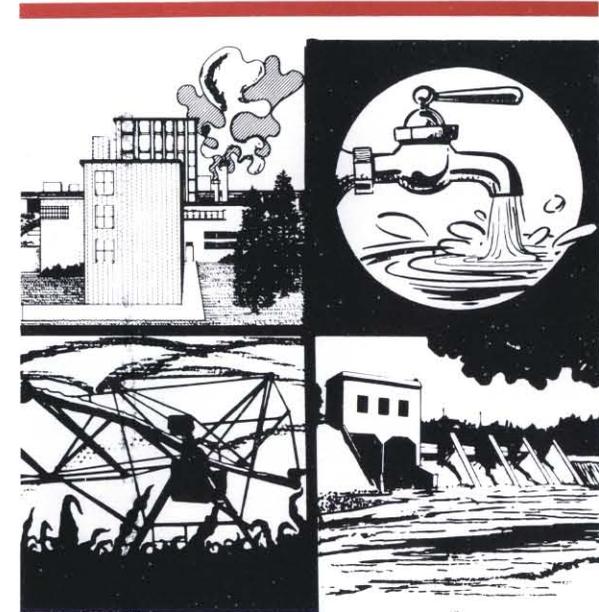


POLICY ISSUE STUDY ON SELECTED WATER RIGHTS ISSUES

PREFERENCES IN THE USE OF WATER

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State Water
Planning and Review Process

Nebraska
Natural Resources Commission

6. The term "manufacturing" as used in preferences laws should be defined to include industrial and commercial uses other than large energy uses.
7. Domestic use of water should have an absolute preference so that compensation to non-domestic users would not be required when the water is needed for domestic purposes. However, compensation should be required when the competition for the water is between non-domestic users.
8. Water uses which are recognized in the surface water preferences list ought to be subject to and receive the same protection from those preferences whether the use of water is direct through diversion or indirect through well field induced recharge.
9. Reasonable standards should be imposed when groundwater preferences are used to protect pumping levels or other factors affecting the ease of access by a preferred user to the groundwater supply.

Plan for Tomorrow

Today



Nebraska now stands at a crossroads with regard to water policy, with a relatively uncontrolled past and a future of possible shortages. With proper management of its vast water resources, Nebraska may look forward to many more years of prosperity and adequate water supplies for all purposes. In the event of shortages, though, Water Use Preferences should be available to ensure that water is allocated to the most highly valued uses. The Natural Resources Commission urges Nebraskans to plan for tomorrow today, by strengthening the existing preferences system in anticipation of all possible futures.

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Alternative #13 - Modify the preferences system by adding instream uses.

Alternative #14 - Make compensation a requirement in the exercise of groundwater preferences.

Alternative #15 - Impose reasonable standards on the use of preferences for protecting the means of access to a groundwater supply.

Six of the alternatives, #'s 1, 2, 3, 5, 7, and 11, were rejected by the Commission. The other nine were recommended, in total or in part, for favorable consideration. In summary, the Commission recommends the following:

1. Municipal use of water ought to be divided into two categories: (1) domestic municipal use, and (2) non-domestic municipal use. Domestic municipal use should have the same preference as all other domestic uses and the non-domestic portion should receive a preference immediately after manufacturing.
2. Energy uses which result in the consumption of large amounts of water should be treated separately from manufacturing and industrial uses and should be located after manufacturing in the preferences list.
3. Provision should be made to allow water to be reserved for future preferred use, at least for domestic municipal uses.
4. Preferences ought to be considered when initial water allocation decisions are being made, not just when shortages actually occur.
5. The present definition of "domestic use" for groundwater, which includes uses necessary for health, fire control, and sanitation and for domestic livestock when part of a normal farm or ranch operation, should also be adopted for surface water.

PREFERENCES IN THE USE OF WATER

Imagine the following:

An individual irrigator, located along Nebraska's North Platte River, finds that a manufacturer located upstream is using water at a rate which affects his ability to irrigate effectively. "According to Nebraska's Water Use Preferences, the irrigator merely needs to invoke his preferred status over the manufacturer to obtain his necessary water, and the manufacturer must comply. True?"

False. This hypothetical situation illustrates one of the most popular misconceptions concerning the water preference provisions. The common misunderstanding is that regardless of priorities in time and other qualifications and conditions, the preferred user simply gets the water in times of shortage.

The water preference system is more complicated than is commonly believed, and does not allow for simple transactions as presented in the opening story. Exactly what the preferences are, their objectives, how they have been used to date, and recommendations for changes to the system are the subjects of this brochure. Water Use Preferences are also the subject of a 118 page report which is available from the Natural Resources Commission upon request.

Nebraska's vast supply of water was once commonly believed to be inexhaustible, but this belief has proved to be short sighted. Shortages of surface water commonly occur, and groundwater supplies in much of Nebraska are being pumped faster than the rate of natural recharge. Shortages will occur in the future, and Water Use Preferences are legal tools which may come into play in determining who receives available water, and for what use.

Preferences in the Use of Surface Water

As a general rule, under Nebraska law when the surface water supply is not adequate for all

users, the user who is "first in time is first in right." For example, the holder of a water right granted April 1, 1950 is first in time in relation to, or has "priority" over the holder of a right granted April 2, 1950. In most instances, the appropriator with priority has the better right to use the water. The allocation of water between holders of surface water appropriations who use the water for the same type of use - eg. two irrigators - is always based on the priority of their rights. However, if they are using the water for different purposes, the question of who has the better right to use the water may be resolved on the basis of "preferences" rather than priority.

The term "preferences" is generally used to describe "a legal system for allocating water between different types of uses during times of shortages." Section 6, Article XV of the Nebraska Constitution provides that "those using the water for domestic purposes 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."

The preference of domestic over agricultural and manufacturing uses allows domestic use of water to which irrigators or manufacturers would otherwise be entitled due to their earlier priority dates. An agricultural user has the same power over a manufacturer. Certain requirements must be met to exercise a preference, however. If they are not met, the first in time, first in right rule applies.

A surface water preference may only be exercised when compensation is paid to the inferior (non-preferred) user. This limitation appears to be fairly well established in current water law. Surface water preferences also may only be available to public entities with the power of eminent domain. Current water law provisions are unclear as to exactly who can exercise eminent domain. Future court cases may address this uncertainty, and rule whether public entities and private individuals, or public entities alone, may exercise a preference.

Preferences in the Use of Groundwater

Nebraska's groundwater preference statute is unusual in that preference provisions are generally associated with a system of prior appropriation, as is applied to surface water use in Nebraska. This doctrine has not been applied to groundwater use in the state, however. Instead, groundwater rights are based on land ownership. As a general rule, each landowner has a right to make a reasonable use of the water on his land overlying the aquifer. In times of shortage all groundwater users are to share equally in the available supply.

Since its adoption in 1957, the groundwater preference statute has been considered by the Supreme Court on only one occasion. In that case the court relied heavily on the preference statute in holding that an irrigator had to compensate a domestic user for the cost of deepening the domestic user's well. Although the water supply was adequate for both users, the irrigator's use was found to have interfered with the domestic user's means of access to the water and therefore the irrigator, as an "inferior" user of water was required to pay damages.

How groundwater preferences will be used to resolve conflicts when a true shortage of groundwater exists is not yet known. Payment of compensation to the non-preferred user may not be a requirement for the exercise of a groundwater preference.

Backup System

As can be seen, water preferences in Nebraska exist largely as a legal backup system to the general water allocation rules of time and land ownership. Their purpose is to provide favorable treatment to uses most highly valued by society.

To date, applications of preference provisions have been rare. Limitations placed on the exercise of preferences, both legal and economic, have served to keep them in the background of Nebraska water law. The idea of assigning preferences to uses of water, though, is not unique to Nebraska. Most western states also employ preferences in one form or another, from systems similar to Nebraska's to those which differ in significant ways.

Policy Alternatives

Numerous problems, both real and potential, combine to give Nebraska's water preference system a lack of definition in many respects. In an effort to further define and/or modify the preferences, an interagency task force, as part of the State Water Planning and Review Process, has formulated a list of fifteen possible policy alternatives. The Commission feels that these alternatives, listed below, comprise a representative range of possible alternatives.

- Alternative #1 - **Make no changes in present policies.**
- Alternative #2 - **Abolish preference system entirely.**
- Alternative #3 - **Abolish all preference systems except for domestic use.**
- Alternative #4 - **Modify the preferences system by adding municipal uses.**
- Alternative #5 - **Make manufacturing, commercial and industrial uses superior to agricultural uses.**
- Alternative #6 - **Modify the preferences systems by adding other consumptive uses.**
- Alternative #7 - **Repeal current preferences and substitute a flexible preferences system.**
- Alternative #8 - **Allow reservation of water for preferred uses.**
- Alternative #9 - **Utilize preferences as a basis of approval of competing application.**
- Alternative #10 - **Define the water use terms used in preferences provisions.**
- Alternative #11 - **Clearly authorize or deny the right of private individuals to utilize eminent domain to exercise a preference.**
- Alternative #12 - **Repeal the requirement that compensation be paid to exercise a preference.**