

NEBRASKA SOIL AND WATER  
CONSERVATION COMMISSION

STATE WATER PLAN  
PUBLICATION NUMBER 101D



Report on  
**THE FRAMEWORK STUDY**

APPENDIX D

**SURVEY OF  
NEBRASKA WATER LAW**

JUNE, 1971



J. James Exon  
Governor



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Preparation and publication of this report was supported in part by grants  
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## NEBRASKA'S STATE WATER PLAN

Nebraska Revised Statutes § 2-1507 (7) (Supp. 1967) directs the Nebraska Soil and Water Conservation Commission to "plan, develop, and encourage the implementing of a comprehensive program of resource development, conservation and utilization for the soil and water resources of this state in cooperation with other local, state and federal agencies and organizations."

Legislative Resolution 5, of the 1967 Legislature, (Reaffirmed by L.R. #72 -- 1969 Session) specifically directed the Nebraska Soil and Water Conservation Commission to "...prepare a comprehensive water and related land plan for the State of Nebraska, such framework plan to be completed no later than June 30, 1971, and to be known as the State Water Plan." In addition to an analysis and evaluation of the state's water and land resources, the Resolution directed that the State Water Plan include an examination of legal, social, and economic factors associated with resource development.

Nebraska's State Water Plan, as established by the Commission, will consist of the following four sections:

Section 1. The Framework Study - The framework study is based on reconnaissance type investigations and makes use of presently available planning data in formulation of the framework plan. Basic objectives of the study were to assess the present quantity, distribution, quality, and use of Nebraska's water and land resources and to provide a broad, flexible guide to the best uses of these resources to meet current and future needs.

Section 2. Basin Studies - This section will consist of studies of individual river basins. The studies will be made in the detail necessary to identify potential projects, estimate project costs and benefits, suggest the order of development, show the relationship of each project to the state's framework plan, and recommend local action to accelerate resource development.

Section 3. Status Summary - Significant water resource development projects which have been proposed for future development are described in the Status Summary of Potential Projects. It will be updated periodically to reflect new proposals and progress in resource planning. The Status Summary section of the State Water Plan will also include a report summarizing the present status of water resource development in the State.

Section 4. Special Recommendations - This section consists of recommendations for action by the Legislature, Governor, and various units of government to improve the conservation, development, management, and utilization of Nebraska's land and water resources. The recommendations will be prepared as the need for action becomes apparent and are to include a thorough study of the legal, social, and economic aspects of major problems of resource development.

## THE FRAMEWORK STUDY

The Framework Study is the central feature of Nebraska's State Water Plan. Results of the study are presented in a main report and four appendices. The appendices generally present summations of basic data and miscellaneous supporting material for the main report.

Appendix A, "Land Inventory," is an inventory of the land resources of the State. Three major topics (1) existing land use, (2) land ownership, and (3) land capability are discussed. This appendix was printed in preliminary form in June, 1969.

A summary of the ground and surface water resources of the State is included in Appendix B, "Inventory of Water Resources." That volume deals with the location, quantity, quality, availability, and present use of the state's ground and surface water. In addition, Appendix B summarizes those climatic factors related to water resource development. Appendix B was printed in preliminary form in December, 1969.

Appendix C, "Land and Water Resources Problems and Needs," is an inventory of the present and anticipated future water requirements and water related problems of the State. It was printed as a preliminary report in September, 1970.

This Appendix D, "Survey of Nebraska Water Law," provides a broad scope coverage of the laws, government agencies and programs pertaining to public and private developments, management, and use of water. It also summarizes compacts and court decrees which are important to water resource development in the State. It was printed in preliminary form in June, 1970.

The main report on the Framework Study is based on information presented in the appendices and the sources given in them. It presents a generalized statewide reconnaissance of Nebraska's water and related land resources, problems and needs, and a general framework for development. It does not provide detailed evaluations or time schedules for specific projects but a flexible guide into which properly designed projects can be fitted. The report also presents recommendations for action necessary for proper development of Nebraska's water resources.

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## INTRODUCTION

This appendix to the Report on the Framework Study of Nebraska's State Water Plan has been prepared to provide a broad scope coverage of the laws, government agencies and programs pertaining to public and private development, management, and use of water. Subjects are not given exhaustive treatment; such comprehensive analysis was not considered to be appropriate for the Framework Study. As part of the Framework Study, this appendix will serve as background and a stepping-stone for more complete studies of individual legal topics with the possibility of future proposals for change. Although not a definitive work, it contains information for government leaders, technicians and administrators who are interested in laws affecting water use and management in Nebraska.

Many aspects of federal, state and local law and government are discussed. The six primary subject areas are state law, state administrative agencies and programs, federal constitutional law, federal administrative agencies and programs, federal-state organizations, and subdivisions of state government. The introduction section at the beginning of each chapter provides a review of the subject material and some necessary background.

Discussions of proposed changes of law are not included in this Appendix. However, well-recognized problems with existing legal situations are noted when the courts or commentators have expressed concern, and the reader may find other areas where problems are evident.

## CHAPTER 1. STATE LAW

### Introduction

Water law is a complex combination of constitutional provisions, legislation, custom and judicial decree. Its explanation is not easily handled and would take a voluminous publication to be thoroughly reviewed.

In this publication the various aspects of water law in Nebraska are briefly depicted, and only the basic rules of a complex system of water laws are discussed. For the sake of simplicity and brevity the State Law section describes basic rules and purposely eliminates the numerous secondary considerations which would necessarily follow in a complete legal analysis.

This section attempts to answer no specific questions on individual or unique situations. Likewise, this section should never be solely relied upon to answer specific questions, but should only be used to review general legal principles.

### Legal Classification of Water\*

#### Introduction

Prior to discussing Nebraska water law the reader should become acquainted with the legal definitions for several classes of water which are found in court opinions and legislative enactments in Nebraska. No attempt is made to cover classifications of water and their definitions as developed in the modern scientific fields of hydrology or geohydrology. The work of persons in these scientific disciplines requires sophisticated sets of classifications to serve their needs. Likewise, the legal classes and definitions discussed in this section are presently used in the work of attorneys and judges; and, although they do not parallel those of modern science, such legal classes are controlling in the later discussions of water law.

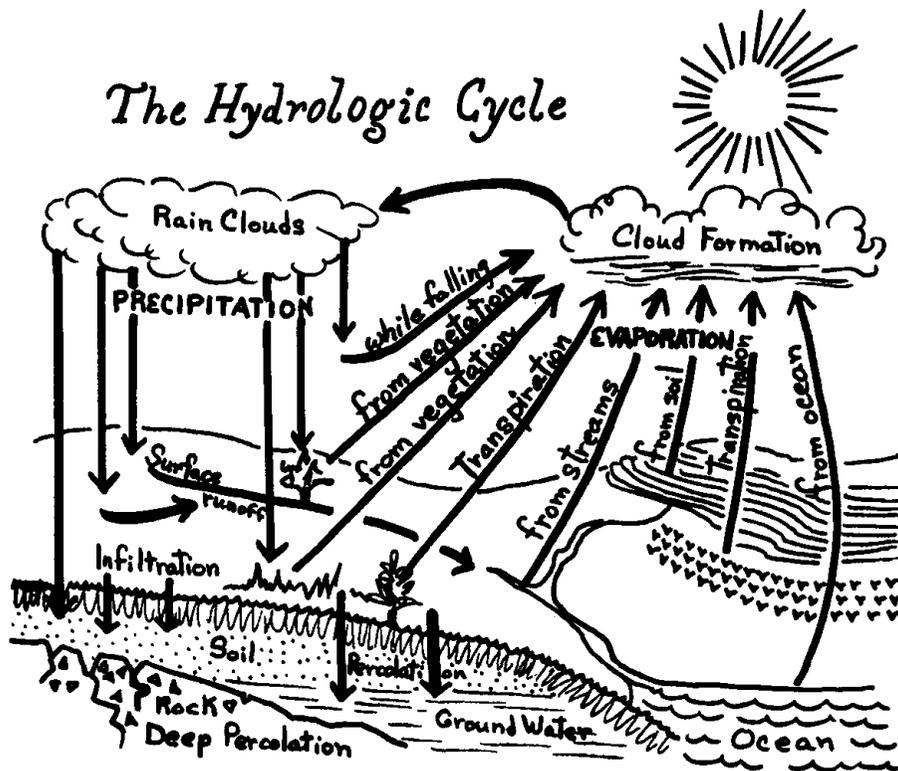
Legal classification of water is important because the legal rules or doctrines to be applied in a given legal dispute will depend in part upon the legal "class" of water involved. The classifications are usually based upon the immediate source of supply. Geologists and hydrologists often find these classifications to be artificial and repugnant to the modern concept of the hydrologic cycle.

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\* Sources quoted and otherwise relied upon for this part include: Clark, Plan and Scope of Work, in 1 WATERS AND WATER RIGHTS, 16-29 (R. Clark ed. 1967); Clark and Martz, Classes of Water and Character of Water Rights and Uses, in 1 WATERS AND WATER RIGHTS 283-344 (R. Clark ed. 1967); Yeutter, A Legal-Economic Critique of Nebraska Watercourse Law, 44 NEB. L. REV. 11 (1965) and Harnsberger, Nebraska Ground Water Problems, 42 NEB. L. REV. 721 (1963).

The hydrologic cycle traces the perpetual progress of water, essentially all water, through various environments from the ocean, lakes, and other surface exposures to the atmosphere by evaporation and transpiration and then to the ground and surface runoffs through precipitation and eventually to the ocean and lakes again, being used and reused continually. This concept recognizes water in the several phases of the cycle (surface water, precipitation, soil water, ground water) as being only transient in terms of its classification at many places and times. Courts of law, however, were adjudicating disputes between litigants concerned with rights to water supply or liability for drainage activity long before the concept of the hydrologic cycle generated concern that the law give actual recognition to the physical interrelationships of "sources" of water supply. It was also later that modern studies of hydrology produced the scientific data for developing clearer theories of ground water occurrence and movement, which pointed out inaccuracies in legal classifications.

THE HYDROLOGIC CYCLE<sup>1/</sup>



<sup>1/</sup> Hutchins, Selected Problems in the Law of Water Rights in the West, U.S.D.A. Misc. Pub. No. 418 (1942) 1-2.

The following chart lists and briefly defines some generally recognized legal classes of water. Not all of the types mentioned have been recognized as distinct classes in Nebraska.

LEGAL CLASSES OF WATER

WATER	SURFACE WATER	<p><u>DIFFUSED SURFACE WATER</u> - the uncollected flow from falling rain or melting snow, or waters which rise in the earth from springs and diffuse over the surface of the earth.</p> <p><u>WATERCOURSE</u> - water flowing in a definite channel with a bed and banks or sides.</p> <p><u>FLOODWATER</u> - water which escapes from a watercourse and flows over adjoining lands in no channel.</p> <p><u>LAKE &amp; POND</u> - water substantially at rest in a depression of natural origin.</p> <p><u>SLOUGH</u> - river arm apart from the main channel.</p> <p><u>SWAMP</u> - ground saturated but not covered with water.</p>
	GROUND WATER	<p><u>UNDERGROUND STREAM</u> - water flowing in a well-defined and known channel which is discoverable from the surface.</p> <p><u>PERCOLATING WATER</u> - water which seeps or filters through the soil without a defined channel and which is not discoverable from surface indications without excavation. Percolating water often moves through or is stored in large underground waterbearing material known as aquifers, which may be rechargeable or nonrechargeable.</p>
	WATER FROM SPECIAL SOURCES	<p><u>SPRING</u> - water issuing by natural forces out of the earth at a particular place.</p> <p><u>WASTE or ARTIFICIAL</u> - water due to escape, seepage, etc., from constructed works.</p> <p><u>FOREIGN</u> - water that has been imported by a user from one watershed into another.</p> <p><u>SALVAGED or DEVELOPED</u> - water that is the product of man's efforts in increasing or saving a supply.</p> <p><u>STORAGE or EXCESS SUPPLY</u> - project storage, which is the principal source for irrigation, residential-municipal uses.</p>

## Water in Watercourses

A Nebraska statute defines a watercourse as "any depression or draw two feet below the surrounding lands and having a continuous outlet to a stream of water, or river or brook."<sup>2/</sup> This succinct definition has of necessity been expanded and explained by the Nebraska Supreme Court which has declared: (1) that a watercourse must be a stream in fact, as distinguished from mere surface drainage; (2) that it must have banks and sides; (3) that there must be a definite channel, flowing in a particular direction, although flow need not be constant.<sup>3/</sup> It would seem that proof of reliable existence of a true stream would be a determinative factor in the final decision of whether or not a channel constitutes a watercourse. Such proof could tend to show operational reliance by the landowners on the channel because of its well-defined existence.

## Diffused Surface Water

Although, logically, all waters on the surface of the earth would seem to be "surface waters," the courts of Nebraska and other states continue to refer to "surface waters" when the more specific category of "diffused surface waters" is meant. Problems involving diffused surface water are usually related to rights and liabilities concerning drainage of unwanted water.<sup>4/</sup> It is rare for a landowner to be concerned with retaining diffused surface waters for use; however, the rule is well settled that an owner of land upon which surface waters arise which have not become part of a watercourse or lake may retain the water for his own use.<sup>5/</sup> Such is not subject to the same rules of water rights which apply to use of watercourses and lakes.

The Nebraska Supreme Court has defined surface water as follows:

Water which appears upon the surface of the ground in a diffused state with no permanent source of supply or regular course is regarded as surface water.<sup>6/</sup>

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<sup>2/</sup> NEB. REV. STAT., section 31-202 (Reissue 1968).

<sup>3/</sup> For case citations see, Yeutter, A Legal-Economic Critique of Nebraska Watercourse Law, 44 NEB. L. REV. 11, 11-12 (1965).

<sup>4/</sup> The legal rules governing liability for drainage activity involving diffused surface water are discussed elsewhere in this volume.

<sup>5/</sup> *Nichol v. Yocum*, 173 Neb. 298, 113 N.W.2d 195 (1962); *Rogers v. Petsch*, 174 Neb. 313, 117 N.W.2d 771 (1962).

<sup>6/</sup> *Scotts Bluff County v. Hartwig*, 160 Neb. 823, 828, 71 N.W.2d 507, 511 (1955).

A later case stated:

Surface water is that which is diffused over the surface of the ground, derived from falling rains or melting snows, and continues to be such until it reaches some well-defined channel in which it is accustomed to and does flow with other waters.<sup>7/</sup>

As previously stated, diffused surface waters do not include waters which form part of a watercourse or lake, however, water found in a depression in the earth amounting only to a basin or pond from which water will normally disappear by evaporation or percolation is classified as diffused surface water. The distinction seems to rest with the relative permanency of the water.<sup>8/</sup>

### Flood Waters

Flood waters are that portion of the overflow of a stream during times of high water which will return to the stream at a lower point. Nebraska has consistently held that water which is a part of the overflow of

. . . a stream which is accustomed to spill flood waters beyond its banks in times of high water and to flow over adjacent lands . . . and which flood waters return to the channel of the stream at points farther down stream, remains a live stream, and the spilled waters so flowing out are flood waters and not diffused surface waters.<sup>9/</sup>

Therefore, flood waters are treated as part of a watercourse and not as diffused surface waters.<sup>10/</sup> This determination is important for questions concerning rights to use water beneficially by diverting for application or storage and concerning liability for drainage activity of repelling or diverting water for the purpose of protecting land from the destructive effect of water.

### Ground Water (Underground Streams and Percolating Water)

The Nebraska Legislature has defined ground water as "that water which occurs or moves, seeps, filters, or percolates through the ground

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<sup>7/</sup> Walla v. Oak Creek Township, 167 Neb. 225, 229, 92 N.W.2d 542, 545 (1958).

<sup>8/</sup> Block v. Franzen, 163 Neb. 270, 276, 79 N.W.2d 446, 451 (1956).

<sup>9/</sup> Frese v. Michalec, 148 Neb. 567, 573, 28 N.W.2d 197, 199 (1947).

<sup>10/</sup> Chicago, B. & Q. R. Co. v. Emmert, 53 Neb. 237, 73 N.W. 540 (1897).

under the surface of the land."<sup>11/</sup> This definition controls for purposes of interpreting what water is covered by Nebraska legislation on "ground water." However, to the extent that ground water problems are still covered by common law and case decisions in the absence of legislation, other definitions have been developed and are controlling.

The Nebraska Supreme Court in a 1933 case<sup>12/</sup> recognized the generally held distinction between underground waters flowing in known and well-defined channels as contrasted to underground waters in channels which are undefined and unknown. The first situation constitutes an "underground stream" and the second describes "percolating ground water"; and the court stated that "the principles of law governing the former are not applicable to the latter."<sup>13/</sup>

As to underground streams, it is generally held that the law applicable to watercourses determines the rights to use,<sup>14/</sup> while the rights of surface owners to use percolating ground water are determined by Nebraska's ground water rules.

One Nebraska writer has commented that all of the ground water in Nebraska is in a state of percolation and that no underground streams exist in this State;<sup>15/</sup> however, the Olson case did discuss a geological situation which would fit the definition of an underground stream. Hydrologists point out that the legal distinction between underground streams and percolating water has no scientific basis.<sup>16/</sup>

#### Summary and Comments

More extensive discussions of legal rules governing the above mentioned classes of water are found in other sections of this publication. Legal classification of water warrants special attention because of the recognized disparities between the modern precepts of science and the classification touchstones of water law. A succinct statement of the broad problems of classification is provided by the following quotations:

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<sup>11/</sup> NEB. REV. STAT., section 46-635 (Reissue 1968).

<sup>12/</sup> Olson v. City of Wahoo, 124 Neb. 802, 248 N.W. 304 (1933).

<sup>13/</sup> Id., 124 Neb. 15 810.

<sup>14/</sup> See Olson v. City of Wahoo, 124 Neb. 802, 248 N.W. 304 (1933) and Harnsberger, Nebraska Ground Water Problems, 42 NEB. L. REV. 721 (1963).

<sup>15/</sup> Sorensen, Ground Water -- The Problems of Conservation and Interferences, 42 NEB. L. REV. 765, 769 (1963).

<sup>16/</sup> Harnsberger, supra note 14, at 731 n. 35.

. . . A water supply . . . is almost never in truly static condition, awaiting exploitation by man. Its component parts are generally in motion--they have come from some other water supply or supplies, and are en route to still others. Therefore, diversion of water from a particular source of supply interrupts the natural replenishment of some other available source of supply. Recognition of this fundamental relationship is necessary to an orderly definition of water rights.

The point at which waters are physically appropriated for use--that is, diverted from their natural state and brought under control by artificial devices--determines the legal classification of such waters for such use. Thus, waters taken from a stream into a canal, through a headgate installed on the bank of the stream, are classified at the point of diversion as waters of a watercourse, regardless of their natural origin or subsequent use. Waters diffused over the ground and which if not intercepted would flow over a bank into a stream, but which before doing so are captured by means of an artificial dike and thereby simply detained or directed into a canal, are classified at the point of interception as diffused surface waters. And waters percolating through the soil, which, if not intercepted would seep into a surface watercourse through the banks or bottom of the channel, . . . but which are captured and brought to the surface by means of a pumping plant installed some distance away from the stream and its subterranean channel, are classified at the point of interception as diffused percolating waters or as ground waters in channels, depending upon the geological structure through which they are moving.<sup>17/</sup>

In defense of this legal system of classification, inherited by use from past generations, it may be argued that the quality and usefulness of water do not depend on the name by which it is called; also, that the legal classes summarized above are not much more artificial than the hydrologist's distinction between surface water and ground water: a now-you-see-it now-you-don't distinction that can refer to the same water molecule at different times and places. A classification commonly is made to suit man's convenience. He is likely to become confounded, however, if he assumes a separation that does not exist in nature, or vice versa, and legislates or renders judgment on the basis of that false assumption.<sup>18/</sup>

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<sup>17/</sup> Piper and Thomas, Hydrology and Water Law: What is Their Future Common Ground?, in WATER RESOURCES AND THE LAW, (University of Michigan Law School, 1958), quoted in Beuscher, WATER RIGHTS (1967) at p. 7.

<sup>18/</sup> Id. at 3.

## Water Rights

### Basic Legal Approach to Conflicts Between Water Users in Nebraska

When two or more persons are disputing the right to use a water supply insufficient for all, a logical sequence of legal questions is presented. The following material is a very brief outline of the basic inquiries in the order which they must be asked and resolved for determining the relative rights to the supply. The purpose of this material is to orient the reader to the subject matter of later discussions of ground water and watercourse water rights.

Situation: Two or more water users are disputing which one has the right to make use of a water supply which is insufficient for all.

#### 1st Question

WHAT IS THE LEGAL CLASSIFICATION OF THE DISPUTED WATER SUPPLY?

##### Possibilities

- a. Natural Stream Water  
(watercourses & lakes)
- c. Underground Stream  
(for clarification about  
definition see Legal Classification)

- b. Ground Water  
(percolating ground water)
- d. Diffused Surface Water  
(see Legal Classification  
section)

#### 2nd Question

WHAT LEGAL DOCTRINES CAN EACH PARTY RELY UPON IN SHOWING A LEGAL RIGHT TO USE THE WATER?

##### Possibilities

a. If supply is from a natural stream (both watercourses and lakes):

Appropriative Right  
Under Nebraska's Appropriation System  
legislation and Constitution.  
(See section on "The  
Appropriation System")

or

Riparian Right  
Under Nebraska's riparian rights  
doctrine; common law.  
(See section on "The  
Riparian Doctrine")

b. If supply is Percolating Ground Water:

The right to use percolating ground  
water is related to landownership,  
subject to the Reasonable Use Rule.  
(See section on "Ground Water Use Law")

c. If supply is an "Underground Stream":

Same rules as for natural stream water.  
(See section on "Ground Water Use Law")

d. If supply is "Diffused Surface Water":

A rule of capture applies. Landowner may keep and use the water when found on his land.

3rd Question

WHICH USER'S LEGAL RIGHT IS "BETTER" IN TERMS OF NEBRASKA LAW?

Possibilities

<u>Situation</u>	<u>Method to Decide Superior Rights</u>
<u>Appropriator v. Appropriator</u> - - -	Date of appropriation governs; first in time, first in right. (See section on "The Appropriation System")
<u>Riparian v. Riparian</u> - - - - -	Position on stream and reasonableness of use in relationship to the facts of each situation. (See section on "The Riparian Doctrine")
<u>Riparian v. Appropriator</u> - - - - -	Balance equities; standards enumerated in <u>Wasserburger v. Coffee</u> , 180 Neb. 149, 141 N.W.2d 738 (1966). (See section on "Relative Status of Riparian and Appropriation Rights")
<u>Ground Water User v. Ground Water User (Percolating Ground Water)</u> - -	Rule of reasonable use with correlative sharing in times of shortage.
<u>Ground Water User v. Appropriator</u> -	No Nebraska rule, but refer to <u>M.U.D. v. Merritt Beach Co.</u> , 179 Neb. 783, 140 N.W.2d 626 (1966)
<u>Ground Water User v. Riparian</u> - -	No Nebraska rule, but refer to <u>M.U.D. v. Merritt Beach Co.</u> , 179 Neb. 783, 140 N.W.2d 626 (1966)

4th Question

IF A WATER USER'S RIGHT IS NOT THE "BETTER" RIGHT UNDER THE ANALYSIS OF QUESTION THREE, THEN, DISREGARDING THAT FACT, DOES THE NEBRASKA PREFERENCE SYSTEM ALLOW THAT WATER USER TO OBTAIN THE WATER THROUGH SPECIAL CONDEMNATION PROCEEDINGS? (See section on the "Preference System")

a. Is the purpose of the water use by the holder higher on the list of preferences than the purpose of the use by the holder of the "better" right? (The order of preferred uses for both surface water and ground water is (1) domestic, (2) agriculture, and (3) manufacturing; power use is equated with manufacturing use in the statutory surface water preferences).

b. Can the superior (preferred) user show that his use is for a "public use"? (This is probably a necessary showing before condemnation of the water right of an inferior user).

c. As a practical matter, can the superior (preferred) user afford to pay the damages? (For example, the value of water to an industrial user may be so high as to prevent a preferred agricultural user from being able to afford to pay the damages because of the relative worths of the water use in contrast to the order of preferences).

#### Watercourse Use Law

Short History of the Nebraska Rules. Two distinct doctrines of water law have been formulated during the growth and development of the United States. From the old common law we have inherited the doctrine known as riparian rights, and from what might be called "American common law" we have been given the prior appropriation doctrine.<sup>19/</sup> Several of the states have accepted either one or the other of these two diverse concepts, but since 1895 Nebraska has used both riparianism and appropriation in a dual system of water rights. However, for all practical purposes, acquiring new rights under the riparian doctrine has been prohibited since 1895, as will be discussed later. The actual use of any significant amount of the waters of our natural streams is made through rights acquired under the appropriation doctrine.

Riparianism was recognized by the Nebraska Supreme Court in several cases<sup>20/</sup> decided in the late 19th Century. Nebraska's high court, however, accepted a modified common law rule of riparian rights known as the rule of reasonable use. That rule provided that each riparian had a right to make a beneficial use of the water of the stream, provided his use did not interfere unreasonably with the beneficial uses of other proprietors.<sup>21/</sup> Riparian rights were again considered in the cases of Crawford Co. v. Hathaway<sup>22/</sup>

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<sup>19/</sup> Prior appropriation was originally a mining camp rule in the California gold fields, and it was later accepted by that state's courts and legislature.

<sup>20/</sup> Gill v. Lydick, 40 Neb. 508, 59 N.W. 104 (1894); Clark v. Cambridge & Arapahoe Irrigation & Improvement Co., 45 Neb. 798, 64 N.W. 239 (1895).

<sup>21/</sup> Clark v. Cambridge & Arapahoe Irrigation & Improvement Co., note 20, supra.

<sup>22/</sup> 67 Neb. 325, 93 N.W. 781 (1903).

and Meng v. Coffee<sup>23/</sup> in 1903 and were held applicable to all parts of the State to the extent that the riparian doctrine had not been altered by legislation.

The legislation referred to by the court in those two cases were the Acts of 1877, 1889 and 1895.<sup>24/</sup> The Act of 1877 provided that corporations formed for the purpose of irrigation, or water power, might acquire rights-of-way for canals, dams and reservoirs by the exercise of the power of eminent domain.<sup>25/</sup> Although the statute did not expressly confer the right to acquire a vested water interest by appropriating it to a beneficial use, the State Supreme Court did declare that such a right was implied.<sup>26/</sup>

The Act of 1889, referred to above, declared that all persons, companies or corporations owning or claiming land on a bank or in the vicinity of any stream were entitled to the use of the water for irrigating such lands and might acquire a water right by appropriation to a beneficial use.<sup>27/</sup>

Although these last two statutes are the first codification of an appropriation doctrine in Nebraska, it is interesting to note that priorities antedating the 1877 Act have been recognized by the State Board of Irrigation.<sup>28/</sup>

In 1895 the Legislature approved a complete revision of the Nebraska irrigation laws. This revision has remained almost unchanged since its enactment. The Act of 1895 established the State Board of Irrigation, which is now the Department of Water Resources. It affirmed the right to divert unappropriated waters to a beneficial use; and it declared the waters of the State not previously appropriated to beneficial uses to be publicly owned and dedicated to the use of the people.<sup>29/</sup> Priority of time (first in time, first in right) controls which appropriators have the superior right to water in time of shortage; however, some types of uses were given preferences over others.<sup>30/</sup>

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<sup>23/</sup> 67 Neb. 500, 93 N.W. 713 (1903).

<sup>24/</sup> Laws of 1877, p. 168; Laws 1889, Ch. 68; NEB. COMP. STAT. (1895) Ch. 93a, p. 844.

<sup>25/</sup> See note 24, supra.

<sup>26/</sup> Kearney Water & Electric Powers Co. v. Alfalfa Irr. Dist., 97 Neb. 139, 149 N.W. 363 (1914).

<sup>27/</sup> See note 24, supra.

<sup>28/</sup> See Report of Secy. Dept. of Public Works, Nebraska, 1923-24. Also In, State, ex rel. Cary v. Cochran, 138 Neb. 163, 292 N.W. 239 (1940), it was said that the oldest priority on the Platte River was acquired in 1882, after the Act of 1877, but before the Act of 1889.

<sup>29/</sup> See note 24, supra.

<sup>30/</sup> The preference system in Nebraska is discussed thoroughly later in this part.

The Nebraska Supreme Court has said that April 4, 1895, the date of the Act, "is the cut-off date for the acquisition of riparian rights."<sup>31/</sup> This has been the long standing rule which was considered as imposed by the 1895 water code revisions. This conception of riparian rights has been somewhat clouded by Brummund v. Vogel, decided by the State Supreme Court on May 16, 1969. Language in that opinion could be taken to mean that an owner of land abutting a stream has the right to use water flowing therein for domestic purposes even though proof of severance from the public domain before April 4, 1895, is not made; and despite the fact that he has not obtained an appropriation permit.<sup>32/</sup>

Any understanding of Nebraska's dual system of water rights, only briefly illustrated here, requires a study of riparianism and prior appropriations, individually. The next sections will contain a more thorough development of each and will be followed by a discussion of the relative status of the two doctrines in Nebraska today.

The Riparian Doctrine. The concept of riparian rights equates a right to use water with land ownership. At common law, persons owning land along a stream or lake were called riparian proprietors, and each of these proprietors had a right to use water upon his own riparian land as an incident of his ownership. The first application of the riparian rule in the territory of Nebraska is uncertain; however, it is believed to have been firmly established as law at the time of statehood in 1867.

Riparian rights attach only to the use of surface waters in a natural watercourse or natural lake. A watercourse is defined in the Nebraska statutes as "any depression or draw two feet below the surrounding lands and having a continuous outlet to a stream of water, or river or brook."<sup>33/</sup> A lake has been defined as a reasonably permanent body of water of natural origin, which is substantially at rest.<sup>34/</sup> It is important to note that not all land bordering on a watercourse or lake has riparian water rights attached. There are important requirements which riparian lands must meet in order to qualify for any water rights under that doctrine and these are discussed later in this section.

The early common law, developed in American and English cases, stated that each riparian was entitled to have the stream flow past his lands in all of its natural beauty as it had been wont to flow.<sup>35/</sup>

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<sup>31/</sup> See Wasserburger v. Coffee, 180 Neb. 149, 141 N.W.2d 738 (1966).

<sup>32/</sup> 184 Neb. 415, 168 N.W.2d 24 (1969). The Brummund case will be discussed more extensively in other sections.

<sup>33/</sup> NEB. REV. STAT., section 31-202 (Reissue 1968); see part entitled "Legal Classification of Water" elsewhere in this publication.

<sup>34/</sup> Restatement of Torts §842 (1939).

<sup>35/</sup> In two late 19th Century Nebraska cases this so-called natural flow doctrine was expressed, although in neither instance was it essential to the decision. See Barton v. Union Cattle Co., 28 Neb. 350, 44 N.W. 454 (1889) and Plattsmouth Water Co. v. Smith, 57 Neb. 579, 78 N.W. 275 (1899).

Under this natural flow theory one could not lawfully use water from the stream if the use caused injury to those downstream. Because this doctrine made no provision for consumptive uses such as irrigation, which is so essential in semi-arid areas, it was generally modified and a new rule of "reasonable use" was established in many states, including Nebraska.

Under the reasonable use doctrine the riparians' use of the water must be reasonable in relation to the needs of all of the other riparians on the stream. The doctrine controls all uses made by the riparian, except domestic use, which includes water for drinking, cooking and watering domestic livestock. Because it is necessary to assure a supply of water for the basic sustenance of life, domestic uses have always been considered paramount, and riparians have been allowed to divert all the water needed for such purposes.

The application of the rule of reasonable use in the courts requires consideration of many factors in determining whether or not a particular use is "reasonable." Perhaps the best statement of such considerations is found in Meng v. Coffee.<sup>36/</sup>

The uses which an upper riparian owner may make of a stream for purposes of irrigation must be judged, in determining whether they are reasonable, with reference to the size, situation and character of the stream, the uses to which its waters may be put by other riparian owners, the season of the year, and the nature of the region.

A riparian proprietor does not own the water, but merely has a right to the reasonable use of the stream as it flows past his land. The right to reasonable use is further subject to the same right of other riparians. Ownership of the water actually remains with the State; however, it has been recognized that owners with valid riparian rights have a constitutionally protected right to use the water flow;<sup>37/</sup> and it has been stated that a riparian may not be deprived of that right without just compensation.<sup>38/</sup>

Generally, one of the first requirements for possessing a riparian right is ownership of land which either has a stream flowing across it

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<sup>36/</sup> 67 Neb. 500, 515, 93 N.W. 713, 718 (1903).

<sup>37/</sup> See City of Fairbury v. Fairbury Mill & Elevator Co., 123 Neb. 588, 243 N.W. 774 (1932).

<sup>38/</sup> Clark v. Cambridge & Arapahoe Irrigation & Improvement Co., 45 Neb. 798, 64 N.W. 239 (1895).

or along its border.<sup>39/</sup> "(R)iparian rights are a result of the possession of riparian land; that is, land adjacent to water, not land underlying water."<sup>40/</sup> It should follow from these generally accepted requirements that ownership of the bed of a stream is unnecessary for riparian rights to vest.<sup>41/</sup> However, in most instances, upon conveyance of the bank, the ownership of the bed of a stream is also acquired. Grants of land on nonnavigable streams include an exclusive right and title to the bed of that stream to the center line, unless the terms of the grant specify otherwise; and even where the land was platted with a meander line on the bank under a patent it has been held that ownership of the bed still extends to the thread line of a stream.<sup>42/</sup> Therefore, in most cases ownership of the bed is an incident of ownership of riparian land. One exception to this rule exists in Nebraska: that of meandered lakes, the beds of which are by statute owned by the State.<sup>43/</sup>

Although the uniform rule in America seems to be that bed ownership is unnecessary, the Nebraska Supreme Court has stated that one requirement necessary for the vesting of a riparian right is ownership of part of the bed.<sup>44/</sup> This seems not to have been a Nebraska rule prior to Wasserburger; and it has yet to be seen what effect it will have on riparians, if any, who do not meet the requirement.

Riparian lands may be increased by accretion and reliction. Accretion is due to alluvial formation caused by the siltation or the gradual and imperceptible change in the channel of a stream.<sup>45/</sup> Reliction is

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<sup>39/</sup> In Crawford Co. v. Hathaway, it was said that: "Land, to be riparian, must have the stream flowing over it or along its borders." 67 Neb. 325, 354, 93 N.W. 781, 790 (1903).

<sup>40/</sup> Johnson and Austin, Recreational Rights and Titles to Beds on Western Lakes and Streams, 7 NAT. RES. J. 1, 6 (1967).

<sup>41/</sup> See generally, Comment, The Dual-System of Water Rights in Nebraska, 48 NEB. L. REV. 488 (1969).

<sup>42/</sup> McBride v. Whitaker, 65 Neb. 137, 90 N.W. 966 (1902), aff'd 197 U.S. 510 (1905).

<sup>43/</sup> NEB. REV. STAT., section 37-411 (Reissue 1968).

<sup>44/</sup> Wasserburger v. Coffee, 180 Neb. 149, 141 N.W.2d 738 (1966).

<sup>45/</sup> Higgins v. Adelson, 131 Neb. 820, 270 N.W. 502 (1936). The Higgins case indicates that riparian ownership to the thread of a stream is important to the court's rule that a riparian's holding changes whenever the stream shifts. But see, Yearsley v. Gipple, 104 Neb. 88, 175 N.W. 641 (1919), which dealt with natural boundary changes without bed ownership.

the uncovering of land by a gradual lowering of a stream.<sup>46/</sup> On the other hand, riparian land is not considered alterable by avulsion, which is the sudden and rapid change in the channel of a stream.<sup>47/</sup> In this situation the court has apparently concluded that it is unfair to extend the holdings of one riparian to another's expense.

Three different rules exist which control the amount or extent of land which is considered riparian. These are: (1) the "source of title" rule, by which riparian land is limited to the smallest piece bordering the stream during the history of title to all of the lands held by one owner; (2) the "unity of title" rule, by which riparian rights extend to the entire tract held in common ownership no matter how acquired at the time of the claim; and (3) the "single entry" rule, by which riparian land terminates at the outermost edge of land described in a single entry. The court in Wasserburger<sup>48/</sup> added two more characteristics to the "single entry" rule, saying that riparian rights extended only to the smallest tract held in one chain of title since 1895,<sup>49/</sup> and that if land subsequently loses its riparian status by severance, it cannot later be regained by reacquisition.

It is imperative that interested landowners know exactly what land is riparian since Nebraska law is considered as prohibiting the use of water by a riparian on nonriparian lands. An authority on Nebraska water law has concluded that language in Crawford v. Hathaway<sup>50/</sup> and Meng v. Coffee<sup>51/</sup> supports this conclusion.<sup>52/</sup> Meng v. Coffee is said to imply that the right to use water at common law is limited strictly to riparian land.<sup>53/</sup>

It would seem to follow that if water may not be used by a Nebraska riparian on his nonriparian lands, he likewise could not sever his riparian right from the land and convey the water right to another person, not a riparian.<sup>54/</sup>

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<sup>46/</sup> Krimlofski v. Matters, 174 Neb. 774, 119 N.W.2d 501 (1963).

<sup>47/</sup> Frank v. Smith, 138 Neb. 382, 293 N.W. 329 (1940).

<sup>48/</sup> Wasserburger v. Coffee, 180 Neb. 149, 141 N.W.2d 738 (1966).

<sup>49/</sup> The date that Wasserburger said was the end of new riparian acquisition and the start of the acquisition of water rights by appropriation.

<sup>50/</sup> See note 39, supra.

<sup>51/</sup> Meng v. Coffee, 67 Neb. 500, 93 N.W. 713 (1903).

<sup>52/</sup> Doyle, Water Rights in Nebraska, 20 NEB. L. REV. 1, 14 (1941).

<sup>53/</sup> See Osterman v. Central Nebraska Public Power and Irr. Dist., 131 Neb. 356, 366, 268 N.W. 334, 339 (1936).

<sup>54/</sup> This nonseverability rule has been sustained in other states. See Duckworth v. Watsonville Water & Light Co., 158 Cal. 206, 110 P. 927 (1910).

An additional limitation of use on lands which might otherwise be riparian was created by Osterman v. Central Nebraska Public Power and Irr. Dist.<sup>55/</sup> That case held that any excess flow must return to the watercourse from which it was withdrawn, thus restricting use of water to lands within the watershed even if all other tests for determining the extent of the riparian holdings indicate that adjoining lands in another watershed are indeed riparian to the former.<sup>56/</sup>

By the nature of riparian rights they may be used at any time and are not lost by nonuse, provided, of course, that a prescriptive right in the water has not been established. A prescriptive right may be said to be a right acquired by an appropriator or riparian for the use of water in a stream against a lower user by an open, notorious exclusive and adverse claim and use of the water for a period of ten years in Nebraska.<sup>57/</sup> Unused water under a riparian right, however, may be taken for a public use with payment of only nominal damages if no actual injury can be shown other than loss of the expectation of future use.<sup>58/</sup>

Although no definite rule has been found to exist in Nebraska on whether a riparian may store water, it is often said that although the right is limited to the use of the water, it may be reduced to possession by use of a dam, ditch or reservoir thus becoming private property.<sup>59/</sup> However, a riparian user wanting to store water would probably be required to comply with the provisions of Nebraska Revised Statutes section 46-241 (Reissue of 1968) which requires that anyone intending

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<sup>55/</sup> 131 Neb. 356, 268 N.W. 334 (1936).

<sup>56/</sup> A special statutory interbasin water transfer limitation also applies under the Nebraska appropriation system and is discussed infra under the heading "Interbasin Water Transfers."

<sup>57/</sup> For a discussion of prescriptive rights see generally, Harnsberger, Prescriptive Water Rights in Wisconsin, 1961 WIS. L. REV. 47. See also, NEB. REV. STAT., section 25-202 (Reissue 1964), concerning Nebraska's adverse possession rules, which would apply to acquiring prescriptive rights.

<sup>58/</sup> In Crawford Co. v. Hathaway, 67 Neb. 325, 93 N.W. 781 (1903), the court said: "In order to entitle the riparian owner to compensation, he must suffer an actual loss or injury to the use of the water which the law recognizes as belonging to him, and to deprive him of which is to take from him a substantial property right. It is for an interference with or injury to his usufructuary estate in the water for which compensation may rightfully be claimed where the water of the stream is diverted and appropriated for the use of irrigation..." 67 Neb. at 353, 93 N.W. at 790.

<sup>59/</sup> 1 S. WIEL, WATER RIGHTS IN THE WESTERN STATES § 32 (3rd ed. 1911).

to store water must apply to the Department of Water Resources for a permit to do so.

At this point in the discussion it might seem that riparianism is still in full operation in Nebraska. However, as stated earlier, the right to acquire land with new riparian rights attached was concluded by legislation in 1895.<sup>60/</sup> On April 4 of that year the comprehensive water code was enacted which provided that "the water of every natural stream not heretofore appropriated . . . is hereby declared to be the property of the public . . . ." <sup>61/</sup> The Wasserburger court said that: "(I)n respect to parcels which were severed from the public domain prior to April 4, 1895, riparians may possess a superior right."<sup>62/</sup> Therefore, the statutory repeal of riparian rights definitely has not affected pre-1895 common law riparians with vested property rights; nor has it affected the subsequent owners of these rights.

Since 1895, several cases have been decided by the Nebraska Supreme Court which further limit the rights of a riparian. Two of these cases were Cline v. Stock<sup>63/</sup> and McCook Irr. & Water Power Co. v. Crews<sup>64/</sup> which were decided at the same time.

The Cline case held that a prior (in time) riparian could not enjoin a subsequent appropriator from diverting water from a stream; and the McCook case went on to say that a prior appropriator could enjoin a subsequent riparian and implied that a subsequent appropriator might even be able to enjoin a prior riparian from diverting water. In each instance the court concluded that the only recourse open to a riparian was an action for damages and then in the McCook case said:

Whether the defendants have suffered any substantial damages to their riparian estates by reason of their being denied the reasonable use of the water of the stream, when such use interferes with plaintiff's appropriation, is problematical and must depend upon the state of proof . . . . This

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<sup>60/</sup> This year was set out in Wasserburger v. Coffee, 180 Neb. 149, 141 N.W.2d 738 (1966), supra, as the end of acquisition of riparian rights in Nebraska and is now considered the correct date. In the past the court had vacillated between 1889 & 1895.

<sup>61/</sup> NEB. COMP. STAT., Ch. 93a, section 5485 (1895). This same provision now appears in NEB. REV. STAT., section 46-202 (Reissue 1968).

<sup>62/</sup> 180 Neb. at 155, 141 N.W.2d at 743.

<sup>63/</sup> 71 Neb. 79, 102 N.W. 265 (1905), reversing on rehearing, 71 Neb. 70, 98 N.W. 454 (1904).

<sup>64/</sup> 70 Neb. 115, 102 N.W. 249 (1905), reversing on rehearing, 70 Neb. 109, 96 N.W. 996 (1903).

right may prove to be so infinitesimal that the law would not take note of it. The damages may be nominal only. Whether the right to damages in such a case, if it exists, is to be claimed and enforced, must, we think, in a large measure, rest with the riparian owner where lands have thus been injuriously affected. Under such circumstances, it does not seem inequitable to remand the riparian owner to his remedy by an action at law for the recovery of whatever damages he has sustained by reason of such appropriation.<sup>65/</sup>

As a result of these two decisions, it was concluded by at least one authority that a riparian who desired to protect his existing uses of water that antedated appropriations was forced to comply with the irrigation laws and claim as an appropriator, for otherwise his only right against a later appropriator would be collection of money damages, and he would have no protection for his water at all.<sup>66/</sup>

In conclusion it may be said that although acquisition of riparian rights has been abrogated by statute and several cases have diminished rights under the doctrine, it is still in effect in Nebraska;<sup>67/</sup> and the doctrine is still relied upon by some water users subject to the rules set out in this section.

The Appropriation System. Prior appropriation is usually defined as a doctrine in which a property interest in the use of a definite quantity of streamflow may be acquired by diverting and applying it to a beneficial use.<sup>68/</sup>

As stated in the preceding part of this section, the doctrine had its beginning in the customs and practices of the California miners and is based upon the maxim "first in time, first in right." In

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<sup>65/</sup> Id. at 123, 102 N.W. at 252.

<sup>66/</sup> See Trelease, Coordination of Riparian and Appropriative Rights to the Use of Water, 33 TEXAS L. REV. 24, 60-62 (1954).

<sup>67/</sup> Sioux City Bridge Co. v. Miller, 12 F.2d 41 (8th Cir. 1926); Drainage Dist. No. 1 v. Suburban Irr. Dist., 139 Neb. 460, 298 N.W. 131 (1941).

<sup>68/</sup> Crawford Co. v. Hathaway, 67 Neb. 325, 93 N.W. 781 (1903). Many courts have stated definitions of an appropriation, and a composite of these definitions has been suggested: "an appropriation requires an intent to appropriate, notice of the appropriation, compliance with state laws, a diversion of the water from a natural stream, and its application, with reasonable diligence and within a reasonable time, to a beneficial use." F. TRELEASE, H. BLOOMENTHAL, J. GERAUD, CASES AND MATERIALS ON NATURAL RESOURCES 28 (1965).

Nebraska it, like the riparian doctrine, applies only to surface waters in natural watercourses or lakes.<sup>69/</sup> Therefore, diffused surface waters are not subject to appropriative rights.<sup>70/</sup>

Water diverted from a stream or lake under a valid appropriation permit need not be used on lands adjacent to that stream or lake, as required by the riparian doctrine.<sup>71/</sup> However, Nebraska's unique interbasin water transfer rules do present limitations on removal of water from the watersheds of certain streams.<sup>72/</sup>

The common law rules of riparianism still apply in Nebraska, except where they are altered or modified by statute.<sup>73/</sup> The principles affecting riparianism and governing appropriations of the State's waters are found in the Nebraska Constitution and statutes.<sup>74/</sup>

The statutory history of Nebraska's appropriative rights was briefly outlined in the previous part of this section, beginning with the Act of 1877 and ending with the comprehensive revision of the State's water code in the Act of 1895. Since the latter enactment little has been done to change its provisions.

The acts which preceded the 1895 legislation, although not of great significance in today's appropriative rights, played a key role in the development of the doctrine. Several federal acts, directly or indirectly aimed at lands like those in Nebraska, have also affected the doctrine's development in the State.

In 1866 the United States Congress enacted statutes providing that whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes have vested and accrued and are recognized by local customs, laws, and the decisions of the courts, the owners of such vested rights were to be protected,

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<sup>69/</sup> See Doyle, Water Rights in Nebraska, 29 NEB. L. REV. 385 (1950). As to the limitation of appropriation applying to natural watercourses, as opposed to man-made ditches or drains, see NEB. CONST., art. XV, section 6.

<sup>70/</sup> Morrissey v. Chicago, B. & Q. R. Co., 38 Neb. 406, 56 N.W. 946 (1893).

<sup>71/</sup> See Doyle, supra note 69.

<sup>72/</sup> See the discussion, "Interbasin Water Transfers," infra.

<sup>73/</sup> Meng v. Coffee, 67 Neb. 500, 93 N.W. 713 (1903).

<sup>74/</sup> Drainage Dist. No. 1 v. Suburban Irr. Dist., 139 Neb. 460, 298 N.W. 131 (1941).

thus confirming a person's right to acquire a vested interest in the use of a quantity of water upon the public domain where that had become the rule of the jurisdiction.<sup>75/</sup>

In 1870, Congress provided further that all patents granted, or preemptions or homesteads allowed, would be subject to water rights acquired under the Act of 1866.<sup>76/</sup>

Although these statutes were passed prior to Nebraska's recognition of the appropriation doctrine,<sup>77/</sup> their passage did codify federal recognition of the previously local doctrine and although neither act applied directly to this State, probably did influence Nebraska's later recognition of the doctrine.

The Act of 1889 passed by Nebraska's Legislature provided that all persons, companies, or corporations owning or claiming land on a bank or in a vicinity of any stream were entitled to the use of the water for irrigating such lands and might acquire a water right by appropriation to a beneficial use.<sup>78/</sup> The Act of 1895 reiterated this appropriative procedure; however, it also provided that acquisition of a right to use water from a stream could no longer occur simply by appropriating and applying it to a beneficial use.<sup>79/</sup> Unappropriated waters were reserved to the State by the 1895 legislation, and a person desiring to acquire a water right was thereafter required to file an application with the State's administrative agency in charge of water resources.<sup>80/</sup>

Today, by statute, an applicant for appropriation of water in Nebraska must furnish the following information to the Department of

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<sup>75/</sup> 43 U.S.C.A. § 661. Nebraska was not included among the states designated by this legislation, but see Trelease, Coordination of Riparian and Appropriative Rights to the Use of Water, 33 TEX. L. REV. 24 (1954), in which the writer suggests that the Desert Land Act did sever the water rights from rights granted by the Federal Land Patents in Nebraska, thus allowing an appropriation system to operate.

<sup>76/</sup> 16 Stat. 217 (1870).

<sup>77/</sup> First legislative recognition is said to be implicit in the Act of 1877, Laws of 1877, page 168.

<sup>78/</sup> NEB. COMP. STAT. (1889) Ch. 93a, p. 844.

<sup>79/</sup> NEB. COMP. STAT. (1895) section 5447 et seq.

<sup>80/</sup> An application must today be filed with the Department of Water Resources according to NEB. REV. STAT., section 46-233 (Reissue 1968).

Water Resources:

- (1) Name and address;
- (2) Source from which the appropriation is to be made;
- (3) The amount of water desired;
- (4) The location of the proposed diversion works;
- (5) The estimated time of completion of the diversion works and canals;
- (6) The estimated time by which water can be applied for beneficial purposes;
- (7) The purpose of the appropriation, and if for irrigation a description of the lands to be irrigated and the amount thereof; and
- (8) Any additional facts which may be required by the Department.<sup>81/</sup>

The Department of Water Resources records these applications immediately upon receipt and examines them for obvious defects. If an error or deletion in the material required is discovered, the application is returned to the applicant who then has thirty days in which to refile and still retain the priority date of the original filing.

The approval of this application to appropriate water for a specified purpose does not confer an absolute right. Certain statutory requirements must be complied with by the appropriator. Since a vested right to the use of water depends on satisfaction of these statutory conditions, the appropriation certificate is but evidence of a right and may be cancelled by the agency upon the basis of fraud in its procurement.<sup>82/</sup>

According to statute the Department of Water Resources must decide if there is unappropriated water in the source of supply and if appropriation would or would not be detrimental to the public welfare. After determination of these questions, the Department may approve the application by endorsement thereon and return it to the applicant.<sup>83/</sup>

After approval, the applicant has six months in which to file a map or plat showing the point of diversion from the stream or proposed dams,

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<sup>81/</sup> NEB. REV. STAT., section 46-233(2) (Reissue 1968).

<sup>82/</sup> Kersenbrock v. Boyes, 95 Neb. 407, 145 N.W. 837 (1914).

<sup>83/</sup> NEB. REV. STAT., section 46-235 (Reissue 1968).

reservoirs, canals and other structures which are involved in the project, and if the appropriation is for the irrigation of lands, a map showing the number of acres of irrigable land in each 40-acre subdivision in the project. Failure to file such map or plat results in forfeiture of the appropriation and all rights gained thereunder.<sup>84/</sup>

Within this same six months the applicant must commence work on the actual diversion. The statute requires the applicant to prosecute such construction work "vigorously, diligently, and uninterruptedly."<sup>85/</sup> At least one-tenth of the construction must be completed within a year.

Although it is a recognized principle of the doctrine of appropriation that one may not divert more water than can be applied to a beneficial use,<sup>86/</sup> Nebraska's Legislature has quantified the maximum amount to which an appropriator for irrigation is entitled. By statute no allotment of water for irrigation may exceed one cubic foot per second for each seventy acres of land, nor may it total more than three acre-feet during one calendar year for each acre of land for which the appropriation has been made. Furthermore, the appropriation may not exceed the quantity that experience might indicate is necessary in the exercise of good husbandry for the production of crops.<sup>87/</sup>

Thus, Nebraska's Legislature established a relationship between the quantity of water appropriated and the quantity of land in which it was to be used. Many appropriations had been granted under the acts preceding legislative enactment of these limitations and some exceed the statutory maximums established.<sup>88/</sup> These early appropriative rights which exceeded the annual maximums were, however, sustained to the extent that the waters appropriated therein had actually been applied to beneficial use without waste in Enterprise Irrigation District v. Willis.<sup>89/</sup> The court in Enterprise noted that the police power may

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<sup>84/</sup> NEB. REV. STAT., section 46-237 (Reissue 1968).

<sup>85/</sup> NEB. REV. STAT., section 46-238 (Reissue 1968).

<sup>86/</sup> Enterprise Irr. Dist. v. Willis, 135 Neb. 827, 284 N.W. 362 (1939).

<sup>87/</sup> NEB. REV. STAT., section 46-231 (Reissue 1968). The amount of water diverted under an appropriative right in Nebraska is always measured at the point of diversion, and not at the place of use. Loup River Pub. Power Dist. v. North Loup River Pub. Power & Irr. Dist., 142 Neb. 141, 5 N.W.2d 240 (1942).

<sup>88/</sup> None exceed one foot per second for seventy acres.

<sup>89/</sup> Enterprise Irr. Dist. v. Willis, 135 Neb. 827, 284 N.W. 326 (1939).

interfere with vested rights in order to secure proper regulation and supervision thereof but, nevertheless, held that "any interference that limits the quantity of water or changes the date of its priority to the material injury of its holder is more than regulation and supervision and extends into the field generally referred to as a deprivation of a vested right."<sup>90/</sup>

The priority of an appropriative right, in the absence of statute, is assigned as the date of diversion and beneficial use, because that act would be the last step in completing an appropriation.<sup>91/</sup> Rights initiated under the law of 1877, the law of 1889 or by actual beneficial use prior to April 4, 1895, were adjudicated by the Board of Irrigation at which time the date of priority was determined and assigned. Since the Act of 1895, Nebraska has adhered to the relation-back doctrine. Under this statutory relation-back doctrine the applicant is required to specify the time necessary for the completion of his proposed diversion works, which time the department may in its discretion approve, increase or reduce. Upon completion of those works within the time allowed, the priority of the right acquired relates back to the date of the filing of the application.

Appropriative rights for irrigation use acquired in Nebraska before the Act of 1895 are not attached to specific lands. To acquire a water right prior to that act, all that was necessary was the construction of works with which to divert the water. The appropriator thus acquired a vested right measured initially by the capacity of the works, without any reference to the intended use. The pre-1895 appropriator might transfer or assign his water rights as he would any other property interest<sup>92/</sup> subject, of course, to rules prohibiting trans-watershed diversion.<sup>93/</sup> Water rights acquired since the Act of 1895 are attached to the land upon which they are to be used. Such restrictions on transfers do not divest the right but constitute a valid exercise of the State's regulatory power to prevent waste and to insure orderly administration.<sup>94/</sup> A post-1895 water right for irrigation use is deemed to be attached to the land for which it was authorized.<sup>95/</sup> This intention is evidenced by the requirement that an application for a water right for irrigation must specifically describe the land to be

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<sup>90/</sup> Id. at 834, 284 N.W. at 330.

<sup>91/</sup> Kearney Water & Electric Powers Co. v. Alfalfa Irr. Dist. 97 Neb. 139, 149 N.W. 363 (1914).

<sup>92/</sup> U.S. v. Tilley, 124 F.2d 850 (8th Cir. 1941).

<sup>93/</sup> See the discussion "Interbasin Water Transfers," Infra.

<sup>94/</sup> See U.S. v. Tilley, 124 F.2d 850 (8th Cir. 1941).

<sup>95/</sup> Farmers Canal Co. v. Frank, 72 Neb. 136, 100 N.W. 286 (1904).

served. If it does not, it is too vague and indefinite for a permit to issue.<sup>96/</sup> It has been asserted that the denial of a right to change the place of use does not apply to an appropriation made by a canal company.<sup>97/</sup> However, the Department of Water Resources takes the position that an irrigation district or canal company may change the place of use of water from one tract of land to another within the district with the approval of the Department if the right was initiated prior to April 4, 1895. If the right is acquired after this date, the place of use cannot be changed.

A property interest in water acquired by appropriation may be lost by abandonment.

Abandonment is usually defined as the relinquishment of a right with the intention to forsake or desert it. It is said to be a mixed question of law and fact. Intention to relinquish the right is the important element. It may be evidenced by a single unequivocal act revealing clearly a desertion of the right. Under such circumstances the length of time the appropriator has failed to use the water is immaterial.<sup>98/</sup>

In Nebraska a water right may also be lost by statutory forfeiture.<sup>99/</sup> After notice and hearing, if proof of nonuse for some beneficial and useful purpose for a period of more than three years is shown, the appropriation may be cancelled by the Department of Water Resources. Because the statutes specify only that nonuse need be shown, it appears that intent is not necessary to lose an appropriation by forfeiture. However, the Nebraska Supreme Court has indicated that simple nonuse is not enough for loss of a water right by forfeiture. In State v. Oliver Bros.<sup>100/</sup> a complaint was filed requesting a water right cancellation for nonuse for more than the statutory period. In that case the defendants' diversion works had been destroyed by high water. Reasonable efforts had been made to restore those works; however, actual use of the water had not yet been resumed. The court denied cancellation of the appropriation and stated: "There is nothing in the record that tends to establish that the defendants intended at any time to abandon the irrigation system . . . ."101/

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<sup>96/</sup> Id.

<sup>97/</sup> Doyle, Water Rights in Nebraska, 29 NEB. L. REV. 385, 404 (1950).

<sup>98/</sup> Id. at 409.

<sup>99/</sup> NEB. REV. STAT., section 46-229 et seq. (Reissue 1968).

<sup>100/</sup> 119 Neb. 302, 228 N.W. 864 (1930).

<sup>101/</sup> Id. at 305, 228 N.W. at 865.

Another statutory procedure by which one may lose an appropriative right to water in Nebraska has been referred to by the Supreme Court in Nebraska.<sup>102/</sup> This third method of loss is based upon nonuse of water rights for the prescriptive ten-year period of statutory limitations relating to real estate under section 25-202 of the Nebraska statutes.

This brief discussion of the doctrine of prior appropriation in Nebraska merely emphasizes some of the most important rules. As may be seen by the numerous references made to the Nebraska Revised Statutes, the doctrine is extensively controlled by legislative enactment. Chapter 46 of the statutes is devoted to irrigation, and the general provisions regulating irrigation are in article 2 of that chapter. Specific questions regarding a Nebraska water right should therefore definitely be studied by considering these enactments, but it should at the same time be remembered that nonstatutory riparian rules may affect each water right question as well.

Relative Status of the Riparian and Appropriation Rights. In the first part of this discussion of water rights it was pointed out that Nebraska has two legal doctrines in force which confer rights to the use of water in the watercourses and lakes of the State. As that section suggested, understanding this dual system requires an initial understanding of the two doctrines individually. Ensuing discussions of the riparian and appropriative doctrines have related how relative rights to the water are determined as between riparians<sup>103/</sup> and as between appropriators.<sup>104/</sup>

In a dual system state, like Nebraska, a third type of water rights dispute also exists, e.g. a dispute between riparian and appropriator. Much more difficulty exists in settling this type of conflict. Such a conflict requires the mediator, the courts or the legislature, to assimilate two distinct and diametric sets of rules into a new rule intended to govern both parties fairly.

Early Nebraska court decisions on dual system conflicts set a precedent for the superiority of the appropriator. At that time the Nebraska Supreme Court followed the policy established in Crawford Co. v. Hathaway.<sup>105/</sup> There the Court stated:

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<sup>102/</sup> See State v. Nielsen, 163 Neb. 372, 79 N.W.2d 721 (1956).

<sup>103/</sup> See the discussion of "Riparian Rights" on page 13.

<sup>104/</sup> See the discussion of the "Appropriation System" on page 19.

<sup>105/</sup> 67 Neb. 325, 93 N.W. 781 (1903).

(T)he conclusion appears to us irresistible that every appropriator of water who has applied it to the beneficial uses contemplated by these several acts has acquired a vested interest therein, which gives him a superior title to the use of the water over the riparian proprietor whose right has been acquired subsequent thereto . . . .<sup>106/</sup>

The two doctrines stand side by side. They do not necessarily overthrow each other, but one supplements the other. The riparian owner acquires title to his usufructuary interest in the water when he appropriates the land to which it is an incident, and when the right is once vested it cannot be divested except by some established rule of law. The appropriator acquires title by appropriation and application to some beneficial use, of which he can not be deprived except in some of the modes prescribed by law. The time when either right accrues must determine the superiority of title as between conflicting claimants.<sup>107/</sup>

In the preceding discussion of riparianism two other cases were briefly considered which further established the superiority of appropriator concept. In Cline v. Stock<sup>108/</sup> a riparian who acquired his right prior in time to an appropriator was not allowed to enjoin the appropriator from diverting stream water; and in McCook Irr. & Water Power Co. v. Crews<sup>109/</sup> a prior appropriator was allowed to enjoin a subsequent riparian, and the court implied that a subsequent appropriator might even enjoin a prior riparian from diverting water.

These appropriator-oriented decisions governed the conflicts between the two systems until 1966 when the Nebraska Supreme Court decided the case of Wasserburger v. Coffee.<sup>110/</sup> In that case the court, contrary to its previous analysis, decided the conflicting claims between a riparian and an appropriator upon a balancing of equities theory.

Although the appropriator-defendant in Wasserburger held a claim prior in time to that of the plaintiff-riparian, the court considered

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<sup>106/</sup> Id. at 364, 93 N.W. at 794 (emphasis added).

<sup>107/</sup> Id. at 357, 93 N.W. at 792.

<sup>108/</sup> 71 Neb. 79, 102 N.W. 265 (1905), reversing on rehearing, 71 Neb. 70, 98 N.W. 454 (1904).

<sup>109/</sup> 70 Neb. 115, 102 N.W. 249 (1905), reversing on rehearing, 70 Neb. 109, 96 N.W. 996 (1903).

<sup>110/</sup> 180 Neb. 149, 141 N.W.2d 738 (1966).

the preference for domestic uses recognized in Nebraska and determined the appropriator-defendants' use was unreasonable.<sup>111/</sup> This balancing of equities or utility of harm rule was, according to the court, instituted in the absence of legislation toward a viable system of correlated riparian and appropriation water rights.

It appears from the Wasserburger decision that Nebraska's Supreme Court intended thereafter to consider and decide water rights disputes between riparians and appropriators on the equities appurtenant to each side of the dispute, having for the first time in such disputes, recognized that both riparians and appropriators had equally protected interests in water.

In 1969 the Supreme Court of Nebraska again considered a water rights dispute in the case of Brummund v. Vogel.<sup>112/</sup> It appears that an attempt was made in that case to apply the Wasserburger rule of balanced equities with the court again considering domestic preference as the key factor in deciding which water user was entitled to the supply. The defendant in the Brummund case was an appropriator with a protected interest under his permit and the plaintiff was a downstream user who was neither an appropriator with a permit nor a riparian and who therefore had no protected interest according to any known Nebraska law. Yet the court, with reference to the Nebraska preference system, evidently concluded that the plaintiff possessed some valid claim to the water.

Thus, although it appears that the court intends to use its balancing of equities rule in dual system disputes, the Brummund case leaves the State with the possibility that previously recognized rights to water may no longer be sufficient protection against certain other users who are not operating within the known water rights system.

Preference System. What is a "preference system" as that term is used in the realm of water law? At the outset it is important to understand that a preference system is not an independent system of water rights; and therefore, a surface water user must have a valid appropriation right<sup>113/</sup> before seeking to invoke the benefits of the preferences. The riparian's right<sup>114/</sup> is protected by equitable remedies<sup>115/</sup>

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<sup>111/</sup> The Wasserburger decision stated that an appropriation is unreasonable unless its utility outweighs the gravity of the harm. 180 Neb. at 159, 141 N.W.2d at 745.

<sup>112/</sup> 184 Neb. 415, 168 N.W.2d 24 (1969).

<sup>113/</sup> See discussion of "Appropriation System" under "Water Rights," supra.

<sup>114/</sup> See discussion of "Riparian Doctrine" under "Water Rights," supra.

<sup>115/</sup> Loup River Pub. Power Dist. v. North Loup River Pub. Power & Irr. Dist., 142 Neb. 141, 5 N.W.2d 240 (1942); Wasserburger v. Coffee, 180 Neb. 149, 141 N.W.2d 738 (1966).

and the preferences do not apply to conflicts among riparians nor between riparians and appropriators although the order of preferred uses may be collaterally referred to by a court in making equitable determinations. It is also important to note that preferences come into operation only after all the water of a stretch of watercourse has been allocated for use under the water rights system of the State.<sup>116/</sup>

The Nebraska preference system is a constitutional and legislative expression of authority for a superior use to interfere with a prior appropriation for an inferior use. This procedure of acquisition is an exercise of the power of eminent domain.<sup>117/</sup>

In Nebraska, among appropriators, domestic uses have preference over all other uses and agricultural uses have preference over manufacturing and power uses.<sup>118/</sup> In most states payment of compensation is

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116/ As between appropriators, the first in time is first in right; therefore, an appropriator with a later priority date will be cut off in favor of appropriators who are senior in time. If, however, the use by the junior appropriator is "preferred" over the use by the senior appropriator, he might be able to compensate the senior appropriator and obtain the water through assertion of the preference system.

As between riparians, (users having riparian rights traceable to a date before April 4, 1895), the common law rule of reasonable use governs their relative rights to the water.

As between a riparian and an appropriator, the Nebraska Supreme Court has fashioned the following rule:

"An appropriator who, in using water pursuant to a statutory permit, intentionally causes substantial harm to a riparian proprietor, through invasion of the proprietor's interest in the use of the waters, is liable to the proprietor in an action for damages if, but only if, the harmful appropriation is unreasonable in respect to the proprietor. The appropriation is unreasonable unless its utility outweighs the gravity of the harm." *Wasserburger v. Coffee*, 180 Neb. 149, 159, 141 N.W.2d 738, 745-746 (1966) (emphasis added).

117/ Hutchins, Background and Modern Developments in State Water Rights Law, 1 WATERS AND WATER RIGHTS 119 (R. Clark ed. 1967) (hereinafter cited as Hutchins).

118/ Nebraska Constitution (pertaining to water of natural streams):

Priority of appropriation shall give the better right as between those using the water for the same purpose, but when the waters of any natural stream are not sufficient for the use of all those desiring to use the same, those using the water for domestic purposes

required by the superior user to the inferior user whose water right is interfered with.<sup>119/</sup> The State Constitution would seem to make compensation an explicit requirement in Nebraska because, following the pronouncement of preferred uses in Article XV, section 6, that document states:

Provided, no inferior right to the use of the waters of this state shall be acquired by a superior right without just compensation therefor to the inferior user.

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shall have preference over those claiming it for any other purpose, and those using the water for agricultural purposes shall have the preference over those using the same for manufacturing purposes. Provided, no inferior right to the use of the waters of this state shall be acquired by a superior right without just compensation therefor to the inferior user. NEB. CONST. Art. XV, section 6. (Adopted, 1920).

NEBRASKA REVISED STATUTES (pertaining to water of natural streams):

Priority of appropriation shall give the better right as between those using the water for the same purposes, but when the waters of any natural stream are not sufficient for the use of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming it for any other purpose, and those using the water for agricultural purposes shall have the preference over those using the same for manufacturing purposes. NEB. REV. STAT., section 46-204 (Reissue 1968).

No inferior right to the use of the waters of this state shall be acquired by a superior right without just compensation therefor to the inferior user. The just compensation paid to those using water for power purposes shall not be greater than the cost of replacing the power which would be generated in the plant or plants of the power user by the water so acquired. NEB. REV. STAT., section 70-669 (Reissue 1966).

(pertaining to ground water):

Preference in the use of underground water shall be given to those using the water for domestic purposes. They shall have preference over those claiming it for any other purpose. Those using the water for agricultural purposes shall have the preference over those using the same for manufacturing or industrial purposes. NEB. REV. STAT., section 46-613 (Reissue 1968).

<sup>119/</sup> Hutchins, supra note 117, at 119.

The recent case of Brummund v. Vogel<sup>120/</sup> creates some confusion as to the Nebraska Supreme Court's view of the preference system as it applies in this State. Statements in Brummund indicate that the court interprets the Nebraska Constitution and statutes pertaining to preferences as giving to a person, even though not having a valid water right, the "right" to acquire the water of a holder of a valid water right for an agricultural or manufacturing use when the taking is for domestic use.<sup>121/</sup> Furthermore, the opinion does not mention compensation for the person whose water right would be taken. Article XV, section 6, discussed above, was not mentioned by the court.

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<sup>120/</sup> 184 Neb. 415, 168 N.W.2d 24 (1969); for a discussion of some problems raised by Brummund, see Report of Special Committee on Water Resources, 19 NEBRASKA STATE BAR JOURNAL, No. 2 (April 1970).

<sup>121/</sup> The court in the Brummund opinion states:

Plaintiff does not plead nor prove facts entitling him to vested riparian rights under the common law . . . . Plaintiff concedes that he has never applied for nor secured any water rights from the Department of Water Resources." 184 Neb. at 420, 168 N.W.2d at 27.

(Therefore, plaintiff does not have any previously known water right.)

The defendants are upstream appropriators having applied for and received on August 24, 1967, their priority of appropriation . . . Id.

(Therefore, defendant does have a valid water right.)

The opinion then states:

We hold that the right of plaintiff to use water from this stream for domestic purposes is superior to the defendants' right to construct a dam to have a reservoir for either agricultural or recreational purposes . . . . 184 Neb. at 421, 168 N.W.2d at 28.

(The opinion seems to equate "preferred use" with "water right." Past discussions by commentators on water law have indicated that the Nebraska preference system is for adjustment of supply between users possessing appropriative water rights, and that compensation is a requisite for the preferred user to obtain the water. See Doyle, Water Rights in Nebraska, 29 NEB. L. REV. 385, 407-409 (1950); Yeutter, A Legal-Economic Critique of Nebraska Watercourse Law, 44 NEB. L. REV. 11, 44-49 (1965); Trelease, Preferences to the Use of Water, 27 ROCKY MT. L. REV. 133, 137-138, 150-151 (1955); Thomas, Appropriations of Water for a Preferred Purpose, 22 ROCKY MT. L. REV. 422, 425 (1950); and Loup River Pub. Power Dist. v. North Loup River Pub. Power & Irr. Dist., 142 Neb. 141, 5 N.W.2d 240 (1942).)

Assuming that some possible meanings of language in Brummund will not be pursued in future Supreme Court cases, there are some other aspects of working preference systems which apply to Nebraska.

First, municipal use of water is not listed in Nebraska's preferences; however, some other western states have municipal use as a separate classification which is usually equated with domestic use.

Second, there seems to be doubt on the part of some commentators as to whether or not a private individual wanting water could invoke the preference system.<sup>122/</sup> Conditions in at least one state have led to court determinations that the use by a private individual for irrigation did constitute a "public use"; and although this case involved condemning land for a water use project, application to the preference system is arguable.<sup>123/</sup>

Third, acquiring water by asserting the preferences is administered by the courts in Nebraska.<sup>124/</sup> In some states the process is accomplished through administrative agencies.<sup>125/</sup>

Lastly, with the exception of domestic use, the preferences seem to be in reverse order of what a free market situation would create. While the preferences give an irrigation district the opportunity to "purchase" the rights to interfere with the water right of a manufacturer, for example, the economic return from the use of the water by the irrigators may not be sufficient to pay for the damage caused to the manufacturer. Thus, the dollar return to the irrigation user (value of the water to him) may not allow the preferences to operate.

Interbasin Water Transfers. Interbasin (or transbasin) water transfers (movement of water from a basin of origin to another watershed area) have been allowed in Nebraska. However, under what circumstances and when this may be done is not entirely clear. Discussion

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<sup>122/</sup> See Doyle, Water Rights in Nebraska, 29 NEB. L. REV. 385 (1950) "An individual who possesses a junior right to water for agricultural purposes and wishes to acquire his neighbor's senior right to water for a nonpreferred use does not enjoy the same power (as a public irrigation district). His taking would be for a private and not a public purpose." at p. 409. But see Trelease, Preferences to the Use of Water, 27 ROCKY MT. L. REV. 133, 151 n. 138 (1955), cited in Yeutter, Nebraska Watercourse Law, 44 NEB. L. REV. 11, 45 n. 143 (1965) as saying that the position taken by Doyle would render worthless the preferences in NEB. REV. STAT., sections 70-668 and 46-204.

<sup>123/</sup> Nash v. Clark, 27 Utah 158, 75 P. 371 (1904); see Yeutter, Nebraska Watercourse Law, 44 NEB. L. REV. 11, 44-49 (1965).

<sup>124/</sup> Loup River Pub. Power Dist. v. North Loup River Public Power & Irr. Dist., 142 Neb. 141, 5 N.W.2d 240 (1942).

<sup>125/</sup> See e.g., WYO. STAT., SECTIONS 41-3, 41-4 (1957).

must begin with a review of the statutory law. In this regard, two Nebraska statutes are on point. The first, section 46-206, provides:

The water appropriated from a river or stream shall not be turned or permitted to run into the waters or channel of any other river or stream than that from which it is taken or appropriated, unless such stream exceeds in width one hundred feet, in which event not more than seventy-five percent of the regular flow shall be taken.<sup>126/</sup>

Section 46-265, the second statute, states:

The owner or owners of any irrigation ditch or canal shall carefully maintain the embankments thereof so as to prevent waste therefrom, and shall return the unused water from such ditch or canal with as little waste thereof as possible to the stream from which such water was taken, or to the Missouri River.<sup>127/</sup>

Both statutes have been reviewed by the Nebraska Supreme Court in decisions which are discussed below. It should be noted that section 46-265 does not forbid interbasin water transfers, but only requires a return of unused waters to the original source or "to the Missouri River."<sup>128/</sup> A broad interpretation of what constitutes the basin of the Missouri River could include all the stream basins in Nebraska.

Three Nebraska Supreme Court decisions have interpreted these Nebraska statutes. In 1936 the court ruled the statutes did not authorize the Department of Roads and Irrigation to grant applications for interbasin transfers. In Osterman v. Central Nebraska Public Power & Irrigation District<sup>129/</sup> the principal question was the validity of an order<sup>130/</sup> granting to Central Nebraska Public Power and Irrigation District a water right permitting diversion of 600,000 acre-feet of water from the Platte River. Approximately sixty percent of the water was to be used in irrigating lands located in the basins of the Blue and Republican Rivers. Objectors included appropriators and downstream riparians in the Platte Valley.

The court cited Meng v. Coffee<sup>131/</sup> for the proposition that water usage by riparian owners was to be based upon equality, and that each

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<sup>126/</sup> NEB. REV. STAT., section 46-206 (Reissue 1968).

<sup>127/</sup> NEB. REV. STAT., section 46-265 (Reissue 1968).

<sup>128/</sup> Id.

<sup>129/</sup> Osterman v. Central Nebraska Public Power & Irr. Dist. 131 Neb. 356, 268 N.W. 334 (1936).

<sup>130/</sup> This order was made pursuant to NEB. COMP. STAT., ch. 81, art. 63 (1929).

<sup>131/</sup> Meng v. Coffee, 67 Neb. 500, 93 N.W. 713 (1903).

riparian was required to exercise his rights reasonably and with due regard for the rights of other riparians. From this the court concluded the right to use water at common law was limited strictly to riparian lands, and that at common law there was usually no right to transport waters over a divide or watershed that enclosed the source from which it was obtained. Thus, because the common law prohibited interbasin diversion, permission for such diversions must be derived from legislative enactment.

Recognizing this, the defendant, Tri-County Irrigation District (now called the Central Nebraska Public Power and Irrigation District), contended that legislative enactments allowed diversions from one watershed to another. The court disagreed and cited a line of State statutes beginning in 1889 and culminating in the modern section 46-206.<sup>132/</sup>

The court indicated that it found an intent in the legislative history of the modern statutes to preserve the unused waters for the benefit of the source from which they were obtained.<sup>133/</sup> As for the words "or to the Missouri River," the court held they had no bearing whatsoever on the issue under consideration.<sup>134/</sup>

The court considered section 46-265<sup>135/</sup> as controlling the operation of all irrigation ditches, and held it applicable to interbasin diversions because the water transported had to be carried away from its source by the use of irrigation canals. In line with this reasoning, the court held that a divide or watershed could not be crossed by an irrigation ditch or canal where the unused waters would not be returned to the source from which they were taken. The legal effect of Osterman seemed to bar interbasin transfers in all cases.

The statutes were not again considered by the Nebraska Supreme Court for twenty-four years. Then, in 1960, the court decided Ainsworth Irrigation District v. Bejot.<sup>136/</sup> In the Bejot case the plaintiffs had sought a permit to appropriate water from the Snake River for irrigation purposes. As opposed to the facts of Osterman, the Snake River Valley was not a farming area; sub-irrigation was not an issue, and the only downstream appropriators on the Niobrara River, of which the Snake River is a tributary, were two small power plants that were to be compensated for any damages suffered.

The Snake River flows north and slightly east into the Niobrara River, which empties into the Missouri River. The plaintiff's canal

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<sup>132/</sup> NEB. REV. STAT., section 46-206 (Reissue 1968).

<sup>133/</sup> Doyle, Water Rights in Nebraska, 29 NEB. L. REV. 385 (1950).

<sup>134/</sup> 131 Neb. at 368, 268 N.W. at 340.

<sup>135/</sup> NEB. REV. STAT., section 46-265 (Reissue 1968).

<sup>136/</sup> 170 Neb. 257, 102 N.W.2d 416 (1960).

was to run for about 56 miles to and through the lands to be irrigated, with the unused waters emptying into the Niobrara River where they would have been eventually carried in any event. The canal would intersect and cross several small streams, all of which were tributaries to the Niobrara River. None of the water was to be returned to the Snake River.

In objection to granting a permit, the defendants claimed the appropriation to plaintiff would violate section 46-265<sup>137/</sup> because some of the water taken from the Snake River would cross the divide and eventually flow into the Niobrara--an alleged illegal attempt to transport water by canal over a watershed or divide. Defendant's primary reliance was on the Osterman decision.<sup>138/</sup>

The court referred to its decision in Osterman but declined to consider it controlling.<sup>139/</sup> The court recognized the following definition of a watershed:

. . . A river and all its tributaries constitutes a watershed, which may be defined as all the area lying within a divide, above a given point on a river or stream. The term watershed is synonymous with river basin, drainage basin, or catchment area, except in some instances, where by definition for specific purposes, in connection with specific agreements, the basin may have been extended upon the natural watershed.<sup>140/</sup>

Because the court was of the opinion that the Snake and Niobrara Rivers were one stream, basin or watershed, it concluded that the Osterman decision was entirely distinguishable as to both the facts and the law.<sup>141/</sup> The court, therefore, was not required to give sections 46-206 and 46-265 an interpretation which varied from that in the Osterman case.

Of significance is the fact that the Platte, Blue, and Republican Rivers (involved in the Osterman case) and the Snake and Niobrara Rivers (involved in Bejot) all empty into the same river--the Missouri. Under such facts, the statutory requirements of section 46-265 would not be violated regardless of the river under consideration. Due to this, the basis of the Bejot decision has been subject to serious question. In fact, it has been suggested that the Bejot decision has nullified the watershed limitation doctrine as espoused in the Osterman case.<sup>142/</sup>

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<sup>137/</sup> NEB. REV. STAT., section 46-265 (Reissue 1968).

<sup>138/</sup> 170 Neb. at 265, 102 N.W.2d at 422.

<sup>139/</sup> Id.

<sup>140/</sup> Id. at 273, 102 N.W.2d at 426.

<sup>141/</sup> Id. at 276, 102 N.W.2d at 427.

<sup>142/</sup> Johnson and Knippa, Transbasin Diversion of Water, 43 TEX. L. REV. 1035 (1965).

The diverse holdings of the two decisions point out the problems of attempting to deal with interbasin water transfer by blanket statutory prohibitions.<sup>143/</sup>

Another aspect of the interbasin transfer problem which faces Nebraska is illustrated by Metropolitan Utilities District v. Merritt Beach Company.<sup>144/</sup> (hereinafter referred to as M.U.D.). The case was an appeal from an authorization by the Director of the Department of Water Resources which allowed Metropolitan Utilities District of Omaha to supplement its daily water supply in a maximum amount of 60,000,000 gallons of ground water from a well field to be located on the north bank of the Platte River and on an adjacent island in Sarpy County, approximately five miles upstream from the confluence of the Platte and Missouri Rivers. The water was to be pumped, treated, and conveyed by pipeline to the service area of M.U.D. in and around the City of Omaha. No direct transfer of water from the river was contemplated, as the entire supply was to be pumped from the ground. Expert testimony indicated that the source of the aquifer's recharge would be 4,000,000 gallons per day from underground waters and 56,000,000 gallons per day from surface waters of the Platte River. Other evidence established that the pumping would reduce the level of flow in the Platte River to some extent, but that it would not directly affect the level of ground water beneath the defendants' lands.

The defendants objected to the M.U.D. permit on the grounds that: (1) it would violate vested rights of riparian property owners by lowering the water table under their lands; and (2) the grant of the application amounted to an unlawful diversion of water from the Platte River watershed. As to the first objection, the court stated that Nebraska had never ruled upon a situation in which the right of the riparian owners to take percolating waters constituted an interference with the prior appropriation rights of persons on a nearby stream.<sup>145/</sup> However, after reviewing decisions from California<sup>146/</sup> and Utah,<sup>147/</sup> the court concluded<sup>148/</sup> that the defendants failed to show they were damaged; and it then followed that they were not in a position to raise the objection.

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<sup>143/</sup> Id. at 1039.

<sup>144/</sup> 179 Neb. 783, 140 N.W.2d 626 (1966).

<sup>145/</sup> Id.

<sup>146/</sup> Tulare Irrigation District v. Lindsay-Strathmore Irrigation District, 3 Cal.2d 489, 45 P.2d 972 (1935).

<sup>147/</sup> Silver King Consol. Mining Co. v. Sutton, 85 Utah 297, 39 P.2d 682 (1934).

<sup>148/</sup> 179 Neb. at 796, 140 N.W.2d at 634.

In arguing the second objection, defendants relied upon the holding of the Osterman case<sup>149/</sup> that water cannot be transported and used outside a watershed. The court stated that while riparian rights still exist, they have been limited by rules of reasonable use and public interest; so where a riparian landowner's reasonable use is not impaired, the public interest demands that water be applied to a needed public purpose rather than be wasted.<sup>150/</sup> Having laid this foundation, the court analyzed again the rationale of the Osterman decision and did not consider it controlling because in Osterman the taking of water would have damaged the rights of others. But in the M.U.D. case no damage had been caused to downstream riparians or appropriators.<sup>151/</sup> In fact, had the water not been taken by M.U.D., it would have flowed unused out of the State; and the court concluded by holding that where the taking of water beyond a watershed does not injure appropriators or riparians, then no reason exists for not permitting an interbasin water transfer for a public and beneficial purpose.

The court in the M.U.D. case assumed that it was dealing with ground water rather than a diversion from a stream. This made discussion of sections 46-206<sup>152/</sup> and 46-265<sup>153/</sup> unnecessary. The question arises whether the case can be considered authority for only the transportation of ground water across a divide or watershed or whether it has equal applicability to interbasin transfer of stream water. It is of interest that the court in the M.U.D. case stated<sup>154/</sup> that underground waters, whether they be percolating waters or underground streams, are a part of the water referred to in the Constitution,<sup>155/</sup> and that ground or stream waters form part of the same hydrologic cycle. The opinion said:

It is true that such waters are not concentrated as in a river nor do they move with the velocity of a river, but they do percolate through underground formations and have the same source and termination as surface water flowing in a river. Underground waters are a part of the source of water supply to a growing population and an expanding economy the same as the surface waters flowing in a live stream on the surface of the ground.<sup>156/</sup>

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<sup>149/</sup> 131 Neb. 356, 268 N.W. 334 (1936).

<sup>150/</sup> 179 Neb. at 801, 140 N.W.2d at 637.

<sup>151/</sup> Id.

<sup>152/</sup> NEB. REV. STAT., section 46-206 (Reissue 1968).

<sup>153/</sup> NEB. REV. STAT., section 46-265 (Reissue 1968).

<sup>154/</sup> 179 Neb. at 799, 140 N.W.2d at 636.

<sup>155/</sup> NEB. CONST., Art. XV, section 4.

<sup>156/</sup> 179 Neb. at 800, 140 N.W.2d at 636.

Evidence in the M.U.D. case indicated that pumping ground water near the river directly influenced the level of flow to some extent and that the aquifer was dependent upon the river for recharge. However, the court, although recognizing the hydrologic fact of ground and stream water interconnection at this point on the Platte River, evidently decided that the immediate source of the water was ground water and thus gave no evidence of intent to discuss stream water diversions.

Summary. Although interbasin water transfers in Nebraska have been allowed and some may be permitted in the future, it is not clear under what circumstances and when this may be done. The two Nebraska statutes of special interest<sup>157/</sup> do not explicitly prohibit interbasin transfers, but they do present limitations.

In the Osterman decision the Nebraska Supreme Court held that a divide or watershed could not be crossed by an irrigation ditch or canal where the unused waters would not be returned to the source from which they were taken. The decision in Osterman seemed to prevent interbasin transfers in all cases, but in 1960 the Nebraska Supreme Court in the Bejot case dispelled that contention. In the M.U.D. case the Nebraska Supreme Court again deviated from its position in Osterman and formulated the following rule: The question of allowing interbasin water transfers is to be decided upon the ground of reasonable use and all the factors that enter into such a consideration including the reasonableness of a watershed diversion. It remains uncertain whether the M.U.D. decision involved only diversions from an immediate ground water source.

#### Ground Water Use Law<sup>158/</sup>

Generally. The three common law theories governing ground water in the United States are the English rule of absolute ownership, the American rule of reasonable use, and the California rule or correlative rights doctrine. When speaking of "ground water" in this section, reference is to "percolating" water rather than to "underground streams." The distinction between these two classes of water is discussed in the section entitled "Legal Classification of Water."

The English rule declares that a landowner has absolute ownership

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<sup>157/</sup> NEB. REV. STAT., section 46-206 (Reissue 1968) and NEB. REV. STAT., section 46-265 (Reissue 1968).

<sup>158/</sup> See generally, Olson v. City of Wahoo, 124 Neb. 802, 248 N.W. 304 (1933) and other cases and materials in Harnsberger, Nebraska Ground Water Problems, 42 NEB. L. REV. 721 (1963); Danielson, Ground Water in Nebraska, 35 NEB. L. REV. 17 (1955).

of underlying water as though it were a part of the soil.<sup>159/</sup> This rule has been rejected in Nebraska.<sup>160/</sup>

The American rule of reasonable use acknowledges the landowner's proprietary interest in ground water, but with the restriction of reasonable use. Use of the water is confined to the land overlying the source if diversions to outlying lands will injure other overlying landowners who have an interest in the water. As one authority on Nebraska ground water law has noted, "What is a reasonable use is judged solely in relationship to the purpose of the use on overlying land; it is not judged in relationship to the needs of others."<sup>161/</sup> Thus, under the American rule one landowner by taking all of the ground water for a reasonable use on his own land can effectively deprive other overlying landowners of a supply.

The California rule of correlative rights places an emphasis on recognition of the common rights of users withdrawing water from the same supply. According to the doctrine, when the recharge rate in an aquifer is insufficient to maintain a plentiful supply of water for all common users, then the available supply is apportioned among those having substantial rights to the water. When supply is plentiful, users operate as they would under the reasonable use rule<sup>162/</sup> with no restrictions on taking amounts necessary for application to reasonable or beneficial use on their overlying land, nor on diverting withdrawals to outlying lands.

The above common law theories of ground water use rights are all predicated upon the ownership of land, e.g., the right to use water is an incident of land ownership. Some states have by statute adopted the doctrine of appropriation to apply to ground water. This doctrine is applied with comparative ease to waters in watercourses and lakes, but its application to ground water is not as simple because diversion by wells from an underground water supply makes it difficult to prove relative shortages and interference effects.

The Nebraska Legislature has not adopted or affirmed any system of rights to ground water; therefore, this state derives its ground water use rules from case law and the common law theories as discussed below.

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<sup>159/</sup> 2 S. WIEL, WATER RIGHTS IN THE WESTERN STATES 970 (3rd. ed. 1911).

<sup>160/</sup> Luchsinger v. Loup River Pub. Power Dist., 140 Neb. 179, 181, 299 N.W. 549 (1941); Metropolitan Utilities District v. Merritt Beach Co., 179 Neb. 783, 800, 140 N.W.2d 626 (1966).

<sup>161/</sup> Harnsberger, Nebraska Ground Water Problems, 42 NEB. L. REV. 721, 728 (1963).

<sup>162/</sup> Hutchins, Trends in the Statutory Law of Ground Water in the Western States, 34 TEX. L. REV. 157, 164 (1955).

Nebraska Rule. Ground water rights in Nebraska are determined by a combination of the American rule of reasonable use and the California doctrine of correlative sharing in time of shortage. Approval of this rule is first found in dictum by the Nebraska Supreme Court in Olson v. City of Wahoo.<sup>163/</sup> In a subsequent case the court citing Olson said: "We are committed to the rule: 'The owner of land is entitled to appropriate subterranean waters found under his land, but his use thereof must be reasonable, and not injurious to others who have substantial rights in such waters.'"<sup>164/</sup> The rule was again reaffirmed in Luchsinger v. Loup River Public Power District<sup>165/</sup> and in Metropolitan Utilities District v. Merritt Beach Co.<sup>166/</sup> The correlative rights, sharing in times of shortage, seems to have also been approved in Olson when at the end of the usual pronouncement of the American rule the court added: ". . . if the natural underground supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole . . . ." This was also affirmed in Luchsinger.

When supply is readily available, the present Nebraska rules allow landowners to withdraw and use the ground water on the overlying land for purposes which are reasonable. What constitutes a "reasonable use" has been explained and held to be a use which constitutes a beneficial purpose in relation to the legitimate use and enjoyment of the overlying land.<sup>167/</sup>

The Nebraska rules probably will not allow an owner to withdraw ground water and transport it for use on land outside the vicinity if another landowner above the same aquifer objects to the exportation on the basis that the availability of water for his use on land which overlays the aquifer would be impaired by the removal.<sup>168/</sup>

The correlative rights aspect of the Nebraska ground water rule recognizes that water moves through aquifers from under the land of one landowner to others and that the supply of a landowner is seldom

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<sup>163/</sup> 124 Neb. 802, 811, 248 N.W. 304 (1933).

<sup>164/</sup> Osterman v. Central Pub. Power & Irr. Dist., 131 Neb. 356, 365, 268 N.W. 334 (1936).

<sup>165/</sup> 140 Neb. 179, 181-183, 299 N.W. 549 (1941).

<sup>166/</sup> 179 Neb., 783, 801, 140 N.W.2d 626, 637 (1966).

<sup>167/</sup> Clark, Groundwater Management: Law and Local Response, 6 ARIZ. L. REV. 178, n. 36 at p. 184 (1965); Drummond v. White Oak Fuel Co., 104 W. Va. 368, 375, 104 S.E. 57, 60 (1927).

<sup>168/</sup> See Harnsberger, Nebraska Ground Water Problems, 42 NEB. L. REV. 721, 727-728 (1963).

static; rather, it is often dependent in part upon uses by others. With correlative rights, overlying landowners share proportionately in a dwindling supply.<sup>169/</sup> This element of the Nebraska rules allows landowners situated over a common supply to prevent some of their number from depriving the rest of a share in the supply by making extraordinary withdrawals in times of shortage, even if for reasonable use on overlying land. The American rule of reasonable use applied alone would allow such deprivations to occur.<sup>170/</sup>

Water rights of land owners in Nebraska have been summarized as follows:

Only a right to use may be acquired; and this right to use is affected and circumscribed by the rights of other persons and the interest which the state has in a resource which is so largely a public treasure.<sup>171/</sup>

Legislation. At the present time Nebraska has only rudimentary beginnings of ground water use legislation. A pertinent comment on the adequacy of the existing legislation is found in Metropolitan Utilities District v. Merritt Beach Co.<sup>172/</sup> where it is stated:

While the rights of appropriators to the use of water from rivers and streams have been protected over the years, rights in the use of ground water have not been determined nor protected, nor the public policy with reference to the use of such underground water legislatively declared. The difficulties in administering dual conflicting principles, and fixing the rights of users thereunder, are readily apparent.

(Protecting Municipal Water Supply Sources). Recent legislation in Nebraska has dealt with present and future supplies of ground water for cities and villages, and for municipal corporations supplying cities or villages.<sup>173/</sup> This legislation has a very limited scope, and it is questionable whether much protection for municipal water supplies is provided. The statutes involve the issuance of permits to:

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<sup>169/</sup> See Hutchins, Trends in the Statutory Law of Ground Water in the Western States, 34 TEX. L. REV. 157, 164 (1955).

<sup>170/</sup> Clark, Groundwater Management: Law and Local Response, 6 ARIZ. L. REV. 178, n. 36 at p. 184 (1965).

<sup>171/</sup> Danielson, Ground Water in Nebraska, 35 NEB. L. REV. 17, 21 (1955).

<sup>172/</sup> 179 Neb. 783, 799, 140 N.W.2d 626, 636 (1966).

<sup>173/</sup> City, Village and Municipal Corporation Ground Water Permit Act, NEB. REV. STAT., sections 46-638 to 46-650 (Reissue 1968).

. . . locate, develop and maintain ground water supplies through wells or other means and to transport water into the area to be served . . . and . . . to continue existing use of ground water and the transportation of ground water into the area served . . . <sup>174/</sup>

Permits are not required; rather, permits are available when an applicant desires one and his application is approved.<sup>175/</sup> A permit receives a priority date of the time when the application is filed with the Director of the Department of Water Resources.<sup>176/</sup> It is not clear whether future litigation of municipal water rights will place much significance on priority dates.

There is also a well spacing statute which affects municipal ground water wells.<sup>177/</sup> Under this statute, no irrigation, industrial, or another municipality's well may be drilled within one thousand feet of a municipal well, nor may a municipality drill a well within one thousand feet of an irrigation or industrial well. However, Nebraska Revised Statutes section 46-653 (Reissue 1968) allows the Director of Water Resources to issue a special permit to drill a well notwithstanding the spacing requirements when facts are shown which justify the request. Presumably, proof of noninterference with the municipal well would be required before such a permit would issue.

(Irrigation Wells). Again, there is minimal legislative regulation of ground water use among irrigators. Section 46-651, discussed above, affects distance between an irrigation well and a municipal well. Also, there is a statute governing spacing between irrigation wells.<sup>178/</sup> Under this statute, no irrigation well is to be drilled within six hundred feet of another irrigation well. However, the statute does not apply to wells used to irrigate two acres or less, and wells for domestic, culinary, or stock use on a ranch or farm are also exempted. The spacing regulation does not apply to irrigation wells of a landowner on his own land, but each of these wells must be at least six hundred feet from any irrigation well on neighboring land.<sup>179/</sup> As with municipal well spacing regulation, the irrigation well spacing regulation need

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<sup>174/</sup> NEB. REV. STAT., section 46-638 (Reissue 1968).

<sup>175/</sup> NEB. REV. STAT., section 46-639 (Reissue 1968).

<sup>176/</sup> NEB. REV. STAT., section 46-642 (Reissue 1968).

<sup>177/</sup> NEB. REV. STAT., section 46-651 (Reissue 1968).

<sup>178/</sup> NEB. REV. STAT., section 46-609 (Reissue 1968).

<sup>179/</sup> NEB. REV. STAT., section 46-611 (Reissue 1968).

not be followed if an applicant can show facts which satisfy certain legislative requirements.<sup>180/</sup>

Some protection of ground water quality is provided by Nebraska Revised Statutes section 46-602(3) which requires "capping" or "plugging" abandoned registered irrigation wells.

(Relationship of Ground Water and Watercourse Use Law). Relatively recent developments in hydrology have prompted widespread realization that the total water resource should be dealt with as one interrelated unit. However, prior to these developments legal principles had already been formulated to resolve disputes, so that today Nebraska is faced with three different sets of rules to apply to this unit. Two sets of rules, riparianism and appropriation, apply to rights in stream flows and a third set of rules applies to rights in ground water.<sup>181/</sup> This legal dichotomy of ground and surface water law produces conflicting, but equally valid, claims on the hydrologic unit in times of shortage.

(W)ater development in the United States has been mainly a laissez-faire process, in accord with the individualistic tradition inherited from the pioneers. Surface-water users commonly have been forced by the high cost of construction to join hands in development projects. Most ground-water users have gone independent ways. Each class of users tends to regard its source of water as distinct from the others. In many areas, however, overdevelopment is now forcing <sup>182/</sup> recognition of the unity of water as a single resource.

Users in some areas of the United States are recognizing the unity of water, and changes in the legal rules are being made in some states in order to resolve conflicts. The changes proposed are usually

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<sup>180/</sup> NEB. REV. STAT., section 46-610 (Reissue 1968). The user wanting a special permit to drill an irrigation well without regard to the spacing requirements of section 46-609 must make a detailed application. When considering the approval or objection of the application, the Director of the Department of Water Resources must consider the size, shape, and irrigation needs of the property for which the permit is sought, the known ground water supply, and the effect on the ground water supply and the surrounding land. The application may be approved or disapproved in whole or in part.

<sup>181/</sup> For discussions of these different rules see "Basic Legal Approach to Conflicts Between Water Users" and "Watercourse Use Law" of this publication.

<sup>182/</sup> Nace, Water Management, Agriculture, and Ground Water Supplies, U.S. Geological Survey, 8 (Cir. 415, 1958).

concerned with ground water.<sup>183/</sup> Following is the view of a well-known Colorado commentator on this problem:

The need for legislation is apparent. Without clear cut rules, the relatively inexpensive drilling of wells continues apace, and surface water users may soon be faced with a facit accompli (sic) where courts will be reluctant to prohibit or curtail well users who have incurred large investments and brought large acreages under cultivation through the use of underground waters.<sup>184/</sup>

Only one legislative measure has been enacted in Nebraska to deal with the problems of interferences between users of ground water on the one hand and riparian owners or appropriators of surface water on the other. That statute reads as follows:

The Legislature finds that the pumping of water for irrigation purposes from pits located within fifty feet of the bank of any natural stream may have a direct effect on the surface flow of such stream.<sup>185/</sup>

A permit must be obtained from the Department of Water Resources before an irrigator may pump water in the situation described by the quotation above.<sup>186/</sup>

The statute exhibits recognition of the problems presented by "connected" ground and surface waters, but the situations to which the statute applies are narrowly circumscribed.

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<sup>183/</sup> See Harnsberger, Nebraska Ground Water Problems, 42 NEB. L. REV. 721, 741 (1963), regarding surveys of other states and suggestions for correlation of rights.

<sup>184/</sup> Moşes, The Correlation of Surface and Underground Water Rights, 27 OKLA. B. J. 2095, 2098 (1956).

<sup>185/</sup> NEB. REV. STAT., section 46-636 (Reissue 1968).

<sup>186/</sup> NEB. REV. STAT., section 46-637 (Reissue 1968).

## Drainage Law

### Common Law Rules

Fact situations of the typical drainage cases involve waters that are not classifiable as lakes, streams or ponds, usually called "surface water" but more descriptively termed "diffused surface water." The Nebraska Supreme Court has described such waters as those which flow in no defined watercourse,<sup>187/</sup> are diffused over the surface of the ground, and are derived primarily from rains and melting snow.<sup>188/</sup> They have also been described as waters with no permanent source of supply or regular course<sup>189/</sup> and waters which become separated from a watercourse or water body so that they are prevented from returning to the channel or bed.<sup>190/</sup> Also included are waters flowing from springs which do not follow a well-defined channel.<sup>191/</sup> Diffused surface waters retain their character until they reach a well-defined channel and become part of a watercourse,<sup>192/</sup> lake or stream.

Civil Law Rule. This rule is that a landowner cannot obstruct the flow of surface water coming on his land from a higher estate; nor can the owner of the higher estate cause the natural flow of surface water onto the lower land to be increased.<sup>193/</sup> The effect of this rule is to allow surface water to follow its natural path of drainage.

This rule does not allow interference with surface drainage by any landowner, and therefore does not lend itself to solving drainage problems in urban settings where the grades of lots and construction of buildings thereon would interfere with natural drainage. One commentator has also observed that the civil law rule "would seem to

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<sup>187/</sup> Morrissey v. Chicago, Burlington & Quincy R. Co., 38 Neb. 406, 56 N.W. 946 and 57 N.W. 522 (1893).

<sup>188/</sup> Jack v. Teegarden, 151 Neb. 309, 37 N.W.2d 387 (1949).

<sup>189/</sup> Id.; Schomberg v. Kuther, 153 Neb. 413, 45 N.W.2d 129 (1950); Mader v. Mettenbrink, 159 Neb. 118, 65 N.W.2d 334 (1954).

<sup>190/</sup> Krueger v. Crystal Lake Co., 111 Neb. 724, 197 N.W. 675 (1924).

<sup>191/</sup> Rogers v. Petsch, 174 Neb. 313, 117 N.W.2d 771 (1962).

<sup>192/</sup> NEB. REV. STAT., section 31-202 (Reissue 1968) defines a watercourse as "any depression or draw two feet below the surrounding lands and having a continuous outlet to a stream of water, or river or brook . . . ."

<sup>193/</sup> Clark and Martz, Classes of Water and Character of Water Rights and Uses, in 1 WATER AND WATER RIGHTS 305 (R. Clark ed. 1967). See Comment, Diffused Surface Water Law in Nebraska, 41 NEB. L. REV. 765, 766 (1962).

be the antithesis of soil and water conservation practices which are essential to the long term preservation of American agriculture."<sup>194/</sup> The civil law rule is not followed in Nebraska.

Common Enemy Rule. This rule is also known as the "common law" rule although several commentators contend the early English cases do not support it.<sup>195/</sup>

The common enemy rule is the raw basis of Nebraska drainage law. In its earliest form as applied in this State the rule was:

(S)urface water is regarded as a common enemy, and every landed proprietor has a right to take any measures necessary to the protection of his own property from its ravages, even if in doing so he throws it back upon a coterminous proprietor, to his damage, which the law regards as a case of damnum absque injuria,<sup>196/</sup> and affording no cause of action.<sup>197/</sup>

Simply stated, the rule allowed an owner of land to do anything to repel or remove surface water from his property, even though in so doing he caused injury to his neighbor.

Nebraska now seems to adhere to a modified common enemy rule. In Nichol v. Yocum<sup>198/</sup> the Nebraska Supreme Court held that the "common enemy" rule was not (and never had been) the law of this State. It continued by stating that the rule in the State is "the true doctrine of the common law" and it is "a general rule in force and controls in this State."<sup>199/</sup> The court stated:

(D)iffused surface waters may be dammed, diverted, or otherwise repelled, if necessary, and in the absence of negligence. But when diffused surface waters are concentrated in volume and velocity and flow into a natural depression, draw, swale or other drainway, the rule as to diffused surface waters does not apply.<sup>200/</sup>

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<sup>194/</sup> Comment, Diffused Surface Water Law in Nebraska, 41 NEB. L. REV. 765, 766 (1962).

<sup>195/</sup> Id. at 767.

<sup>196/</sup> Loss, hurt or harm without injury in the legal sense. See BLACK'S LAW DICTIONARY (4th ed. 1951).

<sup>197/</sup> Morrissey v. Chicago, Burlington & Quincy R. Co., 38 Neb. 406, 430, 56 N.W. 946, 953 (1893).

<sup>198/</sup> 173 Neb. 298, 113 N.W.2d 195 (1962).

<sup>199/</sup> Id. at 306, 113 N.W.2d at 200.

<sup>200/</sup> Id.

The rule as to such drainways, natural depressions, draws and swales, generally is that they must be kept open to allow natural drainage.

Although it is questionable whether the water dealt with was "surface water" or "drainway water," the Supreme Court in the recent case of Erickson v. Tyler<sup>201/</sup> may have tempered its earlier "surface water" decisions by stating:

Surface water is a common enemy, and the owner of real estate in the interest of good husbandry and in the absence of negligence or evidence of diversion to the injury of the lower landowner, may accelerate its flow in the natural course of drainage without liability to the lower owner.<sup>202/</sup>

Reasonable Use Rule. The two rules defined above are based on property concepts. The "reasonable use" rule, however, is expressed in the language of tort law. This rule is that a landowner is not liable for damages caused by him in repelling surface waters if he proceeds with reasonable care and prudence. Whether a landowner's attempt to deal with his surface water problem is reasonable is a question of fact to be determined from all the circumstances surrounding the situation. Although it is a minority rule it has been successfully applied in some jurisdictions to do equity in cases where the somewhat rigid "property oriented" rules may have failed. The Nebraska Supreme Court has consistently tempered application of its rule with language requiring reasonableness and absence of negligence<sup>203/</sup> in carrying out drainage activity.

### Nebraska Rules

As stated above, Nebraska had early taken a "common enemy" approach to diffused surface water cases. The Nebraska Supreme Court has found it necessary to modify the common enemy rule by introducing the concept of reasonableness when passing judgment on attempts of landowners to solve their surface water problems.<sup>204/</sup> Finally, the court changed the label of this State's rule and now applies a "common law" rule to diffused surface water cases.

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<sup>201/</sup> 186 Neb. 743, \_\_\_ N.W.2d \_\_\_ (1971).

<sup>202/</sup> Id. at 746.

<sup>203/</sup> Anheuser-Busch Brewing Assn. v. Peterson, 41 Neb. 897, 60 N.W. 373 (1894); Snyder v. Platte Valley Public Power and Irr. Dist., 144 Neb. 308, 13 N.W.2d 160 (1944); Courter v. Maloley, 152 Neb. 476, 41 N.W.2d 732 (1950); County of Scotts Bluff v. Hartwig, 160 Neb. 823, 71 N.W.2d 507 (1955).

<sup>204/</sup> Id.

To understand the present law of surface water drainage it is imperative to recognize that all drainage problems are not susceptible to application of a single rule. For purposes of discussing drainage law, the facts must be examined to determine whether the situation may be categorized as involving watercourses and drainways, interference with natural drainage of diffused surface water by an upper proprietor, or interference with natural drainage of diffused surface water by a lower proprietor.

Watercourses and Drainways. Rules governing drainage of diffused surface water are not applicable to water in "watercourses." A watercourse is defined by statute as "any depression or draw two feet below the surrounding lands and having a continuous outlet to a stream of water, or river or brook . . ."205/ As to interfering with the flow of a watercourse, it is well settled that:

The owners or proprietors of lands bordering upon either the normal or flood channels of a natural watercourse are entitled to have its water, whether within its banks or in its flood channel, run as it is wont to run according to natural drainage, and no one has the lawful right by diversions or obstructions to interfere with its accustomed flow to the damage of another.206/

The Nebraska rule governing interference with the flow in drainways not meeting the tests for being a watercourse is also well developed. The rule closely parallels that for watercourses and is that a lower landowner cannot interfere with the natural flow of water in any natural drainage-way, be it a draw, ditch, slough or swale.207/

Interference with Natural Drainage of Diffused Surface Water by an Upper Proprietor. A landowner may collect diffused surface water located on his land for his use even though his action deprives a lower landowner of the benefits that the latter would otherwise enjoy were the water allowed to flow down to the lower lands, but he cannot, without incurring liability, collect the water and then discharge it upon his lower neighbor causing the latter damage.208/

Interference with Natural Drainage of Diffused Surface Water by a Lower Proprietor. A common situation which results in litigation is when a landowner builds a dike to prevent surface waters from entering upon his property. Nebraska has quite consistently applied the common enemy rule, modified by a test of reasonableness, in situations where

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205/ NEB. REV. STAT., section 31-202 (Reissue 1968).

206/ Schwank v. County of Platte, 152 Neb. 273, 180, 40 N.W.2d 863, 868 (1950).

207/ Comment, Diffused Surface Water Law in Nebraska, 41 NEB. L. REV. 765, 776 (1962).

208/ Chicago, R. I. & P. R. Co. v. Shaw, 63 Neb. 380, 88 N.W. 508 (1901).

a landowner repels surface water not flowing in a natural watercourse or drainageway. In this situation the lower landowner may dam, divert or otherwise repel the diffused surface waters if the action is necessary to protect his property and if he does so in a nonnegligent manner.

#### Legislation

Nebraska law provides that a landowner may drain his land in the "general course of natural drainage" by open ditch or tile drain; and if the ditch or drain is wholly on his property, the landowner will not incur liability for damages to any person nonnegligently injured by the water being drained.

Statutory provisions also exist which permit groups of landowners faced with a common drainage problem to undertake concerted action. Three approaches are available. Landowners may organize a drainage district,<sup>209/</sup> of which there are two types. Landowners may also petition county government to aid in accomplishing certain drainage projects under a procedure in Chapter 31, articles 1 and 9, Revised Statutes of Nebraska.

Advantages common to all three approaches are: (1) use of a political entity allows the individual landowner to avoid personal liability if damages occur; (2) such organization makes it possible to allocate costs according to benefits and effectively assess levies to meet the cost of projects; (3) contract letting for the project and general supervision of the project work can often be handled easier by the political entity; and (4) the county or public corporation has a continuing existence. In addition, the two forms of organized drainage districts have the power of eminent domain to acquire necessary lands and rights-of-way.

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<sup>209/</sup> See the discussion of drainage districts elsewhere in this publication.

## Miscellaneous

### Public Recreational Access and Use for Lakes and Streams

General Comments. The demand for water-based recreation has recently increased in Nebraska and other states. From 1950 to 1967 the number of pleasure boats in use in the United States at least doubled, and the number of motors for such boats tripled in the same period.<sup>210/</sup> Also, the expected increase in population in the future will produce more boating enthusiasts, hunters, fishermen, and others who will demand suitable waters and access to pursue their avocations.<sup>211/</sup> The State of Nebraska through the Game and Parks Commission has developed extensive park and recreational areas.<sup>212/</sup>

In a discussion of this area of law it is important for the reader to be acquainted with a legal touchstone called "navigability" and further to understand that there are different definitions or tests of navigability for different legal purposes. The reason for examining tests of navigability is to determine who controls the use of the surface area of streams and lakes, which in turn rests on the determination of who owns the beds of the stream or lake.

Historical Background (The Navigability Test for Determining Title to Beds). Nebraska follows the federal test in determining what waters are navigable for title to beds purposes. The Nebraska Supreme Court stated this test as follows: ". . . navigability in law is synonymous with navigability in fact, without regard to the influence of the ocean tide, and includes those waters only which afford a channel for useful commerce . . . ." <sup>213/</sup> In Nebraska this apparently encompasses only the Missouri River, and therefore other waters within the State are "nonnavigable" for determining ownership of beds.

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<sup>210/</sup> UNITED STATES DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 208 (1968).

<sup>211/</sup> That no small number of persons are involved is evidenced by the fact that in 1965 there were nearly 33,000,000 hunters and fishermen in this country. See id. at 204.

<sup>212/</sup> Nebraska Game and Parks Commission figures show approximately 107,810 acres of land; 3,062 acres of marsh; and 69,495 acres of water are controlled by that agency for the conduct and development of game, fish and recreation. These lands are either owned or leased, or partly owned and leased by the Game and Parks Commission. NEBRASKA GAME AND PARKS COMMISSION, Hunting, Fishing and Recreation Areas (Revised July, 1969).

<sup>213/</sup> Clark v. Cambridge & Arapahoe Irrigation & Improvement Co., 45 Neb. 798, 805, 64 N.W. 239, 240 (1895).

Generally, the beds underlying nonnavigable waters are owned by the private riparian landowners,<sup>214/</sup> and the public has no rights to the use of these private waters.<sup>215/</sup> Nebraska seems to adhere to this general rule; however, one notable exception exists. The Legislature in 1929 made the beds of meandered lakes, which are nonnavigable in Nebraska, the property of the State and dedicated them to the public.<sup>216/</sup> Meandered lakes are those which lie in two or more sections of land. When the section lines were surveyed, these bodies of water lay on the proposed boundaries. Instead of surveying through the lakes, the lines were laid to follow the shore lines. Meandered lakes are not numerous and most or all are located in the Sandhills area. It should also be noted that the statute does not include those meandered lakes patented to private individuals by the United States.

In many states a finding that a stream is navigable leads to the conclusion that the citizens have the right to use the bed and surface for recreation or any otherwise lawful purpose. This is not true in Nebraska.

In the 1905 case of Kinkead v. Turgeon<sup>217/</sup> the State of Nebraska departed from the public ownership rule. In that case the Nebraska Supreme Court declared: ". . . a riparian owner of lands on one side of a navigable river above the flow of the tide holds to the thread of the stream, subject to the public easement of navigation . . ."<sup>218/</sup> The Kinkead case dealt with the problems of bed ownership in the Missouri River caused by a sudden change of channel. The court further observed that the public right attaches to the water of the new channel--that the public retains all its rights.

A summary of the discussion to this point may be helpful. First, it must be reiterated that the title to beds of all nonnavigable waters in Nebraska belong to the private stream-bank landowner, except in the case of meandered lakes, declared by the Legislature to be public. Also, in Nebraska the beds of navigable rivers belong to private stream-bank landowners, but he holds it subject to the navigation easement. This is so because of the holding of Kinkead v. Turgeon.<sup>219/</sup>

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<sup>214/</sup> Reis, Policy and Planning for Recreational Use of Inland Waters, 40 TEMP. L. Q. 155, 171 (1967).

<sup>215/</sup> Annot., 57 A.L.R.2d 569 (1958).

<sup>216/</sup> NEB. REV. STAT., section 37-411 (Reissue 1968).

<sup>217/</sup> 74 Neb. 573, 580, 583-4, 104 N.W. 1061, 1062 (1905).

<sup>218/</sup> Id. at 580, 583-4, 104 N.W. at 1062.

<sup>219/</sup> Id.

Nothing, of course, prevents the State government from becoming a landowner with control over the water surface, and it has in fact become such an owner of significant areas.<sup>220/</sup>

(The Navigation Easement). The seemingly restrictive state of affairs as to public recreational use of waters in Nebraska under the title to beds theory is considerably modified by the navigation easement doctrine.

This doctrine has been simply explained by one commentator as follows:

(T)o the ordinary citizen (the navigation easement) means that the waterway subject to the (easement) is a public highway upon which he has a right to transit for himself and his goods, and upon which he may hunt and fish without hindrance by the riparian owner.<sup>221/</sup>

As stated above, there is a different test for determining which waters are navigable for purposes of applying the navigation easement than for determining who owns the bed. The navigation easement test as it exists today is that a water body is navigable if it is navigable in fact or can be made so with reasonable improvement.<sup>222/</sup> It is not necessary that the stream or lake actually be used for navigation.<sup>223/</sup> The easement also attaches to nonnavigable parts of navigable streams<sup>224/</sup> and to the tributaries of navigable streams.<sup>225/</sup>

Application of the navigation easement to the tributaries would seem to open them at least to canoeing, float trips and perhaps even to hunting and fishing from boats to the extent that access could be gained from public lands such as a road right-of-way.

The Nebraska Approach (Waters Open to Public Use). Despite the fact that Nebraska case law on the public's right to use the surface of the State's waters is not well developed, there are several Nebraska Attorney General's opinions concerning whether the public has a right to use certain waters for recreational purposes. In 1930 an opinion maintained that riparian landowners along the Platte River have jurisdiction over hunting privileges and can sell or lease the exclusive right to hunt or fish on the river and islands to the thread of the

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<sup>220/</sup> See note 210, *supra*.

<sup>221/</sup> Bielefeld, Navigability In the Missouri River Basin, 4 LAND & WATER L. REV. 97, 102 (1969).

<sup>222/</sup> *United States v. Appalachian Power Co.*, 311 U.S. 377 (1940).

<sup>223/</sup> *Economy Light & Power Co. v. United States*, 256 U.S. 113 (1921).

<sup>224/</sup> *United States v. Rio Grande Irrigation Co.*, 174 U.S. 690 (1899).

<sup>225/</sup> *Id.*; *United States v. Griffin*, 58 F.2d 674 (W.D. Va. 1932); *Oklahoma v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941).

stream and no one has the right to hunt or fish on an island or from a boat without the riparian landowner's permission. The opinion states that this is the rule even though the hunter or fisherman reached the river through public access afforded by a public road.<sup>226/</sup>

This opinion was no doubt a fair statement of the law in 1930. However, it seems to be based entirely on the title to beds doctrine. Although the navigation easement was a recognized legal doctrine in 1930, it must be pointed out that the test for navigability for its application received major development after that year.<sup>227/</sup>

At least two federal cases were decided after 1930 which are important for the subject. In Grimes Packing Co. v. Hynes<sup>228/</sup> the court held that generally all members of the public have a right to fish in public waters such as the sea and other navigable or tidal waters, and no private person can claim an exclusive right to fish in any portion of such waters unless he acquires such a right by grant or prescription. In the federal case of Ne-Bo-Shone Assn. v. Hogarth<sup>229/</sup> it was held that Michigan law did not declare exclusive fishing rights to the riparian, and a state agency decree which gave the public general fishing rights was valid. The waterway involved in that case was a shallow stream formerly used to float logs but not otherwise navigable.

In view of these cases and the fact that the Platte River is probably navigable for application of the navigation easement, the 1930 Nebraska Attorney General's opinion, at least as far as it applies to recreation pursuits from a boat, may not reflect the present status of Nebraska law.

In 1949 the Nebraska Attorney General was presented a similar question although the facts differed considerably from the 1930 controversy. The 1949 inquiry concerned the public's right to hunt and fish on the Central Nebraska Public Power and Irrigation District's reservoirs. The opinion was prompted by the fact that the district leased the exclusive right to hunt and fish to a private individual. The Nebraska Attorney General offered the opinion that this was a misuse of the eminent domain power because the subject land had been condemned for a public purpose and could not be leased to a private individual for his exclusive use. The opinion stated: "It is our opinion that the general public has a right to fish and hunt upon the Central Nebraska Public Power and Irrigation District reservoirs . . . ." <sup>230/</sup>

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<sup>226/</sup> NEB. OP. ATT'Y GEN. 224 (1930).

<sup>227/</sup> See United States v. Griffin, 58 F.2d 674 (W.D.Va. 1932); Oklahoma v. Guy F. Atkinson Co., 313 U.S. 508 (1941).

<sup>228/</sup> 67 F. Supp. 43 (Alas. 1946).

<sup>229/</sup> 81 F.2d 70 (6th Cir. 1936).

<sup>230/</sup> NEB. OP. ATT'Y. GEN. 129, 130 (1949).

From this last discussed opinion it seems that a general public right to hunt and fish, and probably to pursue other recreational uses, was receiving recognition in Nebraska as to publicly owned waters.

(Statutes). The extensive system of recreation areas and parks of the Nebraska Game and Parks Commission provides opportunities for a great number of persons seeking water-based recreation. Hunters, fishermen and water sports enthusiasts gain access and use of other water areas by obtaining permission from the owners of such areas.

It is the policy of the State of Nebraska to encourage the permissive use of privately owned water resources by the public. This is evidenced by the Recreation Liability Act of 1965.<sup>231/</sup> Section 37-1001 states:

The purpose of sections 37-1001 to 37-1008 is to encourage owners of land to make available to the public land and water areas for recreational purposes by limiting their liability towards persons entering thereon and towards persons who may be injured or otherwise damaged by the act or omissions of persons entering thereon.

The act also establishes the duty of care owed by the landowner to those coming on his land for recreational purposes. That duty of care is, in effect, no duty whatsoever, except that the landowner is liable for wilful or malicious failure to guard or warn against a known dangerous condition. The limiting of liability does not apply to landowners who charge a fee for the recreational use of their land by the general public. It should be noted that the Recreational Liability Act in no way gives the public access to private property. It stands as an established rule of law that the public has no right to cross private land to reach public waters.<sup>232/</sup>

A statute enacted in 1967<sup>233/</sup> modified the law of trespass in Nebraska. The law states that persons "in the process of navigating or attempting to navigate with nonpowered vessels any stream or river in this state" may portage or otherwise transport their vessels around obstructions in the stream. A penalty is provided if damage is caused to private property during such a portage. It is implied in this law that the general public may use any appropriate stream of this State for canoeing or floating a raft, which are recreational uses. As

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<sup>231/</sup> NEB. REV. STAT., sections 37-1001 to 37-1008 (Reissue 1968).

<sup>232/</sup> 2 AMERICAN LAW OF PROPERTY § 9.48 (Casner ed. 1952); 1 S.WIEL, WATER RIGHTS IN THE WESTERN STATES 361 (3rd ed. 1911). See Stone, Public Rights in Water Uses and Private Rights in Land Adjacent to Water, in 1 WATERS AND WATER RIGHTS 221 (Clark ed. 1967).

<sup>233/</sup> NEB. REV. STAT., section 28-589.01 (Supp. 1969).

mentioned previously, the Nebraska statutes also dedicate meandered lakes to public use.

### Interstate Water Compacts and Court Decrees

Where states have conflict of policies with respect to water from an interstate stream, their respective interests can usually be negotiated, modified and embodied in an interstate compact. The constitutional limitation on negotiating interstate river compacts is that they must be approved by Congress.<sup>234/</sup>

The federal government, as well as the states, has an interest in the allocation of interstate stream waters. In order to receive federal approval the negotiation of an interstate compact usually involves: (1) an act of Congress authorizing negotiation (and usually providing for a federal representative to the negotiations); (2) actual negotiation of the terms by the state and federal representatives; and (3) ratification of the compact by the affected states and Congress.

In allocating the waters of interstate streams Nebraska has entered into the following compacts with neighboring states.

The South Platte River Compact between Colorado and Nebraska was signed by state representatives on April 27, 1923, and received congressional approval by the Act of March 8, 1926.<sup>235/</sup> The purpose of the compact is to remove present and future causes of controversy between the compacting states over the South Platte River, running easterly from Colorado into Nebraska, and Lodgepole Creek, running southeasterly from Nebraska into Colorado. In order to achieve that purpose the compact provides for joint maintenance of a stream gauging station on the South Platte River. A point is affixed on Lodgepole Creek above which the full benefit of the waters go to Nebraska, and below which the same benefits go to Colorado. The waters of the South Platte are apportioned based on season of the year, prior appropriators' rights and regional irrigation need. The stream flow station on the South Platte permits the establishment of a minimum amount of stream flow which establishes a limit on upstream diversions.

The Republican River Compact between Colorado, Kansas and Nebraska was negotiated pursuant to Public Law 696, 77th Congress, 2nd session.<sup>236/</sup> The subject matter of the compact is the apportionment of the Republican River and its tributaries above its junction with the Smokey Hill River

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<sup>234/</sup> "No state shall, without the consent of Congress . . . enter into any agreements or compact with another state, or with a foreign power . . ." U.S. CONST., Art. 1, § 10.

<sup>235/</sup> 44 Stat. 195 (1926).

<sup>236/</sup> 56 Stat. 736 (1942).

in Kansas. The compact recognizes and seeks to achieve six goals: (1) the most efficient use of the waters of the Republican River; (2) an equitable division of the waters of the Republican River; (3) the removal of causes of controversy between the signatories; (4) the promotion of interstate comity; (5) the recognition that efficient utilization of the waters in the basin is for beneficial consumptive use; and (6) the promotion of joint action by state and federal governments in the efficient use of water and control of floods.

The compact defines the drainage basins and apportions their total available acre-feet of water to Colorado, Kansas, and Nebraska. The allocations to the states are based on estimates of availability and are subject to the condition that these quantities are actually available in the respective basins. The compact also leaves unimpaired the rights of the federal government in the Republican River Basin.

The Upper Niobrara River Compact between Nebraska and Wyoming was negotiated pursuant to congressional consent as embodied in the Act of August 5, 1953, the Act of May 29, 1958, and the Act of August 30, 1961.<sup>237/</sup> The negotiated compact was signed on October 26, 1962, and received congressional approval on August 4, 1969.<sup>238/</sup>

The three purposes of the compact, as stated in the first article, are: (1) to provide for equitable division or apportionment of the waters of the Upper Niobrara River Basin; (2) to gather data on ground water and underground water flow so that such waters may be apportioned by supplement to the compact; and (3) to remove causes of controversy and promote interstate comity.

The compact defines the extent of the Upper Niobrara River Basin, designates officials to administer the compact, and provides for establishment and operation of necessary stream gauging stations.

The surface waters of the Upper Niobrara River are apportioned between Nebraska and Wyoming with Wyoming receiving unrestricted use of the river's surface flow except for restrictions placed upon the river by Wyoming law and restrictions from prior appropriators whose rights are defined by the compact. The compact also provides for gathering data on ground water and a possible future allocation of ground water.

Although the proposed Lower Niobrara River and Ponca Creek Compact between Nebraska and South Dakota was signed by representatives of the compacting states on January 18, 1961, it has not yet been ratified by Congress. The principal purposes of the compact are: (1) to remove causes of interstate controversy over the waterways involved in the compact; (2) to encourage beneficial use of subject waters; (3) to provide for a fair sharing of available water between the signatory states;

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<sup>237/</sup> 67 Stat. 365 (1953), 72 Stat. 147 (1958), 75 Stat. 412 (1961).

<sup>238/</sup> 83 Stat. 86 (1969).

and (4) to recognize the acquisition of water to the subject waters by groups and individuals.

The proposed compact would establish a Nebraska-South Dakota Board to administer the terms of the compact. Article V of the compact defines the rights and standards of individuals affected by the compact. The compact also provides for the collection of data and the preservation of existing federal rights and obligations.

A Big Blue River Compact between Kansas and Nebraska was signed by the representatives of those states on October 19, 1970, and has since been ratified by the Legislatures of both states. It is now awaiting ratification by Congress. The principal goals of the compact are stated as follows: (1) to promote interstate comity between the States of Nebraska and Kansas; (2) to achieve an equitable apportionment of the waters of the Big Blue River Basin between the two states and to promote orderly development thereof; and (3) to encourage continuation of the active pollution-abatement programs in each of the two states and to seek further reduction in both natural and man-made pollution of the waters of the Big Blue River Basin.

Included within the proposed compact are minimum flow requirements for both the Big Blue and Little Blue Rivers at their respective state line gauging stations for the months of May through September of each year. Also included is the establishment of an interstate agency, known as the "Kansas-Nebraska Big Blue River Compact Administration," with the responsibility of administering the compact whenever it becomes effective.

Under Article III, section 2 of the United States Constitution, the Supreme Court has original jurisdiction to settle cases and controversies between states. These cases and controversies may often be settled between the states with the approval of Congress through interstate compacts such as those discussed above. However, where a lawsuit is initiated the Supreme Court has jurisdiction to hear the case and render a decree. Typically, the Court will not hear the case until there has been a preliminary hearing held before a court appointed Special Master. After the Special Master has presented his report and the parties have had an opportunity to present their exceptions to it, the Court will issue a decree.

A United States Supreme Court decree concerning Nebraska waters was issued in the case of Nebraska v. Wyoming,<sup>239/</sup> in which Nebraska instituted suit against Wyoming to apportion the waters of the North Platte River. Colorado was joined as a defendant because of its interest in the North Platte River. The decree in the case apportioned the water by setting maximums on the amount of water which could be diverted and on the amount of acreage which could be irrigated. Diversion limitations with respect to reservoirs and canals were established for the May 1 to September 30 period of each year.

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<sup>239/</sup> 325 U.S. 589 (1945), modified, 345 U.S. 981 (1953).

The decree adjudged Nebraska appropriations for lands supplied by the French and State Line Canals senior to the appropriation rights of the Pathfinder, Guernsey, Seminoe, Alcova and Glendo Reservoirs and the Casper Canal in Wyoming. Wyoming was therefore enjoined from permitting storage of water in its reservoirs contrary to this appropriation rule from May 1 to September 30 of every year.

The decree apportioned only the natural flow of the North Platte River and provided that the flow would be measured by additional gauging stations which were to be established as they were needed with their expenses allocated between Nebraska and Wyoming.

Both Colorado and Wyoming were permitted to divert water for ordinary and usual domestic, municipal and stock watering purposes. However, both states were required to maintain public records on irrigation, storage and exportation of water from the North Platte River and its tributaries.

Exclusive of the Kendrick Project and the Seminoe Reservoir, Wyoming was enjoined from diverting water above the Guernsey Reservoir or from the tributaries of the North Platte above the Pathfinder Dam for the irrigation of more than a total of 168,000 acres of land in Wyoming during any one irrigation season. They also were enjoined from storing more than 18,000 acre-feet annually for use above Pathfinder Reservoir. In the area between Guernsey and the Tri-State Dam section, between May 1 and September 30 of any year, the natural flow of the North Platte River was divided between Wyoming and Nebraska on the basis of 25 percent to Wyoming and 75 percent to Nebraska. Water stored in federal reservoirs was not affected by the decree, but is controlled by contracts of the North Platte Project and Warren Act Contracts.

In 1952, when the Glendo Project was found to be feasible, the parties felt it was necessary to amend the decree. The decree was amended by stipulation to provide that Colorado might increase its use from 135,000 acres of land to 145,000 acres of land. Storage rights in Glendo were to be limited to 40,000 acre-feet annually, and including carryover storage, would never exceed 100,000 acre-feet. This water was to be distributed according to contracts with the Secretary of the Interior, and divided among the states with 15,000 acre-feet available for use in Wyoming below Guernsey Dam and 25,000 acre-feet available for use in Nebraska.

### Maintenance of Water Quality

State Action. The maintenance of the quality of the waters of the State of Nebraska is essentially the responsibility of two state agencies. On May 26, 1971, the Governor designated the Nebraska Soil and Water Conservation Commission<sup>240/</sup> as the official water quality planning agency for the State of Nebraska.

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<sup>240/</sup> State agencies are discussed in Chapter 2 of this publication.

Under that designation the Commission is expected to develop interim basin-wide water quality plans for the State by January 1, 1972. Such interim plans will make use of readily available data and are intended to be temporary. The projected completion date for fully developed plans involving considerably more detail and significant data collection are projected for completion in July, 1975. These plans will describe in detail the problems facing the basin and propose alternative methods of remedying those problems, along with a comparison of costs for the various remedies.

Enforcement of water quality standards will be the responsibility of the newly formed Department of Environmental Control. That Department is vested with the power, duties and functions formerly assigned to the Nebraska Water Pollution Control Council, the agency responsible for water quality standards prior to June 30, 1971. It is expected that the new department will adopt standards similar or identical to those promulgated by the Water Pollution Control Council. It is also expected that the dates for compliance with these standards by the various municipalities in the State will remain at no later than January 1, 1972, for all municipalities except those discharging into the Missouri River, which are assigned a compliance date of no later than January 1, 1975.

Private Remedies. The Nebraska cases dealing with the maintenance of water quality are few in number and were all brought by one private party against another. They are based almost exclusively on the doctrine of private nuisance, and concern both surface and ground waters. In an 1889 case<sup>241/</sup> the Nebraska Supreme Court reversed the action of the District Court in Sarpy County in denying a permanent injunction against the owner and operator of a large feedlot located along Papillion Creek and in favor of adjoining downstream landowners who used their land for general farming purposes and for stock raising and watering their cattle from the creek. The court found that the downstream landowners' use of the stream and of their property had been impaired because wastes were flowing from the neighboring upstream feedlot into Papillion Creek. The wastes were being carried down to and upon the plaintiffs' land by the force of the stream, polluting the water and rendering it unfit for use by the plaintiffs. Noxious odors and a general nuisance condition also resulted. This situation had been in existence for approximately two years. The court in ordering the granting of the permanent injunction made clear that the case was one of a continuing private nuisance and was not based on the riparian doctrine of reasonable use. The injury complained of, it declared, was pollution of the watercourse, not improper or unreasonable use of the water of the stream by the defendant. In rendering its decision, the court also noted that Papillion Creek, unlike the Platte or Missouri Rivers was too small in size to sustain wastes from a feedlot of no less than 3,750 head of cattle.

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<sup>241/</sup> Barton v. Union Cattle Co., 28 Neb. 350, 44 N.W. 454 (1889).

However, in a rather similar case<sup>242/</sup> from Sarpy County some fifty-four years later in 1943, the Nebraska Supreme Court took a more restrictive view of the situation. The case concerned alleged pollution of a small fresh water creek flowing into Papio Creek, caused by wastes flowing from an upstream landowner's feedlot. Despite the allegations of the downstream riparian landowner, the court held that the feeding of livestock along a small stream outside of an incorporated city, and where stock feeding is generally engaged in, may not be enjoined by a neighboring landowner where there is no evidence showing that a nuisance was created. Again the issue was one of continuing private nuisance, but in this case the court found a lack of sufficient evidence. The issue of water pollution was but one aspect in the case, though an important one. This case demonstrated the law's reluctance to enjoin permanently an important and common commercial enterprise in a particular area unless the business would constitute a "nuisance per se" (a nuisance under any circumstances) or would cause irreparable and serious injury or destroy another's interests or property if not enjoined.

In Lowe v. Prospect Hill Cemetery Association,<sup>243/</sup> a case from the City of Omaha, Douglas County in 1899, the Nebraska Supreme Court upheld the granting of a permanent injunction against a private cemetery association to prohibit the proposed use of a portion of the latter's ground for interring dead bodies where evidence sustained the finding of the district court that such use would probably result in contaminating the waters of nearby landowner's wells with disease germs and thus endanger health and lives. The cemetery was originally established in a rural area, but by 1899 was bordered on at least three sides by a residential district. The action was again one of private nuisance. Some four years later in Braasch v. Cemetery Association,<sup>244/</sup> the court upheld the refusal of the Madison County District Court to grant an injunction in a similar case by distinguishing the facts from the Prospect Hill Cemetery case. The Court found on the evidence that there was no possible danger of contamination of the underground water.

The above mentioned cases were decided on the basis of private nuisance and not on water quality issues arising from violations of State water quality standards. The cases were based on common law, and the water quality standards adopted for Nebraska are an additional legal basis for attacking sources of water pollution. Judicial interpretation of the State of Nebraska's Water Pollution Control Act is yet to come.

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<sup>242/</sup> Vana v. Grain Belt Supply Co., 143 Neb. 118, 8 N.W.2d 837 (1943).

<sup>243/</sup> Lowe v. Prospect Hill Cemetery Ass'n., 58 Neb. 94, 78 N.W. 488 (1899).

<sup>244/</sup> Braasch v. Cemetery Association, 69 Neb. 300, 95 N.W. 646 (1903).

## CHAPTER 2. STATE AGENCIES

### Introduction

The State of Nebraska's resource agencies have historical developments similar to experiences in many other states. Through the years new agencies, departments or commissions were established or new functions assigned as specific needs were realized. Thus, today the State's water resources are affected by the actions of one code department headed by a director, one code department headed by a board, one code department headed by both a director and a council, two independent commissions and four divisions of the University of Nebraska. In addition to these nine entities the Department of Economic Development and the Office of Planning and Programming may in the future have significant roles in the future of this State's water and land resource development and use. Furthermore, the program of statistics gathering by the Department of Agriculture provides data used by other resource agencies; and the Department of Roads' construction programs affect water resource projects while resource projects in turn affect highway features.

In 1968 then Governor, Norbert T. Tiemann, retained a consultant to analyze the Nebraska resource agencies and to give recommendations concerning their reorganization. A report, by Frank J. Trelease, Dean of the University of Wyoming Law College, was submitted to the Governor on January 10, 1969.

The origins, purposes, programs, and organizational structures of several state agencies are discussed in Chapter 2.

### Department of Water Resources<sup>1/</sup>

The Department of Water Resources was established by legislative action in 1957 and was assigned all of the powers and duties formerly exercised by the Bureau of Irrigation, Water Power and Drainage, in the Department of Roads. Its history goes back to 1895 when the State Board of Irrigation was created with authority over water rights for irrigation, power and all other useful purposes.

The Department is a code agency created to aid the Governor in the execution and administration of the laws of the State and is headed by a director appointed by the Governor and subject to the confirmation of the Legislature.

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<sup>1/</sup> See generally, NEB. REV. STAT., section 46-208 et seq. (Reissue 1968); NEB. REV. STAT., section 81-102 (Reissue 1966); NEB. REV. STAT., section 70-1003 et seq. (Reissue 1966) as amended by REV. STAT. SUPP. (1969); NEBRASKA BLUE BOOK (1968) pp. 439-441.

The Department has original jurisdiction over matters pertaining to rights to the use of water in all natural streams in the State for irrigation, power and other useful purposes. In addition to determining water rights, the Department must also regulate the use of water from natural streams in accordance with the rights which have been determined and made of record.

Other duties and powers of the Department are:

(1) To approve all plans for proposed drainage districts before contracts for construction are let or work done, with authority to require changes in any such plans;

(2) To conduct public hearings concerning rights to the use of waters of the State. These hearings may be initiated by complaint, petition, or application in connection with such rights;

(3) To make surveys of streams showing the location of possible water power developments, irrigation or drainage projects;

(4) To direct operators of interstate ditches to construct and maintain measuring devices on such ditches at or near the State's boundaries;

(5) To measure the quantity of water flowing in the streams of the State and make records. To carry out this assignment the Department employs from 10 to 15 full-time engineers and hydrographers. The stream-gauging program is conducted under a 50-50 matching agreement with the Water Resources Branch of the U.S. Geological Survey, the arrangements being essentially a matching of services. In addition to obtaining records of stream flow, the personnel of the Department also measure and record the amounts of water diverted from the streams through canals or pumps to be used for irrigation or other useful purposes;

(6) To examine and approve plans of all proposed dams to be constructed for reservoir purposes or across the channels of natural streams, and the designs of headgates and measuring devices at the diversion point of irrigation and hydroelectric power canals;

(7) To approve the petitions for formation of proposed irrigation districts, reclamation districts and rural water districts; petitions for creation of proposed public power and/or irrigation districts; and petitions for any changes in the organization of any such districts; and

(8) To register, when data is submitted by well owners, all water wells in the State except those used for domestic purposes and to issue permits relative to the spacing of water wells when special application for the same are filed.

To aid the Department in the enforcement of water rights and in the proper distribution of water, the State is divided into water divisions which in turn are divided into water districts. In each division the Department employs a division engineer, and in each water district water

commissioners are employed during the irrigation season to regulate the use of water under the supervision of the division engineer.

In 1963 a Nebraska Power Review Board was established within the Department of Water Resources. The Board consists of five members appointed by the Governor to staggered terms of four years each. The membership is composed of an engineer, an attorney, an accountant, and two lay persons.

The Board has the statutory power to authorize or deny the construction of transmission lines and related facilities outside of the corporate limits of cities and villages. It also has the authority to require public power districts, municipalities and other retail power suppliers to enter into service area agreements and to enforce these agreements.

The Board also now possesses certain powers in the area of the inter-connection of facilities of the various suppliers and, in the event of disputes, over the wheeling of electricity.

The Director of the Department of Water Resources serves as the secretary for the Power Review Board and is also a member of the Nebraska Soil and Water Conservation Commission.

The Department of Water Resources publishes a biennial report to the Governor which contains statistical data concerning water appropriations, water supplies, and listings of public power and irrigation districts and reclamation districts.

#### Nebraska Soil and Water Conservation Commission<sup>2/</sup>

The Nebraska Soil and Water Conservation Commission was created by an act of the Legislature in 1937 and today serves as the official agency of the State in connection with soil and water conservation, flood prevention, watershed protection, flood plain regulation, flood control and development of the Nebraska Water Plan. The Commission has been assigned the task of establishing a water and land resources data collection center for Nebraska. Also, in 1969 the Nebraska Legislature established a special Snagging and Clearing Fund to be administered by the Commission for allocating limited appropriations to cities, counties or other subdivisions of government to aid projects to clear watercourses.

The Commission is now composed of fourteen members including the Dean or Director of the Conservation and Survey Division of the University of Nebraska; the Dean of the College of Agriculture and Home Economics; the Director of the State Agricultural Extension Service; the Director of Water Resources; three members appointed by the Governor, including one representing irrigation interests, one representing chambers of commerce and one representing municipal and individual users; one soil

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<sup>2/</sup> See generally, NEB. REV. STAT., section 2-1503 et seq. (Reissue 1970); NEBRASKA BLUE BOOK (1968) pp. 522-524.

and water conservation district supervisor or past district supervisor from each of the four statutorily established divisions; one member of the Nebraska State Irrigation Association; and one director or former director of a watershed conservancy district, watershed district or watershed planning board.

An Advisory Committee was established by the Legislature in 1963 to work with the Commission in coordinating and planning programs and projects affecting water resources in the State. The Director of Health, the State Engineer and the Secretary of the Game and Parks Commission or their designated representatives are members of this Committee. In addition to these three advisors the Commission may also invite the United States Secretaries of Agriculture, Defense and the Interior and the Governor to each appoint one person to serve as advisors.

In addition to the Advisory Committee there are also two other committees which were established to review work on the Nebraska Water Plan. These are: (1) the Technical Advisory Committee (which provides technical guidance, information on federal and State laws, regulations and policies, and coordinated inter-agency participation) consists of representatives of: the U.S. Departments of Agriculture, Defense, and Interior, the Nebraska State Departments of Economic Development, Health, Roads, Water Resources, and the Game and Parks Commission; the University of Nebraska's Conservation and Survey Division; the Agricultural Reclamation Association; the Office of the Governor; and the Commission itself; and (2) the Special Representatives Committee, which considers Nebraska Water Plan materials as they relate to the policies and programs of the organizations represented; it also disseminates information to the membership of those organizations; it consists of representatives of Nebraska's League of Municipalities, League of Women Voters, Reclamation Association, State Irrigation Association, Association of Commerce and Industry, Association of Soil and Water Conservation Districts, Farm Bureau Federation, Farmer's Union, State Grange, Petroleum Council, Press Association, Rural Electric Association, Water Works Association, Power Industries Committee, Association of County Officials, and Well Drillers Association. From time to time special work groups are also established to handle specific projects.

Heading the staff is an Executive Secretary who is appointed by the Commission to plan, administer and coordinate business activities.

The office is comprised of three divisions: (1) the Planning Division, which is in charge of development of the Nebraska Water Plan; (2) the Operations Division, which is in charge of flood plain management, aid to local districts, watershed planning, and general office coordination; and (3) the Legal Division, which acts in a general advisory capacity to the other divisions, the Executive Secretary and the Commission, and has responsibility for selected items of the Nebraska Water Plan.

The Commission carries on numerous activities in the performance of its duties. Among these are the following duties and powers:

(1) To assist, as may be appropriate, the supervisors or directors of any subdivision of government with responsibilities in the area of natural resources in the carrying out of their programs;

(2) To keep the supervisors or directors of each such subdivision informed of the activities and experiences of other subdivisions, to coordinate the exchange of advice and experience, and to foster cooperation between them;

(3) To secure the cooperation and assistance of the United States and any of its agencies, and other State agencies, in the work of such subdivisions;

(4) To disseminate information concerning the activities and programs of such subdivisions throughout the State;

(5) To assist, encourage and coordinate the programs of watershed organizations;

(6) To plan, develop and encourage the implementing of a comprehensive Nebraska Water Plan for resource development, conservation and utilization of the soil and water resources of the State in cooperation with other local, state and federal agencies and organizations;

(7) To help local governmental organizations secure, plan and develop information on flood plains for the creation of regulations and ordinances on the use of the State's flood plains;

(8) To hold hearings on all watershed or flood control programs developed by responsible subdivisions of Nebraska government;

(9) To establish the number and the boundaries of natural resources districts;

(10) To initiate a comprehensive program of flood plain zoning along all of the watercourses and drainways in the State; and

(11) To allocate funds to local organizations to facilitate the acquisition of real property and easements needed to permit the installation of upstream flood controls or watershed protection and flood prevention structures.

Department of Health<sup>3/</sup>

The original Department of Health was established in 1891 by enactment of the Board of Health Law. That Board was composed of the Governor,

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<sup>3/</sup> See generally, NEB. REV. STAT., section 81-101 and sections 71-2601 to 71-2615 (Reissue 1966) as amended in REV. STAT. SUPP. (1969); NEBRASKA BLUE BOOK (1968) pp. 378-398.

the Attorney General, and the Superintendent of Public Instruction.

The present Department of Health is governed by the State Board of Health created in 1953. The Board consists of the Governor and twelve members appointed by the Governor to staggered terms of three years. The Governor is a member with the privilege of voting only in cases of a tie vote of the Board. Two members selected must be medical doctors, one each from the dental, optometric, veterinary medical, pharmaceutical, nursing, osteopathic, podiatry, and civil engineering professions, and two representing the lay public. Commencing on August 27, 1971, the Board membership will increase to fourteen members with the addition of one member from the chiropractic profession and one member from the physical therapy profession. The current civil engineering profession member will also be changed to a professional engineering member.

The Board appoints a Director of Health who serves as secretary of the Board and as the chief executive officer of the Department who administers the affairs of the Department.

The Department of Health has general supervision over matters of public health and sanitation. Major responsibilities of the Department include the maintenance of vital statistics; State health laboratory services; health education programs; communicable disease and tuberculosis control; dental health; maternal and child health; emergency health services; establishing standards for the construction and maintenance of hospitals, nursing homes, and related medical facilities, and licensing the same; examination and licensing of members of the various health professions; public health nursing; and environmental sanitation programs. The Board of Health also maintains a continuing study of the health needs of the State.

#### Department of Environmental Control<sup>4/</sup>

The Department of Environmental Control and the Environmental Control Council were established in 1971 by the Environmental Protection Act, effective July 1, 1971. The basic purpose of the Act is to conserve, protect and improve the quality of water and to achieve and maintain a degree of purity in the atmosphere and on the land to allow humans, plants and animals indigenous to this State to flourish.

The Environmental Control Council is composed of sixteen members appointed by the Governor with the advice and consent of the Legislature; one each representing the food products manufacturing industry, the agricultural processing industry, the automotive or petroleum industry, the chemical industry, heavy industry, the power generating industry, the livestock industry, conservation, crop production, labor, county government, the public at large, a physician knowledgeable in health

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<sup>4/</sup> See generally, L.B. 939, 82nd Nebraska Legislature (1st Session), 1971.

aspects of air, land and water pollution, and a professional engineer experienced in the control of air and water pollution and solid wastes; and two representing municipal government. The Council is to submit names to the Governor for appointment of a director of the Department and jointly with the director is to issue all necessary rules and regulations.

The Department of Environmental Control replaces the Water Pollution Control Council and the Air Pollution Control Council. The Department has general supervision over the prevention, abatement and control of all water, land and air pollution. More specific responsibilities of the Department are to (1) enforce all rules and regulations adopted jointly by the Council and the director; (2) develop comprehensive programs; (3) cooperate with other state and federal agencies; (4) administer grants and loans from the federal government and other sources; (5) conduct studies; (6) conduct educational programs; (7) assist in the adoption by the Council and the director of air, water and land pollution control standards; (8) issue, modify or revoke orders;<sup>5/</sup> (9) administer state grants; (10) hold hearings; (11) require submission of plans and specifications relative to construction of disposal systems; (12) issue permits; (13) require proper disposal systems; (14) set up bureaus within the Department; (15) require access to records as regards air contamination and water pollution; (16) obtain scientific services; (17) encourage voluntary cooperation, especially with local governmental units and individuals; (18) conduct consultations; (19) conduct inspections; (20) receive and initiate complaints; and (21) delegate enforcement to local governmental subdivisions.

#### Game and Parks Commission<sup>6/</sup>

In 1929 the Department of Agriculture was divested of its authority over game and fish and the University over parks when the Legislature established the Game, Forestation and Parks Commission. This Commission remained basically the same until 1967 when a State Forester was created and the responsibility for that area was removed from the Commission. The Commission became the Game and Parks Commission.

The Commission is composed of seven members, representing different areas of the State. The members are appointed to five year terms by the Governor with the approval of a majority of the Legislature. The statutes

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<sup>5/</sup> There is an ambiguity in the Environmental Protection Act, as originally passed, as both the Council and the Department are given the power to issue, modify, or revoke orders, but section 3(7) of the Act specifically provides that the Council cannot delegate this power to the Department.

<sup>6/</sup> See generally, NEB. REV. STAT., section 81-801 et seq. (Reissue 1966) as amended by REV. STAT. SUPP. (1969); Ch. 37, NEB. REV. STAT. (Reissue 1968) as amended by REV. STAT. SUPP. (1969); NEBRASKA BLUE BOOK (1968) pp. 501-506.

require that at least two members of the Commission be engaged in agriculture and reside on a farm or ranch and that not more than four members be affiliated with any one political party.

The Commission offices are operated under the control of a secretary appointed by the Commission. This secretary acts as the director and chief conservation officer with supervision and control of all activities and functions of the Commission.

The Commission has "sole charge of State parks, game and fish, recreation grounds, and all things pertaining thereto." To carry out this task the following powers and duties are provided by statute:

(1) Replenish and stock the State with game and the public and private waters with fish;

(2) Establish, maintain and operate hatcheries for game and fish necessary to fully supply the State;

(3) With the Governor's consent, purchase land to establish State parks, hatcheries, recreation grounds, game farms, game refuges and public shooting grounds;

(4) Survey the State for areas suitable for the purposes in (3) above and take action to conserve them;

(5) Enact regulations governing uses which may and may not be made of the areas either owned by, or under the control of, the Commission;

(6) Make agreements with states bordering on the Missouri River to provide for reciprocal recognition of licenses, permits and laws;

(7) Advertise and promote "Nebraskaland" with its scenic, historic and outdoor recreation values;

(8) Register motor boats and promote safety for persons and property and uniformity of laws in the use of boats; and

(9) Administer the land and water conservation fund making grants to political subdivisions from monies available through federal appropriation to the fund and from monies provided as state matching funds.

The Game and Parks Commission provides a number of Nebraskaland promotional publications including fishing and boating guides, small maps of some Nebraska lakes, a comprehensive outdoor recreation plan, and the NEBRASKAland Magazine.

Department of Economic Development<sup>7/</sup>

This Department was created in 1967 when the Legislature separated

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<sup>7/</sup> See generally, NEB. REV. STAT., section 81-1201 et seq. (Reissue 1966) as amended by REV. STAT. SUPP. (1969); NEBRASKA BLUE BOOK (1968) pp. 376-378.

it from the Department of Agriculture where it existed as the Division of Nebraska Resources.

Its statutorily established duties include planning, promoting and developing the State's economy; working for the fullest development of the human, natural and physical resources; stimulating the growth of commerce, agriculture, industry and job opportunities; and coordinating the efforts of private and governmental agencies engaged in similar activities in Nebraska.

The Department is composed of three separate divisions to carry out these assigned tasks. A Division of Community Affairs is assigned the task of creating attractive communities for citizens and investors. This includes conducting annual community improvement programs. Also, this Division is responsible for the administration of the federally sponsored Farmer's Home Administration's water and sewer planning program. A Division of Industrial Research and Information Services identifies the State's assets and liabilities as they relate to plant location criteria and developing new products and technologies. Lastly, a Division of Industrial Development aids existing industry and procures new industry.

The Department is headed by a Director and is supplemented by an eleven member advisory committee which serves in an advisory capacity to the Department Director. The Committee members are appointed by the Governor to four-year terms.

In addition to other outlined duties the Department administers the Nebraska Agricultural Products Research Program which has developed new, additional or improved uses for agricultural products.

A bimonthly bulletin entitled Nebraska on the March and a biennial Directory of the Nebraska Manufacturers are published by the Department. Brochures containing data on the State's resources are available on request.

#### State Office of Planning and Programming<sup>8/</sup>

The State Office of Planning and Programming, created by the 1969 Legislature, exists within the executive branch of the government. Originally a separate agency, it became a division of the Department of Administrative Services on July 1, 1971. The new Office is composed of the Governor, a Director of Planning appointed by the Governor, and any other employees appointed by the Director. The Governor may establish special or general advisory committees or councils to the Office and appoint members to them who may serve for stated times or at the Governor's direction.

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<sup>8/</sup> See generally, NEB. REV. STAT., section 84-131 et seq. (Supp. 1969) and L.B. 1025, 82nd Nebraska Legislature (1st Session), 1971.

The Governor is also authorized to appoint the Planning Director to serve as an ex officio, nonvoting member of any committee, commission, council or other organization of any state agency, department, institution or group interested in planning, programming or research.

The Office has been given the principal duty of planning the comprehensive development of the social, economic and physical resources of the State and coordinating the programs of the State and its subdivisions required to put such comprehensive development plans into effect. To aid in the compliance with these directives the Governor may require any of the State's departments, agencies or institutions to furnish the Office with information, personnel, equipment and services.

Other duties of the State Planning Office include:

(1) Formulation of long range development policies and plans which may include areas of outdoor recreation, water resources transportation and economic development;

(2) Preparation of special reports and furnishing of research results through publications, memoranda, briefings and expert testimony;

(3) Coordination and consolidation of the collections of data in existing data banks and the approval of establishing new, separate data banks;

(4) Coordination of the planning activities of all the State's departments, agencies and institutions and its political subdivisions;

(5) Participation in interstate planning;

(6) Application for and acceptance of advances, loans, grants and contributions from all sources, public or private; and

(7) Arrangement for professional or consultant services in planning.

#### University of Nebraska

#### Conservation and Survey Division<sup>9/</sup>

The Conservation and Survey Division was established by the Legislature in 1921 as a part of the University of Nebraska. By that act the Board of Regents was given authority to appoint a director to coordinate the work of the Division.

The Division was created to survey the State's soils, water and water power, geology, forests, road materials and industry. To carry out its

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<sup>9/</sup> See generally, NEB. REV. STAT., sections 85-163 thru 85-165 (Reissue 1966).

functions in these areas the Division was given the following enumerated duties: (1) survey and describe the natural resources in the State; (2) study the climate, physical features, geology and mineral resources in the State; (3) study and describe the operations, production and importance of leading industries; (4) investigate and report on the State's conservation problems; (5) study water-bearing formations and assist in the location of water supplies; (6) secure and preserve logs and physical data of wells drilled; (7) prepare and present publicity and educational materials on the State's resources, industries, institutions and development; (8) investigate and report misrepresented or fraudulent sales and offers for sale of foreign realty, oil, mineral and gas structures and leases or interest in them; and (9) provide an information Bureau on the State's resources, industries and development.

With the approval of the Board of Regents the Division may also enter into agreements with federal agencies necessary to carry on cooperative surveys and investigations. Presently, soil surveys are being conducted in cooperation with the U.S. Department of Agriculture, and the water surveys are being conducted in cooperation with the U.S. Geological Survey.

An Information Bureau Service is also a major activity of the Division. Staff members participate in their specialty through publication and consultation with individuals and public and private organizations. This Service, in addition to education leaflets, bulletins and displays, makes available to the public the knowledge gained from the University's research on Nebraska's resources.

#### Agricultural Experiment Stations<sup>10/</sup>

The Agricultural Experiment Station, in Nebraska as in many other states, was established under the authority of an act of the United States Congress in 1887. That act provided for the establishment of experiment facilities, under the authority of the several land grant colleges, to investigate and experiment with the principles and applications of agricultural science.

In 1903 the Nebraska Legislature further expanded this experiment program by establishing several regional experiment substations through the State. These substations were under the control and supervision of the Director of the Agricultural Experiment Station and the Board of Regents of the University of Nebraska.

In addition to the central station at Lincoln, the University today operates regional stations at North Platte, Clay Center, Concord and Scottsbluff, the latter having satellite stations at Alliance and Sidney. These regional stations are administered from the station at Lincoln.

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<sup>10/</sup> See generally, Act of March 2, 1887, Ch. 314, 24 Stat. 440; Act of February 24, 1925, Ch. 11, 43 Stat. 80; see also, NEB. REV. STAT., sections 35-145, 85-146 and 85-201 et seq. (Reissue 1966).

A field research laboratory is operated near Mead for the use of the scientists at Lincoln.

Operating under the federal act, the Nebraska Agricultural Experiment Station conducts research and experiments on the physiology of plants and animals, diseases of plants and animals and their remedies, chemical compositions and patterns of growth of useful plants, production systems for plants and animals, capacity of new plants for acclimation, soil fertility, soil conservation and management, water development and utilization, chemical control of pests, adaptation and value of grasses and forage plants, composition and digestibility of animal foods, marketing products, human nutrition, product processing, rural families and homes, and any other experiments bearing directly upon the agricultural industry and rural life.

Bulletins and reports of the activities and experiments conducted are published regularly and are provided to the public upon request, so far as possible.

#### Agricultural Extension Service<sup>11/</sup>

The Agricultural Extension Service was initiated by an act of the United States Congress in 1914, which act provided for a cooperative program between the U.S. Department of Agriculture and the several land grant colleges consisting of instruction and demonstration in agriculture and home economics to persons not attending land grant colleges.

The Agricultural Extension Service in Nebraska is a division of the University of Nebraska, Colleges of Agriculture and Home Economics and is headed by a director. It is operated today as a cooperative service partnership including the federal, state and county governments, each of which share in financing, planning and carrying out of extension education programs. These programs are intended to involve all members of the family. Thus, at least one-third of the programs involve 4-H Clubs and the work of young men and women.

In 1928 the United States Congress enacted further provisions for extension work. Along with increased financial support it was then directed that a large part of that support be used to provide county agents to disseminate the information through personal contact. Today's Agricultural Extension Service thus consists primarily of county agents, area extension specialists and state specialists.

Information provided through the program is obtained through research at the several State experiment stations, Federal U.S.D.A. laboratories, and observations by specialists in the field. It is disseminated through

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<sup>11/</sup> See generally, Act of May 8, 1914, Ch. 79, 38 Stat. 372; Act of May 22, 1928, Ch. 687, section 1, 45 Stat. 711. See also, NEB. REV. STAT., sections 85-150, 85-151 (Reissue 1966); NEB. REV. STAT., section 2-1601 et seq. (Reissue 1970).

farm and home visits, public meetings, study workshops, demonstrations, radio, newspapers, television, circulars and bulletins.

Local people work with the Extension Service of the University of Nebraska, College of Agriculture and Home Economics through a County Extension Board which cooperates in the employment of the county agents and serves as an advisory group in the development of the local county programs.

The Extension Service provides numerous bulletins and circulars many of which have special significance to the State's waters. Most Service publications are available in the local county Extension office, and those that are not may be obtained from the University of Nebraska, Colleges of Agriculture and Home Economics, Department of Information, Lincoln, Nebraska.

#### Water Resources Research Institute<sup>12/</sup>

The Water Resources Research Institute, associated with the University of Nebraska, was established in 1965 to administer funding provided by an act of the United States Congress. The Institute is funded entirely under the Federal Water Resources Research Program which provides for assistance to each participating state in establishing and carrying on the work of a competent and qualified water resources research institute at a land grant college or university or some other institution designated by an act of the state's legislature.

In Nebraska a director is appointed by the Board of Regents to manage the affairs of the Institute. The Director also cooperates with the comptroller of the University in receiving and accounting for all funds made available under the Federal Act.

The purpose of the Institute is to stimulate, sponsor, provide for and supplement research programs, investigations, and training of scientists in water and related resource areas. The establishing Act suggests that the broad scope of supported work include aspects of the hydrologic cycle, supply and demand for water, conservation and use of water, and economic, legal, social, engineering, recreational, biological, geographical and ecological water problems.

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<sup>12/</sup> See generally, 42 U.S.C. section 1961a et seq. (1966).

## CHAPTER 3. FEDERAL CONSTITUTIONAL LAW

### Introduction

In taking action on water resources the federal government derives its authority from the Constitution of the United States. To determine the actual extent of those powers the Constitution must be consulted. Although the Constitution does not specifically mention water resources, several basic constitutional clauses invest the federal government with power to act in this area.<sup>1/</sup> The commerce power,<sup>2/</sup> the power to manage federal lands (the property clause),<sup>3/</sup> the war power,<sup>4/</sup> the treaty power,<sup>5/</sup> and the general welfare power<sup>6/</sup> are the most significant sources of federal power over water resources.<sup>7/</sup> These powers are supplemented by

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<sup>1/</sup> "If the U.S. is regarded as an opponent by the Western states, it is a formidable one indeed. It has a number of powerful weapons at its command. Though some of them look disarmingly simple, many are flexible and sophisticated, suitable for use in a wide variety of situations.

"The federal government derives its authority from the Constitution of the United States. It has only such powers as are delegated to it by that instrument. But the founding fathers provided for a strong nation. Powers that permit the national government to take action on water resources or to regulate their use are found in the authority given by the Constitution to control commerce, to provide for the common defense, to enter into treaties, to control interstate relations, to manage federal property, and to provide for the general welfare of the country. Freedom to perform these functions without let or hindrance from the states is given by the supremacy clause."

Trelease, Water Rights of Various Levels of Government -- States' Rights vs. National Powers, 19 WYO. L. J. 189, 191 (1965) (hereinafter cited as Trelease, 19 WYO. L. J.).

<sup>2/</sup> U.S. CONST., Art. I, § 8.

<sup>3/</sup> U.S. CONST., Art. IV, § 3.

<sup>4/</sup> U.S. CONST., Art. I, § 8.

<sup>5/</sup> U.S. CONST., Art. II, § 2.

<sup>6/</sup> U.S. CONST., Art. I, § 8.

<sup>7/</sup> Trelease, 19 WYO. L. J., supra note 1, at 191; see generally, Morreale, Federal-State Rights and Relations in 2 WATERS AND WATER RIGHTS 1 (R. Clark ed. 1967) (hereinafter cited as Morreale in Clark).

the supremacy clause<sup>8/</sup> which permits the federal government to perform these functions without hindrance from the states.

The extent of the federal constitutionally based power over water resources has led some authorities to conclude that federal congressional authority to deal with water resources is "no longer an issue" and that "future debate will revolve instead around the extent to which the federal government should exercise its powers."<sup>9/</sup> To better understand these conclusions the constitutional clauses are here briefly examined.

## The Commerce Clause

### The Navigation Power

The Commerce Clause is the basis for the most important and extensively used federal power--the navigation power. "The power to control navigable waters is by far the most important base upon which federal water development and control is rested, in the sense of the overall picture of what has been done by government in the water field."<sup>10/</sup>

The navigation power was established as an element of the interstate commerce power in the case of Gibbons v. Ogden<sup>11/</sup> where Chief Justice Marshall wrote: "All America understands and has uniformly understood, the word 'commerce' to comprehend navigation." This constitutional power has undergone substantial definition since the Gibbons case. In The Daniel Ball<sup>12/</sup> the Court ruled that "navigable" waterways were those which were "navigable in fact." The Court has attempted to provide a clearer definition for "navigable" in the leading case of United States v. Appalachian Power Co., 311 U.S. 377 (1940) (New River Case) in which the Court concluded that a stream is navigable for purpose of exercising the navigation power if it is navigable in fact or can reasonably be made so. The Court appeared to leave the decision of "navigability" largely up to the discretion of Congress as part of its function to assert navigability as an incident to its authorization or completion of federal water projects.

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<sup>8/</sup> U.S. CONST., Art. VI.

<sup>9/</sup> Morreale in Clark, supra note 7, at 108, see generally, Goldberg, Interposition -- Wild West Water Style, 17 STAN. L. REV. 1 (1964) (hereinafter cited as Goldberg).

<sup>10/</sup> Trelease, Federal Limitations on State Water Law, 10 BUFF. L. REV. 399, 410 (1961) (hereinafter cited as Trelease, 10 BUFF. L. REV.).

<sup>11/</sup> Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 84 (1824).

<sup>12/</sup> The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870).

Control has also been asserted over nonnavigable tributaries of navigable streams. In Oklahoma v. Guy F. Atkinson Co., 313 U.S. 508 (1941), Oklahoma attempted to prevent construction of a federal project on the Red River on the reasoning that the river was nonnavigable within Oklahoma. The Court rejected Oklahoma's argument. Although the precise ground for the decision was unclear,<sup>13/</sup> Mr. Justice Douglas writing for the Court argued that "the power of flood control extends to the tributaries of navigable streams."<sup>14/</sup> The federal control over tributaries of navigable streams was in part confirmed when in 1960 the Court decided United States v. Grand River Dam Authority, 363 U.S. 229 (1960). In that case the Grand River, a nonnavigable tributary of the navigable Arkansas River, had been included in a comprehensive plan for the Arkansas basin.<sup>15/</sup> The court held that Congress could permit regulation of nonnavigable streams under the commerce power: "There is no constitutional reason why Congress cannot, under the commerce power, treat the watershed as a key to flood control on navigable streams and their tributaries."<sup>16/</sup>

The purposes for which the navigation power can be exercised must result in at least incidental benefit to navigation although nonnavigational purposes may also be advanced.<sup>17/</sup>

#### The Navigation Servitude<sup>18/</sup>

In the exercise of the navigation power the United States can take

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<sup>13/</sup> Morreale, Federal Power in Western Waters: The Navigation Power and the Rule of No Compensation, 3 NATURAL RES. J. 1, 6 (1963) (hereinafter cited as Morreale, 3 NATURAL RES. J.).

<sup>14/</sup> 313 U.S. 508, 525 (1941).

<sup>15/</sup> Morreale, 3 NATURAL RES. J., supra note 13, at 6-7.

<sup>16/</sup> U.S. v. Grand River Dam Authority, 363 U.S. 229, 232 (1960) (citing to Oklahoma v. Guy F. Atkinson Co.). It has been argued that the Grand River Dam Authority case limits exercise of the navigation power in two respects: (1) the navigable capacity of a navigable stream must be in issue; and (2) Congress must then expressly exercise its power over the nonnavigable tributary.

<sup>17/</sup> U.S. v. Grand River Dam Authority, 363 U.S. 229 (1960); United States v. Twin City Power Co., 350 U.S. 222 (1956); Oklahoma v. Guy F. Atkinson Co., 313 U.S. 508 (1941); Arizona v. California, 283 U.S. 423 (1931).

<sup>18/</sup> Also referred to as the "superior navigation easement" or the "dominant servitude"; see, respectively, U.S. v. Grand River Dam Authority, 363 U.S. 229, 231 (1960) and F.P.C. v. Niagara Mohawk Power Corp., 347 U.S. 239, 249 (1954).

state-created private water rights in the waters of a navigable stream without having to pay compensation.<sup>19/</sup> The navigation servitude is based on the proposition that all private rights the states attempt to create in "navigable waters" are never vested but are always subject to the navigation servitude and void as against the United States. Nevertheless, the fact that nonfederal water rights are subordinate to the right of navigation does not fully explain why the former should go uncompensated.<sup>20/</sup>

It is incorrect to speak of the navigation servitude as being co-extensive with the navigation power.<sup>21/</sup> The servitude applies only to certain private property rights. It extends to the ordinary high water mark of navigable streams and artificial means may be used to stabilize it at that level.<sup>22/</sup> Private property within that boundary may be taken without compensation if the United States exercises the navigation power.<sup>23/</sup>

The navigation servitude applies not only to state-created rights in navigable waterways,<sup>24/</sup> but to water rights in nonnavigable streams as well if such rights are taken as an incident to the promotion of navigation.<sup>25/</sup>

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<sup>19/</sup> Morreale, Federal-State Conflicts Over Western Waters -- A Decade of Attempted Clarifying Legislation, 20 RUTGERS L. REV. 423, 430 (1966) (hereinafter cited as Morreale, RUTGERS L. REV.).

<sup>20/</sup> It is unclear why the navigation servitude should permit taking without compensation when the Fifth Amendment seems to embody the constitutional decision that even where the private rights are subordinate to the public they are nevertheless compensable. Morreale, 3 NATURAL RES. J., supra note 13, at 22-23.

<sup>21/</sup> Id. at 20.

<sup>22/</sup> Id. at 62. See also, United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950); U.S. v. Chicago, Milwaukee, St. Paul & Pac. R. Co., 312 U.S. 592 (1941).

<sup>23/</sup> Morreale, 3 NATURAL RES. J., supra note 13, at 62-63; private property taken by the United States could include: "title to the stream bed, title to structures within the stream, access to the stream, title to abutting land up to the ordinary high water mark and rights to the stream flow." Id.

<sup>24/</sup> Comment, Federal-State Conflicts Over the Control of Western Waters, 60 COLUM. L. REV. 967, 979 (1960); see e.g., U.S. v. Twin City Power Co., 350 U.S. 222 (1956); U.S. v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913); F.P.C. v. Niagara Mohawk Power Co., 347 U.S. 239, 248-249 (1954) (Dictum).

<sup>25/</sup> U.S. v. Grand River Dam Authority, 363 U.S. 229 (1960) (usufructuary power rights taken); U.S. v. Willow River Power Co., 324 U.S. 499 (1945) (same).

The servitude also extends to abutting uplands to the degree that their value is related to their location near a navigable stream. However, where private property abutting on nonnavigable streams is injured through exercise of the navigation power only on a navigable stream, it is compensable.<sup>26/</sup> If the United States exercises the navigation power over nonnavigable tributaries in order to improve navigability of the mainstream, any resulting losses are not mandatorily compensable. Of course, Congress may compensate the property owner even though it is not necessary to do so under the navigation servitude doctrine.

As stated in the Introduction to Chapter 3, the concern of the states is the extent to which the federal government should exercise its available authority.

### The Property Clause and the Proprietary Power

The constitutional basis for federal control of waters found or originating on federal public lands in the western states is the Property Clause, Article IV, section 3, clause 2 of the Constitution:

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

A supplement to the power granted to Congress by the Property Clause is found in the Supremacy Clause of Article VI which provides for the federal power to override that of the states:

This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

The so-called proprietary power is based on these constitutional clauses. This power is not currently as significant as the navigation power, and its limits have not been fully defined. The extent of the federal proprietary claims as to water rights is currently one of the

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<sup>26/</sup> Morreale, 3 NATURAL RES. J., supra note 13, at 63; see United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950); U.S. v. Cress, 243 U.S. 316 (1917).

most volatile issues in federal-state relations.<sup>27/</sup> The issue concerns federal authority over water arising from tracts of land which are owned by the United States as part of the public domain or which are acquired for the performance of governmental functions. There are a number of important Supreme Court cases concerning the extent of the federal proprietary powers. While other litigation continues and the full impact of these decisions has not yet been felt, several conclusions regarding the extent of federal proprietary powers can be drawn. It is clear that the United States has been able to reserve large and indeterminate quantities of unappropriated water based upon its continued ownership of the non-navigable waters on public lands, except where that ownership has been divested by actual and valid appropriations under state law.<sup>28/</sup> A recent United States Supreme Court decision will likely alter this practice, having held that the McCarron Amendment<sup>29/</sup> gives the state courts jurisdiction over the United States to try all of its rights and claims to the use of water, including the "reserved waters."<sup>30/</sup>

In order to prevent appropriation of waters, the United States may withdraw public lands from entry. When this is done, appropriations made prior to the date of withdrawal are "vested rights" and are unaffected while appropriations subsequent to the date of withdrawal are not valid as against the United States.<sup>31/</sup>

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<sup>27/</sup> Morreale, RUTGERS L. REV., supra note 19, at 431.

<sup>28/</sup> Id.

<sup>29/</sup> 43 U.S.C. 666.

<sup>30/</sup> U.S. v. Dist. Ct. of Eagle Co. Colo., CCH Sup. Ct. Bull. B1405 (1970-71).

<sup>31/</sup> Id.

## The War Power

Under Article I, section 8 of the United States Constitution, Congress has the power to declare war and to levy taxes and appropriate money to provide for the common defense. Historically this power has played "an insignificant part in federal dealings with water resources."<sup>32/</sup> Nevertheless, under the terms of the 1916 National Defense Act, Congress authorized the President to designate those sites on rivers and public lands which he deemed best suited for the generation of power for production of nitrates and other useful products. The construction of Wilson Dam was authorized under this Act and when hydroelectric power was later sold in peacetime in the Tennessee Valley, the authorization for the dams was challenged. In the case of Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936), the Supreme Court took judicial notice of the international situation in 1916 and concluded that Wilson Dam and power plant were "adapted to the purposes of national defense" and that their continuing maintenance was justifiable under the purpose of national defense.<sup>33/</sup>

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<sup>32/</sup> Morreale in Clark, supra note 7, at 85.

<sup>33/</sup> Id.; at least one federal court's decision indicates the potential impact of the war power on water resources. In Nevada v. United States (The Hawthorne Case), 165 F. Supp. 600 (Nev. 1958), the question involved was whether the federal government must first secure permission of and from a state agency before making use of water from the Hawthorne Naval Ammunition Depot. The court placed heavy reliance on the Supremacy Clause and on case law but added that Nevada's attempt to interfere with the armed forces raised the "national defense aspect" of the case. Relying heavily on United States v. Public Utilities Commission of California, 141 F. Supp. 168 (N.D. Cal. 1956), affirmed 355 U.S. 534 (1953), the Nevada court quoted with approval the following language:

It is well settled that a state statute which places an unreasonable burden upon the discharge of a Federal function is unconstitutional.

(The) very subordination of the military to the civil power--fundamental in every true democracy--itself imposes a grave responsibility upon civil courts. We dare not, in good conscience and under the Constitution of the United States, deny relief to such a suitor when it proves to our satisfaction that such denial would hamper the national defense.

Federal resource development under the war power has not yet contravened state water law or rights.<sup>34/</sup> If such a conflict should occur, the federal legislation would be supreme although destruction of private, state-created property rights would be compensable.<sup>35/</sup> While compensability would minimize disruptive effects of federal taking, there is a large potential scope of federal activity under the war power and the "potential impact of the war power on state planning obviously is great."<sup>36/</sup> Once Congress has decided that a project is necessary for national defense or the courts have been convinced through evidence that the project is so related, state objections can not stand in the way of the project.

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Such proof the present plaintiff has produced in abundance, We do not believe that a federal court, after listening to such testimony and dispassionately reviewing the record, as we have done, can or should stay its hand when legitimate relief is requested by the armed forces of the nation.

141 F. Supp. 168, 190 (N.D. Cal. 1956), quoted in 165 F. Supp. 600, 610 (Nev. 1958).

<sup>34/</sup> Trelease, 10 BUFF. L. REV., supra note 10, at 414.

<sup>35/</sup> Morreale in Clark, supra note 7, at 85; see also, International Paper Co. v. United States, 282 U.S. 399 (1931), which required that the United States pay compensation where a private right had been taken in the exercise of the war power.

<sup>36/</sup> Morreale in Clark, supra note 7, at 85; Morreale, RUTGERS L. REV., supra note 19, at 429.

## The Treaty Power

Under the Constitution, the President with the advice and consent of the Senate may make treaties which are then the supreme law of the land.<sup>37/</sup> This treaty power extends to international waters and has been exercised in apportioning a given quantity of water from international streams<sup>38/</sup> and in maintaining an international lake at a certain level.<sup>39/</sup>

Because treaties are the supreme law of the land, they impose limitations on any state action which might affect international waters. State interference with these treaty obligations can be enjoined. When a treaty is in question:

Any state water law that appeared to authorize a use proscribed by the treaty would have to yield, and such a use could not be initiated, or could not be allowed to continue, though the law stood on the books as applicable to other waters.<sup>40/</sup>

Not only can states be enjoined from contravening the terms of treaties, but the treaty power can probably be used as an additional source of authority to build federal projects "on international waterways or to acquire easements or construct and operate dam and reservoir

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<sup>37/</sup> U.S. CONST., art. II, § 2; U.S. CONST., art. IV; see generally, T. WITMER, DOCUMENTS ON THE USE AND CONTROL OF THE WATERS OF INTER-STATE AND INTERNATIONAL STREAMS -- COMPACTS, TREATIES, AND ADJUDICATIONS, H.R. Doc. No. 319, 90th Cong., 2d Sess. (1968). International treaties affecting water rights between the United States and the Government of Canada and between the United States and Mexico include the following treaties: Boundary Waters Treaty, 1909 (36 Stat. 2448, T.S. 548)(between Great Britain and United States); Lake of the Woods Convention, 1924 (44 Stat. 2108)(between Great Britain and the United States); Rainy Lake Convention, 1938 (54 Stat. 1800 T.S. 961)(between Great Britain and the United States); Niagara River Water Diversion Treaty, 1950 (1 U.S. Treaties and Other International Acts 695)(between United States and Canada); Columbia River Basin Cooperative Development Treaty, 1961 (TIAS 5638, 15 U.S.T. 1555)(between United States and Canada); Rio Grande Convention, 1906 (34 Stat. 2953, T.S. 455)(between United States and Mexico); Rio Grande Rectification Convention, 1933 (48 Stat. 1621, T.S. 864)(between United States and Mexico); Rio Grande, Colorado, and Tiajuana Treaty, 1944 (59 Stat. 1219, T.S. 944)(between United States and Mexico.)

<sup>38/</sup> See generally, Morreale in Clark, supra note 7, at 86; Colorado River Treaty with Mexico, 1944 (59 Stat. 1219).

<sup>39/</sup> See Sanitary Dist. of Chicago v. United States, 266 U.S. 405 (1925).

<sup>40/</sup> Trelease, 10 BUFF. L. REV., supra note 10, at 414.

systems."<sup>41/</sup> While the Supreme Court has not specifically ruled on the use of the treaty power as justification for such projects, lower federal courts have indicated the United States possesses such power.<sup>42/</sup>

### The General Welfare Power

The general welfare power, also referred to as the spending power, is based upon Article I, section 8 of the Constitution which gives Congress the power to levy taxes "to pay the Debts and Provide for the common Defense and general welfare of the United States."

While this power is relatively unexplored, there are indications that it is the strongest of all. In United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950), the Supreme Court expressed its opinion that the general welfare power was at least as strong as the navigation power:

Thus the power of Congress to promote the general welfare through large-scale projects for reclamation, irrigation or other internal improvements is now as clear and ample as its power to accomplish the same results through resort to strained interpretation of the power over navigation.<sup>43/</sup>

Based on this broad statement of congressional power it may be concluded that the general welfare power offers a "basis for vast federal activity in developing and allocating the nation's water resources . . . whether such action would conform to or displace state law is clearly a matter of congressional choice rather than constitutional mandate."<sup>44/</sup>

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<sup>41/</sup> Morreale in Clark, supra note 7, at 87; Trelease, 10 BUFF. L. REV., supra note 10, at 415.

<sup>42/</sup> See United States v. Wheeler Township, 66 F.2d 977 (8th Cir. 1933) (where control of "'existing works and dams' or . . . additional construction" in pursuit of treaty obligations was implicitly endorsed) (Id. at 979); and Hudspeth County Conservation and Reclamation Dist. No. 1 v. Robbins, 213 F.2d 425 (5th Cir. 1954), cert. den. 348 U.S. 833 (1954) (where the United States Court of Appeals for the Fifth Circuit wrote: "The authority of the United States to construct, maintain and operate the dams, reservoirs and irrigation facilities is unquestioned. One of the purposes is to fulfil a treaty obligation to the Republic of Mexico . . . .") (Id. at 429).

<sup>43/</sup> United States v. Gerlach Live Stock Co., 339 U.S. 725, 738 (1950).

<sup>44/</sup> Morreale, RUTGERS L. REV., supra note 19, at 429.

## Jurisdiction of the United States Supreme Court and Sovereign Immunity of the United States

The important power of final adjudication over interstate controversies resides in the United States Supreme Court. Where states cannot agree upon such matters as apportionment of interstate streams they must capulize their dispute and plead it before the Court. While the Supreme Court exercises no federal jurisdiction over water, the law of interstate controversies acts as an important limitation upon the internal law of the states<sup>45/</sup> because of the doctrine of sovereign immunity which permits the United States to stand immune from suit unless it expressly consents to be sued. The states, therefore, cannot sue the United States without its consent and hence cannot force the United States to adjudicate its interests.

The effect of this sovereign immunity is that where the United States is an indispensable party to the lawsuit and has not consented to be sued, no lawsuit will be allowed at all.<sup>46/</sup> The reasoning of the Court is that since no final determination can be made of the United States' rights then no final determination can be made of states' rights because the latter may be subordinate and dependent upon federal rights. This inability on the part of the states to make the United States a party to a lawsuit means that the United States may "operate free from the claims of the states in certain instances."<sup>47/</sup>

### Limitations Upon the Federal Government

The states can argue that federal powers are limited by the tenth amendment to the United States Constitution which reserves to the states

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<sup>45/</sup> See generally, Trelease, 10 BUFF. L. REV., supra note 10, at 416-417; see also, Connecticut v. Massachusetts, 282 U.S. 660 (1931); Kansas v. Colorado, 206 U.S. 46 (1907); Hinderlider v. LaPlata and Cherry Creek Ditch Co., 304 U.S. 92 (1938); Arizona v. California, 298 U.S. 558 (1936); Nebraska v. Wyoming, 325 U.S. 589 (1945).

<sup>46/</sup> See e.g., Arizona v. California, 298 U.S. 558 (1936).

<sup>47/</sup> Trelease, 10 BUFF. L. REV., supra note 10, at 416.

all powers not specifically delegated to the federal government.<sup>48/</sup>

As indicated earlier, however, federal power in water rights does not depend upon one single clause of the Constitution dealing specifically with water, but upon a number of constitutional clauses which have been construed to authorize federal action in the field of water resources. It can be said that the extent of federal constitutional powers far overshadows the constitutional authority of the states. One authority has contended that, despite the tenth amendment:

The national powers granted by the property clause, the commerce clause, and the general welfare clause are so blended that the national government, were it so disposed, could proceed to develop natural resources without regard to the desires of the states.<sup>49/</sup>

Yet this is a strict constitutional view. Constitutionally the federal government may have this authority, but this is not to say that the states cannot move ahead in the area of water resources development. Indeed, between the federal and the state governments there exists "a vast legal no-man's-land . . . with respect to water rights."<sup>50/</sup>

Taken as a whole, the states have not exploited fully their opportunities for water resources development. The result has been that in the last quarter of a century the states have been overshadowed by the federal government in water resources development.<sup>51/</sup> Yet since 1950, at least five federally created commissions have studied the various

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<sup>48/</sup> The states have their own spheres of jurisdiction over water rights. A state may regulate water for the general welfare and determine the allocation and distribution of surface and underground waters within the state. The states are permitted to adopt whatever system of water law they choose, but they are limited in that they may not conflict with the federal government's powers over navigation. Engelbert, Federalism and Water Resources Development, 22 LAW & CONTEMP. PROB. 326, 327 (1957)(hereinafter cited as Engelbert). See also, Trelease, 19 WYO. L. J., supra note 1, at 194: "The powers of the states in the field of water resources stem not from express delegations in state constitutions, but from the general residuum of sovereignty and imperium left to the states after the grant of specific powers to the United States. These include the power to create property rights and the police power to regulate property rights and the conduct of citizens in the public interest."

<sup>49/</sup> Goldberg, supra note 9, at 35-36.

<sup>50/</sup> Engelbert, supra note 46.

<sup>51/</sup> Id. at 330.

aspects of federal-state relationships in water resources development.<sup>52/</sup> Without exception all of these commissions concluded that the role of the states in water resources development should be strengthened.<sup>53/</sup>

To date, Congress has not chosen to exert to the limit its constitutional powers; in fact, the federal government has often chosen to defer to state law. Congress has often chosen to waive federal powers rather than maintain that federal constitutional powers have pre-empted the field of water resources. In many national laws Congress has recognized and used state water laws. In several instances Congress has used less than all of its powers and has recognized state-created rights even though it was under no obligation to do so.<sup>54/</sup>

Cooperation, an assumption of greater responsibilities by the states, and, when there is unavoidable federal-state clash, an emphasis upon the policy reasons supporting the position of the state are the essential elements towards improved federal-state relations.<sup>55/</sup>

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<sup>52/</sup> Id. at 344. The President's Water Resources Policy Commission (1950), the Missouri Basin Survey Commission (1953), the Commission on Organization of the Executive Branch of the Government (1955), the Commission on Intergovernmental Relations (1955), and the Presidential Advisory Committee on Water Resources Policy (1955).  
Id.

<sup>53/</sup> Id. at 344.

<sup>54/</sup> See Trelease, 19 WYO. L. J., supra note 1, at 196.

<sup>55/</sup> Id. at 190.

## CHAPTER 4. FEDERAL AGENCIES\*

### Introduction

There are a number of federal agencies administering programs in Nebraska. The three most important agencies operating in the State with respect to water resources are the Department of Interior, Department of Agriculture, and the U.S. Army Corps of Engineers. Following are discussions of these and other agencies and their functions within the Nebraska region.

### Department of Interior

#### The Bureau of Reclamation

The Bureau's initial purpose was to plan and construct irrigation works. This purpose has been expanded to include activities in power generation, and municipal and industrial uses. The Bureau also works with the Corps of Engineers in developing programs for navigation and flood control.

Various federal acts, beginning with the 1902 Reclamation Act, have assigned the Bureau the following powers: (1) to provide for project water for land tracts of 160 irrigable acres and more if the landowner agrees to dispose of the excess land within a reasonable time; (2) to sell reclamation project water to nonproject users and to permit them to carry or store water in project works; (3) to use project revenues for the reduction of project costs which would otherwise be paid by the irrigation water users; (4) to sell electricity in connection with reclamation projects (with preference to municipalities or public corporations); (5) to provide and contract for water for municipal purposes; (6) to sell power and use of irrigation water on multipurpose projects constructed by the Corps of Engineers.

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\* The following sources were relied on in writing Chapter 4:

1. Missouri Basin Inter-Agency Committee, Laws Appendix, Federal Water Laws and Policies and Relation to the States, final draft (July 1969).
2. Missouri Basin Inter-Agency Committee's Annual Programming Report, fiscal years 1968-1970 (May 1968).
3. Illinois Technical Advisory Committee on Water Resources, Water for Illinois--A Plan for Action (March 1967).
4. Walton, Summary of Information on Federal Agencies and Responsibilities in Water and Related Land Resources Field in Minnesota, Information Circular 99 of the Minnesota Water Resources Research Center (1969).

In the Missouri River Basin the Bureau of Reclamation has acted pursuant to at least four special authorizations. The first of these was the Fort Peck Project of May, 1938, which permitted the Secretary of the Interior to market and build facilities to transmit energy from the dam which was constructed by the Corps of Engineers. The next special authorization was the Water Conservation and Utilization Act of 1939 under which the Department of Interior and the Department of Agriculture operated together to relieve drouth through construction of reclamation projects. A third special authorization for the Missouri River Basin, under the Flood Control Act of December 22, 1944, provided for the development of the Basin's water resources with the Bureau of Reclamation assigned the task of constructing upstream and distribution facilities where irrigation, consumptive use and power generation were the chief functions. The final authorization, under Public Law 875, authorizes the Bureau of Reclamation to restore flood-damaged public facilities when directed to do so by the Office of Emergency Planning.

The reclamation laws permit the Secretary of the Interior to withdraw from public entry public lands required for irrigation. Once the Secretary has made the decision to withdraw land, it is difficult to review.

Current work done by the Bureau includes the 242-mile-long Fort Thompson-Grand Island 345 KV transmission line in South Dakota and Nebraska. In addition, the Bureau has undertaken investigations and reconnaissance studies in Nebraska.

### Geological Survey

This is an important agency in the survey and measurement of the nation's water resources. Since 1879 the Geological Survey has been engaged in mapping and cataloging natural resources. Under the Act of August 18, 1894, the survey has had the task of gauging streams and determining the water supply of the United States, including the investigation of underground currents and artesian wells in arid and semi-arid sections. The Geological Survey in Nebraska has the role of providing water resources information and topographic maps in cooperation with those Interior bureaus having management or development responsibilities. The Geological Survey also operates streamflow measuring stations and sampling sites to determine chemical and sediment quality.

### Bureau of Sport Fisheries and Wildlife

The Bureau is charged with: (1) assisting states in the development of projects for the restoration and management of fish and wildlife resources; (2) operating national fish and wildlife refuges; (3) planning and approving programs for the maintenance or improvement of fish and wildlife resources on multipurpose water projects undertaken by other public or private agencies.

The Bureau is charged also with investigation of damages caused to fish and wildlife resources by water projects, and to recommend means and measures to reduce such damage, and to improve and develop fish and wildlife resources.

#### Office of Water Resources Research

This agency supports water resources research at the land grant universities which have been designated state water resources research centers or institutes. The University of Nebraska is one of these. The purpose of the program is to provide financial support for research into any aspects of water problems relating to the mission of the Department of the Interior which are not otherwise being studied.

#### Bureau of Land Management

The Bureau is responsible for the administration of public lands and the water rights appurtenant to them. Important concerns of the Bureau include promoting water conservation, providing for rights-of-way over public lands for water facilities, and withdrawing public lands for public water reserves to benefit range land users.

Current work includes continuing studies and development of watersheds encompassing public lands within the Missouri River Basin, and where desirable, in collaboration with agencies of the Departments of Agriculture and Interior. The Bureau also reports on federal water project proposals affecting the public lands.

#### National Park Service

The Service administers national parks, monuments, historic sites and recreation areas. Sufficient water is reserved to carry out the purposes for which these lands were set aside. One of the functions of the Service is to review proposals by the Corps of Engineers in order to determine what effects these projects would have upon the National Park System, Registry of National Landmarks, and historical, archeological or other scientific values present in the project area. In Nebraska the Service has special authorization to administer the Homestead National Monument of America, Scottsbluff National Monument, and Agate Fossil Beds National Monument.

#### Bureau of Outdoor Recreation

This Bureau was created by administrative order of the Secretary of the Interior and is charged with coordination and development of federal and state programs for outdoor recreation, which includes water-based sports. The Bureau has been authorized to formulate a nationwide outdoor recreation plan and to assist federal and nonfederal agencies in the development of outdoor recreation resources. The Nebraska Game and Parks Commission has formulated a recreation plan

which is the Nebraska input to the national plan. In addition to planning, the Bureau has been given some funds to assist state planning and development of outdoor recreational resources (including recreation planning and development in multipurpose projects). These federal funds can also be used for the purchase of lands and waters needed for outdoor recreation in national parks, forests, and refuges.

### Bureau of Indian Affairs

The Bureau of Indian Affairs is responsible for irrigation, drainage, and other water resources activities concerning waters which flow through or along the boundaries of Indian reservations. The water rights of the reservations are derived from the respective treaties and agreements made with the United States by the Indian tribes.

The Bureau is currently engaged in investigations leading to the full development of Indian water and related land resources in accordance with the Pick-Sloan Plan. Soil and engineering studies are under way to identify potentially irrigable reservation lands within Nebraska.

### Department of Agriculture

#### Soil Conservation Service

The SCS is primarily concerned with the management of land and water resources and has general authority to engage in the planning and application of the soil and water conservation measures.

The Watershed Protection and Flood Prevention Act (PL-566), administered by SCS, authorizes the Secretary of Agriculture to plan for and assist in financing projects for control and use of water in sub-watersheds not to exceed 250,000 acres in size. Project improvement may include flood prevention, irrigation, drainage, wildlife, recreation and municipal and industrial water supplies.

The Soil Conservation Service assists project sponsors by helping them prepare the watershed work plan, provide engineering and technical assistance for design and construction of project measures and by assisting farmers and ranchers with planning and application of farm and ranch conservation systems.

Section 16(b) of the Soil Conservation and Domestic Allotment Act, administered by SCS, authorizes the Secretary of Agriculture to enter into soil and water conservation contracts of not more than 10 years for the planning and installation of conservation measures in the Great Plains area. The Great Plains includes the western three-fourths of Nebraska.

Under the Water Conservation and Utilization Act of 1939, both the Secretary of Agriculture and the Secretary of Interior have been autho-

rized to cooperate in irrigation projects in the Missouri River Basin. This includes all of Nebraska. The Bureau of Reclamation administers the construction and operation of major projects for the Secretary of Interior and SCS administers the on-farm development program for the Secretary of Agriculture.

### Agricultural Stabilization and Conservation Service

ASCS is charged with providing federal grants-in-aid to encourage construction of soil and water conservation measures such as erosion control dams, terraces, grassed waterways, and farm ponds. This assistance is provided under the Soil Conservation and Domestic Allotment Act of 1936. In addition to these conservation measures, ASCS, through the Land Use Adjustment and Cropland Conversion Program assists farmers in converting land regularly used for the production of row crops, small grains and tame hay to income-producing recreation areas, farm forests, water storage and wildlife habitat. Farmers and ranchers may receive additional benefits if they permit public access to their diverted lands for hunting, fishing, etc.

ASCS also provides disaster relief through direct assistance to farmers and ranchers who have been seriously affected by wide-spread natural disasters.

### Forest Service

This Service is authorized to reserve and acquire forested public lands and to reserve water sufficient for the reservation's purpose. A basic reason for national forests is to protect watersheds. Under the Bankhead-Jones Farm Tenant Act of July 22, 1937, this protection is accomplished through providing for prevention of soil erosion, for reforestation, and for mitigation of floods. Other authorizations have promoted these same ends, especially that of reforestation.

The Act of June 12, 1960, provided for the multiple use of national forests for outdoor recreation, range, timber, watershed, and wildlife and fish purposes.

### Farmers Home Administration

The FHA's programs are primarily directed to farmers and rural residents living in or near small rural communities which are unable to obtain credit from other sources for reasonable terms. The FHA seeks to assist through both loans and grants farmers and local organizations in the development of irrigation and drainage systems, watershed protection and flood prevention and similar projects. The consolidated FHA Act of 1961 permits federal grants (up to 50 percent of construction costs) and loans to public and nonprofit associations for development of community water and waste disposal systems in rural areas.

### Agricultural Research Service

The Agricultural Research Service conducts research to provide a scientific basis and support for the land and water resource programs administered by operations agencies of the Department of Agriculture. Included are investigations on the hydrologic performance of agricultural watersheds; erosion and sedimentation; moisture and water conservation; irrigation; drainage; hydraulics management; soil-water-plant relations; plant nutrition; reclamation and management of saline and sodic soils; and practices and systems for preventing or controlling contamination of soil and water resources by agricultural chemicals and farm wastes.

### Economic Research Service

The Economic Research Service has the responsibility to provide the economic analysis of the effects of alternative resource uses on various aspects of the nation's agricultural life including: food supplies and costs, farm income, the costs of government programs, etc. The principal effort concerning the economic analysis of water and related land resources use is carried on by the Natural Resource Economics Division of the Economic Research Service. Economic Analysis and Projections are carried on in river basin planning with research also conducted concerning water rights, water quality, watershed program analysis, outdoor recreation, land tenure, income distribution, and rural zoning and other land use controls.

### Department of the Army - Corps of Engineers

The major responsibilities of the Corps of Engineers are navigation and flood control works. Some of the work undertaken by the Corps includes dredging navigable streams, planning and constructing flood control and multipurpose projects, administering laws pertaining to protection and preservation of navigable streams, fighting floods, and making emergency repairs. The Corps is also charged with developing hydroelectric power, storing water for irrigation, and developing water quality control, water supply and recreation.

### Department of Transportation - The Coast Guard

The Coast Guard operates or may operate on inland navigable waterways to promote safety in water travel, provide flood relief assistance and enforce marine laws. The Coast Guard patrols stretches of the Missouri River along Nebraska.

## Department of Housing and Urban Development

The Department is empowered to make grants to local bodies of government for the purpose of comprehensive planning--including planning for water supply, sewer facilities, and storm drainage. Through HUD both grants and public facility loans are available to local public bodies and agencies to provide water facilities. The grants are dependent upon a showing that the projects are consistent with area-wide water and sewer facilities systems as part of the area's development.

## Department of Health, Education and Welfare The Public Health Service

The Service has responsibilities in connection with public health aspects of water resources and development. It undertakes research and investigation on disease prevention, including water purification. Under section 361(a) of the Public Health Service Act, the Surgeon General has authority to prevent communicable disease by regulating water provided by public use by interstate carriers. The Secretary of Health, Education and Welfare has authority to assist in the areas of water quality control, emergency water supplies and solid waste disposal.

## Independent Commissions, Councils and Agencies

### Water Resources Council

The Council was established by the Water Resources Planning Act of 1965. Its responsibilities include: (1) administration of grants to the states to assist them in developing comprehensive water and related land resource plans; (2) recommendations on the creation of river basin commissions; (3) approval of requests for appropriation of federal funds submitted by river basin commissions; and (4) review of plans prepared by the river basin commissions and the formulation of recommendations for the President and the Congress.

Under Title II of the Water Resources Planning Act there is authorization to create river basin commissions for an area, river basin, or group of river basins. These commissions are empowered to serve as the coordinating agencies for the development plans of water and land resources by governmental or nongovernmental agencies. The commissions can also undertake studies for preparation of comprehensive plans, develop and keep the comprehensive plans up to date, and recommend priorities in the investigation, planning and construction of projects. Nebraska is not presently included in any river basin commission.

### Federal Power Commission

This Commission is charged with regulating water power projects.

The Commission's responsibilities in water resources development may be summarized as: (1) river basin surveys; (2) license project works; and (3) power requirements and supply studies.

The Commission has jurisdiction over licensing of nonfederal hydroelectric projects and over the transmission and sale of electric energy in interstate commerce. The Commission is also empowered to gather data concerning the utilization of water power resources in an area to be developed, to issue licenses for periods in excess of fifty years for the development and maintenance of dams, water conduits, and reservoirs for the development of hydroelectric power in or affecting navigable waters or on any stream on which Congress has jurisdiction where the project affects interstate commerce, federal lands, or where surplus water from government dams is used. The projects which the Commission licenses must initially meet and continue to comply with the comprehensive basin plans.

Two other acts vest the Commission with significant authority: (1) the Flood Control Act of 1938 in conjunction with other flood control and river and harbor acts authorizes both Commission investigations of the power potential at projects to be constructed by the Department of the Army and Commission report of potential hydroelectric facilities at such projects; (2) section 5 of the Flood Control Act of 1944 requires Commission approval of rate schedules, except in the Missouri River Basin, for the sale of surplus energy and power generated at reservoirs under the control of the Department of the Army.

In Nebraska the Commission has continued as advisor to the federal representation on the Big Blue River Inter-State Compact Commission, and has cooperated with the Corps of Engineers and the Bureau of Reclamation in determining hydroelectric power potential and economic and engineering feasibility of additional power installations in the Missouri River Basin.

#### National Water Commission

Under the Act of September 26, 1968, Congress established the National Water Commission to consist of seven members who were to be appointed by the President from outside the federal government. The purpose of the Commission is to review national water resource problems and consult with other water resource agencies. Their work is in the nature of an "auditor" of national water policy and activity.

#### Council on Environmental Quality

On January 1, 1970, the President signed the National Environmental Policy Act of 1969 which establishes a national policy on the environment. The Act: (1) states that the federal responsibility is in cooperation with state and local governments to use all practical means to insure a healthful environment; (2) directs all federal agencies, to the fullest extent possible, to administer programs in accordance with the Act and to consider the environmental impact of decisions; (3) requires the President

to submit annually, beginning July 1, 1970, an Environmental Quality Report appraising status and progress; and (4) establishes a Council on Environmental Quality in the Executive Office of the President, to assist with the annual report, establish a system to monitor status of the environment, and review federal programs affecting quality of the environment.

### Environmental Protection Agency

In 1970, a new agency designated as the Environmental Protection Agency (EPA) brought together the major federal pollution control programs previously existing in four separate agencies and one interagency council. One of the agencies consolidated was the Federal Water Quality Administration (FWQA), formerly in the Department of the Interior. EPA has the responsibility for the administration of the Federal Water Pollution Control Act and under this authority cooperates with federal, interstate, and state agencies, and municipalities and industries in developing comprehensive programs to improve sanitary conditions of surface and ground waters. Other EPA activities inherited from FWQA include: (1) administration of federal grants to state and interstate water quality control and pollution agencies; (2) grants to municipalities for waste treatment works construction; (3) grants for research, development, and water pollution control programs; (4) development and application of water quality control standards for interstate streams; (5) interstate pollution surveillance (including pollution surveillance stations on the North Platte River at Henry, Nebraska; the Platte River at Plattsmouth, Nebraska; and the Missouri River at Omaha, Nebraska); (6) training of pollution control personnel and technical assistance to states and localities; (7) establishment of field and research laboratories to develop technicians and to train personnel in water quality control; (8) dissemination of public information on water quality and pollution control; (9) establishment of enforcement programs for implementation of the Federal Water Pollution Control Act; (10) control of pollution for federal installations; and (11) control of oil pollution in navigable waters.

In addition to receiving the responsibilities of the FWQA, the new Environmental Protection Agency also acquired the following programs and authorities: (1) the National Air Pollution Control Administration, formerly in the Department of Health, Education and Welfare; (2) parts of the Environmental Control Administration (Bureaus of Solid Waste Management, Water Hygiene and a portion of the Bureau of Radiological Health), also from HEW; (3) the pesticides research and standard setting program of the Food and Drug Administration; (4) the pesticides registration authority of the Department of Agriculture; (5) the authority to perform general ecological research, from the Council of Environmental Quality; (6) certain pesticide research authorities of the Department of Interior; (7) the environmental radiation protection standard--setting functions of the Atomic Energy Commission; and (8) the functions of the Federal Radiation Council.

## CHAPTER 5. FEDERAL-STATE ORGANIZATIONS

### Introduction

A persistent difficulty in the relations among the states and between the state and the federal government has been their differing goals and overlapping jurisdictions. In the past one agency operating independently would often commit itself to a plan of development without knowledge of what other agencies, both state and federal, were attempting to accomplish in the same area. In order to achieve the objective of mutual planning and development for water and related land resources, communication between agencies has now been facilitated through the establishment of the joint federal-state organizations which are discussed below.

### Interstate Compact Commissions

These commissions have been organized where there has been a need to apportion the waters of interstate streams. According to the Constitution, no state may enter into a compact with another state unless Congress has given its consent. Where states have agreed upon a compact and the compact has received congressional consent, the administration of the compact is then vested in a compact commission comprising a representative from the Department of the Interior and representatives from the compacting states. Nebraska and neighboring states are negotiating or have entered into the following compacts which are discussed in more detail in Chapter 1 of this publication.

The South Platte River Compact between Colorado and Nebraska was approved by Congress in 1926. The compact followed state priorities in time for allocating the water, in addition to providing for a diversion in Colorado to serve Nebraska lands.

The Republican River Compact was approved by Congress in 1943; the compact apportioned waters of the drainage basins of the Republican River among Colorado, Kansas, and Nebraska.

A compact on the Lower Niobrara River and Ponca Creek has been agreed upon by both Nebraska and South Dakota and awaits congressional approval. The most recently operative compact is the Upper Niobrara River Compact between Nebraska and Wyoming which was approved by Congress in the summer of 1969.

A Big Blue River Compact between Kansas and Nebraska has been agreed upon by both states and is awaiting Congressional approval.

### Missouri Basin Inter-Agency Committee

The purpose of this committee is to provide in the Missouri River Basin both the facilities and the procedures for better coordination of the federal agencies and the states within the region. The Committee provides the means by which the conflicts can be resolved and the interests coordinated. In addition to representatives of the states within the region, the federal departments which are involved include the Departments of Interior, Commerce, Labor, Agriculture, Transportation, Health, Education and Welfare, Army, and the Federal Power Commission.

### Missouri River States Committee

The Committee is composed of representatives from all of the states within the Missouri River Basin. The major purpose of the Committee is to provide an agency whereby the states of the Missouri River Basin can indicate their needs to each other as well as the federal government. The Missouri States Committee is the policy making arm of all state government in the Missouri Basin and the Committee discusses programs, problems and opportunities in the Missouri River Basin. The action of the Committee is usually taken through resolutions which either support or oppose legislative programs for the area.

## CHAPTER 6. SUBDIVISIONS OF STATE GOVERNMENT

### Introduction<sup>1/</sup>

As commonly conceived, there are three levels of "government" in the United States. These are the federal government, the fifty state governments and innumerable "local" political subdivisions of state governments. The subject of these following pages is a review of the political subdivisions of Nebraska that have been given responsibilities and power pertaining to water by the State Legislature.

For convenience of analysis and discussion the topic has been subdivided into counties, cities and water districts.

There are 93 counties in Nebraska. Twenty-eight of these are organized under the township or supervisor form of government and 65 are of the precinct or commissioner type; however, the powers and authorities of each type are the same; most prominently including rural road construction and maintenance, public recordation for transfers of land and vehicles, administration of justice, and miscellaneous general governmental duties.

The term "water districts" is used in this publication to refer to various types of subdivisions of State government which have special governmental powers in the realm of water development as contrasted with the general governmental powers of counties and cities. Each type of district government is established and operated pursuant to a separate legislative act. (For example, there are about 150 sanitary and improvement districts in Nebraska which are all governed by sections 31-701 to 31-766 of the Nebraska statutes.)

Individual districts have a governing board of directors, supervisors or trustees that conduct the business of the district. The board members are elected to their terms of office by the eligible voters within the boundaries of the district.

A district is established either through a declarative act of the State Legislature or through an enabling act. With a declarative act the district is established when and where the Legislature directs. An enabling act sets a procedure which must be followed by persons seeking to organize a district. A typical procedure under an enabling act includes these steps: (1) organizers circulate a petition in the area sought to be covered by the district, attempting to obtain signers representing a statutorily established percentage of eligible persons in the area; (2) the petition, with sufficient signers, is submitted to a governmental body (usually the county board) which is to hold a public hearing to determine whether the proposed district would be conducive to the public health, convenience or welfare, and, sometimes,

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1/ See generally, NEBRASKA BLUE BOOK (1968).

the proper boundaries for the district; (3) the governmental body conducting the hearing either denies or approves the petition; (4) approval of the petition either means that the district is then established or that an election is to be held on the question of whether the district will be established; (5) the district comes into existence, the first board is selected and the district is ready to begin operation pursuant to the powers and directives of the enabling act.

## Counties<sup>2/</sup>

### Powers

County boards may create planning commissions to adopt and implement a comprehensive development plan, and adopt zoning regulations, which may regulate, among other things, surface water drainage. Special zones may be established in those areas subject to seasonal or periodic flooding. This zoning power may be exercised in conjunction with flood plain zoning responsibilities under the Nebraska Flood Plain Regulation Act of 1967. This county zoning power, however, is not to be exercised within the limits of any incorporated city or village nor within the area over which a city or village has been granted zoning jurisdiction and is exercising that jurisdiction.

There are also special provisions for flood control by the county governments. Whenever any portion of a county, exceeding 320 acres in area, is put in peril of destruction by reason of the probable flooding of any watercourse, upon petition of landowners and upon investigation, a county may build necessary structures for the protection of the land. For such purposes the county has the power to acquire lands, rights-of-way and easements, including lands outside the county boundaries.

County boards have the power to cause all natural watercourses to be kept clean and free of obstructions in such a manner as to permit natural flow. This may be done on their own initiative or upon request or petition.

Any board may carry out drainage improvement projects by creating or changing a watercourse, ditch or drain in such a manner as is necessary to drain lots, lands, roads or railroads. In addition, the County Drainage Act of 1959 empowers counties to maintain adequate drainage in road ditches, public and private ditches and natural watercourses. Upon petition by any landowner, the county board makes an investigation and declares whether or not the facts in the petition are true. If true, the county may assist in drainage.

A county has the authority to impose a misdemeanor penalty on anyone found guilty of polluting watercourses, ditches or drains.

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<sup>2/</sup> See generally, NEB. REV. STAT., Chapter 23 (Reissue 1970) and Chapter 31, articles 1 and 9 (Reissue 1968).

## Financial Capabilities

Each year counties must present the public with a complete financial plan in the form of a budget. Contracts or liabilities in excess of this budget are prohibited; and, therefore, the county is not liable on them.

Funds for construction of flood control projects are to be paid out of the county's general fund. Counties also have the power to issue general obligation bonds, to be retired upon annual levies; and they may establish a special flood and erosion control reserve fund, to be funded by an annual tax levy. The aggregate of the bonds issued are not to exceed one half of one percent of the assessed valuation of the county. The annual tax levy for the purpose of these bonds is not to exceed one half mill of the assessed value of all taxable property within the county.

Under the County Flood Control Act of 1963, the county may designate watershed boundaries for taxation purposes so that property within the perimeter of the defined drainageway will be assessed for the financing of the program for improvement. In using these provisions it does not appear that the county can issue bonds; and all costs of condemnation, maintenance, and operation of flood control works and soil and water resources programs may be paid from an annual tax levy of not to exceed one half mill on the dollar upon the assessed value of all the taxable property in a designated watershed area.

For drainage programs carried out by the county authorities, assessments may be made according to the benefits received along with bonds issued at a rate not to exceed six percent per annum and for no longer than ten years. If the drainage program is carried out under the County Drainage Act of 1959, the county board may set up a drainage fund with an initial one-fourth mill levy. Pending such assessment, the board may borrow from the general fund.

## Cities

### Cities of the Metropolitan Class<sup>3/</sup>

Powers. A city of the metropolitan class is one which has a population of 300,000 inhabitants or more. Omaha is the only city within this definition. It has certain basic powers which are essentially common to cities of all sizes. It may: (1) sue and be sued; (2) purchase, lease, acquire by gift and hold real and personal property within or

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<sup>3/</sup> See generally, NEB. REV. STAT., Chapter 14 (pertaining specifically to cities of the metropolitan class), Chapter 18 (pertaining to cities of all classes); and L.B. 186, 82nd Nebraska Legislature (1st Session), 1971.

without the city limits; (3) sell, exchange, lease and convey any real or personal property owned by the city; (4) make all contracts and do all other acts necessary in the exercise of its corporate powers; and (5) carry out any other powers conferred by law.

Among its other powers, a city of the metropolitan class may levy any tax or special assessment authorized by law. It may also appropriate money and provide for payment of debts and expenses of the city. Property for waterworks may be purchased or acquired by eminent domain, payment being made out of funds provided for such purposes.

A metropolitan class city also has the power to zone, or more precisely, to develop a comprehensive plan which, among other things, will secure safety from floods. This zoning power may be exercised to zone the flood plains under the Flood Plain Regulation Act of 1967. The city council has the power to regulate by ordinance, under its zoning power, in areas within three miles of the corporate limits, except as to construction on farms for farm purposes.

In addition, commencing on August 27, 1971, when the governing body of a metropolitan class city determines it is in the best interest of the city, the operation and maintenance of a drainage district organized by landowners may be assumed by the city and the real and personal property, assets, obligations and responsibilities of that district transferred to it.

Financial Capabilities. The city council must annually appropriate money and credits to be set aside for certain designated statutory funds. From the balance, funds are appropriated to be set aside to designated departments. The final balance is transferred to the general sinking fund. The annual tax levy for all municipal purposes must not exceed 14.4 mills on the dollar upon the assessed value of all taxable property in the city. However, the city council may also assess not less than four additional mills to create a fund to pay bond issues as they mature. The council may appropriate an additional one-fourth mill for recreational purposes.

The city council has the power to issue bonds, which are to be sold at not less than par and which cannot bear an interest in excess of five percent per annum. However, where these limits in application to water bonds or bonds issued for a public utility are in conflict with another provision relating to such bonds, the other provision will control. The bonded indebtedness of the city is not at any time to exceed five percent of the actual value of the taxable property within the corporate limits, although bonds issued to acquire a water plant are to be deducted from the total bonded indebtedness. Bonds in excess of \$250,000 may not be issued in any one year, except to pay for the construction and maintenance of waterworks, among other things.

Bonds to raise money for the acquisition of a water plant are not to be sold at less than par and may only be issued if ratified by a majority of votes cast upon the proposition at a general election or by two-thirds of the votes cast at a special election.

Expenses involved in water service are to be paid from a water fund which consists of money obtained from charges to water users together with any water fund levies. Any amount left in the fund at the end of each year is to be placed into a sinking fund for the payment of any outstanding water bonds. For the purpose of creating a fund out of which water pollution abatement measures may be financed, the city may make a special levy not exceeding one mill.

#### Cities of the Primary Class<sup>4/</sup>

Powers. All cities having more than 100,000 and less than 300,000 inhabitants are classified as cities of the primary class. Lincoln is the only primary class city. The general powers for a city of the primary class are basically the same as those for a city of the metropolitan class. In addition, a primary city has the power to establish, alter, and change the channel of watercourses, and to wall and cover them over, to establish, make and regulate public wells, cisterns, aqueducts and reservoirs of water, and to provide for filling them.

When a system of waterworks has been adopted by the city and the people have voted to borrow money, the mayor and council may: (1) construct and maintain such system; (2) make necessary rules and regulations; and (3) do all other necessary acts including the exercise of the right of eminent domain.

Another important function of a primary city is that of city planning and zoning. No landowner within the city nor within three miles of the corporate limits may plat or subdivide his property without approval of the city council. The council has the power to regulate and restrict the use and construction of any structures within this area except as to structures upon farmsteads outside the corporate limits. However, a primary class city has responsibilities and authority under the Nebraska Flood Plain Regulation Act; and when these responsibilities are undertaken by the city, construction of all buildings in the flood plain will be regulated.

A primary class city has the power to regulate in the area which is within the city or within three miles of the city and outside the zoning jurisdiction of any city or village in order to secure the general health, and to provide for the prevention and abatement of nuisances including the pollution of water.

Financial Capabilities. A primary city may borrow money on the credit of the city. It may also issue general obligation bonds and revenue bonds. The power to levy taxes exists but is limited by a dollar amount prescribed in its home rule charter. No bond issued by

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<sup>4/</sup> See generally, NEB. REV. STAT., Chapter 15 (pertaining specifically to cities of the primary class) and Chapter 18 (pertaining to cities of all classes) (Reissue 1970).

the city for any purpose may draw interest at a greater rate than five percent per annum, nor may it be sold at less than par. And a tax levy for payment of bonds may only be in an amount sufficient to meet interest accruing on bonds until they mature. An additional levy of up to one mill may be made for the purpose of creating a fund out of which anti-pollution control measures may be financed.

### Cities of the First Class<sup>5/</sup>

Powers. All cities having more than 5,000 and not more than 100,000 inhabitants are designated as cities of the first class. The general powers of such a city are basically as those of the cities discussed above.

A city of the first class has the power to establish, alter, and change the channel of watercourses, and wall and cover them over. No city is liable in damages on account of accumulations of surface waters which fall upon its site unless such accumulations are caused by the act of a city officer while employed in his official capacity with recorded authorization of the mayor and council.

Water and sewer districts may be created and regulated by a city of the first class. The city may also create a system of water purification for the city's waterworks system.

Those rights, powers, authority and jurisdiction conferred on counties under the county flood control provisions are also conferred upon cities of the first class. Also, like powers under the County Flood Control Act of 1963, they are conferred on such city and may be exercised, in the absence of federal participation or sponsorship, whenever any project of flood control outside the limits of such city directly affects the welfare of such city and involves a cost of not to exceed \$500,000. In addition to these authorities, cities of the first class, commencing on August 26, 1971, are authorized, apparently without limitation to develop, implement, amend, change or modify a general program of flood and storm water control, drainage and disposal. Flood plain zoning responsibility and authority is also vested in these cities under the Flood Plain Regulation Act of 1967.

Cities of the first class are also empowered to enact and enforce other zoning regulations. They have the power to apply those regulations to the unincorporated areas two miles beyond and adjacent to the corporate limits of the city. Cities of the first class also have the

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<sup>5/</sup> See generally, NEB. REV. STAT., Chapter 16 (pertaining specifically to cities of the first class); Chapter 18 (pertaining to cities of all classes); Chapter 19, article 9 (pertaining to city planning and zoning for cities of the first and second classes and villages); Chapter 23, article 3 (pertaining to flood control) (Reissue 1970); and L.B. 57, 82nd Nebraska Legislature (1st Session), 1971.

power to create a municipal planning commission which may adopt plans for the physical development and zoning of the city and the unincorporated areas over which it has control.

Financial Capabilities. A city of the first class may levy taxes for general revenue purposes in any one year, not exceeding twelve mills on the dollar upon the assessed value of all the taxable property in the limits of such city; however, this limitation does not affect annual levies for all municipal purposes which is set at 25 mills on the dollar. In addition, water bonds may be issued to finance water improvement for periods of less than ten years at not more than six percent and sold at not less than par value.

Up to one mill may be levied as an additional tax to finance anti-pollution of water measures if undertaken by the city.

#### Cities of the Second Class and Villages<sup>6/</sup>

Powers. All cities, towns, and villages containing more than 1,000 and not more than 5,000 inhabitants shall be cities of the second class unless they adopt a village government. Any town or village containing not less than 100 nor more than 600 inhabitants, incorporated, or any second class city adopting a village government is classified as a village.

Second class cities and villages have specific powers to carry out their various functions which in toto are basically the same as those for cities of other classes. Among those particular powers affecting the water resources is utilization of and protection against flood and surface waters. Such cities and villages have the power: (1) to establish and alter channels of watercourses, and to wall them or cover them over; (2) to establish and regulate wells and other water conveyors or storage facilities; (3) to fill the same; and (4) to erect and maintain a dike or dikes as protection against flood or surface waters. They are granted the power of eminent domain to acquire a right-of-way over land within or not more than two miles outside the corporate limits for the purpose of constructing a ditch and dike to prevent flooding by a watercourse. Such cities and villages may also cooperate with the federal government in flood control projects. If the federal government would acquire the entire site upon which a city of the second class or village is located under such flood control project, the city or village may be moved to another site and retain its corporate identity by observing certain procedures.

The power to contract for and erect waterworks and water supply systems is granted subject to certain procedures. The city or village may take, hold and condemn property necessary for this purpose, including land beyond their territorial limits.

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<sup>6/</sup> See generally, NEB. REV. STAT., Chapter 17 (pertaining to cities of the second class and villages) and Chapter 18 (pertaining to cities of all classes) (Reissue 1970).

As with other classes, cities of the second class and villages have the authority to zone for all the basic uses of land, including zoning under the Flood Plain Regulation Act of 1967. They may extend existing or future zoning ordinances to an area within one mile of the corporate limits. And the jurisdiction of a second class city and village, to prevent pollution or injury to the stream or source of water for supply of its waterworks, extends fifteen miles beyond its corporate limits.

Financial Capabilities. Cities of the second class and villages may levy taxes for general revenue purposes each year in an amount which cannot exceed ten mills on the dollar of the assessed value of all taxable property. They may also levy any other tax or special assessment authorized by law.

For the purpose of paying for flood control projects second class cities and villages may borrow money and issue bonds in an amount not to exceed five percent of the actual value of all taxable property. The bonds must be issued for less than twenty years and may not draw more than six percent per annum. They may levy and collect a general tax to pay the interest and principal of bonds issued for flood control purposes. However, no money can be borrowed or bonds issued unless authorized by a three-fifths vote of those voting for or against the proposition.

The total allowable tax levy or special assessments for all city or village purposes is set at thirty mills on the dollar upon the assessed value of all taxable property. An appropriation of up to three mills may be levied to establish a sinking fund or funds to defray general or incidental expenses of the municipalities. In addition to the thirty mill levy limitation, an additional levy of two mills on the dollar may be imposed when necessary for implementation of a sewage disposal system.

In the creation of a waterworks system second class cities and villages may borrow money and issue bonds, in an amount not to exceed twelve percent of the actual valuation of all taxable property. They may levy and collect a general tax to create a water fund in an amount sufficient to pay the interest and principal of the bonds. The bonds issued can come due in no longer than twenty years, and they cannot exceed six percent in interest. However, no money may be borrowed or bonds issued unless authorized by three-fifths of the legal votes cast for or against the proposition at a special election.

For the purpose of creating a fund out of which anti-pollution measures may be financed, such city or village may also make a special levy not exceeding one mill.

## Nebraska Water Districts

### Reclamation Districts

There are five reclamation districts operating in the State of Nebraska. These districts are regulated by sections 46-501 to 46-587 of the Nebraska statutes. The statutory declaration of the purpose of such districts is to provide for the conservation of the water resources of the State. Generally, the purposes of reclamation districts are to control and make use of the available waters of the State for domestic, irrigation, drainage, power, manufacturing, recreation, and other beneficial purposes.

A board of directors governs the district. The first board is appointed by the Department of Water Resources, from persons named in the formation petition. The successors to the original directors are later nominated and elected to six-year terms of office.

A reclamation district, acting through its board of directors, has the power to acquire and use water rights, waterworks, and real and personal property for carrying out its powers; to condemn under the right of eminent domain; to enter into contracts with the United States relating to the waterworks; to list in separate ownership the lands within the district susceptible of irrigation from the district's sources and to enter into contracts to provide water service to these lands; to fix rates for water service; to borrow money; and to levy and collect taxes and special assessments.

### Irrigation Districts

Nebraska has 44 irrigation districts organized and operated under the provisions of sections 46-101 to 46-1154 of the Nebraska statutes. These districts have responsibilities in the areas of drainage, water supply, irrigation and hydroelectric power.

Irrigation districts have been organized to finance water supplies, consolidate irrigation systems, construct irrigation systems, or provide for drainage of irrigated land. Districts may also be formed to provide for new development or to extend and improve existing irrigation systems and works.

A ballot is submitted to the electors on the question of whether the district shall be formed. This ballot also bears the names of those to be voted for to become the first board of directors of the district. The officers so elected hold their offices until the next general election for the district. Thereafter directors of the district are elected to staggered terms of three years each.

The board has the power and duty to manage and conduct the business affairs of the district, make all necessary contracts, employ agents, officers and employees as required, establish by-laws, and rules and regulations for distribution and use of the water supply, and generally

perform all acts necessary to carry out the provisions and purposes of the State law governing irrigation districts.

The irrigation district, acting through its board of directors, has the power to condemn by eminent domain; to enter into contracts with the United States for construction, operation and maintenance of irrigation works; to equalize and levy assessments within the district; to levy taxes; to issue bonds; to call special elections; to authorize special assessments; and to borrow additional funds if needed.

### Public Power and Irrigation Districts

Nebraska has five public power and irrigation districts governed by the provisions of sections 70-601 to 70-672 of the Nebraska statutes and generally recognized to have responsibilities in the areas of flood control, water supply, irrigation, hydroelectric power, and use of radioactive material for constructive use and energy production.

The initial board of directors of a public power and irrigation district is selected as an integral part of the petition process bringing the district into being. The following qualifications apply to selecting this first board: (1) If the district's boundaries do not encompass 25 or more cities or villages, the district may have not less than five nor more than 21 directors. (2) If the district contains 25 or more cities or villages, the number of directors may be stated in the petition but the individuals to fill the positions are to be appointed by the Governor within 30 days after approval of formation of the district. (3) If the district proposes to operate in more than fifty counties in the State, the number of directors shall be seven, to be named in the petition.

The selected or appointed directors take office immediately upon the filing of the approval certificate in the office of the Secretary of State and the office of the county clerk. Succeeding directors are elected to terms of six years in the same manner as members of the State Legislature, on a nonpartisan ballot in primary and general elections.

Public power and irrigation districts have all the usual powers of a corporation for public purposes. These powers include purchasing, holding, selling and leasing personal and real property. A district may construct, purchase, lease or otherwise acquire any electric light and power plants or irrigation works. It may also enter into any kind of contract with any person, corporation or any government division or subdivision. A district is required to sell electrical energy (if it is in the business) to any municipality or political subdivision making application to it for an amount of energy that can be supplied if the receiving party agrees to pay for the physical connection between it and the district's works.

The power to tax is denied public power and irrigation districts, but they have the power to make assessments on land benefitted from recharge facilities and drainage projects, and to borrow money and

incur indebtedness. Districts may also exercise the power of eminent domain.

### Drainage Districts

There are at least 130 drainage districts in Nebraska generally recognized to function for the purposes of flood control, channel rectification and drainage. Two distinct sets of statutory provisions apply to the forming of drainage districts. Sections 31-301 to 31-377 of the Nebraska statutes provide for drainage districts organized in the district court. Sections 31-401 to 31-451 provide for drainage districts organized by landowners. Sections 31-301.01 and 31-401.01 (Supp. 1969) Nebraska statutes,<sup>7/</sup> provides that no new drainage districts may be organized after June 30, 1972.

Districts Organized in District Court. Section 31-301, Nebraska Revised Statutes (Reissue 1968), states:

(A) majority in interest of the owners in any contiguous body of swamp or overflowed lands in this state, situated in one or more counties in this state, may form a drainage district for the purpose of having such land reclaimed and protected from the effects of water, by drainage or otherwise.

To initiate formation of a drainage district, which must not be less than 160 acres under sections 31-301 to 31-377 the landowners make and sign articles of association stating the name of the district, the number of years it is to continue, the limits of the proposed district, the names and addresses of the owners of land within the proposed district, the description of the real estate owned by those who do not join in the organization of the district but who will be benefited thereby, and that the owners of real estate forming the district are willing to and do obligate themselves to pay the assessed costs of making the improvements necessary to drain the land of the district.

Landowners may object to including their land in the district's on the ground that it will not be benefited by drainage. If the objection of a landowner is overruled, his land is included in the district and subject to assessments to pay for the drainage activities. If an objection is sustained, the land will not be included in the district.

Upon formation of the district, a meeting is called to elect a board of five directors from the landowners of the district, a majority of whom must also be residents. At the election meeting each elector is entitled to one vote for each acre of land he owns in the district. The five persons receiving the highest number of votes are declared the board of directors.

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<sup>7/</sup> As amended by L.B. 544, 82nd Nebraska Legislature (1st Session), 1971.

The directors may hire an attorney and are required to employ a competent engineer. The engineer must make a complete survey of the district and submit a plan for draining, reclaiming and protecting the lands in the district from damage by overflow, water or floods. The engineer's report must include a classification of properties according to the benefit they will receive from the district's drainage activities and an estimate of the cost of performing such activities. No assessment can be made for benefits to any lands within the district except upon the principle of benefits derived.

The board of directors on behalf of the district has the power to acquire, or condemn through eminent domain, any real estate, easement or franchise whether inside or outside the boundaries of the district. The district also has the power to levy taxes following submission and hearing of the engineer's report, to assess additional taxes for maintenance and repair of works constructed by the district, and to issue negotiable bonds.

Districts Organized by Landowners. Drainage districts formed under the provisions of sections 31-401 to 31-451 of the Nebraska statutes are initiated by filing a petition with the county clerk of the county having the largest portion of land within the proposed district. If the land within the district is owned by less than twenty persons, one-fourth of them must sign the petition; if the district is to be comprised of land owned by over twenty persons, ten signatures are required.

After filing the petition, the county board determines whether the proposed boundaries of the district are reasonable and proper. The board has the power to change the boundaries. Hearings on proposed boundaries are given to anyone upon request.

After the county board has made boundary determinations and set the number of directors and their bonds, the county clerk gives public notice of the board's decisions. The notice must declare that an election will be held on the proposed district, giving the time and place of such election.

At this and future elections any person or corporation, public, private or municipal, may cast one vote on each proposition to be voted on for each acre of land or fraction thereof and for each platted lot which he may own or have an easement in, as shown by the official records of the county where the land or lots may be.

If a majority of the votes cast are in favor of the formation of the district, it is deemed conclusive that the formation of the district, and the work that may be done under the supervision of the board of directors, will be for the public health, convenience and welfare, and the county clerk thereupon files and preserves all the ballots and records; and the district is, at that time, fully organized.

A majority of the directors elected must be residents of the county or counties in which the district is located. The terms of office are to be adjusted so that the term of one director expires each

year. The directors choose a president, a secretary and a treasurer each of whom holds their office for one year.

With the aid of an engineer, surveyor and others as it may choose, the board of directors makes a detailed plan of the project to be undertaken. The board shall then determine the benefits accruing to each tract of land and establish that the tract least benefited is apportioned one unit of assessment. Each tract receiving greater benefit will be assessed a greater number of units.

### Ground Water Conservation Districts

There are three ground water conservation districts in Nebraska located in Hamilton, Clay and York Counties in the southeastern section of the State. Ground water conservation districts are established and operated under the provisions of sections 46-614 to 46-634 of the Nebraska statutes and have dissemination of ground water information and regulation as their primary functions. Section 46-614.01 (Supp. 1969) of the Nebraska statutes<sup>8/</sup> provides that no new ground water conservation districts may be organized after June 30, 1972.

A ground water conservation district is governed by a board of directors, a majority of which must be resident owners of irrigation wells within the district. Board members are elected to six-year terms.

A district is a body politic and may sue and be sued in its own name. The district, through its board of directors has the power and duty to maintain an office and employees as necessary; to gather information on ground water conservation and supply it to the Department of Water Resources, the Conservation and Survey Division of the University of Nebraska, and the Nebraska Soil and Water Conservation Commission as requested; to enter into contracts; and to adopt rules and regulations to ensure the proper conservation of ground water. No ground water conservation district has adopted any rules and regulations, and the statutes have been analyzed as only doubtfully containing sufficient guidelines to support such regulatory attempts.<sup>9/</sup> The districts may levy and collect taxes necessary to finance their activities but not to exceed one mill on the dollar of the assessed value of all taxable real property within the district.

### Rural Water Districts

There are areas in Nebraska where the rural, farm and nonfarm residents cannot individually obtain suitable ground water supplies.

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<sup>8/</sup> As amended by L.B. 544, 82nd Nebraska Legislature (1st Session), 1971.

<sup>9/</sup> See Good and Grether, Nebraska Water Resources, Committee Reports of the American Bar Association Section of Mineral and Natural Resources Law 167 (1962).

Some of these areas do, however, contain localized supply sources of adequate quantity and quality which could be utilized for the general benefit of the region.

The rural water district, organized and operated pursuant to sections 46-1001 to 46-1020 of the Nebraska statutes, serves to accomplish the planning financing, construction and allocation of costs to users necessary for the rural delivery of a water supply where it is needed for home and livestock use. Section 46-1001.01 (Supp. 1969) of the Nebraska statutes 10/ provides that no new rural water districts may be organized after June 30, 1972.

There are five rural water districts in Nebraska located in Nemaha, Boyd, Pawnee, Johnson and Otoe Counties, and five other districts are in the process of organizing. The Boyd County Rural Water District, at a cost in excess of \$8,000, provides service through one well, a tank, and twenty miles of pipe, to 21 users. The district in Nemaha County is larger and plans indicate that service will be provided to 188 outlets.

A board of directors of up to nine members is the governing authority for the rural water districts. Members of the board are elected to three-year terms.

Nebraska's rural water districts have the power to have perpetual succession, subject to statutory provision for dissolution; to condemn by eminent domain; to sue and be sued; to enter into contracts; to acquire real and personal property; to construct, maintain and operate suitable waterworks; and to borrow money for the financing of up to 95 percent of the cost of such construction.

### Sanitary Drainage Districts

Sanitary drainage districts are controlled by sections 31-501 to 31-553 of the Nebraska statutes and are generally recognized to function in the areas of flood control, channel rectification, drainage, sewage disposal and flood plain zoning.

Districts are governed by a board of trustees. Those containing a city of over 40,000 have five trustees, and those not having such a city have three. Trustees are elected for staggered four-year terms.

The board of trustees has the power to hire a clerk and an engineer, and to pass all necessary ordinances, orders, and rules and regulations necessary to the conduct of the district's business and purpose. The board of trustees has the additional power to provide for the drainage of the district with channels, drains or ditches for carrying off and disposing of drainage and sewage, and to straighten, widen or deepen any existing channel for the purpose.

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10/ As amended by L.B. 544, 82nd Nebraska Legislature (1st Session), 1971.

The districts have the power to borrow money and issue bonds for corporate purposes; however, a district may not become indebted in an amount in excess of four percent of the valuation of the property in the district as assessed for county purposes.

The district, acting through its board of trustees, may levy and collect taxes; defray expenses by special assessment, general taxation or a combination of the two; and acquire by purchase, condemnation or otherwise real or personal property.

### Sanitary and Improvement Districts

One hundred fifty-five sanitary and improvement districts exist in Nebraska. They are governed by the provisions of sections 31-701 to 31-766 of the Nebraska statutes and have responsibilities for drainage, recreation, water supply and sewage disposal.

The five members of a board of trustees are elected from the resident taxpayers in the district. Trustees are elected to staggered terms of four years.

Sanitary and improvement districts have the "power to sue and be sued; contract, acquire and hold real and personal property by purchase, condemnation or otherwise; and adopt a common seal." Districts may also employ and pay an engineer and pass all necessary ordinances, orders, and rules and regulations for the conduct of its business and fulfillment of its purposes.

A district may borrow money for corporate purposes and issue general obligation bonds. Through its board of trustees the district may levy and collect taxes upon property within the district to the amount of not more than one mill per dollar valuation.

### Soil and Water Conservation Districts

Presently there are 86 soil and water conservation districts encompassing all of the land area of Nebraska. The districts are controlled generally by sections 2-1508 to 2-1567 of the Nebraska Statutes.

Each soil and water conservation district is governed by a board of five supervisors elected by the legal voters residing within the district to serve for four-year terms.

Like most other water districts in Nebraska, soil and water conservation districts have the general power to sue and be sued and to make and execute contracts. Districts may also employ assistance to carry out their authorized operations, but this is subject to the approval of the Nebraska Soil and Water Conservation Commission. The districts have more specific powers relating to the control of soil erosion, including the authority to conduct surveys, investigations and research relating to the character and prevention of such erosion. They are also authorized to carry out preventive and control measures within

the district, including but not limited to, engineering operations, methods of cultivation, the growing of vegetation, changes in use of land, pollution prevention and control, and other measures as may be determined feasible on state owned lands or on privately owned property with the owner's consent. In addition to these authorities the districts may make available to landowners within the districts' agriculture and engineering machinery and equipment, fertilizer, seeds and seedlings and such other materials to assist such landowners in the conservation of soil and water resources.

Although soil and water conservation districts have the authority to formulate land-use regulations in the interest of conserving soil and soil resources and preventing and controlling soil erosion, no district has as yet enacted any regulations of this type.

The districts' authorities are carried on without the privilege of a power to tax or the power of eminent domain. The district obtains its operating money from three primary sources: (1) funds from the counties; (2) matching funds from the state; and (3) income from providing residents with otherwise unavailable supplies and equipment. In addition, the district also has the authority to borrow money.

On July 1, 1972, soil and water conservation districts will no longer exist as separate entities of government. Under present law, natural resources districts, discussed later in this same section, are due to become operational on that date. Unless amendments to the law are enacted, the implementation of these new natural resources districts would result in the consolidation of this form of special purpose district along with several other political subdivisions discussed in this section.

#### Watershed Conservancy Districts

Sixty-two watershed conservancy districts operating under the provisions of sections 2-1550 to 2-1567 of the Nebraska Statutes presently exist in the State. These districts each exist as subdistricts of one or more soil and water conservation districts with the declared purpose of developing and executing plans and programs relating to any phase of the conservation of water, water usage, drainage, flood prevention, flood control, erosion prevention and control, pollution prevention and control, and flood water and sediment damages.

A board of directors governs the district, with the first board appointed by the responsible soil and water conservation districts and subsequent boards elected in odd-numbered years to four year terms.

In addition to general powers similar to those of the soil and water conservation districts, conservancy districts have the power to levy an annual tax of not to exceed two mills upon the assessed valuation of all taxable property. The districts are authorized to acquire, by eminent domain if necessary, lands, easements and rights-of-way, and to construct, enlarge, improve, operate and maintain such structures as are necessary for the execution of any authorized functions.

Other authorities include the power to develop and adopt a watershed work plan; to borrow money up to five percent of the assessed valuation of all property within the district; and to enter into an agreement, in the name of the district, to hold the United States free from any damage or claims to persons or property resulting from construction, operation, and maintenance that may be undertaken.

Like soil and water conservation districts, watershed conservancy districts are scheduled to be merged into natural resources districts on July 1, 1972. If the merger is completed as planned, the natural resources districts will carry on the functions of the presently existing watershed conservancy districts.

#### Advisory Watershed Improvement Boards

There are currently three advisory watershed improvement boards in the State created under section 23-320.09 of the Nebraska Statutes. The primary responsibility of these advisory boards is to give advice and counsel to their local county governing board or boards and to give leadership and guidance for the resource development programs, flood control works or other similar works within a defined watershed area.

Membership of each advisory board is composed of three residents of the county or counties involved, except that a minimum of one supervisor from each soil and water conservation district included in the drainage area of the watershed is included in the membership.

The advisory board has the power, subject to the approval of the county board or boards, to submit an annual budget to the county board or board involved; to expend funds so budgeted for technical experts, other personnel, and equipment to carry out the responsibilities involved; to construct, improve, and maintain flood control works or other similar works of improvement in the drainage area of the watershed; and, to call upon the county attorney for such legal services as may be required.

Advisory watershed improvement boards will be merged with and their operations annexed by natural resources districts on July 1, 1972.

#### Watershed Planning Boards

Two watershed planning boards controlled by sections 31-833 to 31-837 of the Nebraska Statutes exist in the State. Such a board may be formed by petition to the Governor from any 100 freeholders residing in a watershed. After consultation with the Department of Water Resources, the Governor may establish such a watershed planning board. The Governor is to establish the boundaries of the watershed for which the planning board is created and is to appoint as members at least one freeholder residing in each county lying within or partly within the watershed for terms not to exceed six years.

A watershed planning board has the power to: (1) make such studies as may be necessary for coordinating the plans of local, state and federal agencies for the conservation, development and utilization of water within the watershed; (2) cooperate with federal and state agencies, and with local organizations, municipalities, counties, and other political subdivisions; (3) receive financial support from gifts and contributions and from counties under the provisions of section 23-320.05 and 23-320.06 of the Nebraska Statutes.

On July 1, 1972, watershed planning boards are to be merged with and their functions taken over by the new multi-purpose natural resources districts, which are discussed later in this section.

### Watershed Districts

Another water district in Nebraska is a watershed district which is organized and operated under the provisions of section 31-801 to 31-832 of the Nebraska Statutes. Only one such district exists in the State, since the statutes provide that one may be formed only in an area having a city of the primary class located within its boundary, and since Lincoln is the only primary class city in the State.

The purposes of a watershed district are to carry out activities which are conducive to the public health, convenience or welfare, such as draining wetlands, lands subject to overflow by water or lands which will be improved by drainage; constructing dikes, levees or reservoirs; constructing, enlarging, extending, improving or maintaining any drainage system; developing wildlife habitat and recreational facilities; or providing for flood control, erosion control, channel rectification or pollution control.

A watershed district is governed by an elected board of directors who must be persons or officers or representatives of firms, partnerships or corporations owning property within the district.

The power of eminent domain and the authority to borrow money and incur indebtedness are given to the district. Its board of directors has the power to enter into contracts and may by resolution issue bonds to pay for district improvements. The board has the responsibility of preparing an itemized budget of funds needed for the next fiscal year and presenting this budget to the county boards of counties in which the district is located. The county boards are to levy a tax sufficient to meet the needs of the district, which cannot exceed 3/4 mill on the dollar upon the assessed valuation of all taxable property in the district.

The watershed district is another district which will be consolidated into the new multi-purpose natural resources districts on July 1, 1972.

## Natural Resources Districts

In Nebraska serious attempts to develop a legislative program for restructuring and modernizing district governments related to natural resources began in 1967 when the Nebraska Soil and Water Conservation Commission added a study of the subject as a special work item of the Nebraska Water Plan. Efforts of many local, state and federal leaders resulted in a recommendation to the Legislature for the 1969 legislative session. Legislative Bill 1357 was passed in the 1969 session to accomplish a reorganization of existing soil and water conservation districts, watershed conservancy districts, watershed districts, advisory watershed improvement boards, mosquito abatement districts and watershed planning boards, having limited individual responsibilities, into larger districts of more comprehensive scope. The statutory law governing natural resources districts is in sections 2-3201 to 2-3261 (Supp. 1969) of the Nebraska statutes.<sup>11/</sup> The natural resources districts will be headed by the boards of directors and supervisors of the above named districts. The new districts are provided consolidated powers and programs, some additional authorities, and new boundaries more relevant to comprehensive natural resources development problems of Nebraska.

According to the natural resources district law, by July 1, 1972, approximately 150 districts of the types mentioned above are to be reorganized into between 16 and 28 natural resources districts. The recognized river basins of the state are to be utilized in determining and establishing the boundaries for the districts and where necessary for more efficient development and general management two or more districts are to be created within a basin.

These districts have an array of project authorities available for local people to apply in solving local resource problems. According to section 2-3229 of the Nebraska statutes, these project authorities include: (1) erosion prevention and control; (2) prevention of damages from flood water and sediment; (3) flood prevention and control; (4) soil conservation; (5) water supply for any beneficial uses; (6) development, management, utilization and conservation of ground water and surface water; (7) pollution control; (8) solid waste disposal and sanitary drainage; (9) drainage improvement and channel rectification; (10) development and management of fish and wildlife habitat; (11) development and management of recreational and park facilities; (12) forestry and range management; and (13) mosquito abatement.

The districts are given the following powers: to levy a tax of not to exceed two mills; to acquire and dispose of water rights; to act as fiscal agent for the United States; to cooperate with and furnish financial aid when it would advance the purposes of the district; to construct facilities necessary to carry out the purposes of the district; to store, transport and supply water to users in the district; to make

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<sup>11/</sup> As amended by L.B. 538 and L.B. 544, 82nd Nebraska Legislature (1st Session), 1971.

studies, surveys and investigations and to conduct demonstration projects which advance district purposes; to acquire property by eminent domain; to promulgate and enforce land use regulations and ground water regulations in restricted circumstances; and to invest surplus funds.

The natural resources district law provides that in areas of the State where there is now a public power and irrigation district of a stipulated size of operation and when that district covers an area which is acceptable for boundaries of a natural resources district, that a natural resources division of the public power and irrigation district may be established in lieu of a district. In most respects a natural resources division would be the same as a district.

The programs of the soil and water conservation districts, watershed conservancy districts, watershed districts, watershed planning boards, advisory watershed improvement boards and mosquito abatement districts are to continue through the natural resources districts. Until July 1, 1972, these districts will be operating under their respective legislative provisions as contained in the Nebraska Revised Statutes.

#### Metropolitan Utilities District

A single metropolitan utilities district exists in Nebraska serving the Omaha metropolitan area. Authority for this district was derived from sections 14-1101 to 14-1114 and from 14-1001 to 14-1041 which provides for metropolitan water districts, the predecessor of a metropolitan utilities district. Its responsibility lies in providing utilities, presently only gas and water, for all users within its boundaries.

Water districts were authorized by the Legislature and given the same powers as other public purpose corporations. Such districts were expressly granted any and all powers granted to cities and villages of the State for the construction or extension of waterworks.

A later session of the Legislature provided that any metropolitan water district assuming control over any other public utility in addition to water would become a metropolitan utilities district. Such a utility district was also given all the powers conferred upon the metropolitan water districts, and these powers were extended to apply to any other public utility under the district's control.

A six member board of directors selected by the electors within the district govern the operation of a public utility district. The directors elect one of their number to be chairman and one to be vice-chairman of the board. The directors also appoint a general manager to act as a secretary for the board and to supervise management, construction, operation and maintenance for the district.