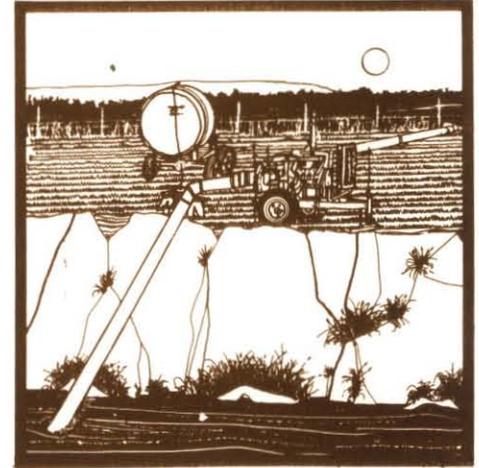


Report # Three
POLICY ISSUE STUDY
ON SELECTED
WATER RIGHTS ISSUES

WATER RIGHTS ADJUDICATION

State Water Planning and Review Process
Nebraska Natural Resources Commission

DECEMBER 1982



**POLICY ISSUE STUDY
ON
SELECTED WATER RIGHTS ISSUES**

STATE WATER PLANNING AND REVIEW PROCESS

REPORT #3, WATER RIGHTS ADJUDICATION

**REPORT
OF THE
NATURAL RESOURCES COMMISSION
TO
GOVERNOR CHARLES THONE
AND
THE MEMBERS OF THE NEBRASKA LEGISLATURE**

December 1982

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PROGRAMS:

SOIL & WATER CONSERVATION
WATERSHED PROTECTION
COMPREHENSIVE PLANNING
FLOOD PLAIN MANAGEMENT
DATA BANK
WATER CONSERVATION FUND
DEVELOPMENT FUND



STATE OF NEBRASKA
NATURAL RESOURCES COMMISSION

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The Honorable Charles Thone
State Capitol, 2nd Floor
Lincoln, Nebraska 68509

Members of the Nebraska Legislature
Eighty-Seventh Nebraska Legislature, Second Session
State Capitol
Lincoln, Nebraska 68509

Governor Thone and Members of the Legislature:

This report, entitled "Water Rights Adjudication," has been reviewed and approved by the Natural Resources Commission. It is the third report of the Selected Water Rights Issues policy study.

Eight alternative courses of action relating to the loss of water rights are analyzed in Part I of the report. Two alternatives relating to the quantification of previously unquantified rights are addressed in Part II. The Commission's recommendations on those alternatives are also provided and can be found on the blue pages immediately following the Foreword.

It is the hope of the Natural Resources Commission that this report will be helpful in making policy decisions and, if necessary, statutory changes. The Natural Resources Commission is prepared to answer any further questions you may have.

Sincerely,

Chairman
Natural Resources Commission

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Foreword

This is report #3 of the Selected Water Rights Issues Policy Study. Twelve water policy issue studies are being conducted under the Nebraska State Water Planning and Review Process. This report addresses the issue of water rights adjudication and has been divided into two parts. Part I deals with adjudication as it relates to the loss of water rights and Part II deals with adjudication as it relates to the quantification of previously unquantified water rights.

The base document for this report was prepared by Annette Kovar of the Natural Resources Commission, with the assistance of an interagency task force. Members of that task force and the agencies represented are as follows:

James R. Cook Natural Resources Commission, Leader
Judy Lange Department of Environmental Control
J. Michael Jess Department of Water Resources
William Lee Department of Health
Darryll Pederson Conservation & Survey Division, UNL
J. David Aiken Water Resources Center, UNL
Karen Langland Policy Research Office
Gerald Chaffin Game & Parks Commission
John Alloway Department of Agriculture

Others who contributed to the preparation of this report are: Norman Thorson, UNL College of Law; Bob Kuzelka, UNL Conservation and Survey Division; and Charles Deknatel, Community & Regional Planning, UNL College of Architecture.

The Commission released this report for public review on January 20, 1982. A public hearing was held in Lincoln, Nebraska, on February 17, 1982. The Public Advisory Board provided the Natural Resources Commission with its recommendations on the alternatives contained within the task force report.

Three Commission members were assigned the responsibility for considering the comments received and for preparing suggested changes in and recommendations on the report. The committee members were:

Henry P. Reifschneider, Chairman
Robert W. Bell
Rudolf C. Kokes

Their work was utilized by the Commission to refine and supplement the task force report to its present form.

Five additional reports have been prepared by the Selected Water Rights Issues task force and transmitted to the Natural Resources Commission. Transmittal to the Legislature and Governor will follow a public review process of at least ninety days. These reports will address the following water rights subject areas:

Property Rights in Groundwater
Riparian Rights
Interstate Water Uses and Conflicts
Transferability of Water Rights
Beneficial Uses

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Comments And Recommendations Of The Natural Resources Commission

INTRODUCTION AND PURPOSE

In preparing policy issue study reports like this one, the Natural Resources Commission has two major responsibilities. The first responsibility of the Commission is to present in an objective manner a representative range of policy alternatives for the particular water policy issue being considered. The purpose of all portions of this report following this section on comments and recommendations is to fulfill that responsibility.

Once all of the alternatives have been presented, the second responsibility of the Commission is to provide the Legislature, the Governor, and the public with opinions on the various alternatives. This section of the report is to fulfill that responsibility. Commission recommendations were made following a review of the report and consideration of comments offered by the public. Comments and opinions are offered in the material which follows on the alternatives in Part I and Part II of the report. Some alternatives are favored and others are not.

PART I _____

RECOMMENDED ALTERNATIVES

The Commission is of the opinion that the right of the state to grant a water appropriation right also gives the state the right to revoke it. The Commission recommends that the provisions in the adjudication statutes whereby a person forfeits his or her water right be clarified. An appropriator's investment in that water right would be made more secure by clearly stating those conditions to which that right is subject and under which that right may be cancelled. The Commission recommends the following alternatives be considered in the furtherance of this basic policy.

Alternative #2: Clarify present policy regarding forfeiture.

Alternative #2B: Indicate that three "successive or consecutive" years of non-use were contemplated in the forfeiture statutes.

Alternative #2D: Clarify the statutes to state that unperfected or inchoate water rights can be cancelled for failure to comply with the conditions of approval in the permit.

The Commission does not recommend, as *Alternative #2A* provides, repeal of either forfeiture statute requiring that when beneficial use of a water appropriation ceases, the appropriation also ceases. It is suggested instead that both statutes be retained and by amendment made consistent by providing that three years nonuse may result in forfeiture of the water appropriation. At the same time, the clarification suggested in *Alternative #2B* could be easily incorporated into the forfeiture statutes making it clear that water appropriations are subject to forfeiture only if the water has not been used for more than three "consecutive" years. *Alternative #2D* would clarify the statutes with respect to the authority of the Department of Water Resources to cancel unperfected water rights for failure to comply with the conditions of approval in the permit. Implementation of these alternatives would conform the forfeiture statutes with the actual practice of the Department of Water Resources in administering the statutes and would result in few if any impacts on the present system.

Alternative #4: Modify the forfeiture provisions to permit exceptions to the three-year period of nonuse.

The Commission recommends the following periods of time be considered as exceptions to nonuse:

1. When irrigated farmlands are placed under an acreage reserve or production quota program or otherwise withdrawn from use as a requirement of participation in any federal or state government program;

2. When federal, state, or municipal laws impose land or water use restrictions;
3. When the available water supply is inadequate to enable the owner to use the water for a beneficial or useful purpose;
4. When climatic conditions cause irrigation to be unnecessary or when circumstances are such that a prudent man, following the dictates of good husbandry, should not be expected to use the water; or
5. When caused by destruction of works, diversion or facilities for use by a cause not within the control of the owners of such water appropriation, and when good faith efforts to repair or replace such works, diversion or facilities are being made;
6. When nonuse occurs as a result of active service in the armed forces of the United States during a national emergency;
7. Non-voluntary service in the armed forces; and
8. During the operation of legal proceedings which affect the appropriation.
9. Any other period of time determined by the Department of Water Resources by rule to be sufficient cause for failure to use a water appropriation.

Adoption of this alternative would provide firm guidelines to the Department of Water Resources for determining whether there has been sufficient cause excusing nonuse. It would also provide standards by which the courts could assess the propriety of administrative actions on appeal. The ninth exception listed above partially incorporates the intent of *Alternative #3* to permit some flexibility to the Department of Water Resources in its administration of the forfeiture statutes to provide additional excepted periods of nonuse which it feels are justified.

The following alternatives are not recommended by the Commission:

Alternative #1 (Make no change) was rejected because the Commission believes some clarification of the forfeiture statutes is necessary. Likewise, it was felt more appropriate to amend, rather than eliminate as *Alternative #2A* provides, the forfeiture statutes to make the language consistent with the intent that three years nonuse may subject a water appropriation to forfeiture.

Alternative #2C (Permit forfeiture only if nonuse was intentional and voluntary) was rejected because "intent" and "voluntariness" language lends itself easily to differing interpretations and could result in unnecessary problems.

Alternative #3 (Require Department of Water Resources to promulgate rules) has been partially absorbed into *Alternative #4* in providing a more comprehensive treatment of the conditions

constituting sufficient cause for nonuse of a water appropriation.

Alternative #5 (Abrogate nonuser and prescription) was rejected for the reason that there is value, (1) in giving another private citizen the right to challenge nonuse of a water appropriation in court if the Department of Water Resources has failed to act and, (2) in setting an upper limit of ten years on nonuse of a water appropriation.

Alternative #6 (Lengthen or shorten 3-year nonuse period) is not favored. Three years is considered an adequate period of time within which to use water if none of the exceptions listed in *Alternative #4* are relied upon as excuses.

Alternative #7 (Petitioned extension of time to resume use of appropriated water) is deemed unnecessary if *Alternative #4* is implemented.

Alternative #8 (Modify the forfeiture statutes to incorporate the "acreage report" concept) is not recommended because it is not felt that it would in fact save time or funds in comparison with present procedures. While some reduction in the number of hearings might be expected if acreage reports were filed after the irrigation season, any savings would be largely offset by the costs of processing and filing the additional reports.

PART II

RECOMMENDED ALTERNATIVE

Alternative #1: Make no change in the adjudication statutes regarding the quantification of federal reserved water rights and Indian water rights.

The Commission is of the opinion that it would not be practical to quantify these rights at the present time. *Alternatives #2, 2A, and 2B* are, therefore, not favored. When, and if, a decision is made to recommend quantification of riparian rights, consideration should then be given to quantifying federal reserved and Indian water rights as well.

Introduction

The overall goal of this study will be to assess the effectiveness of the current adjudication system with respect to both the loss and quantification of water rights. Nebraska, like most western states, has an adjudication procedure designed to measure and record the quantity of water flowing in the several streams of the state and to determine the priorities of rights to use the public waters of those streams. This is accomplished through a system of appropriation. Nebraska's current system has been in effect without substantial change since 1895. At that time, a major effort to quantify and issue appropriations for claims to water was undertaken. Prior to that time, Nebraska had not formally recognized claims to water; it had operated under a riparian system and a quasi-appropriative system under which water was diverted for use with no formal claim procedure. Riparian rights acquired prior to 1895 were recognized by the 1895 law as vested and no attempt has ever been made to quantify and determine these rights. Other claims to water rights which remain unquantified include federal reserved rights, non-reserved rights, and Indian water rights.

One feature of the primarily administrative adjudication system is a procedure by which water appropriations if unused for more than three years may be considered forfeited and cancelled. This is in addition to several other judicially recognized methods of loss of a water appropriation based on the common law, including: abandonment, nonuser, prescription, estoppel, and laches. The forfeiture statutes do not provide guidance on whether certain considerations might excuse nonuse, such as the adequacy of precipitation, cropping patterns or participation in federal land set-aside programs. The Department of Water Resources, the administering agency in this process, does, however, consider these factors. **Part I** of this report will focus on whether these and other exceptions to the three year nonuse rule should be adopted legislatively or other changes made in the

current policies governing loss of water rights.

Part II of this report examines the state's adjudication system with respect to the quantification of previously unquantified rights. These include rights to the use of Missouri River water, riparian rights, federal reserved and non-reserved rights, and Indian water rights. The issue to be addressed is whether the state's water adjudication system is adequate for the identification and quantification of these rights. The question of whether riparian rights should be integrated into the appropriative system is the subject of another report in this study and therefore will only be given cursory coverage here.

The need to determine the status of water appropriations and their relationship to non-appropriative water rights becomes evident if one considers the difficulty in planning water project development in light of the "realistic possibility that there will be no water available for use under the project."²

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Summary

PART I ADJUDICATION AS RELATED TO LOSS OF WATER RIGHTS

HISTORY AND PRESENT LAW

Public policy regarding the use of water in the State of Nebraska has generally been one advocating nonwasteful use so that the greatest economic benefit can be derived therefrom to the greatest number of people. Consequently, provisions were made in the Nebraska statutes for the forfeiture and cancellation of water rights which remain unused for more than three years. The forfeiture procedure is administered by the Department of Water Resources whose field officers make the initial determination of nonuse. The Department notifies the interested landowners and other individuals to appear at a hearing where they must "show cause" why their water appropriation should not be cancelled and annulled because it has not been used for more than three years. If it appears from the evidence that the water has not been put to beneficial use or has ceased to be used for such use as specified in the appropriation permit for more than three years, then the water appropriation shall be declared cancelled. This administrative determination may be appealed to the Nebraska Supreme Court, which has upheld the constitutionality of this forfeiture procedure as a valid exercise of the state's police power to regulate the public waters for the benefit and welfare of its citizens.

The statutes do not elaborate on what "cause" is sufficient to prevent cancellation of a water right. The Nebraska Supreme Court has stated that there may be reasons which could excuse beneficial use, such as adequate rainfall or insufficient streamflows. Legislative history shows that similar exceptions to the three year nonuse rule were considered. Furthermore, the Depart-

ment of Water Resources currently recognizes three specific reasons excusing nonuse: (1) adequate moisture, (2) inadequate streamflow, and (3) cropping patterns such that irrigation is unnecessary. The problem lies with the fact that judicial asides and legislative history do not provide a firm precedent for future forfeitures. Clarification of the forfeiture statutes might eliminate this uncertainty and provide guidance to the Department of Water Resources.

In addition to the statutory forfeiture procedures, there are a number of other judicially sanctioned ways in which a water right may be lost. One is the voluntary relinquishment of claim to those rights made to the Department of Water Resources, which does not require judicial action. The other methods of loss are all asserted by filing a lawsuit. Abandonment is the relinquishment of a right with the **intent** to abandon or desert the right. In this state, upon abandonment, the appropriated water reverts to the public domain where it may again be appropriated. Nonuser is the second method of loss receiving some court attention in the past. Nonuser is the actual neglect to use the water for more than ten years. Prescription is yet a third method of loss of a water right, whereby an individual, not the original appropriator or riparian owner, uses the water referred to in the appropriation permit, exclusively and continuously for ten years, claiming a right to the water adverse and hostile to the owner. It is accompanied by the acquisition of the same right by the person who has been using it.

Two other theories justifying the loss of a water right which have been asserted are the judicial doctrines of estoppel and estoppel by laches. They do not literally work the loss of a water right; for example, if an individual by behavior or statements leads another person to believe he or she does not claim a water right and induces that person to do something, such as seek a water appropriation, which he or she would not otherwise have done, that individual is "estopped"

from pleading the truth that he or she does claim a water right. Laches, on the other hand, means negligence and delay in the assertion of a water right by one person of such duration that it leads another person to believe it will not be claimed and enforcement of the asserted right would be inequitable.

The increasing diligence with which the Department of Water Resources is enforcing the forfeiture statutes has decreased the use and reliance on these other methods of effecting the loss of water rights and therefore, their relevance today is not as great perhaps as it has been in the past.

PRACTICAL EFFECTS

The purpose of the water adjudication process is to determine the status of water appropriations in the state, and, if necessary, to cancel those water appropriations which are not being used and have not been used for more than three years. It is apparent from the foregoing discussion that there is some uncertainty surrounding the operation of the forfeiture statutes and the way in which a water right may be lost generally.

The most troublesome aspect of the forfeiture procedure is the interpretation given to the "show cause" provision in the statutes. The courts, legislative history, and administrative practice have suggested certain exceptions to the three year nonuse rule. However, a clearer definition of what cause is sufficient in this situation to avoid cancellation could eliminate uncertainty and provide guidance for future forfeiture hearings. A number of other confusing aspects of the forfeiture statutes could be removed by clarifying the statutes to accord with administrative practice.

Confusion is the major problem resulting from the other methods of loss of water rights discussed. While there are definite legal distinctions between various methods, the terms have frequently been used interchangeably. Some clarification in this area may also be desirable.

POLICIES IN OTHER STATES

Most of the other Western States have forfeiture procedures similar in basic form to Nebraska's. Common provisions include cancellation of a water right for failure to make beneficial use of a water appropriation for a set number of years in succession. In most states the water under the cancelled appropriation either reverts to the state and becomes unappropriated water or reverts to the public and is again subject

to appropriation. A few states have statutorily qualified nonuse as being without sufficient cause. Approximately an equal number provide that forfeiture will not occur if certain circumstances exist. One state actually statutorily defines sufficient cause for nonuse. In another state, nonuse for the statutory number of years is conclusively presumed to be an abandonment of the water right. In addition, a majority of the states use the terms abandonment and forfeiture interchangeably. A smaller number have separate statutes dealing with forfeiture, nonuser, and abandonment. One state statutorily accepts the acquisition of prescriptive rights to water while another state expressly denies them.

A policy alternative which has been suggested academically recommends that certain periods of time not be considered nonuse for the purpose of forfeiture. These periods of nonuse cover most of those suggested in case law or provided for by statute in other states and has been included as a legislative alternative in this report. In addition, the idea of filing an acreage report and other modifications to the forfeiture hearing process could simplify the forfeiture procedure and make it less expensive and time-consuming. It, too, is included as an alternative.

ALTERNATIVE LEGISLATIVE POLICY ACTIONS

Alternatives Identified

Eight alternatives have been identified for consideration relating to the loss of water rights in Nebraska. They present a range of possible policy options. Variations and combinations of these alternatives are also possible.

Alternative #1: Make no change in present policy regarding loss of water rights. This alternative would leave the state policy on the loss of water rights as it currently exists. The courts would continue to play the primary role in determining what reasons might excuse the nonuse of a water appropriation.

Alternative #2: Clarify present policy regarding forfeiture. The current forfeiture statutes, if clarified, would eliminate much of the uncertainty surrounding the water adjudication process. The primary basis for this clarification lies in the practical administrative application of the statutes by the Department of Water Resources.

Alternative #2A: Eliminate one of the two forfeiture statutes. There are two Nebraska statutes requiring that when beneficial use of a water appropriation ceases, the appropriation right also ceases—one states three years nonuse

and one refers to no time period. The former is the statute actually enforced.

Alternative #2B: Indicate that three "successive or consecutive" years of nonuse were contemplated in the forfeiture statutes. The forfeiture statutes do not explicitly state that three successive years of nonuse may lead to the cancellation of a water right; however, this is probably implied. The Department of Water Resources has construed the statute to mean three consecutive years and determines forfeitures accordingly.

Alternative #2C: Modify the forfeiture statutes to permit forfeiture only if nonuse was intentional and voluntary. It is reported to be the case that water rights are cancelled only if it appears that nonuse has been voluntary or the result of neglect by the appropriator. This alternative would make the language of the forfeiture statutes consistent with actual practice.

Alternative #2D: Clarify the statutes to state that unperfected or inchoate water rights can be cancelled for failure to comply with the conditions of approval in the permit. An appropriative water right has been perfected when the water has actually been put to beneficial use as specified in the appropriation permit. Theoretically, unperfected water rights end with cancellation of the application or revocation of the permit to appropriate, rather than through nonuse. The Nebraska forfeiture statutes, however, do not make it clear that the forfeiture procedure does not apply to unperfected or inchoate water rights.

Alternative #3: Require the Department of Water Resources to promulgate rules on what constitutes "sufficient cause." The director of the Department of Water Resources possesses the authority, currently, to prescribe these rules and regulations; however, this alternative would indicate affirmative legislative intent that he do so.

Alternative #4: Modify the forfeiture provisions to permit exceptions to the three year period of nonuse. Considering the uncertainty surrounding the "show cause" provision of the forfeiture statute, this alternative would have the legislature develop guidelines for determining what facts are sufficient to show cause why a water appropriation should not be cancelled.

Alternative #5: Abrogate nonuser and prescription as methods of effecting the loss of water rights. If the forfeiture statutes are diligently enforced, both nonuser and prescription which require ten years nonuse prior to loss are effectively obsolete; forfeiture would already have resulted from three years nonuse.

Alternative #6: Modify the forfeiture statutes to lengthen or shorten the period of time after which forfeiture of a water appropriation for nonuse will occur. A number of western states recognize a longer period of nonuse, than Nebraska, before forfeiture procedures will be instituted on a water appropriation.

Alternative #7: Provide for the petitioned extension for a reasonable length of time to resume the use of appropriated water. This alternative would permit the Department of Water Resources to grant extensions to resume use of a water appropriation which has been completed and perfected and lapsed into nonuse. It is doubtful that the Department has this authority and it has not been their policy to grant such extensions. This extension would allow a nonuser to retain his earlier priority date.

Alternative #8: Modify the forfeiture statutes to incorporate the "acreage report" concept. This alternative suggests modifications of the forfeiture procedure to make it simpler and less expensive.

Physical/Hydrologic/Environmental Impacts

For the most part, the physical, hydrologic, and environmental impacts which could result from adoption and implementation of these alternatives would not be significant and are more the consequence of other factors affecting nonuse of the water rather than the administrative cancellation or loss of the water right itself. These factors include periods of adequate precipitation, drought, and other climatic conditions which prevent, or make unnecessary, use of the water.

Socio-Economic Impacts

The impacts described in this section deal primarily with the effect these alternatives would have on economic efficiency. Current adjudication procedures are economically inefficient because water users cannot be certain when nonuse will be excused. Consequently, those alternatives which would reduce uncertainty in the adjudication process would also tend to be more economically efficient. For the most part, however, there would be minimal economic impact for those alternatives which merely modify the statutes to conform with administrative practice.

Part II

ADJUDICATION AS RELATED TO PREVIOUSLY UNQUANTIFIED RIGHTS

HISTORY AND PRESENT LAW

Nebraska's first adjudication of water rights claimed in the state occurred under the 1895 Irrigation Law which officially adopted a procedure to administer water rights acquired in accordance with the newly instituted system of prior appropriation. An adjudication of existing appropriative claims to the state's water was an integral part of that procedure. Other adjudications have occurred on scattered streams throughout the state since that time, the most recent coming in 1980 with the passage of LB 802 by the Nebraska Legislature, amending section 46-202 of the state statutes. This law provided for the formal appropriation of the waters of the Missouri River. Prior to that time permits to appropriate water out of the Missouri River had not been required.

The importance of these past adjudication experiences lies in their implication for federal reserved and non-reserved water rights, Indian water rights, and riparian rights. These rights are unquantified at the present time and have not been incorporated into the state's appropriative system of water rights. These outstanding rights prevent an accurate assessment of all the water rights claimed within the state and inhibit the effective planning and development of the state's water resources.

The federal government, for the most part, has acquiesced to state water rights laws except for a separate and distinct classification of "reserved" water rights. Known as the "reserved rights doctrine", it exists independently of state law and has necessarily created some apprehension for states in this respect. A judicially created doctrine, it has generally been applied to Indian reservations and other federal enclaves, particularly national forests. Federal reserved rights are created when the United States withdraws land from the public domain for federal purposes by treaty, Act of Congress, or executive order. The government impliedly reserves a quantity of water sufficient to carry out these federal purposes. The possibility exists with federal and Indian rights that when the water is eventually put to use, private rights acquired later in time

may be impaired or destroyed without compensation.

The states have generally been precluded from adjudicating these federally claimed water rights by the doctrine of sovereign immunity, which prevents the federal government from being sued by the state. The Congress enacted the McCarran Amendment in an attempt to waive the sovereign immunity of the United States in the area of water rights litigation. Under the McCarran Amendment, federal water rights can be determined in a general streamwide adjudication pending before a state court. The purpose of a general adjudication procedure is to determine the priorities of all the water users on a stream. Needless to say, the federal government has been unwilling to participate and has resisted efforts to include them in these adjudications at the state level.

Another hindrance to water resources planning and development in the state is the existence of riparian water rights. Riparian rights to use water are a consequence of the legal ownership, possession, or use of land bordering on the banks of a natural watercourse or lake. In order to qualify as riparian in Nebraska, the land must have been severed from the public domain prior to April 4, 1895 when the irrigation laws of 1895 establishing the appropriation system were enacted, and it must have been held and remained in unitary possession since that time. The possibility of latent riparian rights exists because most of the state's irrigable land was in private ownership before 1895. The suggestion has been made on a number of occasions that riparian rights be adjudicated and incorporated into the appropriation system. The relationship of the adjudication process to riparian rights is only briefly described here as the *Riparian Rights Report* will cover it in greater detail.

PRACTICAL EFFECTS

A general problem associated with the reserved rights doctrine is the fact that no one presently knows how much water will be required in the future to satisfy the federal reservations. The difficulty in planning water project developments is compounded by the possibility that there will be no water available for use due to preemption by a paramount federal right. However, there are also a couple of procedural requirements which make adjudication under the McCarran Amendment difficult. Fortunately, there are only a few streams in the state to which the reserved rights doctrine might apply and it is unlikely that there would be any significant impact in those areas.

POLICIES IN OTHER STATES

A few states have enacted legislation setting timetables for the assertion of certain kinds of water rights and to permit a general adjudication of these rights. The process has by no means been an easy one; it has been obstructed at every turn by the federal government and Indian tribes who are unwilling to be sued in state court. In addition, the United States Department of Interior has vacillated recently over just what policy it will pursue regarding federal reserved and, particularly, non-reserved water rights. Therefore, while it is clear that there will have to be federal and state cooperation in this area of water right adjudications in order to resolve these controversies, it will not be easily achieved.

ALTERNATIVE LEGISLATIVE POLICY ACTIONS

Alternatives Identified

Two basic alternatives have been identified for consideration relating to the adjudication of previously unquantified federal reserved and Indian water rights. One would make no change in the adjudication statutes and adopt a "wait-and-see" posture while the other would authorize the adjudication and quantification of federal reserved and Indian water rights.

Alternative #1: Make no change in the Adjudication Statutes regarding the quantification of federal reserved and Indian water rights. This alternative would leave federal reserved and Indian water rights unquantified with respect to state-created water rights and they would remain outside the state's system of water rights administration. No immediate conflicts between federal, Indian, and state water users are likely to present themselves.

Alternative #2: Authorize the adjudication and quantification of Federal Reserved Water Rights and Indian water rights. Implementation of this alternative would require legislative action amending the state adjudication procedure to meet the jurisdictional requirements of the McCarran Amendment. The actual process of adjudicating federal reserved and Indian water rights would be administered by the Department of Water Resources and the Courts.

Alternative #2A: Modify the Adjudication Statutes to comply with the jurisdictional requirements of the McCarran Amendment. Two McCarran Amendment jurisdictional requirements which must be met before the United States may be joined as a party in a state adjudication of federal reserved or Indian water

rights are that (1) the suit for adjudication involve judicial proceedings, and (2) the adjudication be a general one of all water rights on a stream, not solely federal or Indian rights.

Alternative #2B: Provide for negotiation of a settlement between the Federal Government and Indian tribes, and the state. This alternative would authorize the designation of a compact commission with authority to negotiate a settlement between the Indian tribes and the state regarding water rights which would become effective upon ratification by the state, Indian tribe, and Congress.

Physical/ Hydrologic/ Environmental Impacts

No immediate and significant water use changes or impacts are anticipated to result from the implementation of any of these alternatives. With the exception of *Alternative #2B*, the impact of the other alternatives would all depend to a great extent on court decisions. However, any quantification of water rights is likely to mean less water available for appropriation.

Socio-Economic Impacts

While the quantification of federal and Indian water rights would certainly enhance economic efficiency, the cost of effecting this result would more than offset potential gains in efficiency. Fortunately, at this point in time in Nebraska, the existence of unquantified federal and Indian water rights does not appear to present a major problem.

RELATIONSHIP TO OTHER STUDIES

This report, for the most part will have limited impact on the other policy issue studies. This chapter of the report is important, however, because it examines the various relationships which may exist between it and all the other policy issue studies being conducted and serves to highlight the fact that water policy issues cannot be decided in a vacuum.

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PART I

**ADJUDICATION
AS RELATED TO LOSS OF
WATER RIGHTS**

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CHAPTER 1

HISTORY AND PRESENT LAW

Introduction

In Nebraska, the loss of water rights has not received a great deal of attention. Growing concern over the scarcity of water, however, may eventually bring the issue of water right adjudications to the attention of the legislature. Current adjudication procedures and statutes relating to forfeiture of water rights are confusing and allow much discretion to administrative agencies. At the present time there is no comprehensive policy statement or procedure in the state dealing with the loss of water rights. In addition, there are a number of ways in which one can lose a water right. The most commonly recognized method of loss is by statutory forfeiture. Statutory forfeiture is the only method of loss arising from an administrative action and is to be distinguished from the other methods of loss which arise from private actions initiated directly in court. Other methods of loss which have been recognized judicially include abandonment, nonuser, prescription, estoppel, and laches.³ A further complication arises in Nebraska because the state operates under a dual system of water rights, riparian and appropriative. Not all of these methods of loss apply equally to each system.

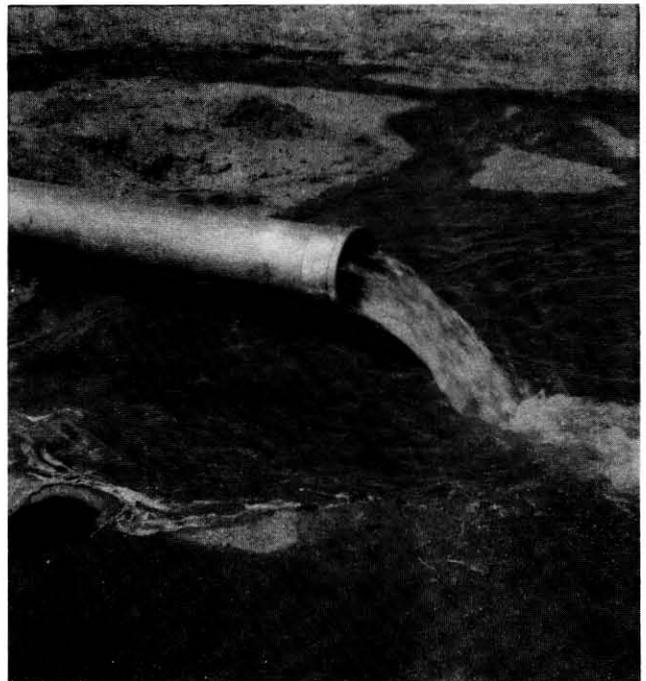
Forfeiture of Water Rights

Public Policy

The most definitive statement of public policy regarding the use of public waters appears in case law and refers specifically to the use of waters for irrigation.⁴

It is the policy of the law in all the arid states to compel an economical use of the waters of natural streams. One of the very purposes of the state in the administration of public waters is to avoid waste and to secure the greatest benefit possible from the waters available for appropriation for irrigation purposes.⁵

This policy is based in part on the state constitution which states, "The necessity of water for domestic and for irrigation purposes in the State of Nebraska is hereby declared to be a natural want."⁶ It is a policy which requires "that the public waters of the state, available for appropriation for irrigation purposes, should be administered to secure the greatest benefit therefrom."⁷



Statutes

In order that waste may be avoided and the waters of the state made available to the greatest number for use, it was provided by law that failure to use a water right could result in its forfeiture or cancellation. Current forfeiture statutes provide that water rights may be cancelled when a water right has not been used for some beneficial or useful purpose for more than three years. Water rights subject to cancellation include those with priority dates both before and after April 4, 1895.⁸ The procedure is set out in sections 46-229 to 46-229.05 of the Nebraska statutes.

There are two major statutes concerning the forfeiture of water rights of importance to this chapter. One statute provides that,

All appropriations for water must be for some beneficial or useful purpose, and when the appropriator or his successor in interest ceases to use it for such purpose the right ceases.

The other statute is more definite in specifying three years nonuse and requires notice and a hearing by the Department of Water Resources prior to forfeiture. It states,

If it shall appear that any water appropriation has not been used for some beneficial or useful purpose, or having been so used at one time has ceased to be used for such purpose for more than three years, the department shall appoint a place and time of hearing, and shall serve notice upon the owners of such water appropriation or such ditch, canal or other diverting works to show cause by such time and at such place why the water appropriation owned by such person should not be declared forfeited and annulled because such water appropriation had not been used for more than three years prior to receiving such notice, and shall also serve such notice upon the landowners under such water appropriation, ditch or canal.¹⁰

These statutes have been construed as one procedure by the courts dealing with the cancellation of irrigation rights notwithstanding the fact that one explicitly states a time limit and the other does not.¹¹ Furthermore, the constitutionality of this forfeiture procedure has been upheld "as a valid exercise of the police power of the state in the regulation of its public waters [1] to insure an orderly administration of such waters, [2] to eliminate waste, and [3] to secure the greatest benefit possible from waters available for irrigation purposes."¹² These three goals should be considered when examining the existing procedure for the cancellation of a water right.

Forfeiture Procedure

The forfeiture procedure is a simple one. An indication of nonuse of a water right for more than three years triggers action by the Department of Water Resources. This initial determination of nonuse is made by an administrative officer from the Department of Water Resources based on his or her field observations and reports.¹³ After determining that nonuse has occurred, the Department of Water Resources is required to serve notice on interested owners and landowners to appear at a hearing where they must "show cause" why the water appropri-

ation should not be declared forfeited and annulled.¹⁴

At the hearing, the verified report of the engineer of the Department of Water Resources indicating nonuse is prima facie evidence for forfeiture and annulment.¹⁵ The water right is automatically forfeited if no one appears at the hearing. If an interested party appears and contests the annulment then the Department must hear the evidence. If it is evident that the water has not been put to a beneficial use or has ceased to be used for such purpose, as specified in the permit, for more than three years, the water appropriation shall be declared cancelled.¹⁶ This administrative determination may be appealed to the Nebraska Supreme Court.¹⁷

In addition to the authority of the Department of Water Resources to cancel water appropriations under the forfeiture statutes, the Department permits individual holders of appropriative rights to voluntarily relinquish their claim to those rights. These relinquishments, however, have occurred infrequently.

The statutes dealing with forfeiture are vague on the question of what constitutes "showing cause." They do not specifically provide for any exceptions to the three year nonuse rule or for any periods of time which shall not be considered nonuse for purposes of forfeiture. The courts, however, have given some guidance on when nonuse may be excused and the legislative history of these statutes sheds some further light on the subject, although this does not provide a firm precedent or rule for future forfeiture cases.

Legislative History

The history of one recent statutory change is particularly pertinent to the issue of excusing nonuse.¹⁸ That change came about in 1963 with the enactment of LB 95 in the Seventy-Third Legislature amending Section 46-229.02 of the Nebraska Statutes. The previous statute had required that if it appeared that a water appropriation had not been used for more than three years, the Department of Water Resources was to hold a hearing and serve notice on interested parties to show cause why a water appropriation should not be cancelled.¹⁹ LB 95 apparently served to clarify the statute by requiring that cause be shown why the water appropriation should not be forfeited and annulled "because such water appropriation had not been used for more than three years prior to receiving such notice."²⁰ The bill was the result and recommendation of a legislative interim committee study on underground water which found that there were a number of situations in the state where appropriated water was not being used. LB 95 did not specifically mention any conditions

under which failure to use a water right might be excused; however, the issue was addressed in the deliberations on the bill.

At the public hearing before the Legislature's Committee on Agriculture, the Director of the Department of Water Resources at the time, Dan Jones, testified that, "If there was no water in the stream, if there was an excess of rain, or situations similar to that, then of course they would not be counted against [the owner of the appropriation]." ²¹ In the floor debate on LB 95, Senator Harold Stryker, the sponsor of the bill, stated that it provided an opportunity to show cause why a water appropriation had not been used for more than three years prior to the receipt of notice from the Department of Water Resources.

[It] would give a person this advantage, since he had an appropriated right, it rained one year, he didn't need to pump for that reason, maybe the next year his rotation was such that he didn't need to pump, and the third year maybe another circumstance of this nature existed and so this [LB 95] would allow him to state these reasons and to reinstate his appropriated water rights. ²²

It would seem that the legislature's purpose in enacting LB 95 was to require an element of intent exist prior to the cancellation of a water appropriation. Nonuse of a water right absent an intent to abandon it does not appear to have been the legislative aim. Clearly there were acceptable periods of nonuse contemplated in the enactment of LB 95. However, whether by inadvertance or by design no such acceptable periods of nonuse were included in the statutes.

A similar conclusion is reached on examining the court decisions dealing with the loss of water rights.

Judicial Suggestions

The courts have suggested a number of reasons which could excuse nonuse of a water appropriation beyond the three year statutory limit. These judicially suggested periods of nonuse of water for purposes of the forfeiture statutes have been set out in dicta in those cases reviewing the administrative determination of forfeiture. A recent case before the Nebraska Supreme Court dealing with the issue of excusing nonuse of a water appropriation was *Hostetler v. State*. ²³ That case involved an appeal from an order of the Department of Water Resources cancelling and annulling a water appropriation which determined that the appropriation had not been put to beneficial use for more than three years prior to the notice of hearing. The court found that, in this case, there was no evidence in the record giving cause to excuse the failure to make beneficial use of the appropri-

ation. However, the court in its analysis expressed its view that, "Reasons which might excuse beneficial use would appear to include the following: Unavailability of or insufficient water in the stream, ... and adequate moisture from natural precipitation so that diversion was unnecessary and would result in waste or violate principles of good husbandry ..." ²⁴ The court's opinion referred to an earlier case, *State v. Delaware-Hickman Ditch Co.*, ²⁵ which found that the Ditch Company had not abandoned its water right. The court held that the Ditch Company's water appropriation should not be cancelled because "at times there is no available water in the river at the point of diversion, and at times irrigation [sic] not necessary ..." ²⁶ The availability of water is necessarily a condition to its use and the court appears to recognize that, due to the uncontrollable nature of precipitation, there may be situations of too much or too little water excusing the failure to use a water appropriation.

An uncontrollable event, whether by act of God or otherwise, appears to be the key question for the courts. In addition, in some cases the court appears to consider whether there was an intent to give up a water appropriation. Generally, the forfeiture of a water right is involuntary or forced by failure to meet certain statutory requirements. However, one court opinion, in *State v. Oliver Bros.* ²⁷, although based on an application to cancel a water right pursuant to the forfeiture statutes, speaks in terms of abandonment. This case dealt with irrigation diversion works which were almost completely destroyed by high water. The court determined that there was no evidence in the record to indicate an intention to abandon the irrigation system. Recognizing that attempts were made in this case to repair the destroyed structures, destruction of diversion works by a natural disaster appears to be sufficient cause excusing failure to use a water appropriation. The court based its decision upon a lack of intent to abandon the irrigation system yet such a determination was more than likely grounded in their finding that a natural disaster prevented the use of the water appropriated.

This intent element was also present in the court's deliberations in *Enterprise Irrigation Dist. v. Tri-State Land Co.* ²⁸ The action in this case was to cancel a water appropriation for nonuser-nonuse of a water right for more than ten years - rather than by statutory forfeiture. However, the court's reasoning in excusing nonuse for more than ten years is relevant here. Development on the planned construction of a canal was halted because of inability to procure funds caused by legal difficulties. It was evident to the court "that the purpose to carry on the enterprise and construct the canal in its entirety was never aband-

oned by the owners”²⁹ and was finally completed. The court excused nonuse based on its conclusion that “the title to the property and right to the appropriation were in such hazardous and uncertain condition that few men would have the temerity to invest money to any extent in the further development of the [canal].”³⁰ Pecuniary difficulties alone are no excuse for failure to complete diversion works but perhaps if caused by legal proceedings affecting the diversion work, they are sufficient cause for nonuse.

Summary

To summarize, both the legislative history of LB 95 and the courts appear to have injected an element of intent into the interpretation of the “show cause” provision of the forfeiture statutes. These legislative and judicial deliberations have suggested five prevalent reasons which, absent an intent to give up a water appropriation, constitute sufficient cause to prevent revocation of the appropriation. It should be kept in mind that these accepted periods of nonuse are not mandated by the statutes or the courts and are therefore subject to change. The following periods of time have support as exceptions to the three year nonuse rule:

1. When water in the stream is insufficient or unavailable.
2. When there is adequate moisture from natural precipitation making irrigation unnecessary.
3. When the rotation of crops on the land is such that irrigation is not needed.
4. When diversion works are destroyed by a natural disaster or other natural and unavoidable cause.
5. When legal proceedings affect the appropriation to such an extent that it prevents application of the water to a beneficial use.

Other Methods of Loss of Water Rights

Introduction

There are apart from the statutory forfeiture procedure, which is administrative, a number of judicially sanctioned ways to lose a water right. It should be noted that these “common law” theories are procedurally different from statutory forfeiture in that they are asserted by filing a private lawsuit in a court. They all antedate the forfeiture statutes yet continue to exist simultaneously with them. This, in itself, presents few problems as the various theories tend to complement each other. However, it can be confusing to have a statutory system providing for the loss and forfeiture of water appropriations supplemented by a number of other theories of

loss. Some of this confusion is evident in one case, *State v. Nielsen*,³¹ which recognized that statutory forfeiture was not exclusive and addressed two other methods of cancellation of irrigation rights - abandonment and nonuser for ten years - directly, and a third - estoppel - indirectly.

Abandonment

Abandonment, as defined by the courts, is “the relinquishment of a right by the owner thereof, without any regard to future possession by himself or any other person, but with the intention to forsake or desert the rights.”³² Two elements are generally required in order to establish abandonment: (1) an intent to abandon, which may be inferred or implied from acts, and (2) the relinquishment of possession. Furthermore, abandonment has immediate effect and there is no revival of an abandoned right.³³ In Nebraska, as in most states, upon abandonment, the water appropriated reverts to the public domain and may again be appropriated.

An application of the theory of abandonment is seen in *State ex rel. Sorensen v. Mitchell Irrigation Dist.*³⁴ The contention in that case was that failure to use the total quantity of a water appropriation amounted to abandonment of the right. It was found that the irrigation district had acquired a contract with the U.S. government for water being stored in the Guernsey and Pathfinder Reservoirs in Wyoming for use in Nebraska during the irrigation season. The court concluded that this “was simply a means to supplement its needs in dry seasons. That it may have used less of the natural flow of the stream than its appropriation called for would not amount to an abandonment of its rights, nor to a surrender of a portion of its appropriation.”³⁵

Nonuser

Nonuser is the second method of loss of irrigation rights referred to in *Nielson*.³⁶ Nonuser is actual “neglect to use”³⁷ a water right and “must be continued for a time equal to the statutory limitation upon actions to recover the possession of real property in order to lose the right of appropriation.”³⁸ That period of time in Nebraska is ten years.³⁹ As with statutory forfeiture and abandonment, nonuser is based upon the failure to use a water appropriation and when loss is established the water reverts to the public domain. The court in *Farmers Canal Company v. Frank*, distinguished between abandonment and nonuser as follows:

Abandonment is a mixed question of law and fact. There must be a relinquishment of possession or nonuser of the right granted, together with the intention to abandon.

Mere nonuser is not itself an abandonment, though if continued for a sufficient length of time, it may result in a forfeiture of the water right by prescription.⁴⁰

The court's language emphasizes the extent of the interrelationship of these various theories of loss of water rights, and perhaps the confusion as well.

Prescription

Prescription and nonuser are terms often used interchangeably. However, a term more synonymous with prescription is adverse possession. They are both methods of acquiring right or title under certain conditions by continued use or possession for the statutory period.⁴¹ Nonuser merely refers to a way in which a water right may be lost while prescription causes the loss of a water right by the consequent acquiring of the same right by another individual or entity. The conditions leading to a prescriptive right are the same as for adverse possession: open, actual and notorious use which is both adverse and hostile to the claim of the rightful owner, such use being exclusive, continuous, and uninterrupted for the entire statutory period.⁴² Prescription and nonuser, however, both utilize the same statutory limitation period of ten years.

In Nebraska, it has been recognized that, "an easement may be acquired by prescription, or by open, notorious, exclusive, and adverse use for a period of ten years, for the flow of water in a watercourse or its flood plain."⁴³ It should perhaps be noted here that prescriptive water rights in Nebraska have been asserted against both riparians and those holding water rights by way of prior appropriation. The courts, however, have only specifically discussed the issue in cases involving riparian owners. An early Nebraska case dealt with the claim of a right to water based on prescription by a riparian owner.⁴⁴ The argument was made that a prescriptive right had been acquired by ten years nonuser to the full flow of a stream as it passed across the riparian owner's land. In denying the claim, the court pointed out that,

There cannot be in the very nature of things, any such thing as a prescriptive right of a lower riparian owner to receive water of a stream as against upper owners ... [the riparian owner] may, by prescription, acquire a right to use and divert the water beyond that which the common law would give him, but he gets this right only by adverse user. If he diverts water which otherwise would flow down to a lower owner, that use is adverse. On the other hand, the water which comes to him would come in any case, and there is nothing adverse to any one, in merely re-

ceiving it, that could be said to give a prescriptive right enabling him to prevent reasonable use of it by the upper owner.⁴⁵

It is unlikely, but not inconceivable, that a claim based on prescription would be upheld in the courts today due to a generally negative attitude regarding the transfer of water rights. Nonuser would probably be a preferred result with the water reverting to the public domain.

Estoppel and Estoppel by Laches

The doctrines of estoppel and laches differ from the preceding methods for losing water rights in that the nonuse of water is not a requisite element in their proof. One definition of estoppel is that it precludes "a person from asserting a fact, by previous conduct inconsistent therewith, on his own part or the part of those under whom he claims or by an adjudication upon his rights which he cannot be allowed to call in question. It is essential to the validity of the claim of estoppel that the person sought to be estopped must have conducted himself with the intention of influencing the conduct of another, or with reason to believe his conduct would be to influence the other's conduct, inconsistently with the evidence he proposes to give."⁴⁶ In other words, if one by acts or declarations induces another to change his position injuriously to himself, that person is "estopped" from pleading the truth.⁴⁷ Estoppel and laches do not literally work the loss of a water right. Rather they prevent an appropriator from using the water to which he or she is normally entitled. Another judicial alternative is to allow the appropriator to continue using the water but require damages or compensation be paid to the injured party.

An example of the working of an estoppel is found in *State v. Nielson*.⁴⁸ The defendant, in that case, Nielsen, expressly represented to a third party, Coulter, that he claimed no rights under any water appropriation. He then stood idly by while Coulter, relying on Nielsen's representation, made an application for water and began work on the diversion. Nielsen later attempted to assert a right to an appropriation prior in time to Coulter's. The court concluded that the doctrine of estoppel applied due to Nielsen's failure to make a claim until after Coulter had obtained an appropriation. It described estoppel as follows:

To constitute an 'estoppel', in the absence of false representations by the party sought to be estopped, he must have been guilty of such conduct as to have given the person pleading the estoppel reason to believe that a state of facts existed inconsistent with those now asserted against him and in reliance on which he acted.⁴⁹

Laches, on the other hand, "means negligence

in the assertion of a right, and exists where there has been a delay of such duration as to render enforcement of the asserted right inequitable.”⁵⁰ It requires an “element of estoppel or neglect which has operated to prejudice” an individual.⁵¹ In *Clark v. Cambridge & Arapahoe Irrigation & Improvement Co.*,⁵² the court applied the doctrine of laches denying relief to a mill owner challenging the appropriation and diversion of water of an irrigation company. It was found that the mill owner had been aware of the appropriation and contemplated diversion of the irrigation company, yet remained silent. By this silence, the irrigation company was encouraged to undertake and complete its diversion canal. The court concluded that due to the mill owner’s laches, it would be impossible to restrain the completion of the diversion works without substantial injury.

Summary

While the foregoing are all valid methods of loss of water rights, the tendency of the courts in recent years has been to uphold the administrative determination of loss of water appropriations, based on the forfeiture statutes, with only supplemental reference to these other methods of loss. The administrative forfeiture procedure is less complicated and the problems of proof less difficult. These other judicial methods of loss have a number of common elements of proof and courts have occasionally found it necessary to make a distinction between various methods.⁵³ Furthermore, nonuser and prescription may in practicality be obsolete as they require proof of a statutory period of ten years while forfeiture only requires nonuse for three years. With the possible exceptions of estoppel and laches, diligent enforcement of the forfeiture statutes could make reliance on these other methods of loss unnecessary.

FOOTNOTES

1. An adjudication is the giving or pronouncing of a judgement or decree in a cause. **Black’s Law Dictionary** 63 (4th ed. 1951). (In Introduction)
2. **A Summary Digest of State Water Laws** 71 (Nat’l Water Comm’n, R. Dewsnup and D. Jensen, eds. 1973). (In Introduction)
3. Note: Outside the scope of this report, but deserving of mention, are those water appropriations which may become subject to effective cancellation in part by court decrees placing limitations on rates of diversion of water instituted by someone other than the Department of Water Resources. The Department accordingly limits withdrawals in these situations to the court specified amount and canal capacity.
4. *State v. Birdwood Irrigation Dist.*, 154 Neb. 52 46 N.W. 2d 884 (1951).
5. *Id.* at 55.
6. **Neb Const.**, art. XV, § 4.
7. *State v. Birdwood Irrigation Dist.*, 154 Neb. 52, 58, 46 N.W. 2d 884 (1951).
8. *In re Water Appropriation - Nos. 442A, 461, 462, and 485*, 210 Neb. 161 (1981). This case was an appeal from a decision of the Department of Water Resources cancelling certain water appropriations in whole or in part, the Department having found that beneficial use of the water had not been made for more than three years. The evidence in the case, however, was insuffi-

cient to establish the defense. The landowners involved further maintained that the Department was in error for not recognizing that the water appropriations involved were vested prior to April 4, 1895 and therefore claimed that the statutory forfeiture procedures, effective on that date, were inapplicable. The court denied their claim and reaffirmed its earlier decision in *State v. Birdwood Irrigation District* which had held that “the statutory forfeiture provisions were applicable to an appropriation with an adjudicated priority date of Oct. 21, 1893.” The court, in this case, reiterated that the adjudication of a water right gives...” a vested right to the **use** of the waters appropriated, **subject to** the law at the time the vested interest was acquired and such reasonable regulations subsequently adopted by virtue of the police power of the state.” (emphasis added). The court further stated that the state in the administration of its public waters has a right under both the police power and the state Constitution to regulate water use so that waste is eliminated. The language of *Birdwood*, repeated in this case, summarizes the public policy behind the forfeiture statutes:

“[W]here it appears that irrigation water has not been applied to lands described in an adjudicated appropriation for the statutory period of three years, such nonuser will result in the loss of

the right, although the right is one that is termed a vested, adjudicated right. The policy of the law is to require a continued beneficial use of appropriated waters to avert their loss under nonuser provisions of the irrigation statutes.”

9. **Neb. Rev. Stat.** 46-229 (1943).
10. **Neb. Rev. Stat.** §46-229.02 (1943).
11. *State v. Nielsen*, 163 Neb. 372, 79 N.W. 2d 721 (1956).
12. *State v. Birdwood Irrigation Dist.*, 154 Neb. 52, 62, 46 N.W. 2d 884 (1951).
13. **Neb. Rev. Stat.** §46-229.01 (1943).
14. **Neb. Rev. Stat.** §§46-229.02 and 46-229.03 (1943).
15. **Neb. Rev. Stat.** §46-229.03 (1943).
16. **Neb. Rev. Stat.** §46-229.04 (1943).
17. **Neb. Rev. Stat.** §46-229.05 (1943).
18. 1963 Neb. Laws c. 278, §1.
19. 1947 Neb. Laws c. 172, §1 (3) (amended 1963).
20. 1963 Neb. Laws c. 278, §1.
21. Hearings on LB 95 Before the Committee on Agriculture, 73rd Sess. Nebraska Legislature, Feb. 14, 1963.
22. Floor Debate on LB 95 Before the Nebraska Legislature, 73rd Sess., Feb. 27, 1963.
23. 203 Neb. 776, 280 N.W. 2d 75 (1979).
24. *Id.* at 781-2.
25. 114 Neb. 806, 210 N.W. 279 (1926).
26. *Id.* at 809.
27. 119 Neb. 302, 228 N.W. 864 (1930).
28. 92 Neb. 121, 138 N.W. 171 (1912).
29. *Id.* at 152-3.
30. *Id.* at 152-3.
31. 163 Neb. 372, 79 N.W. 2d 721 (1956).
32. *Id.* at 381
33. W. Hutchins, **Water Rights Laws in the Nineteen Western States**, Vol. II, 261 (1974).
34. 128 Neb. 745, 260 N.W. 201 (1935).
35. *Id.* at 600. Compare this to **Neb. Rev. Stat.** §46-229.03 and 46-229.04 (1943) which provide for the cancellation of a part of a water appropriation.
36. 163 Neb. 372, 79 N.W. 2d 721 (1956).

37. **Black's Law Dictionary** 1207 (4th ed. 1951).
38. *State v. Nielsen*, 163 Neb. 372, 382, 79 N.W. 2d 721 (1956).
39. See **Neb. Rev. Stat.** §25-202 (1943) providing that, “An action for the recovery of the title or possession of lands, tenements or hereditaments, or for the foreclosure of mortgages thereon, can only be brought within ten years after the cause of action shall have occurred. . .”
40. 72 Neb. 136, 154, 155, 100 N.W. 286 (1904).
41. **Black's Law Dictionary** 73, 1346 (4th ed. 1951).
42. *Supra.*, note 32 at 347.
43. *County of Scottsbluff v. Hartwig*, 160 Neb. 823, 831, 71 N.W. 2d 507 (1955); *Courter v. Maloley*, 152 Neb. 476, 490, 41 N.W. 2d 732 (1950). Note, however, that this rule is inapplicable to surface waters. *Id.* at 831, 490.
44. *Crawford Co. v. Hathaway*, 67 Neb. 325, 93 N.W. 781 (1903). It was asserted in *Maranville Ditch Co. v. Kilpatrick Bros. Co.*, 100 Neb. 371, 160 N.W. 81 (1916) and *Kilpatrick Bros. v. Frenchman Valley Irrigation Dist.*, 101 Neb. 155, 162 N.W. 422 (1917), by plaintiff upper proprietors, that they had acquired rights by prescription or adverse user the prior appropriation of the defendant. The court affirmed the dismissal of both cases finding the evidence insufficient to prove adverse use. The issue of acquiring appropriative rights by prescription was not specifically addressed. *Id.* at 374-5.
45. *Graham Ice Cream Co. v. Petros*, 127 Neb. 172, 179-80, 254 N.W. 869 (1934).
47. **Black's Law Dictionary** 649 (4th ed. 1951).
48. 163 Neb. 372, 79 N.W. 2d 721 (1956).
49. *Id.* at 388 (quoting from *Graham Ice Cream Co. v. Petros*, 127 Neb. 172, 254 N.W. 869 (1934)).
50. W. Hutchins, *supra.* note 32 at 440-1.
51. **Black's Law Dictionary**, 1017 (4th ed. 1951).
52. 45 Neb. 798, 64 N.W. 239 (1895).
53. *Farmers Canal Company v. Frank*, 72 Neb. 136, 155, 100 N.W. 286 (1904).

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CHAPTER 2 PRACTICAL EFFECTS, NEEDS AND PROBLEMS OF EXISTING LAW

Introduction

"With unused appropriation rights scattered throughout the state, the department [of Water Resources] cannot possibly perform its administrative functions with maximum effectiveness. Streams that statistically appear to be over-appropriated may in actuality be underappropriated."¹ The purpose of the water adjudication process is to determine the status of water appropriations and, pursuant to the forfeiture procedure, if necessary, cancel and annul those water appropriations which are not being used and have not been used for more than three years. The need to clarify the forfeiture statutes and, in general, the way in which a water right may be lost, is evident.

Practical Effects/Current Status of Forfeiture Procedure

The Department of Water Resources has become much more active in recent years in the cancellation of water rights for three years non-use. A stream is usually adjudicated by segments and all water rights claimed on that stream segment are investigated. The limited personnel available at the Department to accomplish this task prevents the investigation of more than about 1,000 claims per year. Of this number, approximately 400 water rights were cancelled in 1980. The following is a Table showing the cancellation of water rights by the Department for the last two years.

Department of Water Resources
CANCELLATION HEARINGS
1979 - 1980²

	Appropriations Considered	Amount Canc.		Hearings Dismissed	Appropriations Cancelled in Whole or in Part
		Acres	C.F.S.		
Union Creek, Salt & Weeping Water Creeks	21	1828.26	19.03	0	21
North Fork Elkhorn River	70	6265.85	84.63	2	68
Niobrara River	49	4345.46	439.40	0	49
Pumpkinseed Creek	46	6079.76	90.65	0	46
Frenchman River & Stinking Water Creek	62	6253.10	899.00	14	48
North Loup & Calamus Rivers	67	8149.27	2145.57	1	66
	75	10094.891	120.11	4	71

Continued

Continued

	Appropriations Considered	Amount Canc.		Appropriations Cancelled in	
		Acres	C.F.S.	Hearings Dismissed	Whole or in Part
All streams & water divisions misc. power appropriations	20	102.80	2372.88	0	20
Wahoo Creek, Eight Mile Creek, Nemaha River Tribs.	35	3336.80	41.79	0	35
Lower Elkhorn	42	3257.20	33.28	6	36
Beaver Creek	70	5888.20	61.53	4	66
Upper Elkhorn	51	18804.46	236.27	2	49
Red Willow Medicine Creek	45	2286.36	27.76	2	43
Niobrara River, White River, Hat Creek	39	4874.90	69.28	0	39
South Loup River	92	10068.87	118.67	0	92
Total	784	91636.18	6759.85	35²	749

Needs and Problems

Sufficient Cause

One particularly troublesome aspect of this forfeiture procedure is what constitutes "sufficient cause" for nonuse of a water appropriation. Sufficient cause has generally referred to any valid reason which will excuse nonuse; however, there is no concise statement anywhere delineating what those reasons might be. At the present time, the Department of Water Resources recognizes three specific reasons excusing nonuse: (1) adequate moisture, (2) inadequate streamflow, and (3) cropping patterns such that irrigation is not necessary. This last reason has been identified just this year and primarily for alfalfa. The only other guidance for determining "sufficient cause" excusing nonuse of a water appropriation is that found in the court opinions noted earlier.

The need for a clearer definition of sufficient cause has been recognized on several occasions. A statutory provision providing that certain periods of time not be considered "nonuse" for purposes of forfeiture has merit for a couple of reasons. In the first place, it would "eliminate uncertainty and give the department [of Water Resources] and appropriators guidelines to utilize in a show-cause hearing."³ Currently, an appropriator has little guidance in defending against a forfeiture. Second, "the courts would have the guidance of legislative standards when deciding appeals from the ad-

ministrative decisions."⁴ Apparently, at the show-cause hearing, forfeitures are given effect only if voluntary or the result of neglect.⁵ The lack of any definitive statutory guidelines, however, leaves an appropriator insecure with predictions on the possibility that a water appropriation may be cancelled. Adding to the uncertainty, the Courts and the Legislature have permitted the Department of Water Resources to assume much discretion in determining whether an appropriation should be annulled.

The question is whether an attempt should be made to confine this discretion by fixing statutory boundaries within which discretion may be exercised by statutorily specifying potential reasons excusing nonuse. However, by doing this one, in effect, excludes other, perhaps equally valid, reasons. It is impossible, to consider all the possibilities and the absence of a reason in the statute will usually be interpreted as having been considered and rejected, whether this is, in actuality, what happened or not.

On the other hand, if the Department of Water Resources is to retain the flexibility and individualized treatment normally associated with discretionary authority, this could be established statutorily to prevent any ambiguity.

Abandonment vs. Forfeiture

Another problem raised earlier concerns the distinction between abandonment and forfeiture as applied to the loss of water rights.⁶ In *State v. Oliver Bros.*,⁷ the court required an interest

similar to the requisite intent for abandonment in considering an application to cancel a water appropriation under the forfeiture statutes. Yet there is a conspicuous absence of any reference to abandonment in Nebraska's statutes, which speak only in terms of forfeiture.

Although the terms 'abandonment' and 'forfeiture' are often times used interchangeably, even by the courts, upon the subject of the loss of water rights, and other rights used in connection therewith, there is a decided distinction in their legal significance, and one which, ... should be observed. While, upon the one hand, abandonment is the relinquishment of the right by the owner with the intention to forsake and desert it, forfeiture, upon the other hand, is the involuntary or forced loss of the right, caused by the failure of the appropriator or owner to do or perform some act required by the statute.⁸

The problem has been identified and discussed; however, most states still do not clearly differentiate the two methods of loss. One scholar has suggested that complications may also arise when the statutes state that forfeiture will occur as a result of nonuse for a specified number of years and then also provide for exceptions to this nonuse rule under certain conditions.⁹

Two Statutes

A confusing aspect of Nebraska's forfeiture statutes is the fact that there are **two** statutes requiring the beneficial use of an appropriation for water and that when such use ceases, the right to the appropriation also ceases. One statute, however, makes no reference to any period of time of nonuse,¹⁰ while the other statute specifically states three years nonuse.¹¹ Thus far, there have been no conflicts between these two provisions, although the former suggests the right of appropriation ceases immediately when the water is no longer used for a beneficial purpose. The other statute does not explicitly state that three "successive" years of nonuse may lead to cancellation of a water right; however, consecutive years are probably implied.

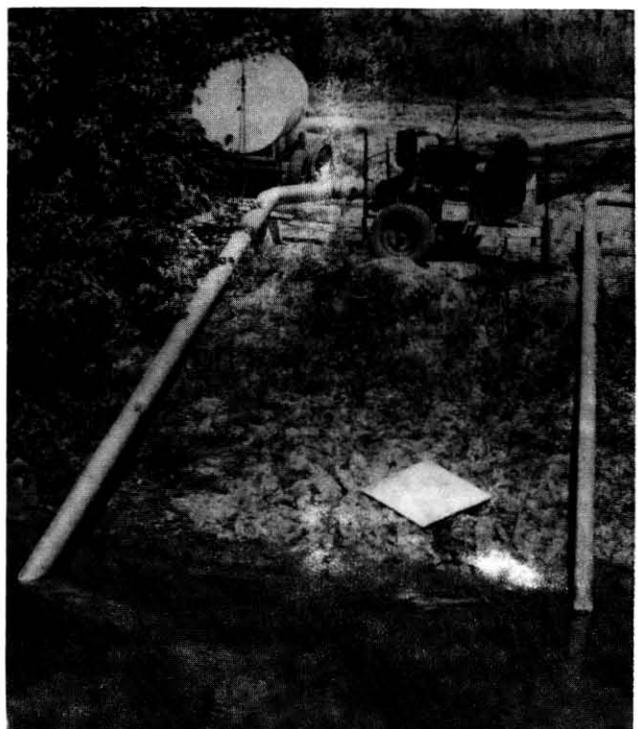
Perfected vs. Unperfected Rights

The forfeiture procedure is somewhat limited in scope as it usually applies only to "perfected" appropriative rights. The Nebraska statutes do not distinguish between perfected and unperfected or inchoate rights with respect to forfeiture. Other Nebraska statutes do, however, refer to the "perfection" of a water appropriation and this apparently occurs with the actual appli-

cation of the water to use.¹² An inchoate appropriative right is an incomplete right which ripens into a complete right when the last step required by law has been taken. Therefore, an inchoate right would theoretically end with revocation of the permit rather than with abandonment or nonuse. The Nebraska forfeiture statutes are unclear in this regard. One statute states that when the appropriator ceases to use the water for some beneficial purpose the right ceases,¹³ such use indicating a perfected water appropriation. The second statute appears to include inchoate as well as perfected rights in referring to "any water appropriation ... [that] ... has not been used"¹⁴ Some clarification in this respect would be helpful.

Other Methods of Loss of Water Rights

The existence of other methods of losing a water right presents some confusion but few major problems. Abandonment, nonuser, and prescription all have certain elements in common. It has been necessary for the courts, on occasion, to distinguish between abandonment and nonuser, and nonuser and prescription. Witness the following statement by an early Nebraska court as an example of the way in which these different terms describing methods of water loss have been used interchangeably: "Mere nonuser is not in itself an abandonment, though, if continued for a sufficient length of time, it may result in a forfeiture of the water right by prescription."¹⁵ The need for these other methods of loss of water rights is minimal with the current statutory forfeiture procedure available.



Furthermore, it is doubtful whether prescription is a valid method any longer. Nebraska does not permit the transfer of water rights and prescription is essentially the acquisition of a water right by adverse use. The Department of Water Resources has the monopoly on determining under what conditions a person may acquire a right to appropriate water. Estoppel and laches are equitable doctrines applied by the courts to prevent unjust results. The need to resort to these remedies would be considerably reduced if the foregoing procedures were clarified.

FOOTNOTES

1. C. Yeutter, "A Legal-Economic Critique of Nebraska Watercourse Law," 44 **Neb. L. Rev.** 11, 37 (1965).
2. See Department of Water Resources Biennial Report for more information.
3. R. Fischer, R. Harnsberger & J. Oeltjen, "Rights to Nebraska Streamflows: An Historical Overview with Recommendations" 52 **Neb. L. Rev.** 313, 370, (1973).

4. **Id.**
5. C. Yeutter, **supra.**; R. Fischer, **supra.**
6. See Ch. 1.
7. 119 Neb. 302, 228 N.W. 864 (1930).
8. **State ex. rel. Reynolds v. South Springs Co.**, 80 N.M. 144, 452 P. 2d 478 (N.M. 1969) reprinted in Trelease, F. **Water Law** 192 (3rd ed. 1979) (citing 2 **Kinney on Irrigation and Water Rights** 2020-2021, § 1118 (2nd ed. 1912).
9. W. Hutchins, **Water Rights Laws in the Nineteen Western States**, Vol. II, 300-301 (1974).
10. **Neb. Rev. Stat.** § 46-229 (1943).
11. **Neb. Rev. Stat.** § 46-229.02 (1943).
12. **Neb. Rev. Stat.** §§ 46-233 to 46-235 (1943).
13. **Neb. Rev. Stat.** § 46-229 (1943).
14. **Neb. Rev. Stat.** § 46-229.02 (1943).
15. *Farmers Canal Company v. Frank*, 72 Neb. 136, 155, 100 N.W. 286 (1904).

CHAPTER 3

POLICIES ADOPTED IN OTHER STATES AND SUGGESTED IN ACADEMIC PUBLICATIONS

Introduction

Nebraska's forfeiture procedure is not a unique one. Most of the other western states have statutes similar in form and effect.¹ Provisions common to most include forfeiture or abandonment for failure to make beneficial use of a water appropriation for a set number of years in succession.

Chart I

—Period of Nonuse Recognized by Law—

3 yrs.	4 yrs.	5 yrs.	7 yrs.
Kansas N. Dakota S. Dakota	New Mexico	Alaska, Arizona California, Idaho, Nevada, Oregon, Utah, Washington, Wyoming	Oklahoma

In most states the water appropriation either reverts to the state and becomes unappropriated water or reverts to the public and is again subject to appropriation. A few states have statutorily qualified nonuse as being without sufficient cause.² Approximately an equal number provide that forfeiture will not occur if certain circumstances exist. One state actually defines "sufficient cause" for nonuse.³ In another state, nonuse for the statutory number of years is conclusively presumed to be an abandonment of the water right.⁴ In addition, a majority of the states use the terms abandonment and forfeiture interchangeably. A smaller number have separate statutes dealing with forfeiture and nonuser, **and** abandonment. One state actually statutorily accepts the acquisition of prescriptive rights to water,⁵ while another state expressly denies prescriptive rights to any of the public water appropriated or unappropriated.⁶ The variations are as numerous as the states themselves.

Policies Adopted in Other States

Forfeitures Not Favored

In the opinions of an Idaho and Wyoming state court, abandonment and forfeiture of water rights are not favored in the law⁷ and "all intendments are to be indulged in against a forfeiture."⁸ The Idaho court interpreting its state statute which bases forfeiture on nonuse without a proper showing of "good and sufficient reason",⁹ states that "No forfeiture or abandonment results if the nonuser is prevented from exercising his rights by circumstances over which he has no control."¹⁰ The opposite extreme is represented by Oregon's nonuse-abandonment statute which states in part that, "Whenever the owner of a perfected and developed water right ceases or fails to use the water appropriated for a period of five successive years, the right to use shall cease, and the failure to use shall be conclusively presumed to be an abandonment of water right."¹¹ The harshness of this provision is reduced somewhat by a statutory exception, for the purpose of computing the five-year period of nonuse, afforded the time within which land is withdrawn under the federal soil bank program.¹²

Excepted Periods of Nonuse

Five other states have attempted to except certain periods of nonuse from the operation of the forfeiture or abandonment statutes in their respective states. Two basic approaches have been taken - one to enumerate exceptions and the other, to define "sufficient or reasonable cause" for nonuse. Both achieve essentially the same result. New Mexico, North Dakota, and Utah have taken the former approach and Washington and Wyoming the latter.

The New Mexico statute provides that, [F]orfeiture shall not **necessarily** occur if circumstances beyond the control of the

owner have caused nonuse, such that the water could not be placed to beneficial use by diligent efforts of the owner; and ... periods of nonuse when irrigated farmlands are placed under the acreage reserve program or conservation program provided by the Soil Bank Act shall not be computed as part of the four-year forfeiture period;¹³ (emphasis added)

The use of the word “necessarily” prevents these two excuses from being blanket exceptions. A third acceptable and unqualified period of nonuse is “when the nonuser ... is on active duty as a member of the armed forces of this country.”¹⁴ Nonuser of an appropriation when caused by circumstances beyond the owner’s control was also held by an early Wyoming court not to constitute abandonment of a water right.¹⁵

North Dakota’s forfeiture statute identifies yet two other reasons excusing nonuse if “such failure or cessation of use shall have been due to the unavailability of water, a justifiable inability to complete the works, or other good and sufficient cause.”¹⁶ Both of these approved periods of nonuse have been accepted by the courts in Nebraska as well. Utah’s statute provides that, “Financial crisis, industrial depression, operation of legal proceedings or other unavoidable cause, or the holding of a water right without use by any municipality, metropolitan water districts” or other public agencies to meet the reasonable future requirements of the public, shall constitute reasonable cause of such nonuse.¹⁷ The Wyoming statute defines “reasonable cause” by way of example including, “delay due to court or administrative proceedings, time required in planning, developing, financing and constructing projects for the application of stored water to beneficial use ... delay due to requirement of state and federal statutes and rules and regulations thereunder and any other causes beyond the control of the holder of the appropriation.”¹⁸

Sufficient Cause Defined

The final and by far most comprehensive treatment of the “sufficient cause” issue is found in the Washington statutes. The relevant statute provides as follows:

‘[S]ufficient cause’ shall be defined as the nonuse of all or a portion of the water by the owner of a water right for a period of five or more consecutive years where such nonuse occurs as a result of:

- (1) Drought or other unavailability of water;
- (2) Active service in the armed forces of the United States during military crisis;
- (3) Nonvoluntary service in the armed forces of the United States;

- (4) The operation of legal proceedings;
- (5) Federal laws imposing land or water use restrictions, or acreage limitations, or production quotas.

Notwithstanding any other provisions of this act, there shall be no relinquishment of any water right:

- (1) If such right is claimed for power development purposes ... and annual license fees are paid ..., or
- (2) If such right is used for a standby or reserve water supply to be used in time of drought or other low flow period so long as withdrawal or diversion facilities are maintained in good operating condition for the use of such reserve or standby water supply, or
- (3) If such right is claimed for a determined future development to take place either within fifteen years of the effective date of this act, or the most recent beneficial use of the water right, whichever date is later, or
- (4) If such right is claimed for municipal water supply purposes ..., or
- (5) If such waters are not subject to appropriation under the applicable [laws]¹⁹

These five latter uses of water are apparently not subject to forfeiture under any conditions and consequently enjoy the statutory privilege of perpetual existence.

Extension of Time

An alternative to providing statutory exemptions to forfeiture proceedings is being accomplished in some states by granting an extension of time to resume use of a water appropriation. In Idaho, the Director of the Department of Water Resources may grant an extension not to exceed five years,²⁰ while in New Mexico, upon application to the state engineer, and a proper showing of reasonable cause, an extension may be granted for up to one year.²¹ Under Utah law, application is also made to the state engineer and upon a showing of reasonable cause for nonuse, an extension of up to five years may be granted.²²

Other Statutes Dealing with Loss of Water Rights

A final point of comparison with Nebraska is that a few states have enacted statutes dealing

with other methods of losing water rights, specifically abandonment²³ and prescription,²⁴ in addition to their forfeiture procedure. Most states, however, are not careful in distinguishing between abandonment and forfeiture and use the two terms interchangeably within the same statute. One state requires actual intent to abandon with voluntary failure to use a water appropriation prior to a determination of forfeiture or abandonment.²⁵ Nevada and North Dakota are unusual in choosing to treat the prescription issue by statute. North Dakota recognizes a prescriptive water right acquired in accordance with its law but subjects that right to forfeiture for nonuse as with other rights to use water.²⁶ Nevada, on the other hand, permits "No prescriptive right to the use of such water or any of the public water appropriated or unappropriated ... acquired by adverse user or adverse possession for any period of time whatsoever..."²⁷

In summary, other western states are not so very different from Nebraska. Rather, they are all variations on a basic theme - forfeiture of water for nonuse.

Policies Suggested in Academic Publications

Suggestion for Acceptable Periods of Nonuse

Although the forfeiture of appropriation rights has not drawn much controversy, it has elicited comment on the part of a few legal scholars. They bemoan the situation in which the "appropriator defending against a forfeiture ... has no guidelines for determining which facts are sufficient to 'show cause'."²⁸ An anomalous situation can occur in Nebraska because nonuse "occurs whenever the department [of Water Resources] orders a junior appropriator to stop diverting so water can be furnished to senior users."²⁹ The Department of Water Resources does not, however, consider this nonuse for the purposes of forfeiture. It has been suggested that a clarifying amendment would be in order to alleviate some of these problems.³⁰

In order to eliminate some of the uncertainty surrounding a determination of sufficient cause, it has been recommended that the following periods of time not be considered nonuse for purposes of the forfeiture statute:

- (1) When irrigated farmlands are placed under an acreage reserve or production quota program or otherwise withdrawn from use as a requirement of participation in any federal or state government program;

- (2) When federal, state, or municipal laws impose land or water use restrictions;
- (3) When the available water supply is inadequate to enable the owner to use the water for a beneficial or useful purpose;
- (4) When climatic conditions cause irrigation to be unnecessary or when circumstances are such that a prudent man, following the dictates of good husbandry, should not be expected to use the water; or
- (5) When caused by destruction of works, diversion or facilities for use by a cause not within the control of the owners of such water appropriation, and when good faith efforts to repair or replace such works, diversion or
- (6) When nonuse occurs as a result of active service in the armed forces of the United States during a military crisis;
- (7) Nonvoluntary service in the armed forces; and
- (8) During the operation of legal proceedings which affect the appropriation.³¹

These eight recommended periods of nonuse run the gamut of those suggested in case law and provided by statute and provide a fairly accurate description and summary.

Suggestion to Simplify the Forfeiture Procedure

One author has suggested a modification of the forfeiture procedure in Nebraska, to simplify it, and to make it less expensive and less time consuming.³² First of all, it would require an acreage report from every appropriator listing all acres irrigated during the past year and to be irrigated in the coming year. If an appropriator failed to submit a report or reported reduced irrigated acreage for three consecutive years, the Department of Water Resources would have authority to temporarily cancel or reduce the appropriation. "Such action could not, however, be taken if it appears that nonuse was due to either a water shortage or high rainfall."³³ Written notice of the temporary cancellation would be given to the appropriator who would then have thirty days to request a hearing. If the appropriation were not reinstated, all costs would be charged to the holder of the permit. "If no hearing were requested, or if [the appropriator] were unsuccessful at such hearing, the cancellation would be made permanent."³⁴ Such a change would be primarily administrative and could be accomplished without substantial revision of the state's current irrigation laws.

FOOTNOTES

1. The states considered for this section include: Alaska, Arizona, California, Colorado, Idaho, Kansas, Montana, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, Wyoming.
 2. Alaska, Idaho, Kansas, Washington.
 3. **WASH. REV. CODE** § 90.14.140. (Supp. 1980).
 4. Oregon; **OR. REV. STAT.** § 540.610 (1953).
 5. **NEV. REV. STAT.** § 533.060(3) (1979).
 6. **N.D. CENT. CODE** § 61-04-22 (1977).
 7. *Hodges v. Trail Creek Irrigation Co.*, 78 Idaho 10, 297 P.2d 524 (1956); *Ramsey v. Gottsche*, 51 Wyo. 516, 69 P.2d 535 (1937).
 8. *Hodges v. Trail Creek Irrigation Co.*, 78 Idaho 10, 297 P.2d 524 (1956).
 9. **IDAHO CODE** § 42-222(2) (1977 & Supp. 1980).
 10. *Hodges v. Trail Creek Irrigation Co.*, 78 Idaho 10, 297 P.2d 524 (1956).
 11. **OR. REV. STAT.** § 540.610 (1953).
 12. **OR. REV. STAT.** § 540.615 (1953).
 13. **N.M. STAT. ANN.** § 72-5-28(A) (Supp. 1980).
 14. **N.M. STAT. ANN.** § 72-5-28(E) (Supp. 1980).
 15. *Scherck v. Nichols*, 55 Wyo. 4, 95 P.2d 74 (1939) (decided under prior law).
 16. **N.D. CENT. CODE** § 61-04-23 (1977).
 17. **UTAH CODE ANN.** § 73-1-4 (1980).
 18. **WYO. STAT.** § 41-3-401 (1977).
 19. **WASH. REV. CODE** § 90.14.140 (Supp. 1980).
 20. **IDAHO CODE** § 42-222(2) (1977 & Supp. 1980).
 21. **N.M. STAT. ANN.** § 72-5-28(E) (Supp. 1980).
 22. **UTAH CODE ANN.** § 73-1-4 (1980). Nebraska law provides that an extension for a reasonable length of time may be granted by the Department of Water Resources after a hearing upon petition. The extension may be for the completion of works, the application of water to a beneficial use or any of the other requirements for completing or perfecting an "application" for the appropriation of water. **Neb. Rev. Stat.** § 46-238 (1943 & Supp. 1980). It is unclear whether an extension could be granted under this section once an application has been completed and perfected. The policy of the Department of Water Resources, to date, has been not to grant extensions for this reason.
 23. **KAN. STAT.** § 42-308 (1973)
 24. **NEV. REV. STAT.** § 533.060(3) (1979); **N.D. CENT. CODE** § 61-04-22 (1977)
 25. **ALASKA STAT.** § 46-15.140 (1971).
 26. **N.D. CENT. CODE** § 61-04-22 (1971)
 27. **NEV. REV. STAT.** § 533.060(3) (1979)
 28. R. Fischer, R. Harnsberger & J. Oeltjen; "Rights to Nebraska Streamflows: An Historical Overview with Recommendations," 52 **Neb. L. Rev.** 313, 368 (1973).
 29. *Id.* at 369; see also C. Yeutter, "A Legal - Economic Critique of Nebraska Watercourse Law," 44 **Neb. L. Rev.** 11, 35 (1965).
 30. C. Yeutter, *supra.* note 29.
 31. R. Fischer, *supra.* note 28 at 369
 32. C. Yeutter, *supra.* note 29 at 38.
 33. *Id.* at 39.
 34. *Id.*
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CHAPTER 4

ALTERNATIVE LEGISLATIVE POLICY ACTIONS

Introduction

One feature of Nebraska's adjudication system has been presented and discussed in the foregoing chapters: adjudication as it relates to the loss of water rights. These chapters have examined the history and current status of the ways in which water rights may be lost in the state and a number of problems resulting therefrom have been identified. In addition, some of the actions in this regard, being taken in other states, have been reviewed.

This section will identify a number of alternative courses of policy action available for implementation through legislation or through administrative channels. An explanation of each alternative, accompanied by an analysis of its physical/hydrologic/environmental impacts and socio-economic impacts will be included.

These alternatives are by no means a comprehensive treatment of the policy options available. Neither are they all mutually exclusive - the adoption of one alternative does not necessarily preclude enactment of other alternatives. Variations and combinations are also possible for these alternatives and the mechanisms available for their implementation. It is hoped that these present an objective, neutral assessment of the range of alternatives available.

The following alternative actions will be described in greater detail in this chapter.

Identification of Alternatives

- (1) Make no change in present policy regarding loss of water rights.
- (2) Clarify present policy regarding forfeiture.
 - A. Eliminate one of the two forfeiture statutes.
 - B. Indicate that three "successive or consecutive" years of nonuse were contemplated in the forfeiture statutes.

C. Modify the forfeiture statutes to permit forfeiture only if nonuse was intentional and voluntary.

D. Clarify the statutes to state that unperfected or inchoate water rights can be cancelled for failure to comply with the conditions of approval in the permit.

- (3) Require the Department of Water Resources to promulgate rules on what constitutes "sufficient cause".
- (4) Modify the forfeiture provisions to permit exceptions to the three-year period of nonuse.
- (5) Abrogate nonuser and prescription as methods of effecting the loss of water rights.
- (6) Modify the forfeiture statutes to lengthen or shorten the period of time after which forfeiture of the water appropriation for nonuse will occur.
- (7) Provide for the petitioned extension, for a reasonable length of time for the use of appropriated water.
- (8) Modify the forfeiture statutes to incorporate the "acreage report" concept.

Information Presented For Each Alternative

Information is presented for each alternative under the following headings: **Description and Methods of Implementation, Physical/Hydrologic/Environmental Impacts, and Socio-Economic Impacts.**

The discussion under the first heading, **Description and Methods of Implementation**, describes the alternative, its potential effect on state policy, and how it would be implemented. Further information is provided concerning the need, if necessary, for any legislative action and any possible administrative costs which may result from adoption of the alternative.

The various physical impacts of each alternative will be identified, to the extent possible, in the section entitled **Physical/Hydrologic/Environmental Impacts**. The alternatives identified in this chapter do not lend themselves easily to an analysis of particular water use effects prior to the formulation of specific legislation to be adopted or policy course of action to be followed. Consequently, the impacts which have been identified are general and sketchy in nature. Most of the physical, hydrologic and environmental impacts which could result from adoption of each of these alternatives are the consequence of other factors affecting nonuse of the water rather than the administrative cancellation or loss of the water right itself. These factors include periods of adequate precipitation, drought, and other climatic conditions which prevent, or make unnecessary, use of the water.

The last category, **Socio-Economic Impacts**, will analyze the efficiency¹ and equity² impacts of implementing each policy alternative. The discussion is necessarily theoretical, and consequently, no attempt is made to quantify the magnitude of the expected impacts. A change that increases economic efficiency is generally desirable, however, since an efficient change translates into a greater output of societal goods and services from a particular combination of resource inputs.

In a perfect economic world, the market would always allocate resources, goods, and services efficiently. For a variety of reasons, however, a market may not operate efficiently. The cost of completing a particular transaction that would increase satisfaction might well exceed the benefit to be gained from the transaction.³ In that case, a potential gain in economic efficiency will be prevented by **transaction costs**.⁴ Alternatives that reduce transaction costs, therefore, generally increase economic efficiency. Similarly, an efficient transaction may not take place because the information necessary to evaluate the transaction is not available at low cost.⁵ Reducing **information costs**, therefore, also enhances economic efficiency. Finally, economic inefficiency may exist because some economic costs and benefits never enter into the economic calculus and hence, are not considered in private decisionmaking.⁶ These costs or benefits are known as **externalities**.⁷ Alternatives which internalize these externalities so that they must be considered by private decisionmakers, also tend to enhance economic efficiency.

Equity refers roughly to the "fairness" of a particular system of production and consumption which may, or may not, be efficient. While economics cannot answer the question of what is fair or equitable, it can indicate what the

likely equity impacts of a particular alternative will be. An alternative has an equity impact if it results in benefits being conferred on some at the expense of uncompensated losses which must be borne by others. In theory, an efficient alternative should produce the necessary revenues to compensate anyone who suffers an adverse equity impact from adoption of the alternative.⁸ Whether or not such effects should be compensated for, however, is a political and social question caught up in personal notions of fairness and justice. Consequently, the equity effects of particular alternatives are noted with no attempt made to evaluate whether those effects are fair or not fair.

EXPLANATION OF ALTERNATIVES

Alternative #1: Make no change in present policy regarding loss of water rights.

Description and Methods of Implementation. This alternative would leave the state policy regarding the loss of water rights as it is described in Chapter One. The courts would continue to play the primary role in determining what reasons might excuse nonuse of a water appropriation for purposes of forfeiture. While the director of the Department of Water Resources possesses limited authority to do this in his or her interpretation of "sufficient cause" at the forfeiture hearing, in the past, the director has declined to construe the language of the statutes any way but literally. Without legislative guidance, the director, based on past practice, will most likely continue to do so in the future. The courts have also had responsibility for sanctioning a number of other methods of losing a water right. Unresolved issues about these policies would most likely be dealt with by petitioning the courts or perhaps the Department of Water Resources.

Physical/Hydrologic/Environmental Impacts. If existing policies are continued, it is unlikely that any major changes in existing uses of surface water will occur as long as appropriations equal or exceed the supply. Continued Department of Water Resource's enforcement of the three year nonuse rule at current rates of review may, in effect, encourage appropriators to use their entire annual appropriation regardless of need to avoid cancellation of their rights. Uncertainty surrounding the circumstances justifying nonuse of a water appropriation could lead some appropriators to shift to groundwater use, if available.

Socio-Economic Impacts. Current adjudication procedures⁹ are economically inefficient because water users cannot be certain when nonuse will be "excused". A water user can avoid

forfeiture for nonuse by demonstrating "sufficient cause", for not using water during the three year forfeiture period. The penalty on a water user for erroneously assuming "sufficient cause", however, is severe -- loss of the water right. Consequently, landowners are encouraged to maintain a history of water use, even if the use is economically inefficient at times. High information costs under existing law thus promote excessive water use.

The equity impacts of existing procedures are difficult to quantify. To the extent that excessive water use is encouraged to avoid forfeiture, current procedures harm later-in-time appropriators. On the other hand, if a forfeiture occurs where a water right holder assumed a "sufficient cause" for non-use, the procedure would work to favor current and continuous users over future and occasional users.

Alternative #2: Clarify present policy regarding forfeiture.

Description and Methods of Implementation. The present policy regarding the forfeiture procedure, if clarified, would eliminate much of the uncertainty surrounding this aspect of the water adjudication process. The basis for clarification lies primarily in the practical application of the forfeiture statutes. The general intent of the legislature, case law and the observations of various commentators provide further explanation.

This alternative differs from the previous alternative by removing some of the points of confusion in the current forfeiture statutes. If adopted, it could conceivably result in reducing the need to resort to the courts for interpretation of the forfeiture procedure.

The selected modifications are, for the most part, routine and management oriented. A number of sub-alternatives can be identified within this category and each will be addressed separately.

Physical/Hydrologic/Environmental Impacts. Very few significant changes in the behavior of water users may result from this alternative as it represents the current operating procedures of the Department of Water Resources. For the most part, any changes and impacts will be similar to those described in *Alternative #1*, such as increased use of groundwater.

Alternative #2A: Eliminate one of the two forfeiture statutes.

Description and Methods of Implementation. There are two Nebraska statutes requiring that when beneficial use of a water appropriation

ceases, the appropriation right also ceases. The confusion lies in the fact that one statute states that three years nonuse of water triggers forfeiture proceedings while the second statute makes no reference to any time period. The implication is that, in this second statute, the right ceases immediately when use for a beneficial purpose ceases. Such has not been the position of the Department of Water Resources which enforces the three year nonuse provision. Strict enforcement of the statute making no reference to a period of nonuse would produce some harsh results. The repeal of this second statute or modification to exclude mention of loss of an appropriation could be accomplished with no adverse consequences as far as enforcement of the other statute is concerned. In addition, the first statute provides administrative determination of forfeiture and is more complete in this respect.

Physical/Hydrologic/Environmental Impacts. The statute providing for forfeiture when beneficial use of the water ceases could lead to reduced streamflows resulting from increased withdrawals by appropriators fearing cancellation for nonuse. The corresponding physical/hydrologic and environmental impacts resulting from reduced streamflows may involve reduced wetlands, water habitat, and ground water recharge. Forfeiture after more than three years nonuse is the current operating procedure of the Department of Water Resources and elimination of the other statute would have no impact other than those which have been described for existing conditions.

Socio-Economic Impacts. Assuming that the "immediate loss" statute would be repealed, this alternative would have no direct economic impact since only the three year forfeiture statute is enforced currently. To the extent that existence of the "immediate loss" provision adds to uncertainty and encourages excessive water use, however, the repeal would enhance the probability of achieving economic efficiency.

Since this alternative would have little direct economic impact, no significant equity impacts would result.

Alternative #2B: Indicate that three "successive or consecutive" years of nonuse were contemplated in the forfeiture statutes.

Description and Methods of Implementation. The forfeiture statutes do not explicitly state that three successive years of nonuse may lead to the cancellation of a water right. Consecutive years are, however, probably implied. There are a number of reasons supporting in-

clusion of such a designation in the statute. The Department of Water Resources has construed the statute to mean three consecutive years and determines forfeitures accordingly. This interpretation relieves the Department of the burdensome duty of keeping a "running tab" every year of all water users on a stream. As the forfeiture statutes are currently enforced, the Department's field engineer need only concentrate on those water appropriators who have not used water for one or more years. A few western states have included "successive" or "continuous" years in their respective statutes dealing with forfeiture.¹⁰ The change would be primarily for purposes of clarification.

Physical/Hydrologic/Environmental Impacts. It is unlikely that any significant changes or impacts, apart from those resulting from current operating procedures, will occur by adopting this alternative.

Socio-Economic Impacts. This alternative, likewise, would have no direct economic impact since it would merely amend the statute to conform with current administrative practice. Of course, any clarification that reduces potential uncertainty would be desirable economically.

Given the minimal economic impact of this alternative, no equity impact can be identified.

Alternative #2C: Modify the forfeiture statutes to permit forfeiture only if nonuse was intentional and voluntary.

Description and Methods of Implementation. It is reported to be the case that "forfeiture provisions are given effect only when the facts show the nonuse is voluntary or is the result of neglect by the appropriator."¹¹ Furthermore, the legislative history of the forfeiture statutes seems to indicate that the legislature considered that an element of intent to abandon or not to use a water right should exist prior to cancellation of the water appropriation. There were clearly acceptable periods of nonuse contemplated in their discussion.¹² There have also been reasons excusing nonuse recognized in judicial opinions. One court case based its decision not to cancel a water appropriation on a lack of intent to abandon the diversion works.

If, in fact, water rights are cancelled only if it appears that nonuse has been voluntary or the result of neglect, no administrative changes would occur from the adoption of this sub-alternative. It would merely involve making the language of the forfeiture statutes consistent with actual practice and the expressed intent of one past legislature and the courts.

Physical/Hydrologic/Environmental Impacts. In that it represents current operating procedures of the Department of Water Resources, this alternative would not cause any additional changes in current water use patterns or impacts from those described in *Alternative #1*.

Socio-Economic Impacts. It is difficult to predict the precise economic impact of this alternative. If nonuse occurs when water is available, the nonuse presumably would be intentional. Consequently, the "intent" language would add nothing to existing law. Requiring that non-use be voluntary to support a forfeiture, however, might or might not constitute a significant change depending on the interpretation given to "voluntary." If non-voluntary would be equated with past judicial interpretations of "sufficient cause" for nonuse, the change would have no economic impact. The notion of "voluntary nonuse", however, could encompass an entire continuum of conduct. Consequently, it is impossible to predict how the qualification would be interpreted. Since this alternative does little to clarify and much to obfuscate existing law, it appears to be economically inefficient.

Uncertainty of interpretation makes determination of the equity impacts of this alternative equally unclear. Probably, however, it would increase the bias toward prior holders of appropriation permits and against subsequent competing users.

Alternative #2D: Clarify the statutes to state that unperfected or inchoate water rights can be cancelled for failure to comply with the conditions of approval in the permit.

Description and Methods of Implementation. Forfeiture procedures for nonuse generally apply only to perfected appropriative rights, those rights under which water is actually being used according to the purpose specified in the permit. Theoretically, unperfected rights end with cancellation of the application or revocation of the permit to appropriate rather than through nonuse. In Nebraska, the Department of Water Resources will automatically cancel a permit for an appropriator's failure to (1) comply with its lease of water from the state, (2) file the map or plat required showing the proposed diversion site, or (3) commence and diligently prosecute construction of the diversion facilities "unless temporarily interrupted by some unavoidable or natural cause."¹³

The Nebraska forfeiture statutes, however, do not make it clear that the forfeiture procedure

does not apply to unperfected or inchoate water rights. Adding to the uncertainty is the reference in one forfeiture statute to ceasing use of a water appropriation, implying a perfected water right; and in the other, to any water appropriation which has not been used, implying unperfected as well as perfected water rights. To avoid confusion, the forfeiture statutes should clearly indicate that the forfeiture procedure for nonuse applies to perfected water appropriations and need not be relied upon for cancellation of unperfected rights. However, in some instances, the Department of Water Resources could still use the forfeiture procedure to cancel what may in fact be an unperfected right.

This sub-alternative can be implemented by amendment of the forfeiture statutes. Automatic cancellation of unperfected water rights is already covered in another section of the statutes. This change would have no impact on the administrative operations of the Department of Water Resources.

Physical/Hydrologic/Environmental Impacts. This alternative would remove any confusion by clarifying the statutes to accord with existing operating procedures of the Department of Water Resources. No impacts or changes are likely to occur beyond those caused by the current situation.

Socio-Economic Impacts. This alternative would have no direct economic efficiency impact and no direct equity impact. The concept of forfeiture would seem to exclude application to unperfected or inchoate rights. Consequently, clarifying this point would have no economic impact.

Alternative #3: Require the Department of Water Resources to promulgate rules on what constitutes "sufficient cause".

Description and Methods of Implementation. The director of Water Resources is empowered to prescribe rules and regulations for the Department.¹⁴ One way in which present policy could be clarified would be to specifically require the director to promulgate rules on what criteria will be considered at the show-cause hearing in determining whether sufficient cause for nonuse exists. Implementation of this alternative would involve some time and expense on the part of the Department of Water Resources in promulgating rules. If limited to actual practice no change in administrative procedures would be required. However, there could potentially be criticism that this constitutes an unlawful delegation of legislative authority. The advantage to prescribing rules at the administrative level lies in their flexibility and the comparative ease of amending them.

Physical/Hydrologic/Environmental Impacts. The purpose of this alternative is to require the director of the Department of Water Resources to establish criteria to be considered in determining whether sufficient cause for nonuse has occurred. Three reasons are currently accepted for excusing nonuse: (1) adequate moisture, (2) inadequate streamflow, and (3) cropping patterns such that irrigation is unnecessary. Any changes or impacts on water use will depend on the rules, if any, promulgated by the Department. If additional periods of nonuse are approved as excuses to the three year nonuse rule, thereby reducing the pressure on appropriators to diligently use their appropriated water, increased streamflow could result with corresponding physical/hydrologic/and environmental impacts such as increased wetlands, water habitat, and groundwater recharge.

Socio-Economic Impacts. Requiring, or otherwise convincing, the Department to issue such rules would enhance clarity of the forfeiture procedures. Such a reduction in uncertainty would be economically efficient. The ultimate effect of this alternative on efficiency and equity cannot be determined, however, without knowing the precise nature of the rules that would be promulgated.

Alternative #4: Modify the forfeiture provisions to permit exceptions to the three-year period of nonuse.¹⁵

Description and Methods of Implementation. There is currently some uncertainty surrounding the actual meaning of the "show cause" provision and the degree of discretion permitted the Department of Water Resources by the forfeiture statutes. Administrative practice, for the most part, follows the dicta of some court opinions recognizing certain exceptions to the three year period of nonuse. Dictum is generally a remark or observation made by a judge "by the way", which does not have the force of law. Therefore, under these circumstances, the legislature would be the appropriate body to develop guidelines for determining what facts are sufficient to show cause why a water appropriation should not be cancelled. They could provide an effective arena for the refinement of recommended periods of time not to be considered nonuse for the purposes of forfeiture. A few states have taken this approach and enacted legislation for excepted periods of nonuse.¹⁶ This has also been the suggestion of a few legal scholars writing on the subject. The following periods of time have been recommended as exceptions to nonuse and provide a composite of most of the suggestions identified in the report.

1. When irrigated farmlands are placed under an acreage reserve or production quota program or otherwise withdrawn from use as a requirement of participation in any federal or state government program;
2. When federal, state, or municipal laws impose land or water use restrictions;
3. When the available water supply is inadequate to enable the owner to use the water for a beneficial or useful purpose;
4. When climatic conditions cause irrigation to be unnecessary or when circumstances are such that a prudent man, following the dictates of good husbandry, should not be expected to use the water; or
5. When caused by destruction of works, diversion or facilities for use by a cause not within the control of the owners of such water appropriation, and when good faith efforts to repair or replace such works, diversion or facilities are being made;
6. When nonuse occurs as a result of active service in the armed forces of the United States during a military crisis;
7. Non-voluntary service in the armed forces; and
8. During the operation of legal proceedings which affect the appropriation.¹⁷

This list provides a fairly comprehensive summary of those exceptions recommended by various authorities cited herein. Some of the exceptions to nonuse may be adopted to the exclusion of others; rejection of one does not preclude enactment of another.

Implementation of this alternative would require action by the legislature. The legislature should declare which, if any, exceptions to nonuse should be considered by the director of the Department of Water Resources in determining whether a water appropriation should be forfeited and cancelled. The remaining procedural aspects of the administrative forfeiture hearing should also be changed accordingly. The legislative recognition of excepted periods of nonuse would further provide standards by which the courts could assess the propriety of administrative actions on appeal and thereby facilitate their review process.

Adoption of this alternative would provide guidelines for the Department of Water Resources in determining whether there has been sufficient cause excusing nonuse. No additional administrative costs would be involved as consideration of these exceptions to

nonuse would occur at the show-cause hearing which is already required. This could potentially reduce the number of appeals of Department decisions to the courts. It could conceivably result in fewer cancellations of water appropriations assuming the costs of appealing an unfavorable decision of the Department of Water Resources, has, in the past, been prohibitive. This number would probably be quite small.

A smaller issue which the legislature may wish to address is whether the excepted periods of nonuse adopted by the legislature are to be exclusive or merely to identify, by way of example, factors which should be considered by the director in making a determination on forfeiture. A New Mexico statute contains language to the effect that forfeiture shall not **necessarily** occur if certain circumstances exist.¹⁸ The Nebraska Legislature may want to consider this type of a qualification to prevent blanket exceptions in the forfeiture statute and permit some flexibility at the administrative level.

Physical/Hydrologic/Environmental Impacts. Implementation of this alternative is unlikely to produce any major changes in water user behavior because most of the time periods suggested as exceptions to nonuse represent those situations in which an appropriator is either effectively prevented from using water or would be unwise or imprudent to do so. Adoption of exceptions one and five could result in temporary increases in streamflows but it is unlikely to increase the number of appropriations sought. Exception two, in some cases, could effect a change of use by relocating the point of diversion and/or site of use.

Socio-Economic Impacts. A strict three-year forfeiture rule encourages excessive water use to avoid operation of the statute. On the other hand, forfeiture provisions are necessary to transfer water to higher and better uses in the absence of more formal transfer mechanisms. Consequently, the economic impact of this alternative depends on the specific nature of the exceptions to the three-year rule. If the exceptions are designed to avoid forfeiture in circumstances where nonuse of water is economical, then the alternative likely would enhance economic efficiency. If, however, the exceptions were drafted in a manner that permitted landowners to retain more water rights than economically optimal, this alternative would decrease the probability of achieving an economically efficient allocation of water. As a practical matter, exceptions probably would operate efficiently in some circumstances and inefficiently in others with a net gain or loss on the balance. A net gain in efficiency, however, seems more likely given the probable scope of the exceptions. Moreover,

codifying exceptions would reduce uncertainty that currently impacts on water right adjudications, thereby reducing an existing barrier to efficiency. On the other hand, codification of exceptions would reduce the flexibility occasionally necessary to promote economically efficient water use.

The equity impacts of this alternative also would depend on the precise nature of any exceptions adopted. One would expect, however, that occasional or future users of water holding vested water rights would benefit at the expense of competing later-in-time water right holders. Given current judicial interpretation of the forfeiture provisions, however, the magnitude of any equity impact likely would not be very great.

Alternative #5: Abrogate nonuser and prescription as methods of effecting the loss of water rights.

Description and Methods of Implementation. The other methods of losing water rights which may be considered include: abandonment, nonuser, and prescription. If the forfeiture provisions in the statutes are diligently enforced, both nonuser and prescription which require ten years nonuse prior to loss, are effectively obsolete; forfeiture would already have resulted from **three** years nonuse. Nevada is an example of a state which statutorily permits "No prescriptive right to the use of such water or any of the public water...."¹⁹ Abandonment, on the other hand, is still a viable method of loss. It differs from forfeiture in providing for loss immediately upon relinquishing possession if there is an intent to abandon the water right.

Implementation of this alternative would require legislative action abrogating nonuser and prescription as methods effecting the loss of water rights. As these methods of loss have not been resorted to in recent years, it is unlikely that their abrogation would cause any significant impacts administratively or judicially.

Physical/Hydrologic/ Environmental Impacts. If nonuse and prescription are indeed effectively obsolete, their removal by legislation should have no effect on water use patterns.

Socio-Economic Impacts. Since nonuser and prescription have had little importance in recent years, the economic impact of adopting this alternative would be slight. Generally, however, nonuser and prescription promote efficient water use so abrogation of the principles should be viewed with economic skepticism. Nonuser has the advantage of facilitating a transfer of water without the need for a "show cause" hearing. It is more in the nature of a conclusive

presumption of abandonment. Consequently, it puts an effective upper limit on use of exceptions to the three-year forfeiture rule. Prescription performs a further significant function in that it transfers rights to those who have instituted an adverse use. Thus, it results in a modification of legal rights to conform with physical reality, protecting those investments that have been made relying on long term changes in water use patterns. Thus, while application of the principles of nonuser and prescription may be rare, they nearly always facilitate economic efficiency when applied.

The equity impacts of this alternative vary for nonuser and prescription. Abrogating nonuser would favor speculators and very occasional water users at the expense of later-in-time appropriators. Abrogating prescription would favor nonusers who are dilatory in objecting to adverse users at the expense of the adverse and actual users.

Alternative #6: Modify the forfeiture statutes to lengthen or shorten the period of time after which forfeiture of the water appropriation for nonuser will occur.

Description and Methods of Implementation. A number of western states recognize a longer period of nonuse than Nebraska before forfeiture procedures will be instituted on a water appropriation. A majority of those states have selected five years. There are reasons supporting both longer and shorter statutory periods.

A longer period of time would take into account a number of the exceptions to nonuse listed in *Alternative (4)*, for instance, those determined by weather conditions. Consequently, it is likely that fewer cancellations based on forfeiture would be issued if the time period were lengthened. Such a move, however, could potentially cause some administrative problems for the Department of Water Resources personnel who are responsible for monitoring nonuse of water appropriations across the state.

A shorter period of time, on the other hand, would also presumably cause more work for Department personnel because it is likely that more cancellations would occur.

The legislature could implement this alternative by amendment to the forfeiture statutes.

Physical/Hydrologic/Environmental Impacts. Assuming nonuse is attributable to such causes as adequate moisture or inadequate streamflow, adoption of a longer nonuse period could result in less diligent use of water by some, due to the added "cushion" of time. This could result in an increased supply for streamflow with

resulting physical/hydrologic and environmental impacts of increased wetlands, water habitat, and groundwater recharge. On the other hand, a shorter nonuse period, without a provision for exceptional cases, would most likely result in more cancellations. It also could serve to increase the diligence in the use of water by appropriators thereby making less water available and reducing streamflows.

Socio-Economic Impacts. In the absence of a voluntary transfer mechanism in Nebraska law, lengthening the period of nonuse for forfeiture likely would be economically inefficient. As long as reasonable exceptions to forfeiture are recognized, little evidence exists to suggest that the current rule does not operate efficiently. Likewise, shortening the period of nonuse would not seem to be justifiable on economic efficiency grounds. If the period of nonuse is made too short, an excessive number of forfeiture procedures would result as well as an excessive number of successful "reasonable cause" defenses. Similarly, if the period of nonuse is made too long, an excessive number of water right holders who lack sufficient cause for nonuse will be protected. Consequently, this alternative would enhance economic efficiency only if it could be demonstrated that too high (or too low) a percentage of nonusers currently can demonstrate reasonable cause.

If the time period is shortened, no obvious equity impacts to this alternative can be identified other than the burden that would be imposed by greater numbers of "show cause" hearings. Lengthening the period, in contrast, would favor future users, occasional users, and speculators at the expense of competing later-in-time appropriators.

Alternative #7: Provide for the petitioned extension for a reasonable length of time to resume the use of appropriated water.

Description and Methods of Implementation. Nebraska law currently provides that an extension for a reasonable length of time may be granted by the Department of Water Resources after a hearing upon petition. The extension may be for the completion of works, the application of water to a beneficial use or any of the other requirements for completing or perfecting an application for the appropriation of water. It is unclear whether an extension could be granted under this section once an application has been completed and perfected. No extensions for this reason have been granted and, to date, it has not been the policy of the Department of Water Resources to grant an extension for such reason.

A similar provision could be adopted pertaining specifically to extensions of time for nonuse of a perfected water appropriation. The extension could be granted for a specific period of time or be left to the discretion of the Department of Water Resources.

Implementation of this alternative would require action by the legislature and, if adopted, would increase the administrative responsibility of the Department of Water Resources by requiring a hearing upon the petition for extension. The granting of extensions, however, could conceivably reduce the need to cancel by forfeiture some water appropriations which are not being used.

Physical/Hydrologic/Environmental Impacts. Depending on the ease in acquiring an extension of time to resume use of a water appropriation this alternative could result in the failure of some water users in attempting to gain an extension of time and thereby increasing streamflows. If, however, extensions are granted only for good and sufficient cause, then the resulting impacts would be similar to those described for *Alternative #4*.

Socio-Economic Impacts. The current forfeiture statute can be tolled for reasonable cause. Consequently, little need exists for petitioned extensions of the nonuse period. The only economic benefit of such a procedure would seem to be an opportunity to preestablish an excuse for nonuse. Most reasonable causes of nonuse, such as abnormal precipitation, cannot be anticipated in advance. Those causes that could be anticipated might well be addressed by legislatively clarifying the nature of the exceptions. Still more flexibility could be achieved by conditioning forfeiture orders on the failure to reinstitute use within a specific time frame. Thus, there seems to be little economic need for this alternative. On the other hand, this alternative would produce no negative economic impacts. The major question is whether an additional administrative procedure is worth the cost of development and implementation.

No equity impacts of this alternative are apparent.

Alternative #8: Modify the forfeiture statutes to incorporate the "acreage report" concept.

Description and Methods of Implementation. One author has suggested modifying the forfeiture procedure in Nebraska to make it simpler and less expensive. It basically requires the preparation of an acreage report and could be incorporated with minor changes into the current forfeiture statutes. It is explained in

greater detail on page I 3-3 of this report. The report would be prepared by every appropriator listing all current irrigated acres and acres to be irrigated in the next year. Failure to submit a report for three consecutive years would result in temporary cancellation of the appropriation by the Department of Water Resources. If a hearing was not requested contesting the temporary cancellation or if the appropriator was unsuccessful at this hearing, the cancellation and forfeiture would become permanent.

This suggestion is appealing in two major respects. It transfers some of the burden of reporting irrigated acreage to the appropriator. This would save a considerable amount of time for the administrative officer of the Department of Water Resources who could more or less spot check and verify the reports. Furthermore, by providing that a hearing be held only upon request, it is conceivable that some uncontested cancellations could save the Department of Water Resources the expense of a hearing.

Implementation of this alternative would require legislative action amending the forfeiture statutes to incorporate these changes.

Physical/Hydrologic/Environmental Impacts. Modification of the forfeiture statutes to incorporate an acreage report would simplify the procedure utilized by the Department of Water Resources in cancelling water rights. Implementation of this alternative, should have no effect on current water uses or change in impacts from the current situation.

Socio-Economic Impacts. As long as the substantive forfeiture rules would remain unchanged, this alternative would have no direct impact on economic efficiency. To the extent that administrative costs of forfeiture would be reduced, however, and uniformity of application improved, more efficient results might be reached. The key would seem to be the accuracy of reports submitted by appropriators.

There are no obvious equity impacts for this alternative.

FOOTNOTES

1. Economics is the science of human choice in a world where resources are limited and wants are insatiable. In addressing the economic impact of various water policy alternatives it is necessary to focus both on the problem of resource utilization and on the problem of want satisfaction, topics subsumed within the broad label of economic efficiency. Economists commonly distinguish between productive efficiency and allocative efficiency. Productive efficiency is achieved when resources are combined to create the most output for the least cost. Thus, a change is productively efficient if it allows society to produce more goods at the same cost or the same amount of goods at a lower cost. Allocative efficiency, in contrast, relates to the distribution of produced goods among the members of society, whether presently living or yet to be born. A change is allocatively efficient if it will increase the satisfaction of at least one member of society without decreasing the satisfaction of another (Pareto superiority), or if it will increase the satisfaction of some members of society more than it will decrease the satisfaction of other members of society (Kaldor-Hicks efficiency). An economic system is thus said to be efficient if it allocates existing resources so as to maximize the production derived from them, and if it distributes the goods produced in a manner that maximizes consumer welfare.
2. Equity refers to how society's wealth is distributed among the members of society. Changes in equity are reflected in changes in the distribution of wealth. Evaluation of equity impacts is difficult, however, as equity is essentially a philosophical concept, not an economic one.
3. An efficient transaction, for instance, could be thwarted if an individual was required to negotiate with several parties, each of whom would be negligibly impacted by the proposed conduct. Efficiency gains often can be offset by such transactions, thereby effectively blocking the efficiency gain.
4. **See generally** Calabresi, **Transaction Costs, Resource Allocation and Liability Rules - A Comment**, 11 J. LAW & ECON. 67 (1968).
5. This is a particular problem where legal rules are unclear making completely accurate information available only at the cost of **ex post** litigation.
6. Historically, for instance, heavy industry was free to pollute the atmosphere with little regard to the costs that such pollution imposed on adjacent landowners.
7. **See generally, e.g.,** Krupp, **Analytic Economics and the Logic of External Effects**, 53 AM. ECON. REV. 220 (1963); Scitovsky, **Two Concepts of External Economics**, 62 J. POLIT. ECON. 143 (1954). "Positive externalities" exist where production or consumption benefits others

in addition to those actually engaged in the activity. These others are known as "free riders". "Negative externalities", in contrast, impose costs on persons other than those engaged in a particular productive or consumptive activity. Since negative externalities impose costs on those who do not benefit from an activity, they are known as "spillover effects". Much governmental activity is justified as an attempt to internalize externalities, that is, to impose spillover costs on the producers or consumers who produce the costs and benefit from the production or consumption. Other governmental activity is designed to apportion the costs of producing positive externalities among potential free riders, often by treating the product as a public good to be produced with public dollars.

8. The relationship between efficiency and equity must be understood. Efficiency gains are independent of equity impact. Thus, if A can make more efficient use of water owned by B than can B himself, it is efficient to transfer the water to B. A need not pay for the water for the transfer to be efficient. Whether A is required to pay for the water or is merely free to take it has an important equity impact, however, since in one case B is compensated for his loss and in the other he is not.
9. The study is concerned only with adjudication **procedures**. The concepts of forfeiture, abandonment, and other water right

loss mechanisms, as well as their attendant economic impacts, are considered in the Beneficial Use Study.

10. **ARIZ. REV. STAT.** § 45-131(c) (1980); **WYO. STAT.** § 41-3-401 (1977); **KAN. STAT.** 42-308 (1973); **OKLA. STAT.** § 105.17 (1980); **OR. REV. STAT.** § 540.60 (1953).
 11. R. Fischer, R. Harnsberger & J. Oeltjen, "Rights to Nebraska Streamflows: An Historical Overview with Recommendations," 52 **Neb. L. Rev.** 313, 368 (1973); see also C. Yeutter, "A Legal Economic Critique of Nebraska Water Course Law," 44 **Neb. L. Rev.** 11, 36n. 106 (1965).
 12. 1963 Neb. Laws c. 278, § 1 (LB 95 see p. 11-3).
 13. **Neb. Rev. Stat.** §§ 46-236 to 46-238.
 14. **Neb. Rev. Stat.** §§ 46-704, 81-112.
 15. This alternative is an expanded version of Recommendation 4 appearing in the Legal and Institutional Technical Paper for the Platte River Basin - Nebraska, Level B Study, March 1975, Missouri River Basin Commission.
 16. **N.M. STAT. ANN.** § 72-05-28(A) & (E) (Supp. 1980); **N.D. CENT. CODE** § 61-04-23 (1977); **UTAH CODE ANN.** § 73-1-4 (1980); **WASH. REV. CODE** § 90.14.140 (Supp. 1980). See p. 1 3-2.
 17. R. Fischer, *supra*. note 11 at 369.
 18. **N.M. STAT. ANN.** § 72-5-28(A) (Supp. 1980).
 19. **NEV. REV. STAT.** § 533.060(3) (1979).
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PART II

**ADJUDICATION
AS RELATED TO PREVIOUSLY
UNQUANTIFIED RIGHTS**

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CHAPTER 1

HISTORY AND PRESENT LAW

Introduction

The first irrigation law in Nebraska,¹ enacted in 1889, contained no provision limiting the amount of a water appropriation. This law was administered on a county basis only and “the records of the county clerks soon showed the waters in most of the streams in the state appropriated many times over.”² Before a statewide appropriation system could be inaugurated on natural streams of the state, an adjudication of existing water rights was necessary. In 1895, when Nebraska’s first adjudication procedure was established,³ no water rights claimed in the state had ever been quantified. The 1895 Law provided that, “The water of every natural stream not heretofore appropriated, within the state of Nebraska, is hereby declared to be the property of the public, and is dedicated to the use of the people of the state, subject to appropriation as ... provided.”⁴ The statute reaffirmed water rights acquired through prior use; however, riparian rights were not quantified as were appropriative claims. To this day, riparian rights acquired prior to 1895 remain unquantified. In addition, no attempt has ever been made to quantify and regulate federal reserved and nonreserved rights or Indian water rights.

One change in the 1895 Law occurred in 1980 when the state legislature enacted LB 802, which expressly included the Missouri River as a “natural stream ... within the state ... subject to appropriation.”⁵ Prior to the effective date of LB 802, no water appropriations had ever been issued for the waters of the Missouri River. Consequently, it again became necessary to adjudicate water rights claimed on the river based on prior use. The adjudication claim procedure which is being utilized is similar to the procedure which was used in 1895. Therefore, a brief description of this early claim adjudication process is in order.

History of Nebraska’s Adjudication Statute

1889 Law

A claim for a water right was established under the 1889 irrigation law by posting a notice at the claimed diversion site stating the amount appropriated and the purpose of the appropriation. A copy of this notice was filed with the clerk of the county in which the appropriation was made within ten days. Construction on the diversion was to begin within sixty days after posting and to continue diligently to completion or risk the forfeiture of all rights against a subsequent appropriator. The records of appropriations acquired pursuant to this law were recorded only by county; consequently, as most streams crossed county lines, there was no way of determining the total appropriations on a stream. There was often more water appropriated than existed in the stream.⁶ This law remained in effect until 1895.

1895 Law

In 1895, a new irrigation statute was enacted making a number of significant changes in the prior law.⁷ The 1895 Law divided the state into two water divisions for the purpose of prescribing regulations for the appropriation, distribution and use of water.⁸ It established a state board of irrigation whose duty it was to manage these regulations and to adjudicate and determine the priorities of rights to use the public waters of the state.⁹ It was necessary to adjudicate the claims to water rights acquired through actual use or compliance with the 1889 Law, prior to April 4, 1895, the effective date of the 1895 Law, “before there could be an intelligent disposition of the new appropriations or any equitable distribution of the water.”¹⁰

The basic steps in this adjudication procedure were as follows:

- (1) Copies of the county records of claims were obtained from the county clerks.

- (2) Each claimant was required to file a claim affidavit setting forth all important facts in the history of the appropriation, with a plat showing the location of the stream and ditch and the territory irrigated.
- (3) Hearings were appointed at points convenient to the claimants for the taking of oral testimony in support of these claims.¹¹

The record in each case consisted of a copy of the original filing, if it existed, the claim affidavit, the transcript of the testimony from the hearing and any other documents offered by the claimant, together with an engineering report based on an inspection of the diversion works. In making a determination of the claimant's rights, the Board considered whether a notice had been posted at the point of diversion, a copy filed with the county clerk, and the construction prosecuted diligently to completion in accordance with the prior 1889 Law. If the law had been complied with, in these respects, the priority date was the date of initial posting of notice at the point of diversion. "When there [was] an evident lack of diligence, the priority dates from the time when beneficial use began."¹² The same was true when no filing was made. The amount of the right was limited to the capability of the canal or, in some cases, the actual acreage covered. Many of the claims made were in an unfinished state and it was, therefore, necessary to condition the amount of the appropriation on the capacity of the completed canal and the area actually irrigated.¹³ This is essentially the procedure which was utilized in adjudicating water rights on Nebraska watercourses at the time the state's present appropriation system was instituted.

LB 802

With the passage of LB 802 in 1980 by the Legislature, amending section 46-202 of the Nebraska statutes, it became necessary to make an adjudication of another watercourse in the state - the Missouri River. The purpose of this bill "was to clarify that water in the Missouri River is subject to appropriation, and that a permit from the Department of Water Resources is required."¹⁴ Until that time, the Department, which administers water appropriations in the state, had interpreted the law quite literally and had not been requiring water users out of the Missouri River to file for a permit.

An opinion of the State Attorney General indicated that "the language of [the former statute] could reasonably be interpreted to comprehend the waters of the Missouri River."¹⁵ It was emphasized that this interpretation might not, in fact, be the one given the language of the statute

by the courts; however, inclusion of the words "including the Missouri River" would leave little doubt as to the intent of the statute.¹⁶

The immediate effect of this statutory change was to bring within the state appropriation system those people currently using water out of the Missouri River for irrigation or other purposes. At the public hearing on LB 802, the Director of the Department of Water Resources, John Neuberger, capsulized the advantage the appropriation system provides to landowners as a system of allocation or rationing during times of shortages.¹⁷ Neuberger pointed out that a shortage of water in the Missouri River in the future could become a reality. He appeared more concerned, however, with the possibility in future years that the waters of the Missouri River might be divided up and apportioned between the river's border states. "Nebraska will then have to apportion its water users, its amount of water from the Missouri among its many users along the eastern edge of our boundary."¹⁸ Neuberger further stressed the need to declare a public policy recognizing the water supply of the Missouri River as part of the state's appropriations system. He forewarned that "it would be to Nebraska's advantage to have this public policy clearly stated in the surface water laws of our state, so if the negotiators for Nebraska in the future begin to negotiate with the other states on an apportionment of the Missouri River water, it would be very crystal clear"¹⁹

It is clearly the policy of the Legislature to protect the right to use the waters flowing through and along the borders of the state and the enactment of LB 802 supports this policy. The implementation of LB 802, in turn, provides a some what limited opportunity to test the adequacy of the state's adjudication procedure in a modern setting.

The Department of Water Resources has already undertaken the task of administering LB 802. The Department obtained a listing from the United States Army Corps of Engineers of all individuals and entities holding Corps issued permits on the Missouri River. These parties were notified of the passage and intent of LB 802 and sent claim forms by the Department on which to report the date water use began, how much water was being used, and for what purpose. Approximately forty percent of those notified responded.

The field officers for the Department then investigated the claims received. No actual hearings have been held in part because there is essentially no competition for the use of the Missouri river's water at this time. A hearing will be held on any claims which look questionable; however, none has been required thus far. All

claims received by the Department for use of Missouri River water, to date, have been granted, including the “big” water users on the river such as the Metropolitan Utilities District. It should be noted that these are **claims** as opposed to new appropriations which has enabled the Department of Water Resources to grant priority dates as of the time actual use commenced rather than the date the claim was made.

Federal Reserved, Indian and Riparian Water Rights

Introduction

The experience with “LB 802 claims” could have other implications as far as federal reserved and nonreserved water rights, Indian water rights, and riparian rights are concerned. The very real possibility exists that entities holding any of the foregoing rights to the use of the state’s water, all of which are unquantified at the present time, could adversely affect the appropriative rights of nonfederal water users currently within the state’s distribution system. Incorporation of these federal, Indian, and riparian rights into the appropriation system would provide a more accurate assessment of all the water rights claimed within the state. There are, however, a number of complicating factors which prevent a streamlined merging of these other rights into the appropriation of framework, beginning with the state’s adjudication procedure. The remainder of this part of the report will be devoted to a discussion of federal reserved and nonreserved rights, Indian rights, and riparian rights, with an examination of the adequacy of the current adjudication procedure for quantifying these rights. Riparian rights will be only briefly described here as they are to be given comprehensive coverage in a separate report being prepared as part of the Selected Water Rights Issues Study.

The Reserved Rights Doctrine

Background and History. The federal government gave formal recognition to the doctrine of prior appropriation with the Mining Act of July 26, 1866.²⁰ “Under that act the federal government acknowledged the local customs and laws governing the possession and right to use water which had arisen on the federal public lands and confirmed water rights granted thereunder.”²¹ However, the law did not approve appropriative rights against the federal government on public lands or patentees of the government. The Act of 1866 was amended and clarified by the Act of 1870 to provide that, “all patents granted, or preemption or homestead allowed, shall be

subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights as may have been acquired under or recognized by the [Act of 1866].”²²

The Desert Land Act of 1877 was the next in this series of Congressional Acts recognizing the doctrine of prior appropriation. It acknowledged that unappropriated water upon public lands would “remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights.”²³ The Act, in effect, “severed the water from the land and thereafter federal patents did not convey any water rights.”²⁴ The Desert Land Act, however, did not apply to Nebraska; consequently its provisions do not affect water rights in the state.²⁵ The implication of this is that the theory supporting Nebraska’s appropriative system is unclear.

“The rationale is that the federal government was the initial proprietor of the lands in Nebraska and any claim by the state or by others must derive from the federal title. (citations omitted). Federal patents on non-navigable streams carried with them the government’s water rights until they were severed from the land by action of the United States. If this severance occurred before 1877 as the Supreme Court indicated might have happened, then the Desert Land Act is superfluous. (citation omitted). In the event severance never took place in Nebraska, action by the Nebraska Legislature in adopting an Appropriation Act in 1895 could not have divested the federal government of its property or interfered with its power of disposal under Article VI of the United States Constitution.”²⁶

Nevertheless, the customary appropriations obtained by prior use, which were contemplated by the Desert Land Act, were made and given legal effect in Nebraska.²⁷ In addition, the state Constitution indicates ownership of the water of the state belongs to the people with the right to divert unappropriated water for beneficial use, thereby adopting the prior appropriation doctrine. The definition and quantification of riparian rights would remove this uncertainty.

The federal government’s early acquiescence to state water rights laws did not foretell the shape of things to come. The federal government has since successfully pursued a separate and distinct classification of “reserved” water rights. In fact, federal reserved rights are often cited as a major exception to Congress’ deference to state water laws. This “reservation” doctrine has understandably created some apprehension on the part of states due to the fact that it exists independently of state law.

The Doctrine

The federal reserved water rights doctrine has been described by the United States Supreme Court as follows:

This Court has long held that when the Federal Government withdraws its lands from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In doing so the United States acquires a reserved water right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators. Reservation of water is empowered by the Commerce Clause, Art. I, §8, which permits regulation of navigable streams, and the Property Clause, Art. IV, §3, which permits federal regulation of federal lands. The doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and non-navigable streams.²⁹

The doctrine was judicially created through a series of U.S. Supreme Court decisions. It was firmly recognized by the Court in *Winters v. United States*³⁰ and was initially applied to Indian water rights. The Court held that when Congress creates an Indian reservation, it impliedly reserves the waters necessary for the Indians' use independent of state laws of appropriation.

A 1955 decision in *Federal Power Commission v. Oregon*,³¹ led to speculation that the reserved doctrine had broader scope than just Indian water rights. In that case, the Court confirmed the right of the federal government to issue a license for a dam on federal reserved lands, without obtaining state authorization. Finally, in *Arizona v. California*,³² the doctrine was extended to all non-Indian, federal reserved lands.

The issue in determining whether there is a federally reserved water right is whether the government intended to reserve unappropriated water. The Supreme Court, in *Cappaert v. United States*, found that, "Intent [to reserve water] is inferred if the previously unappropriated water is necessary to accomplish the purpose for which the land reservation is created."³³ The quantity of water allocated under the doctrine is measured by the nebulous standard stated above - the amount "necessary to accomplish the purpose ... [of] the ... reservation."³⁴ The amount necessary for Indian reservations has often depended upon the "practicably irrigable acreage on the reservation."³⁵ In *United States v. New Mexico*,³⁶ the court addressed the question of what quantity of water was reserved by the United States when it created national forests. The court again held

that the purpose of the forest withdrawal determined the amount of water reserved and then, "only the amount necessary to fulfill the purpose of the reservation, no more."³⁷ It was further observed that where "water is only valuable for a secondary use of the reservation ... there arises the contrary inference that Congress intended ... that the United States would acquire water in the same manner as any other public or private appropriator."³⁸ The priority date of a federally reserved water right is the date on which the reservation was established and set aside.

The doctrine has generally been applied to Indian reservations and other federal enclaves, particularly national forests. Federal reserved rights are created when the United States withdraws land from the public domain for federal purposes by treaty, Act of Congress, or executive order. The government impliedly reserves a quantity of water sufficient to carry out these federal purposes. The reserved rights doctrine was first enunciated with respect to Indian lands. It has since expanded to the degree that Indian water rights and other federal reserved water rights are treated separately.

There are basically two types of Indian water rights which have been asserted: (1) "Those reserved by the Indians from their aboriginal [or ancestral] holdings", dating from time immemorial and (2) "those reserved from the public domain by the federal government for the Indians," dating from the time the reservation was created.³⁹ In either case, most Indian tribes wish to maintain tribal immunity from state jurisdiction, based in part on historical concept of Indian tribes as sovereign nations. Another important concern of the Indian tribes is that state courts may not provide an unbiased forum for the adjudication of their rights.⁴⁰

Considerable doubt exists, however, as to the extent of federal water rights when a federal agency acquires non-reserved lands. This can be accomplished by either acquiring a privately owned right or commencing a new use where unappropriated water is available. The federal government can obtain privately owned land by voluntary purchase, condemnation, or seizure. The implication, in the Supreme Court's decision in *United States v. New Mexico*, is that federal agencies will have to comply with state water laws where reserved rights are unavailable and acquire water rights in the same way as any other public or private appropriator.⁴¹

Impact of Doctrine. The foregoing Supreme Court decisions, while clarifying the reserved rights doctrine, nevertheless, leave much to speculation concerning the impact of these rights on state-created water rights. Due to the fact that the reserved rights doctrine is a judi-

cially established doctrine, the nature and scope of these water rights represent legal claims to water rather than established uses. Unlike the concept of appropriation, reserved water rights do not require actual use and are not subject to abandonment or forfeiture. One commentator has suggested that,

The effect of the doctrine is twofold:

(1) When the water is eventually put to use [,] the right of the United States will be superior to private rights in the source of water acquired after the date of the reservation, hence such private rights may be impaired or destroyed without compensation by the exercise of the reserved right, and (2) the federal use is not subject to state laws regulating the appropriation and use of water.⁴²

These concerns are similar to those expressed with regard to LB 802 and possible apportionment of Missouri River water - the impairment of private rights and the unregulated use of water by other states.

McCarran Amendment. The existence of the reserved rights doctrine has created a federal-state controversy in the area of water rights. "Absent an express waiver of sovereign immunity in the area of water rights determination, the states were precluded from realizing a complete determination of the extent of claims on state water sources."⁴³ The Congress, through enactment of the McCarran Amendment, has generally attempted to waive the sovereign immunity of the United States in the area of water rights litigation. The relevant part of the amendment provides:

Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under state law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit.⁴⁴

The amendment provides the "exclusive method whereby the United States may be joined in a state adjudication of water rights, thus allowing quantification of the extent of the federal claims ... and coordination of such claims with state-created water rights."⁴⁵ The federal government along with Indian tribes have strongly resisted being joined as a defendant in any suit adjudicating rights to the use of water of a river system.

Under the McCarran Amendment, federal water rights can be determined in a general streamwide adjudication pending before a state court. The purpose of a general adjudication procedure is to determine the priorities of all the water users on a stream. The Supreme Court

interpreted the McCarran Amendment, in *Dugan v. Rand*,⁴⁶ to require that all the parties claiming water rights on a particular stream must be present in the adjudication proceeding and all rights determined therein. The policy behind this general, comprehensive adjudication is to prevent suits brought solely to adjudicate federal water rights. In *United States v. District Court, County of Eagle*,⁴⁷ the Supreme Court limited "the availability of the general adjudication requirement as a technical device by which the United States may avoid joinder in state adjudications," and further indicated that the McCarran Amendment applies to any adjudication of federal rights, appropriated, riparian, or reserved.⁴⁸

In seeking an adjudication of federal reserved rights, the United States has preferred filing suit in the federal courts rather than state courts. This was the route taken in *Colorado River Water Conservation Dist. v. United States*, commonly referred to as *Akin*.⁴⁹ The United States filed suit in federal court in Colorado seeking an adjudication of federal reserved rights held on behalf of Indian tribes. Some of the over one thousand defendants filed for an adjudication in state court and sought dismissal of the federal action. The federal court held that the McCarran Amendment granted the states jurisdiction to adjudicate federal reserved water rights, including Indian water rights. The federal suit was dismissed on the basis that the state court was the more convenient forum in the interest of "wise judicial administration."⁵⁰

Other Activity. Additional efforts are being made at the federal level to resolve the federal-state controversy in the water rights area. On July 12, 1978, President Carter issued a memorandum, in conjunction with his efforts to formulate a national water policy, listing several initiatives to strengthen federal-state cooperation. Included was "an instruction to federal agencies to work promptly and expeditiously to inventory and quantify federal reserved and Indian water rights."⁵¹ From the states' standpoint, the need to inventory Indian water rights and federal reserved rights, and to adjudicate and quantify these rights in order to establish their relationship to state-created rights, cannot be over-emphasized. Water rights adjudication is important from an economic standpoint as well. Application of the reserved rights doctrine could potentially disrupt a state's "established water rights priority system and destroy, without compensation, water rights considered to have vested under state law. In addition, until reserved rights are settled, the doctrine is an effective 'impediment to sound coordinated planning for future water resources development.'"⁵²

Riparian Rights

Another hindrance to water resources planning and development in the state is the existence of riparian water rights doctrine. Nebraska is one of a dwindling number of western states which continue to recognize riparian water rights. Riparian rights to use water are a consequence of the legal ownership, possession, or use of land bordering on the banks of a natural watercourse or lake. Their similarity to federal reserved and Indian water rights lies in the fact that they are "neither acquired through use nor lost through nonuse". Riparian claims remain undetermined, and unquantified and there is no way currently "to accurately know what riparian water rights exist in the state today."⁵³

In order to qualify as riparian in Nebraska, the land must have been severed from the public domain prior to April 4, 1895 when the irrigation laws of 1895 establishing the appropriation system were enacted. Furthermore, the land must not have lost its riparian nature by any gradual changes in the stream. Also it must have been held in a unitary possession - if a portion which itself has no access to the stream is separated from the remainder, that portion loses its riparian status. That status is not regained even if that portion is reunited with the remainder at a later date. Riparian status is not, however, affected by changes in ownership - any portion not separated from the stream will remain riparian no matter how many times it has been transferred.

With the 1895 irrigation laws, the Nebraska Legislature abrogated the riparian rights doctrine.⁵⁴ However, rights which had vested

prior to the effective date of this law were protected. The possibility of latent riparian rights exists because most of the state's irrigable land was in private ownership before 1895. Yet, because riparian claims are not a part of the appropriation system, there is no reliable information on the extent of such rights. One authority commenting on the Nebraska system, has observed:

Riparianism causes needless confusion and results in conflicts which would be avoided by imposing administrative supervision over all water allocations except domestic uses. The troublesome aspects of operating two incompatible systems could be eliminated by requiring riparian users to file specified information and obtain a water use permit from the Department of Water Resources within a certain period of time."⁵⁵

The suggestion, that riparian rights held in the state be adjudicated, has been echoed on a number of occasions. Most recently, legislation was introduced which would require the registration of claims of riparian rights.⁵⁶ This would necessitate the adjudication of all claims filed by riparians by the Department of Water Resources. Priority dates and quantities of water used would be established by the Director of the Department of Water Resources, thereby incorporating riparian uses into the appropriation system.

The relationship of the adjudication process to riparian rights has been only briefly described here as riparian rights is the topic of another study entitled *Riparian Rights*. Therefore, further discussion relating to the integration of riparian and appropriative rights has been reserved for that report.

FOOTNOTES

1. St. Raynor Irrigation Laws of 1889, 1889 Neb. Laws c. 68.
2. 2 **Report of Nebraska Board of Irrigation** 213 (1897-1898).
3. 1895 Neb. Laws c. 69.
4. 1895 Neb. Laws c. 69, §42, p. 260 (1895).
5. 1980 Neb. Laws, LB 802 §1, p. 767 (1980) (amending **Neb. Rev. Stat.** § 46-202 (1943)).
6. **Supra** note 2, p. 213.
7. 1895 Neb. Laws c. 69.
8. 1895 Neb. Laws c. 69 §§1-3, p. 244-5.
9. 1895 Neb. Laws c. 69, §16, p. 248.
10. **Supra** note 2, p. 214-5.
11. **Supra** note 2, p. 215.
12. **Id.**
13. **Supra** note 2, p. 215-6.
14. Committee Statement of Intent, Public Works Committee, LB 802, 86th Sess. Nebraska Legislature, Feb. 10, 1980.
15. [1979-1980] **Neb. Att'y Gen. Rep.** No. 200 at 287.
16. **Id.**
17. Committee Hearing, Public Works Committee, LB 802, 86th Sess. Nebraska Legislature, Feb. 13, 1980, p. 30.
18. **Id.**
19. **Id.** at 32.
20. Mining Act of July 26, 1866, ch. 262, 14 stat. 251.
21. J. Palma, II, "Indian Water Rights: A State Perspective After *Akin*," 57 **Neb. L. Rev.** 295, 296, (1978).
22. Act of July 9, 1870, ch. 235, § 17, 16 stat. 217, 218 (amending Act of 1866, ch. 262, 14 stat. 251).

23. Desert Land Act of March 3, 1877, ch. 107, 19 stat. 377.
 24. Fischer, Harnsberger & Oeltjen, "Rights to Nebraska Streamflows: An Historical Overview with Recommendations," 52 **Nev. L. Rev.** 313, n. 108 at 341 (1973).
 25. Note, "Federal-State Conflicts Over the Control of Western Waters," 60 **Colum. L. Rev.** 967 n. 30 (1960).
 26. **Id.**
 27. F. Trelease, "Coordination of Riparian and Appropriative Rights to the Use of Water," 33 **Texas L. Rev.** 24, 29 (1954) citing *Crawford Co. v. Hathaway* 67 Neb. 325 (1903), n. 26 at 29.
 28. **Neb. Const.** Art. XV, § § 5, 6.
 29. *Cappaert v. United States*, 426 U.S. 128, 138 (1976) (citations omitted); see President's Water Policy Implementation Task Force 5a, **Report of the Task Force on Non-Indian Federal Water Rights** (June 1980) (hereinafter **Task Force Report**).
 30. 207 U.S. 547 (1908).
 31. 349 U.S. 435 (1955).
 32. 373 U.S. 546 (1963).
 33. *Cappaert v. United States*, 426 U.S. 128, 139 (1976).
 34. **Id.**; see *Arizona v. California*, 376 U.S. 340 (1964).
 35. *Arizona v. California*, 376 U.S. 340, 345 (1964).
 36. 438 U.S. 696 (1978).
 37. **Id.** at 702.
 38. **Id.** at 702; see **supra** note 27, **Task Force Report** at 16.
 39. **Id.** at S. Morrison, "Comments on Indian Water Rights," 41 **Mont. L. Rev.** 34, 54 (1980).
 40. M. Lamb, "Adjudication of Indian Water Rights: Implementation of the 1979 Amendments to the Montana Water Use Act," 41 **Mont. L. Rev.** 72, 95 (1980).
 41. 438 U.S. 696 (1978).
 42. F. Trelease, **Federal-State Relations in Water Law** (Nat'l Water Commission 1971) note 2 at 109.
 43. *United States v. New Mexico*, 438 U.S. 696, 462 (1978).
 44. Act of July 10, 1952, ch. 651, § 208 (a) - (c), 66 stat. 560, 43 U.S.C. 666.
 45. "Determination of Federal Water Rights Pursuant to the McCarran Amendment: General Adjudications in Wyoming," 12 **Land & Water L. Rev.** 457, 465 (1977).
 46. 372 U.S. 609 (1963).
 47. 401 U.S. 520 (1971).
 48. **Supra** note 45 at 467-8.
 49. 424 U.S. 800 (1976).
 50. **Id.** at 817, The court stated that, "[i]n assessing the appropriateness of dismissal in the event of an exercise of concurrent jurisdiction, a federal court may also consider such factors as the inconvenience of the federal forum the desirability of avoiding piecemeal litigation ... and the order in which jurisdiction was obtained by the concurrent forums **Id.** at 818.
 51. **Presidential Papers, Administration of Jimmy Carter**, July 12, 1978, 1050.
 52. **Supra** note 40 at 95.
 53. R. Fischer, R. Harnsberger & J. Oeltjen, "Rights to Nebraska Streamflows: An Historical Overview With Recommendations," 52 **Neb. L. Rev.** 313, 364 (1973).
 54. *Wasserburger v. Coffee*, 180 Neb. 149 modified 180 Neb. 569 (1966).
 55. **Supra** note 53 at 366.
 56. LB 8, 87th Nebraska Legislature, 1st Sess., § § 3-10 (1981).
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CHAPTER 2

PRACTICAL EFFECTS, NEEDS AND PROBLEMS OF EXISTING LAW

Introduction

A general problem associated with the reserved rights doctrine, itself, is the fact that no one presently knows how much water will be required in the future to satisfy the federal reservations. The difficulty in planning water project developments is compounded by the possibility that there will be no water available for use due to preemption by a paramount federal right.¹

A couple of problems which will affect Nebraska, should the state ever decide to adjudicate federal reserved and Indian Water rights, present themselves from the preceding discussion.

Judicial Proceeding Requirement

The first deals with the definition of what constitutes a "suit for adjudication" within the meaning of the McCarran Amendment. A suit for adjudication has uniformly been held by the federal courts to mean judicial proceedings. The problem arises, however, with the fact that there are a few western states with adjudication procedures carried out exclusively by an administrative agency or which utilize both administrative and judicial proceedings. Nebraska falls into this latter category, as does the state of California. Doubt has been expressed as to the applicability of the McCarran Amendment to the California adjudication procedure which combines judicial and administrative procedures so that no final determination is made without a court decree.² The dilemma has been raised that, "If the McCarran Amendment does not waive immunity before administrative proceedings the anomalous result is reached that Congress has lifted the bar of sovereign immunity in some states but not in others."³

General Adjudication Requirement

A second problem arises with the fact that the statute will not permit federal water right claims to be the primary focus of the adjudication. For example, in the case of a reserved claim, "a private appropriator, independently or acting through the state government cannot use the McCarran Amendment as a basis for jurisdiction to contest a single BLM [Bureau of Land Management] appropriation."⁴ The statute is limited to a general adjudication of all rights on a stream. A problem exists in a number of states, including Nebraska, which have already adjudicated and determined relative rights to appropriation on some or all of their streams. Nebraska did this in 1895. Consequently, there can be no general adjudication proceedings in which the United States may be joined.

Federal Reservations in Nebraska

There are five Indian reservations in Nebraska and two in South Dakota whose potential assertion of claims to water rights could adversely affect the priority status of appropriative water rights issued in this state. The Ponca, Santee, Winnebago, Omaha, and Iowa Indian reservations in Nebraska and the Pine Ridge and Rosebud in South Dakota, are all located on rivers serving Nebraska. The Nebraska Indian reservations were created through a series of treaties, executive orders, and proclamations. The Ponca Indian reservations in northeastern Nebraska was set aside in compliance with the treaties of 1865 and 1868, Congressional Acts of 1863 and 1889 and by various supplemental orders on land lying between the Niobrara and Missouri Rivers.⁵ The Santee Sioux Indians were removed from Minnesota and eventually transferred by Executive Order of February 27, 1866, to their present home in Nebraska.⁶ Treaties were concluded in 1865 and ratified in 1866 by

which the Omaha tribe ceded part of its reservation to the United States which, in turn, set the land apart as the home of the Winnebago tribe⁷.

The Indian reservations established in Nebraska were set aside well before the states first irrigation law was enacted in 1889. Consequently, should the tribes assert claims to water under the reserved water rights doctrine, their priority would date from the creation of the reservation. The earliest recorded priority date for an appropriation in the state is 1890;⁸ therefore, according to "first in time, first in right," the Indian's water rights would have priority over all appropriative rights to water in the state. It is likely that the Indian's rights will predate many

potential riparian claims as well. Even though the Indian reservations in Nebraska are not large, it is quite possible that an exercise of Indian water rights could have an impact on the water distribution scheme during times of water shortage.

In addition, there are three national forests, three national wildlife refuges, and one national grassland situated across the state. It is unlikely, however, that any reserved rights claimed for these areas would have any significant impact due to the fact that they possess priority dates later in time and the minimal quantity of water which would be necessary to accomplish the primary purpose of the reservation.

FOOTNOTES

1. Nat'l Water Comm'n **A Summary - Digest of State Water Laws** (R. Dewsnap, D. Jensen eds. 1973).

2. R. Clark, 2 **Waters and Water Rights**, § 106.2 at 95 (1967).

3. "Determination of Federal Water Rights Pursuant to the McCarran Amendment: General Adjudications in Wyoming," 12 **Land & Water L. Rev.** 457, 470 (1977).

4. Comment, "Federal Non-Reserved Water Rights," 15 **Land and Water L. Rev.** 67, 96 (1980).

5. H. Bennett, "Mineral Resources and Their Potential on Indian Lands," U.S. Dept., of Int., Bur. of Mines, Prelim. Rep. 154, p. 2; Treaty

with the Ponca, 1865, 14 Stat. 675 (1866) (indexed at 2 **Indian Affairs, Laws and Treaties** 875-876 (C. Kappler ed. 1904)).

6. **Id.** at 4.

7. Treaty with the Omaha, 1865, 14 Stat. 667 (1866); Treaty with the Winnebago, 1865, 14 Stats. 671 (1866) (indexed at 2 **Indian Affairs, Laws and Treaties** 872-875 (C. Kappler ed. 1904)).

8. **Gen. Index of Claims and Applications for Water Rights**, Vol. I, p. 1, Neb. Dept. of Water Resources; Application filed June 18, 1895 for the Frites Davenport Canal on the Republican River in Hitchcock County, approved April 1, 1896 and cancelled Jan. 13, 1943.

CHAPTER 3

POLICIES ADOPTED BY THE FEDERAL GOVERNMENT AND OTHER STATES

Introduction

The simplest solution to the federal-state controversy over water rights would be to clarify the scope of the McCarran Amendment by amending the statute. An alternative federal approach, which has been advocated by the Public Land Law Review Commission, would involve limiting the reach of the reserved rights doctrine. Neither approach, however, has received much support at the federal level. Consequently, it will be up to the states to provide a mechanism for the adjudication and quantification of water rights "within the parameters of the McCarran Amendment."¹

Presidential Task Force's Recommendations

President Carter's task force on Federal Non-Indian Reserved Water Rights made a number of recommendations in this same vein for the implementation of President Carter's water policy on federal non-Indian water rights.² Among them were suggestions that:

1. All actual, current consumptive uses of water being made by federal agencies (or by their permittees or licensees in carrying out agency purposes or programs, not theretofore quantified should be quantified within **five years**. [sic]
5. **State law** should be used, to the fullest extent possible consistent with congressionally-mandated management responsibilities, for each water right claimed by the United States for a use of water which is not within or subject to an existing reserved water right.
9. The task force believes that current laws and procedures for adjudicating federal water rights are adequate and the **McCarran Amendment** need not be modified by Congress ...³ (emphasis added)

State Activity

A few states **have** enacted laws establishing timetables for the assertion of certain kinds of rights, including Kansas, Arizona, Montana and Wyoming.⁴ The Kansas statute set July 1, 1980 as the cutoff date for the filing of claims for vested rights. In Arizona, the provisions relating to the general adjudication of water rights specifically provide that the United States and Indian tribes are persons within the purview of the statutes. A general adjudication is defined as "an action for the **judicial** determination or establishment of the extent and priority of the rights of **all** persons to use water in any river system and source."⁵ (emphasis added) The language of the Arizona statute appears precisely designed to comply with McCarran Amendment requirements of a judicial proceeding determining the priorities of all users on a stream.

Wyoming

The Wyoming legislature enacted a bill in its 1977 session "designed to permit a general adjudication of all water claims within the state."⁶ The state Attorney General brings what amounts to a declaratory action to determine the nature, extent and priority of claims on a water source. The proceeding is primarily, although not exclusively, judicial. The court has four major responsibilities with respect to the adjudication. They first confirm all rights evidenced by prior court decrees or certificates of appropriation issued by their State Board of Control. In addition, the court is to determine the status of permits to acquire water rights and to determine the extent and priority of any other interest in the water source which is the subject of the adjudication. Finally, the court is to establish a tabulation of all the water rights so determined and their relative dates of priority.⁷ The purpose of the Wyoming statute is to provide a procedure whereby the state may utilize the waiver of

sovereign immunity in the McCarran Amendment to permit an action in state court, rather than federal court, to quantify federal reserved rights.

The scope of Wyoming's general adjudication procedure, although broad in tone, is limited by the fact that the court, under the statute, only has authority to confirm pre-existing rights and every stream in Wyoming has already been adjudicated. The only rights remaining unadjudicated are federal claims. Therefore, while Wyoming's adjudication procedure, in theory, satisfies the McCarran Amendment's prerequisites to a waiver of sovereign immunity, in reality, any suit would be one directed primarily at the United State for the purpose of adjudicating federal rights.

The tendency of the Supreme Court, however, has been to reject "extremely technical" positions regarding the scope of the Amendment.⁸ In addition, it is the purpose of the adjudication suit, under the Wyoming statute, to incorporate the unadjudicated claims into the state's existing system of priorities.⁹ This issue is likely to be a troublesome one, providing a focal point for continued federal resistance to joinder under the statute.

One commentator on the Wyoming procedure has suggested that, "The primary hurdle which the statute must overcome is the threshold issue of whether the general adjudication proceeding comports with due process requirements of notice and an opportunity to be heard."¹⁰ The statute provides for notice by mail and publication when the number of potential defendants exceeds one thousand. The Wyoming service and notice provisions are similar to Colorado's provisions under the Water Rights Determination and Administration Act of 1969. The Colorado adjudication procedure was before the Supreme Court in *United States v. District Court, County of Eagle*, and was upheld as comporting with due process.¹¹

Montana

Montana has also undertaken the task of adjudicating all existing claims to the state's water. This will require the determination of what rights are held by the various Indian tribes and non-Indian federal reservations located within the state. Most of the controversy in Montana has stemmed from Indian claims to water rights. The Indian tribes assert that they are sovereign and not subject to state control. They also fear the state will not provide an unbiased and non-hostile forum, due, oftentimes, to the existence of local ill-feelings.

Montana amended its Water Use Act of 1979 to accommodate the adjudication of these rights. Generally, the procedure establishing a water

right under the Act requires the following:

1. Issuance of an order by the Montana Supreme Court requiring the filing by all claimants of statements of each claim.
2. Submission of all field claims to the water judge in the division in which the claimed water has been diverted.
3. Issuance of preliminary decrees of water rights by water judges upon reports of water masters.
4. Entry of a final decree of wager [sic] right binding all parties after the passage of a reasonable time without objection to the preliminary decree.
5. If objection is taken by a claimant to the preliminary decree, a hearing will be held for the purpose of adjudicating the right.¹²

The Act specifically provides that the adjudication include "all claimants of reserved Indian water rights as necessary and indispensable parties under authority granted the state by [the McCarran Amendment]."¹³

In order to avoid a state adjudication under the Montana Act, the United States filed seven cases in federal court in 1979 on behalf of the Indian tribes seeking an adjudication of the Indian's water rights. The state of Montana moved to dismiss the cases based on the McCarran Amendment and the motions were granted. The United States has appealed the order. In light of the Supreme Court's decision in *Akin*, finding the McCarran Amendment grants state courts the right to adjudicate federal reserved and Indian water rights, it is likely that the major point of contention will be whether the federal court properly dismissed the federal suits. This will probably involve an analysis of the reasons outlined in *Akin* permitting dismissal.¹⁴

Montana has, furthermore, provided two alternative modes for resolving the conflict between Indian tribes and the state: litigation, or settlement through negotiation. The latter alternative recognizes the advantages of a negotiated settlement - avoiding the ill will and uncertainty which often accompanies an adversarial proceeding.¹⁵ It is also beneficial in striving for a cooperative effort in reaching a final solution to the problem of Indian water rights. The Water Use Act creates a reserved water rights compact commission with authority to negotiate a compact with each of the state's Indian tribes and also with the United States for non-Indian federal reservations. The compact would become effective upon ratification by the state legislature, Congress, and the respective tribal governing body.¹⁶

Federal Non-Reserved Rights

While the states are attempting to resolve the issue of the quantification of federal reserved and Indian water rights pursuant to the McCarran Amendment, a recent development with respect to the issue of federal non-reserved water rights, has led to speculation that the United States may attempt to claim additional water rights on unreserved lands without complying with state laws. This came in the form of an opinion, issued by then solicitor of the United States Department of Interior, Leo Krulitz, to guide federal agencies in making claims to water rights. The most surprising aspect of the opinion was its assertion of new claims to water arising "from actual use of unappropriated water by the United States to carry out congressionally authorized management objectives on federal lands."¹⁷ The impact of this opinion is that it suggests federal agencies have a right to take unreserved and unappropriated water to be used on unreserved lands or for secondary uses on a federal reservation. The solicitor attempted to justify the opinion by stating that the "United States itself retains a proprietary interest" in waters which have not been appropriated. A second theory asserted is that the "United States did not divest itself of its authority, as sovereign, to use the unappropriated waters on public lands for governmental purposes."¹⁸

Early in President Reagan's administration, Secretary of the Interior, James Watt, announced the issuance of a new solicitor's opinion rescinding in part the Krulitz opinion on non-reserved rights. The new opinion, entitled "Non-Reserved Water Rights - United States Compliance with State Law," concludes that,

...there is no federal non-reserved water right. [Federal entities]...may not, without Congressionally created reserved rights, circumvent state substantive or procedural laws in appropriating water. Rather, consistent with the express language in the *New Mexico* decision, federal entities must acquire water as would any other private claimant within the various states.¹⁹

This opinion was intended to supersede the prior Krulitz opinion only with respect to non-reserved rights on federal lands. This apparent about-face between two different Interior secretaries and administrations serves to emphasize the uncertainty regarding federal claims to non-reserved water rights at the federal level.

Summary

It is apparent that a few western states, like

Nebraska, are caught in a "catch-22" as far as the adjudication of federal and Indian water rights are concerned. If the McCarran Amendment requirement of a general adjudication of all existing water rights on a stream is literally interpreted, states which had earlier adjudicated state-created water rights are effectively prevented from adjudicating federal and Indian water rights. Furthermore, compliance with the McCarran Amendment appears to be the tactical point for federal challenge to joinder in a state proceeding to adjudicate federal and Indian rights. Should the federal government insist on a strict interpretation of the Amendment, little could be done to correct this inequity short of amending the federal law. A liberal interpretation by the courts, however, has postponed any seriously inequitable results.

The increasing need at the national level for states' water has prompted further concern over the sanctity of state water laws with respect to federal use. One western state governor expressed alarm at the possibility that the federal government would claim the state's water for its proposed MX missile system under its national defense powers rather than by compliance with the state's water law.²⁰ The contradictory opinions issued by the solicitors of the United States Department of Interior have only fueled that anxiety.

It is clear that there will have to be federal-state cooperation in this area of water right adjudications in order to resolve these controversies. The states do not want to give up control of "their" water; neither does the federal government want to be subjected to biased state proceedings. Care will have to be taken to insure that the interests of all parties are protected.

FOOTNOTES

1. Note, "Determination of Federal Water Rights Pursuant to the McCarran Amendment: General Adjudications in Wyoming," 12 **Land and Water L. Rev.** 457, 474 (1977).
2. Task Force 5a - President's Water Policy Implementation, **Report of the Federal Task Force on Non-Indian Federal Water Rights** (June 1980) (hereinafter cited as **Task Force Report**).
3. *Id.* at 3-5.
4. **KAN. STAT.** §82-704a (1978); **ARIZ. REV. STAT.** §45-251 et seq. (1980); 1979 Mont. Laws, c. 697; **WYO. STAT.** §41-4-317 (1977).
5. **ARIZ. REV. STAT.** §45-251(1) (1980).
6. *Supra* note 1 at 459.
7. **WYO. STAT.** §41-4-301 et. seq. (1977).

8. See *United States v. District Court, County of Eagle*, 401 U.S. 520 (1971).
 9. **Supra** note 1 at 482.
 10. **Supra** note 1 at 478.
 11. 401 U.S. 520 (1971); for discussion see **supra** note 1 at 478-9.
 12. **MONT. REV. CODES ANN.** 85-2-221, 3-7-201, 85-2-231 to -234, 3-7-301 to -311 (1979); M. Lamb, "Adjudication of Indian Water Rights: Implementation of the 1979 Amendments to the Montana Water Use Act," 41 **MONT. L. REV.** 72, 74 (1980).
 13. **MONT. REV. CODES ANN.** § 85-2-701 (1979).
 14. See Ch. 4-1, reference 50, p. II 1-7.
 15. See generally M. Lamb, **supra** note 12.
 16. **MONT. REV. CODES ANN.** §85-2-702 (1970); see M. Lamb, **supra** note 12 at 88.
 17. Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management, 86 **Interior Dec.** 553 (1979) (hereinafter cited as **Opinion**).
 18. Comment, "Federal Non-Reserved Water Rights," 15 **Land and Water L. Rev.** 67, 72-73 (1980).
 19. Non-Reserved Water Rights-United States Compliance with State Law, **U.S. Department of Interior Solicitors Opinion** (1981).
 20. See F. Trelease, "Uneasy Federalism - State Water Laws and National Water Use," 55 **Wash. L. Rev.** 751, 752 (1980).
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CHAPTER 4

ALTERNATIVE LEGISLATIVE AND/OR ADMINISTRATIVE POLICY ACTIONS

Introduction

Part II of this report deals with adjudication as it relates to previously unquantified rights, the most important being federal reserved, Indian, and riparian water rights. The foregoing chapters have reviewed Nebraska's acceptance and adoption of the appropriation doctrine of water rights and the degree of deference of the federal government to state water laws. The reserved rights doctrine has been the major exception in federal acquiescence to state water law.

Some riparian rights continue to be recognized under Nebraska law and the topic is identified in this report; however, a separate report is devoted to this subject and any discussion of alternative courses of policy action is postponed to that report. Therefore, the alternative courses of policy action discussed in this section will relate to federal reserved and Indian water rights. An explanation of each alternative will be accompanied by an analysis of the physical/hydrologic/environmental impacts and socio-economic impacts associated with it.

The following alternative actions will be addressed in this chapter.

Alternatives

- (1) Make no change in the adjudication statutes regarding quantification of federal reserved water rights and Indian water rights.
- (2) Authorize the adjudication and quantification of federal reserved water rights and Indian water rights.
 - A. Modify the adjudication statutes to comply with the jurisdictional requirements of the McCarran Amendment.
 - B. Provide for negotiation of a settlement between the federal government, Indian tribes, and the state.

Information Presented For Each Alternative

The information to be presented for each alternative will be included within the following three categories: **Description and Methods of Implementation**, **Physical/Hydrologic/Environmental Impacts**, and **Socio-Economic Impacts**.

The discussion under the first heading, **Description and Methods of Implementation**, describes the alternative, its effect on state policy, and how it would be implemented. The method of implementing each alternative considers any legislative action which may be necessary and any possible administrative costs which may result from adoption of the alternative.

The impact of the alternatives, to be described in the section entitled **Physical/Hydrologic/Environmental Impacts**, will be limited to only a few streams in the state which flow through or from federal lands or Indian reservations: the White River in northwest Nebraska, Brazile Creek in Knox County, and Logan Creek flowing through Thurston County. The alternatives identified in this chapter do not lend themselves easily to an analysis of particular water use effects without a more precise and detailed description of legislation to be adopted or policy course of action to be followed. Consequently, the impacts which have been identified are somewhat sketchy and general in nature.

The efficiency and equity effects of implementing each alternative are discussed under the heading **Socio-Economic Impacts**.

EXPLANATION OF ALTERNATIVES

Alternative #1: Make no change in the adjudication statutes regarding quantification of federal reserved water rights and Indian water rights.

Description and Methods of Implementation. This alternative would leave the state policy regarding adjudication as it relates to the quantification of previously unquantified water rights as is described in Chapter One. Federal water rights and Indian water rights will remain unquantified with respect to state-created water rights and outside the state's system of water rights administration. No immediate conflicts between federal, Indian, and state water users are likely to present themselves. While this should not be interpreted as a justification for leaving the situation the way it is, it is unlikely that any major problems will occur because of inaction. The status quo is apparently fairly stable at the present time, however uncertain. Any conflicts which do arise will have to be resolved by the courts, and probably the federal courts if the United States is a participant.

Physical/Hydrologic/Environmental Impacts. No changes in water use patterns are likely to occur resulting from no change in the state's system of adjudication until such time as the United States or one of Nebraska's resident Indian tribes asserts a claim to water in the state. Therefore, in the absence of any legislation, any use changes and impacts which will ultimately result will be dependent on court decisions.

Socio-Economic Impacts. This alternative would maintain the current environment of uncertainty, but at comparatively low economic cost. Compared with most western states, unquantified federal and Indian reserved rights do not appear to be a major problem in Nebraska. In those areas where such rights exist, however, investment predicated on state created water rights might be retarded because of the uncertain superior federal and Indian rights. Lack of a comprehensive system of water rights is clearly inefficient, but the magnitude of the problem in Nebraska probably is not great.

Alternative #2: Authorize the adjudication and quantification of federal reserved water rights and Indian water rights.

Description and Methods of Implementation. The existence of federal and Indian reservation lands within the state of Nebraska presents the potential for claims to water which are not currently subject to the state's water administration procedures. At the present time, it is not known whether and to what extent such claims will be made. The United States has tacitly agreed, through its waiver of sovereign immunity in the McCarran Amendment and court decisions, to subject itself to suits for the adjudication of federal reserved and Indian water rights.

This procedure was briefly outlined in Chapter Four of this report. The experiences of the states of Wyoming and Montana illustrate the difficulty in such an undertaking. The possibility exists that assertion of these rights could adversely affect the priority of state-created water rights. It would, therefore, be to the state's advantage to determine the exact quantity and status of these "rights" before any serious conflicts arise.

Implementation of this alternative would require legislative action amending the state adjudication procedure to meet the jurisdictional requirements of the McCarran Amendment. The actual process of adjudicating federal reserved and Indian water rights would be administered by the Department of Water Resources and the courts. It will inevitably be costly and time consuming. In addition, as has been the experience in other states, the possibility of federal challenge to joinder in a state adjudication also exists.

Alternative #2A: Modify the adjudication statutes to comply with jurisdictional requirements of the McCarran Amendment.

Description and Methods of Implementation. It appears that the key to any successful adjudication of federal reserved water rights or Indian water rights lies in compliance with the McCarran Amendment. It provides the exclusive method for joining the United States in a state adjudication. Two requirements identified in the report pose significant problems for compliance in Nebraska: (1) that the suit for adjudication contemplates judicial proceedings, and (2) that the statute is limited to a general adjudication of all rights on a stream, not solely federal or Indian rights.

Nebraska's current adjudication procedure is primarily administrative, permitting appeal to the courts. Furthermore, Nebraska has already adjudicated and determined the relative rights to appropriation on streams within the state. This latter fact could potentially sandbag any attempt to adjudicate and quantify federal and Indian rights because Nebraska cannot, in theory, readjudicate vested water rights. The state could, however, follow the example of Wyoming and provide the courts with authority to confirm pre-existing water rights.

In order that Nebraska's adjudication procedure might comply with the federal law, the courts will have to play a more active role in the process. Wyoming's general adjudication procedure is primarily judicial, in an attempt to comply with the McCarran Amendment. According to their procedure, the court determines the

status, extent, and priority of any permits or other interests in a water source and then issues a decree tabulating these rights and their date of priority. Other states have given duties of fact-finding, similar to that of a court master or referee, with a final determination and decree issued by the court.¹ Doubt has been expressed, however, as to whether such a combination of administrative and judicial procedures would meet the requirement of the McCarran Amendment.² In any event, it should be clearly stated that the purpose of the adjudication suit is to incorporate unadjudicated claims into the state's existing system of priorities.

Implementation of this sub-alternative would require legislative action amending current adjudication procedures. If enacted this sub-alternative would increase greatly the responsibility of the courts in determining the priority and quantity of federal and Indian claims to water rights. The Department of Water Resources would probably continue to play a major role in this determination.

Socio-Economic Impacts. While quantifying federal and Indian water rights would enhance economic efficiency, all else being equal, potential gains in efficiency would, almost assuredly, be more than offset by the cost of McCarran Act adjudications. General adjudications under the McCarran Amendment are very costly and time consuming. For example, adjudication of the Big Horn Basin in Wyoming has involved 20,000 parties with state expenditures alone expected to exceed four million dollars. The problem in Nebraska does not appear to be severe enough to justify that level of expenditure, particularly given the existence of unadjudicated riparian rights. Thus, it is not likely that this alternative would be economically efficient.

The equity impacts of adopting this alternative are not readily apparent.

Alternative #2B: Provide for negotiation of a settlement between the federal government and Indian tribes, and the state.

Description and Methods of Implementation. Another method of resolving the problem of coordinating Indian water rights with other state-created water rights would be to set up a compact commission, as Montana has done, with authority to negotiate a settlement between the Indian tribes and the state regarding water rights to become effective upon ratification by the state, Indian tribe, and Congress. This would have the advantage of providing a non-adversarial atmosphere and cooperative effort.

Implementing this sub-alternative would be costly, time-consuming, and involve the creation of a temporary governmental body to carry out the designated functions. This should be balanced against the perceived need to adjudicate federal and Indian water rights. It would involve legislative action in its initial creation and for ratification of any settlement reached.

Socio-Economic Impacts. The economic impact of this alternative would depend on the precise agreements negotiated and the costs incurred in securing the agreements. It seems safe to assume, however, that costs of securing the needed agreements would be high offsetting much, if not all, of the potential gains in economic efficiency.

The equity impacts of this alternative would, likewise, depend on the precise nature of any negotiated settlement.

Physical/Hydrologic/Environmental Impacts. The effect of implementing *Alternative #2, #2A, and #2B* would depend to a great extent on a court decree. Any adjudication of previously unquantified water rights is likely to mean less water available and, consequently, reduced streamflows. Corresponding physical/hydrologic and environmental impacts would include reduced wetlands, wildlife habitat, and ground-water recharge.

FOOTNOTES

1. See **CAL. WATER CODE** § 2500 et. seq. and § 2700 et. seq. (West 1971).
 2. R. Clark, 2 **Waters and Water Rights**, § 106.2 at 95 (1967).
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CHAPTER 5

RELATIONSHIP OF THIS STUDY TO OTHERS

This report addresses the issue of water rights adjudication as it relates to both the loss of water rights and the quantification of previously unquantified rights. It is only one of several reports included in the overall study entitled *Selected Water Rights Issues*. This study focuses on problems of the existing legal system of water rights. Each report in the study addresses a specific problem area.

In addition to the Study on *Selected Water Rights Issues*, there are ten other policy issue studies which have been designated for the State Water Planning and Review Process. It is, of course, impossible to separate and categorize the complex area of water policy into distinct issues for the purpose of analysis. There are, needless to say, many overlapping issues.

Based on the information available at the time of writing, an attempt is being made, here, to identify the relationship, if any, between this report on *Water Rights Adjudication* and the other policy issue studies being conducted. This task is complicated by the fact that most of the studies are still in varying stages of development, and a number of issues which will be addressed have not been analyzed with any degree of certainty. Therefore, until these studies are completed, it will be impossible to assess the full relationship of one study to another.

This report, for the most part, will have limited impact on the other policy issue studies. There are, however, relationships with some of the other studies which can be identified. A discussion of these relationships follows.

STUDY #1: INSTREAM FLOWS

If the Department of Water Resources were to grant water appropriations for instream uses, it is possible that, according to the existing forfeiture statutes, these appropriations would be subject to cancellation for nonuse like any other water

appropriation, even though the purpose of maintaining instream flows is to keep the water in the stream. The water would not be "used" in the conventional sense; therefore, some qualification and definition of "beneficial use" recognizing instream uses as beneficial may be required to prevent cancellation of appropriations granted for such uses under the forfeiture statutes. The statutes could be modified to provide that passive use of the water (keeping the water in the stream) for instream purposes not be considered nonuse. An alternative policy action has been proposed which would authorize the Department of Water Resources to reassign abandoned or unused natural flow permits for instream uses. This would permit a use acquired later in time to receive an earlier priority date.

Furthermore, the quantification of all previously unquantified water rights would give a more accurate assessment of the potential for water use on the various streams of the state and perhaps aid in a determination of minimum streamflows. The quantification of federal reserved rights could prove to be particularly important in this respect. For example, an attempt was made by the federal government in New Mexico to claim reserved water rights for instream values to maintain a minimum streamflow in the Rio Mimbres river for use in the Gila National Forest.¹ The New Mexico court held that aesthetic uses of water in a national forest would not be given priority dates equal to the date the reservation was first established, because the use was not one within the primary purpose for which the reservation was created. The case was appealed to the United States Supreme Court which upheld the lower court's decision. It was emphasized that Congress reserved "only the amount of water necessary to fulfill the purpose of the reservation, no more."² Although the federal government did not prevail in this particular case, under a different set of facts, a different result might be reached.

STUDY #2: WATER QUALITY

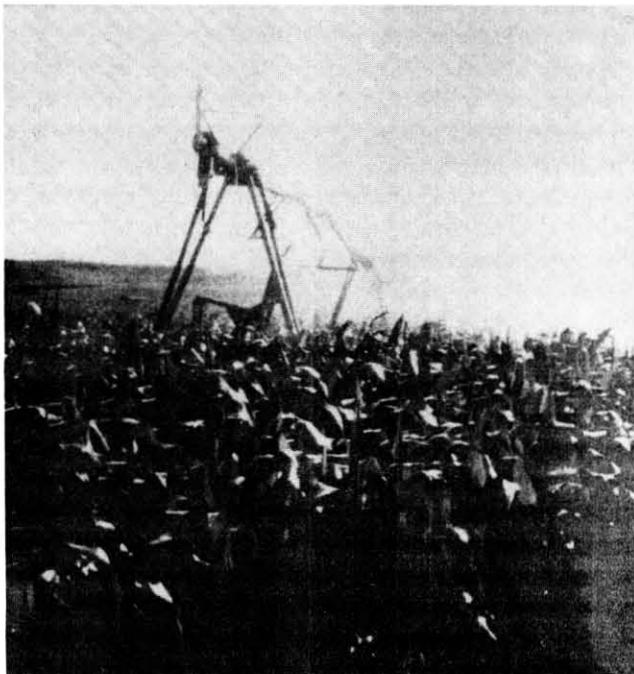
No significant relationship between this *Water Rights Adjudication Report* and the *Water Quality Study* has been identified.

STUDY #3: GROUNDWATER RESERVOIR MANAGEMENT

No significant relationship between this Report and the *Groundwater Reservoir Management Study* has been identified.

STUDY #4: WATER USE EFFICIENCY

The problem being addressed in the *Water Use Efficiency Study* is the inefficient use of water. The policy is to prevent and eliminate the waste of water. The forfeiture provisions, and the under-



lying threat of cancellation of water rights for nonuse, actually encourage the **use** of water, whether or not it is efficient. To some extent, however, these provisions may also encourage the **efficient** use of water by permitting appropriators to refrain from using water if there has been adequate rainfall or if in the interests of “good husbandry” it is not necessary, without fear of cancellation of their appropriations.

Not only must the water be actually used to avoid cancellation, it must also be used for some “beneficial and useful purpose.”³ *The Beneficial Use Report* of the Selected Water Rights Issues

Study suggests that one aspect of “beneficial use” is that water must be used without unnecessary waste. With this nonwasteful use requirement, it might be possible to cancel a water right that is used wastefully (i.e. not put to a beneficial use) for more than three years. The difficulty, of course, lies in defining waste and determining whether it has occurred continuously for more than three years.

STUDY #5: SELECTED WATER RIGHTS ISSUES

Report #1: *Preferences in the Use of Water.* No significant relationship between this report and the Report on *Preferences in the Use of Water* has been identified.

Report #2: *Drainage of Diffused Surface Waters.* One alternative policy action suggested in the *Report on the Drainage of Diffused Surface Waters* would require that an appropriation permit be secured for diversions from natural lakes exceeding a certain size. These appropriations would presumably also be subject to cancellation for nonuse by the Department of Water Resources as are other appropriations of surface water. Due to the fact that lakes are reasonably permanent bodies of water while water courses are generally characterized as flowing, consideration may want to be given to whether or not lakes should be treated like streams for the purpose of forfeiture of water rights.

Report #4: *Property Rights in Ground Water.* No significant relationship between this Report and the Report on *Property Rights in Ground Water* has been identified.

Report #5: *Riparian Rights.* There is a significant relationship between this *Water Rights Adjudication Report* and the *Riparian Rights Report* (see Part II, Chapter 1, p. II 1-6). Currently, riparian rights are neither acquired through use nor lost through nonuse. No attempt has been made to quantify riparian rights in the state and, to this day, they remain undetermined. As such, they pose an impediment to the planning and development of the state’s water resources. If riparian rights are integrated into the appropriative system, they would thereafter be subject to cancellation the same as any other unused appropriative right.

Riparianism and appropriation are admittedly two incompatible systems, causing confusion and conflicts in some cases. *The Riparian Rights Report* will consider whether riparian rights should be integrated into the appropriation system. If the decision is made to integrate, the registration and adjudication of riparian claims will become necessary. It is quite possible that

some riparian rights may be adjudicated and cancelled at the same time.

Report #6: *Interstate Water Uses and Conflicts. Alternative #4* in the *Report on Water Rights Adjudication* suggests modification of the forfeiture statutes to specify a number of excuses for nonuse of surface water rights for more than three years. If that alternative were adopted, fewer surface water rights would be subject to cancellation. The continued recognition of these rights could increase the number of claims considered in an interstate allocation, thus improving Nebraska's position in that event.

The *Report on Water Rights Adjudication* also deals with the adjudication of previously unquantified water claims like those for Indian and federal reserved rights. While quantifications of these types of rights within Nebraska will likely have little impact, quantification and exercise of those rights in upstream states could have significant impact on the water supplies available for use in Nebraska.

Report #7: *Transferability of Water Rights.* As a general rule in Nebraska, surface waters are not transferable to another parcel of land or for another use. For a transferability system to be successful, it may first be necessary to define and quantify riparian, federal reserved and Indian water rights.

Implementation of *Alternative #2* in this report could result in fewer water rights being cancelled for nonuse. Water users no longer desiring to make use of the water right might investigate the possibility of a sale of that water right rather than allowing it to become subject to forfeiture for more than three years non-use. If such transfers were permitted, it is possible that some water rights, rather than being relinquished or cancelled, would be transferred in order to retain an earlier priority date.

Report #8: *Beneficial Use.* Although a task force report has been completed on this particular issue, a report on *Beneficial Use* may not be finalized by the Commission because of the increasingly evident overlap between that study and the other studies being conducted, particularly *Water Use Efficiency*. Whether or not a study on beneficial use is completed, the determination of what constitutes a beneficial use of water in Nebraska could have considerable impact on claims by the state to water in interstate streams. The more beneficial uses which are recognized in Nebraska law, the better the state position will be when limited water supplies are divided up among states.

STUDY #6: MUNICIPAL WATER NEEDS

No significant relationship between this Report and the Study on *Municipal Water Needs* has been identified.

STUDY #7: SUPPLEMENTAL WATER SUPPLIES

A suggestion likely to emerge from the study on *Supplemental Water Supplies* concerns the use of surface waters to recharge inadequate groundwater supplies. This could have an impact on the *Water Rights Adjudication* report in that some modification of appropriation permits maybe needed in order that appropriators may avoid cancellation of their surface water appropriation for nonuse.

STUDY #8: INTERBASIN TRANSFERS

STUDY #9: WEATHER MODIFICATION

STUDY #10: WATER - ENERGY

STUDY #11: SURFACE - GROUNDWATER INTEGRATION

Studies #8 and #9 were originally scheduled for completion as a part of the State Water Planning and Review Process, but have since been cancelled. **Studies #10 and #11** are identified and discussed in the September 15, 1982 Annual Report and Plan of Work. The scope of these two studies, however, has not been well defined at the time this report is being prepared and no attempt has been made to identify possible relationships with this study.

FOOTNOTES

1. *Mimbres Valley Irr. Co. v. Solopek*, 90 N.M. 410, 564 P. 2nd 615 (1977).
 2. *U.S. v. New Mexico*, 238 U.S. 696 (1978).
 3. **Neb. Rev. Stat.** §§46-229 and 46-229.02 (1943).
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