any analytical framework for its determinations.

Similarly, the Department explicitly makes streamflow values a necessary consideration in reaching a fully appropriated determination under its averaging methodology. But the Department has provided only the results of its 20-year

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[45] *Id.*

averaging methodology in tables. It has not explained how it adjusts the historical record of daily streamflow values to account for all currently existing appropriations.

Further, even if the Department had provided the river's streamflow rates or values, its reports show that it maintains many streamflow gauges in the river. And its analyst's affidavit shows that it records more than one daily reading at these points. An independent party could not replicate and assess the Department's findings and methodologies without knowing whether its determinations of streamflow rates or values represented the mean, median, or mode of the Department's daily readings. There is a similar failure to explain how the Department performs its erosion analysis under 457 Neb. Admin. Code, ch. 24, § 001.01C, which also adjusts the historical record to account for the impact of ground water pumping.

In sum, the Department's procedures are opaque. Because the general statements in its regulations and reports are not sufficient for an independent party to replicate or assess its findings or methodologies, we conclude that the Department has failed to comply with § 46-713(1)(d).

Because we conclude that the Department's fully appropriated designation is invalid, we do not reach the NRDs' contention that the Department's methodology for determining the basin's land boundary is not the best available.

VI. CONCLUSION

We conclude that the NRDs had standing to challenge the Department's 2008 determination that the Lower Niobrara River Basin was fully appropriated. Jacobson, however, lacked standing.

We conclude that the Department's fully appropriated designation was arbitrary and invalid. The Department failed to comply with its own regulations when it determined that the basin was fully appropriated by comparing the streamflow values at a specific diversion point or streamflow gauge to a senior appropriator's total appropriation rights. A review of its previous reports also shows a complete lack of consistency in the way it has applied its 20-year averaging methodology.

Finally, we conclude that the Department has failed to plainly describe its methodologies so that they can be replicated and assessed in compliance with § 46-713(1)(d).

We hold that the Department's 2008 fully appropriated determination for the Lower Niobrara River Basin was invalid. We reverse and vacate the director's order affirming that determination.

REVERSED AND VACATED.

JAMES TIERNEY AND JEFFREY TIERNEY, APPELLANTS,
v. FOUR H LAND COMPANY LIMITED
PARTNERSHIP ET AL., APPELLEES.
798 N.W.2d 586

Filed June 3, 2011. No. S-10-103.

1. **Judges: Recusal.** A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned.
2. ____: ____. A trial judge should recuse himself or herself when a litigant demonstrates that a reasonable person who knew the circumstances of the case would question the judge's impartiality under an objective standard of reasonableness, even though no actual bias or prejudice is shown.
3. **Judges: Recusal: Waiver.** A party is said to have waived his or her right to obtain a judge's disqualification when the alleged basis for the disqualification has been known to the party for some time, but the objection is raised well after the judge has participated in the proceedings.
4. **Judges: Recusal: Time.** The issue of judicial disqualification is timely if submitted at the earliest practicable opportunity after the disqualifying facts are discovered.
5. **Judges: Recusal: Appeal and Error.** A traditional harmless error analysis is inappropriate for review of questions of judicial disqualification.
6. ____: ____: ____. The disqualification of a judge is not a disqualification to decide erroneously. It is a disqualification to decide at all.
7. ____: ____: ____. The three-factor special harmless error test in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988), should be used for determining when vacatur is the appropriate remedy for a trial judge's failure to recuse himself or herself when disqualified under the Nebraska Code of Judicial Conduct.
8. **Judges.** When a judge is biased, his or her personal integrity and ability to serve are thrown into question, placing a strain on the court that cannot easily be erased.

Petition for further review from the Court of Appeals, INBODY, Chief Judge, and IRWIN and CARLSON, Judges, on appeal thereto