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The Undefeatable Opponent: How the Effective Administration of Water Is an Exception to Predeprivation Hearings Ordinarily Required by Due Process in *Keating v. Neb. Pub. Power District*, 660 F.3d 1014 (8th Cir. 2011)

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Note*

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I. INTRODUCTION

"Whiskey is for drinking, water is for fighting over."[1] But what happens when the only opponent is the rightful owner? With closing notices in hand, Gerard Keating and his neighbors asked themselves that same question. The Nebraska Department of Natural Resources issued closing notices to Keating and many other appropriators in Holt County, Nebraska, when stream flow in the Niobrara Watershed had become insufficient to satisfy the water needs of all surrounding appropriators. Instead of taking advantage of the postdeprivation hearing offered by the Department of Natural Resources, Keating and the other appropriators filed suit, claiming that Nebraska's established water administration system violated their due process rights.[2] Ultimately, the Eighth Circuit Court of Appeals found no due process violation of the appropriators' rights, simply because the appropriators do not have a property interest in the waters of the state, which includes the Niobrara Watershed.[3]

1. Famously attributed to author Mark Twain, but never authenticated.
2. Keating v. Neb. Pub. Power Dist. (*Keating IV*), 660 F.3d 1014, 1016 (8th Cir. 2011); *see* U.S. CONST. amend XIV, § 1 ("[No State shall] deprive any person of life, liberty, or property, without due process of law . . . .").
3. *Keating IV*, 660 F.3d at 1018.

To clarify the arguments discussed in *Keating*, this Note first provides an overview of Nebraska water administration, followed by a discussion of the property rights vested in public waters. This Note then analyzes the impracticality of predeprivation hearings for water administration, the state's interest in quick administration of water use, and the challenge of providing sufficient due process while also preserving the water administration system.

This Note then provides an overview of *Keating* and related case law. Thereafter, there is a discussion of the United States Supreme Court decisions which have ruled that a predeprivation hearing is necessary, and why those situations are inapplicable to the administration of water use. This discussion also describes established exceptions to the predeprivation hearing requirement and how Nebraska's appropriation system does not violate due process. Finally, this Note concludes with how Keating's and other similarly situated plaintiffs' challenges to the water administration system are a result of misplaced expectations in appropriation permits and the minimal property rights held therein.

II. NEBRASKA WATER LAW

Nebraska has a bifurcated system for the administration of its waters. The doctrines of riparianism and prior appropriation simultaneously exist in Nebraska, though they are not without conflict.[4] Each system provides judicial redress if the user is deprived of the specific rights she is allocated, and both systems are protected by the state. This section discusses the two separate systems, the rights protected within those systems, and how the state provides protection for such rights.

A. Riparianism

Stemming from English common law, the doctrine of riparianism grants landowners whose lands abut a body of water a right to the use of the appurtenant water.[5] A riparian right is "a usufruct, or a right of use, in the stream as it passes by one's land."[6] The common law treated land and water as one entity that could not be separated.[7] Riparianism is the main form of administration in states where water

4. *See* Spear T. Ranch, Inc. v. Knaub, 269 Neb. 177, 691 N.W.2d 116 (2005) (ruling that groundwater users are generally not liable for interference with surface water users).

5. RICHARD S. HARNSBERGER & NORMAN W. THORSON, NEBRASKA WATER LAW & ADMINISTRATION 20 (1984).

6. *Id.* at 24.

7. *Id.*

is plentiful.[8] In 1855, the state of Nebraska adopted the doctrine of riparianism as its system of water administration.[9]

Landowners believing that they have a riparian right to use the water must file a claim with the Nebraska Department of Natural Resources (Department) in order to have that right recognized, and thus gain its protection.[10] Landowners claiming to have a riparian right to use waters must prove that they had been using the water prior to the enactment of the Irrigation Act[11] for "actual and beneficial use,"[12] and the Director of the Department (Director) must also find the landowner's use of the surface water is riparian in nature.[13] The Department may also "administer any riparian water right that has been validated and recognized in a court order from a court of lawful jurisdiction in the state."[14]

Having a solely riparian system, however, proved troublesome to water users.[15] One of the problems with riparianism was access to water was uncertain. The only users guaranteed access to water were those who owned land adjacent to a water body.[16] Riparianism also proved to be an ineffective system for Nebraska because of the natural ebb and flow of water.[17] Riparian land could spontaneously be increased by a depletion of water in the stream, or decreased by a rise in stream flow.[18] The system in place did not effectively distribute state water resources, nor did it encourage efficient water usage.[19] Further, aggrieved riparians were only able to seek remedy against other riparian users through lengthy and costly court proceedings.[20]

8. *Id.* at 19; Sean M. Hanlon, *A Non-Indian Entity is Polluting Indian Waters: "Water" Your Rights to the Waters, and "Water" Ya Gonna Do About It?*, 69 MONT. L. REV. 173, 183 (2008).

9. *See* 1855 Neb. Laws 328.

10. 457 NEB. ADMIN. CODE § 14-001 (2005).

11. 1889 Neb. Laws 68; *see infra* note 23 and accompanying text.

12. 457 NEB. ADMIN. CODE § 14-001; *see also* HARNSBERGER & THORSON, *supra* note 5, at 24 (explaining that rights of a riparian nature are those that are derived from a person's land being appurtenant to a body of water).

13. *See* 457 NEB. ADMIN. CODE, §§ 14-002–14-003.

14. NEB. REV. STAT. § 46-226 (Supp. 2009).

15. Ralph J. Fischer, et al., *Rights to Nebraska Streamflows: An Historical Overview with Recommendations*, 52 NEB. L. REV. 313, 339 (1973).

16. *Id.*

17. *Id.* at 324.

18. *Id.*

19. *Id.* at 339.

20. *See id.* at 353.

B. From Riparianism to Prior Appropriation

Due to the uncertainty of a riparian right, the need for a more structured system arose.[21] Nebraska looked to other semi-arid regions for guidance.[22] In 1877, the Nebraska Legislature passed its first irrigation law.[23] The Act of 1877 allowed corporations to form for the sole purpose of diverting water for irrigation and waterpower.[24] It also gave such organizations the right to "use eminent domain to acquire necessary rights-of-way for canal construction."[25] The Legislature's next major Act affecting water law came in 1889 with the Raynor Irrigation Act.[26] The Raynor Irrigation Act built upon the Act of 1877 by increasing previously granted powers and instituting one of the central tenants of the prior appropriation system: "first in time, first in right."[27] Water rights could be granted to anyone who used stream flow for a beneficial use.[28] The right was not riparian, i.e., natural to the land, instead the right was a permit to appropriate unused water.[29] Although the Department would not issue new riparian rights,[30] the Act protected existing rights.[31]

Nebraska officially adopted the doctrine of prior appropriation in 1895.[32] The Act of 1895 declared that the only way in which a user may obtain a water right is if the user applied for a right through the state.[33] Because the legislation was not retroactive, all users with an established riparian water right maintained the use of their water

21. *Id.* California did not use a riparian system, but instead had instituted a prior appropriation system. *Id.* California's system was developed through the mining industry in which miners periodically met to establish each miner's water right. *Id.* The first miner to take a quantity of water had a right to that water solely because he was the first to divert it; ownership of land was no longer a requirement for the access to water. *Id.* While this was originally a practice only among miners, California eventually adopted prior appropriation as the official water administration system of the state. *Id.* Nebraska's Supreme Court also recognized the need for a new system. *Id.* The court found that it was "the policy of the law in all the arid states and territories to require and enforce an economical use of the waters of the natural streams." *Id.* It further held that efficient and beneficial use of the state's waters was one of "urgent" necessity. *Id.*
22. *Id.* at 340.
23. HARNSBERGER & THORSON, *supra* note 5, at 64 (citing 1877 Neb. Laws 168).
24. *Id.*
25. Fischer, *supra* note 15, at 333 (explaining how the Nebraska Legislature declared the construction of a canal to be "a work of internal improvement" in order to grant corporations the right to eminent domain).
26. HARNSBERGER & THORSON, *supra* note 5, at 64 (citing 1889 Neb. Laws 503).
27. *Id.* at 65.
28. *Id.*
29. *See id.* at 65–66.
30. *Id.* at 65.
31. HARNSBERGER & THORSON, *supra* note 5, at 65 (citing 1889 Neb. Laws 503–04).
32. *Id.* (citing 1895 Neb. Laws 244–69).
33. 1895 Neb. Laws 244–69.

right so long as it was put to beneficial use.[34] The Act declared all waters not yet in use to be "unappropriated" and property of the public, and thus available for an appropriation of beneficial use.[35] In other words, the result of the Act of 1895 was that any riparian user maintained his or her right, but all users subsequent to 1895 could only receive an appropriation for water; no new riparian rights could be established.

These coexisting systems have created "confusion in administrative and judicial attempts to reconcile these fundamentally opposed doctrines."[36] When conflicts arise between riparian users, courts struggle to find a proper resolution.[37] Riparian rights are inherently "allusive" and "can befuddle the most diligent attempts to adjudicate conflicting claims."[38] This struggle within the court systems is one of the many reasons that the prior appropriation system was more effective for Nebraska's water administration. The riparian system "had not provided a method for achieving an efficient allocation of resources."[39] As compared to imprecise riparian rights, "intra-appropriator disputes have been settled easily due to the certainty of who are appropriators, what right each has in relationship to others on the same stream, and when and where each is entitled to water."[40] In comparison to the riparian rights system, the prior appropriation system is a "sophisticated administrative mechanism."[41] Prior appropriation also allows for more effective remedies for aggrieved appropriators.[42] While riparians had to rely on court proceedings to remedy a situation, the move to a prior appropriation system was a move to state-enforced water rights.[43]

C. Prior Appropriation: The Doctrine of Scarcity[44]

An appropriation is a "permit to use water that has been perfected in accordance with terms stipulated by the Department."[45] Only landowners who intend to divert water from a stream, reservoir, or lake for any of a variety of uses—i.e. impounding water, use of impounded water, use of a stream's natural flow, intentionally storing ground water, recovering intentionally stored ground water, using instream

34. *Id.* (citing 1895 Neb. Laws 260).
35. *Id.*
36. Fischer, *supra* note 15, at 324.
37. *Id.* at 325.
38. *Id.*
39. *Id.* at 338–39.
40. *Id.* at 325.
41. *Id.*
42. *Id.* at 353.
43. *Id.*
44. HARNSBERGER & THORSON, *supra* note 5, at 19.
45. 457 NEB. ADMIN. CODE § 1-001 (2005).

flow, recharging ground water, or general power uses[46]—can apply for a permit.[47]

A person seeking an appropriation must apply to the Department in order to receive a permit.[48] The Director may decide a hearing is necessary to determine whether the appropriation is in the best interests of the public.[49] One of the factors in the Director's determination[50] is whether a body of water is fully or overappropriated.[51]

1. Fully, Under, and Overappropriated

A fully appropriated body of water is one in which the Department has determined that the surface water will be "insufficient to sustain over the long term the beneficial or useful purposes" for which permits have already been granted.[52] A body of water can also be designated as fully appropriated if the stream flow would be insufficient to sustain any aquifer wells that depend on the natural flow for recharge.[53] It can also be fully appropriated if increased stream flow depletion (water shortage) would cause Nebraska to be out of compliance "with an interstate compact or decree, other formal state contract or agreement, or applicable state or federal laws," which dictate how much water the state is responsible for delivering to other states.[54] Another method the Department uses to determine whether a body of water is fully appropriated is a method known as the "65/86 Rule."[55] This method determines

46. *Id.* § 2-001.01.
47. *See id.* §§ 1-001, 1-004, 2-001.05.
48. *See id.* § 18-001 (mandating that applications include (1) a study conducted by the Game and Parks Commission or any relevant Natural Resources District that quantifies in-stream flow needs; (2) a United States Geological Survey topographic map of the stream reach in question; (3) evidence that there is unappropriated water available and how—if the application was granted—the appropriation would affect existing appropriators; and (4) an evaluation of how the application would be in the best interests of the public).
49. *Id.* at § 18-004; *see also* City of Fairbury v. Fairbury Mill & Elevator Co., 123 Neb. 588, 243 N.W. 774 (1932) (holding the Department has authority to grant appropriations as long as the appropriation does not adversely affect existing appropriations or riparian users).
50. For such determinations, the Director and the Department use "the best scientific data and information," including surface water administrative records, Department Hydrographic Reports, Department and United States Geologic Survey stream gage records, Department's registered wells database, water level records and maps, ground water models, and current rules and regulations of the Natural Resources Districts. 457 NEB. ADMIN. CODE § 24-002; *see* NEB. REV. STAT. § 46-713 (Reissue 2004).
51. 457 NEB. ADMIN. CODE § 24-001.
52. *Id.*; *see* NEB. REV. STAT. § 46-713(3)(a).
53. 457 NEB. ADMIN. CODE § 24-001; *see* NEB. REV. STAT. § 46-713(3)(b).
54. 457 NEB. ADMIN. CODE § 24-001 *see*; NEB. REV. STAT. § 46-713(3)(c).
55. *See generally* 457 NEB. ADMIN. CODE § 24-001.01A.

> whether the most junior surface water appropriator can divert sufficient water to satisfy two different standards: (1) 65 percent of the Department's calculated annual corn irrigation requirement from July 1 through August 31 and (2) 85 percent of the Department's calculated annual corn irrigation requirement from May 1 through September 30.[56]

The Department will declare a body of water fully appropriated if the appropriator with the latest priority date, i.e., the most junior appropriator,[57] failed either of the two standards.[58] The under and overappropriated distinctions are the determinations on either side of the "fully" appropriated status.

It is important to note that not all appropriations are permanent. The Department has the authority to grant a temporary use permit.[59] When a user needs access to water for a limited time, he or she may apply for a temporary use permit through the Department.[60] A grant of this permit "does not grant access to the surface water source and does not provide a permanent water right."[61]

2. Priority Dates

If the Department approves an application for any type of appropriation, whether temporary or permanent, the applicant (now an appropriator) is given a permit with a priority date.[62] Once approved, priority dates are retroactive to the date the applicant filed the application.[63] Due to this chronological application system, there are "senior appropriators" and "junior appropriators."[64] A "senior appropriator" is an appropriator with an earlier priority date than another appropriator.[65] A "junior appropriator" is any appropriator that has a later priority date than the appropriator in question.[66]

Priority dates are crucial to the effectiveness of Nebraska's prior appropriation system. They are also inherently valuable. An earlier appropriation date is superior to that of a later appropriation date.[67] Moreover, an appropriation permit for water use attaches to the property that is specified on the application,[68] and the original priority

56. Middle Niobrara Natural Res. Dist. v. Dept. of Natural Res., 281 Neb. 634, 649, 799 N.W.2d 305, 317 (2011); *see generally* 457 NEB. ADMIN. CODE § 24-001.01A.
57. *See infra* subsection II.C.ii.
58. *Middle Niobrara,* 281 Neb. at 649, 799 N.W.2d at 317.
59. 457 NEB. ADMIN. CODE §§ 20-001, 20-004 (2005).
60. *Id.* § 20-001–20-002.
61. *Id.* § 20-001.
62. HARNSBERGER & THORSON, *supra* note 5, at 74.
63. *Id.*
64. Bond v. Neb. Pub. Power Dist. (*Bond I*), 278 Neb. 137, 139, 768 N.W.2d 420, 422 (2009).
65. *Id.* at 139, 768 N.W.2d at 423.
66. *Id.* at 139, 768 N.W.2d at 423.
67. NEB. REV. STAT. § 46-203 (Cum. Supp. 1929).
68. Farmers' Canal Co. v. Frank, 72 Neb. 136, 100 N.W. 286 (1904).

date will remain with the land even in the event of a change of ownership.[69] In the case of stream flow depletion, a junior appropriator will be issued a closing notice before a senior appropriator.[70] Because of this, land of a senior appropriator is more valuable than land of a junior appropriator.

3. Calls

In order for an appropriator to exercise his or her priority, or constitutional preference, an appropriator must place a "call."[71] A call is made when "an appropriator with an earlier-in-time right to use the water [requests] that the Department close the rights to divert water belonging to junior appropriators upstream of the senior appropriator."[72] To "close the rights to divert water," the Department issues a "closing notice."[73] When determining if a call is necessary, the Department considers whether the body of water in question is under, fully, or overappropriated.[74]

D. Closing Notices

If it finds there is "insufficient water for all appropriations," the Department will issue a closing notice.[75] This notice instructs junior appropriators "to cease water diversions" issued in their permit.[76] This "increases the stream flow to satisfy the senior appropriator's right to divert water."[77] The Nebraska Legislature has granted the Department the authority to make final decisions, such as issuing closing notices, without first holding a hearing.[78] Aggrieved parties, however, are not without redress: "If a final decision is made without a hearing, a hearing shall be held at the request of any party to the proceeding."[79] Under the rules and regulations of the Department, an aggrieved appropriator may file a petition for a declaratory order, or request a contested case hearing.[80]

69. Change of ownership of an appropriation is governed by 457 NEB. ADMIN. CODE § 4.001 (2005).
70. NEB. REV. STAT. § 46-203.
71. Middle Niobrara Natural Res. Dist. v. Dep't. of Natural Res., 281 Neb. 634, 636, 799 N.W.2d 305, 309 (2011).
72. *Id.* at 636, 799 N.W.2d at 309.
73. *Id.* at 636, 799 N.W.2d at 309; *see infra* section II.E.
74. 457 NEB. ADMIN. CODE § 24; *see supra* subsection II.C.i.
75. *Bond I*, 278 Neb. 137, 141, 768 N.W.2d 420, 424 (2009).
76. *Id.* at 141, 768 N.W.2d at 424.
77. *Middle Niobrara*, 281 Neb. at 636, 799 N.W.2d at 309.
78. NEB. REV. STAT. § 61-206(1) (Reissue 2008).
79. *Id.*
80. 454 NEB. ADMIN. CODE §§ 6–7 (2005).

1. Declaratory Orders

A petition for a declaratory order "may be requested on the applicability of a statute, rule, regulation, or order enforced by the [Department]."[81] "Applicability" is defined as "the appropriateness of the relation of the law to the person, property, or state of facts, or its relevance under the circumstances given."[82] However, a declaratory order issued by a hearing officer is not to be used to issue judgment on the effect of the Department's conduct.[83] For that challenge, when the Department issues a closing notice, the affected appropriator—usually one with a junior priority date—may request a hearing.[84] These hearings are commonly referred to as "postdeprivation" hearings because they occur after the junior appropriator has been ordered to cease using water.

2. Contested Case Hearings (Postdeprivation Hearings)

The procedure commonly referred to as a "postdeprivation" hearing is officially known as a "contested case hearing."[85] A contested case hearing is "a proceeding before the Agency in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after an Agency hearing."[86] This proceeding is commenced when an appropriator files an "objection, complaint, or response" to an order made by the Department.[87] An appropriator can file a contested case hearing at any time the appropriator believes that departmental action has aggrieved one of their rights.[88] It is referred to as a postdeprivation hearing when the Department receives a petition for a contested case hearing after an appropriator has been issued a closing notice.[89]

The procedure for a postdeprivation/contested case hearing is similar to the procedures followed in the court system. Prehearing motions and conferences are permitted, as is discovery and amendments to the pleadings.[90] During the hearing, parties have the option of making an opening statement, presenting evidence and rebuttal evidence, examining witnesses, and giving a closing argument.[91] At the conclusion of a contested case, the hearing officer will issue a deci-

81. *Id.* § 6-003.03.
82. *Id.*
83. *Id.* § 6-003.03B.
84. 457 NEB. ADMIN. CODE § 14-001.
85. 454 NEB. ADMIN. CODE § 7-001.01.
86. *Id.*
87. *Id.* § 7-005.01.
88. *Id.*
89. *Id.* § 7-001.01.
90. *Id.* § 7-007.
91. *Id.*

sion.[92] When making a decision, the hearing officer must consider the "findings of fact"[93] and "applications of the controlling law to the facts found."[94] A party receiving an adverse decision may file for a rehearing[95] or appeal to the Nebraska Court of Appeals.[96]

At the close of a contested case hearing, the designated hearing officer will come to a legal conclusion by applying the controlling law, and issue an order specifying the legal ramifications of her conclusions.[97] The order will also include whatever action the Department has taken as a result of the hearing officer's conclusions.[98] An order resulting from a contested case hearing will normally either affirm or overturn an order made by the Department that a party believes has aggrieved his constitutional or statutory rights.[99]

E. Constitutional Preference

Under Nebraska's constitution, water used domestically or for irrigation is a "natural want."[100] The Supreme Court of Nebraska has defined a "natural want" to be "one absolutely necessary to human existence."[101] Nebraska's conservation and control of water therefore satisfies a valid public purpose by preserving a resource necessary to human existence.[102] Accordingly, Nebraska's constitution gives its citizens the rights to use water, but only if the waters are used beneficially.[103] In other words, Nebraska's citizens have a right to use the state's waters and the state serves a valid public purpose when it regulates the use thereof.

The state's constitution also provides a list of preferred uses of water, and which use will supersede the other in times of water scarcity.[104] The preference system "has the purpose of adjusting supply between users possession water rights under the [appropriation] system."[105] Article XV, § 6 of the constitution requires that users of water for domestic purposes be given preference over agricultural purposes, regardless of priority date.[106] Agricultural users, in turn, have

92. *Id.* § 7-009.01.
93. *Id.* § 7-009.02D.
94. *Id.* § 7-009.02E.
95. *Id.* § 7-010.01.
96. *Id.* § 7-010.03.
97. *Id.* § 7-009.02.
98. *Id.*
99. *Id.* § 7-001.01.
100. NEB. CONST. art. XV, § 4.
101. Neb. Mid-State Reclamation Dist. v. Hall Cnty., 152 Neb. 410, 436, 41 N.W.2d 397, 413 (1950).
102. *Id.* at 436, 41 N.W.2d at 413.
103. NEB. CONST. art. XV, § 5.
104. *Id.* § 6.
105. Fischer, *supra* note 15, at 329.
106. *Id.* at 328.

preference over manufacturing or power users.[107] However, "no inferior right to the use of the water . . . shall be acquired by a superior right without just compensation therefore to the inferior user."[108] Consequently, according to the constitutional preferences, domestic users are superior users when compared to agricultural users, and agricultural users are superior when compared to manufacturing users.[109] But, when exercising constitutional preference, junior appropriators (with senior preference under the constitution) must give just compensation[110] to senior appropriators (with junior preference under the constitution).[111]

F. Property Right in Water

1. Junior Appropriators Do Not Have a Strong Property Right

Appropriators do not have a strong property right to water as a result of their appropriation. In *Frenchman Valley Irrigation District v. Smith*,[112] landowners objected to a contract between an irrigation district and the United States for the purchase of a water supply.[113] The Nebraska Supreme Court held that "the appropriator of the waters of a stream acquires a right to the use of such water."[114] It also ruled that such an appropriator does not acquire ownership of the water he is permitted to use.[115] In *City of Fairbury v. Fairbury Mill & Elevator Co.*,[116] the Nebraska Supreme Court heard an appeal from a Department of Public Works[117] decision that permitted the city to build diversions and obstructions in the Little Blue River.[118] It again held that the defendant did not own the "water of the stream, for it is the general rule that such water is not the subject of private ownership."[119] A right may be acquired for its use, which will be regarded as a property right, but the right carries no specific property in the water.[120]

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107. *Id.*
108. *Id.* at 328 n.57.
109. NEB. CONST. art. XV, §§ 5–6.
110. *See* Loup River Pub. Power Dist. v. N. Loup River Pub. Power & Irrigation Dist., 142 Neb. 141, 5 N.W.2d 240 (1942).
111. NEB. CONST. art. XV, §§ 5–6.
112. Frenchman Valley Irrigation Dist. v. Smith, 167 Neb. 78, 91 N.W.2d 415 (1958).
113. *Id.*, 91 N.W.2d 415.
114. *Id.* at 99, 91 N.W.2d at 428.
115. *Id.* at 99, 91 N.W.2d at 428.
116. City of Fairbury v. Fairbury Mill & Elevator Co., 123 Neb. 588, 243 N.W. 774 (1932).
117. Now the Department of Natural Resources as per 1999 Neb. Laws 900.
118. *Fairbury,* 123 Neb. at 588, 243 N.W. at 774.
119. *Id.* at 588, 243 N.W. at 774.
120. *Id.* at 588, 243 N.W. at 774.

Northport Irrigation District v. Jess[121] is yet another case in which the Nebraska Supreme Court determined that appropriators do not have a property right in the water itself. In *Northport*, an irrigation district petitioned to enjoin the Department of Water Resources[122] from forcing the district to have a permit before it could pump water from Upper Dugout Creek.[123] Citing the Supreme Court of Montana, the court found:

> The corpus of running water in a natural stream is not the subject of private ownership. "Such water is classed with light and the air in the atmosphere. It is *publici juris* or belongs to the public. A usufructuary right or right to use it exists, and the corpus of any portion taken from the stream and reduced to possession is private property so long only as the possession continues."[124]

Thus, the Supreme Court of Nebraska has clearly declared water to be immune to ownership, just as air and light have been.

One of the cornerstone cases for Nebraska water law is *Spear T. Ranch, Inc. v. Knaub*.[125] In that case, a surface water appropriator brought appropriation, conversion, and trespass actions against groundwater users because they were affecting the flow of the surface water.[126] This case is considered a cornerstone because it distinguished liability of groundwater users from that of surface water users.[127] It held that a groundwater user could not be liable for interfering with surface water users unless her use had a "direct and substantial effect"[128] upon a body of water and caused an unreasonable amount of harm to the surface water user.[129] For purposes of this Note, another important aspect of *Spear T.* was the declaration of the court that "[a] right to appropriate surface water however, is not an ownership of property. Instead, the water is viewed as a public want and the appropriation is a right to use the water."[130]

2. Only the Right to Use

There is some property right, however, in a water appropriation, albeit not an ownership right in the water. The Supreme Court of Nebraska has recognized that an appropriation, "whether for irrigation or for power purposes, is a property right which is entitled to the same

121. Northport Irrigation Dist. v. Jess, 215 Neb. 152, 337 N.W.2d 733 (1983).
122. Now the Department of Natural Resources as per 1999 Neb. Laws 900.
123. *Northport Irrigation*, 215 Neb. at 153, 337 N.W.2d at 736.
124. *Id.* at 158, 337 N.W.2d at 738 (quoting Rock Creek Ditch Co. v. Miller, 17 P.2d 1074, 1076 (D. Mont. 1933)).
125. Spear T. Ranch, Inc. v. Knaub, 269 Neb. 177, 691 N.W.2d 116 (2005).
126. *Id.* at 181, 691 N.W.2d at 124.
127. Donald Blankenau, *Nebraska Court Adopts Tort Liability for Groundwater Users*, 36 No. 6 ABA Trends 4, 4 (2005).
128. Restatement (Second) of Torts: Liability for Use of Ground Water § 858 (1979).
129. *Spear*, 269 Neb. at 191, 691 N.W.2d at 132.
130. *Id.* at 185, 691 N.W.2d at 127.

protection as any other property right."[131] It has stated that an appropriator who follows applicable statutory requirements (i.e. priority and preference) has a vested property right.[132] It has also held that "[t]he appropriator of water of a stream does not acquire ownership of such water," but only the right to use the water.[133]

But the vested property right of an appropriator is also subject to the state's police power.[134] The Supreme Court of Nebraska has held that, despite a vested property right, "[t]he adjudication of the water right gave to [an appropriator] 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."[135] As such, it is accepted law of Nebraska that the "right to prescribe the manner of using the waters of the state and apportioning the use among the people of the state rests with the Legislature, and is a proper exercise of its general police powers."[136]

While appropriators may have a property right to the use of water, the right to use has been limited. Although the Supreme Court of Nebraska has held that an appropriator's right to use the water is protected once it has been vested,[137] this right is limited by "the rights of all prior and subsequent appropriators, and he cannot infringe upon their rights and privileges."[138] An appropriator also may not use his or her vested property right to the extent that it injures a senior appropriator.[139]

III. INTRO TO *KEATING*

This Note examines the interaction of due process and Nebraska's water administration as challenged in *Keating v. Nebraska Public*

131. Loup River Pub. Power Dist. v. N. Loup River Pub. Power & Irrigation Dist., 142 Neb. 141, 152, 5 N.W.2d 240, 248 (1942).

132. Enter. Irrigation Dist. v. Willis, 135 Neb. 827, 284 N.W. 236, 329 (1939); *see generally* City of Fairbury v. Fairbury Mill & Elevator Co., 123 Neb. 588, 243 N.W. 774 (1932); Nine Mile Irrigation Dist. v. State, 118 Neb. 522, 225 N.W. 679 (1929); *In re* Kearney Water & Elec. Powers Co., 97 Neb. 139, 149 N.W. 363 (1914); Crawford Co. v. Hathaway, 67 Neb. 325, 93 N.W. 781 (1903).

133. Frenchman Valley Irrigation Dist. v. Smith, 167 Neb. 78, 99, 91 N.W.2d 415, 428 (1958).

134. *See* State *ex rel.* Cary v. Cochran, 138 Neb. 163, 292 N.W. 239, 244 (1940) ("[T]he state in the exercise of its police power may supervise and control the appropriation, diversion and distribution of the public waters of the state, and impose that duty upon administrative officers, is well settled.").

135. *In re* Birdwood Irrigation Dist., 154 Neb. 52, 55, 46 N.W.2d 884, 887 (1951).

136. Farmers' Irrigation Dist. v. Frank, 72 Neb. 136, 100 N.W. 286, 294 (1904).

137. *Id.*

138. *Id.*

139. Northport Irrigation Dist. v. Jess, 215 Neb. 152, 159, 337 N.W.2d 733, 738 (1983).

Power District.[140] In *Keating*, the Nebraska Public Power District (NPPD) held three surface water appropriation permits that allowed NPPD to appropriate a total of 2,035 cubic feet per second of water for Spencer Dam, located in the Niobrara Watershed.[141] The plaintiffs were farmers and ranchers that owned and rented land within the watershed.[142] NPPD had an appropriation senior to the plaintiffs',[143] and began experiencing stream water depletion.[144] On March 2, 2007, NPPD placed a continuing call[145] on the Niobrara River for Spencer Dam.[146] The Department investigated the stream flow depletions, and determined that NPPD could beneficially use the full amount of water to which it had the right to use and that the Niobrara River's stream flow was adequate to fulfill NPPD's appropriations.[147] Because the Department found the stream flow was sufficient, it determined a call was unnecessary and declined to send out closing notices.[148]

Despite finding NPPD's request for a call unnecessary, the Department sent "regulating notices" to upstream proprietors.[149] The regulating notices simply informed appropriators of the specifications of their individual appropriations and prohibited them from exceeding the limits permitted therein.[150] However, by April 2007, the Niobrara River's stream flow was depleted, and the Department sent closing notices[151] to all of the upstream appropriators with a junior priority date to NPPD.[152] The plaintiffs, Gerard Keating and fellow appropriators, were among those that received both the regulating notices and the closing notices.[153] A week later, the Department determined that stream flow had been adequately restored and issued opening no-

140. *Keating I*, No. 7:07CV5011, 2007 WL 2248054 (D. Neb. Aug. 1, 2007).
141. Keating v. Neb. Pub. Power Dist. (*Keating III*), 713 F. Supp.2d 849, 853 (D. Neb. 2010).
142. *Id.*
143. *Id.*
144. *Id*.
145. *See supra* section II.D.
146. *Keating III*, 713 F.Supp.2d at 854.
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *See supra* section II.E.
152. *Keating III*, 713 F. Supp.2d at 854.
153. *Id.* at 854–55.

tices[154] to the plaintiffs.[155] But, the Department reissued the closing notices three months later.[156]

A. Procedural History

The plaintiffs filed a complaint in district court alleging that NPPD and the Department (defendants) had violated their rights[157] by exercising priority over them, thus taking their water.[158] The plaintiffs also claimed that the Department violated their rights by issuing closing notices without prior notice or a hearing.[159] The court, however, dismissed the plaintiffs' claim,[160] finding it not yet ripe as there were no closing notices in effect at the time of the case and the last closing notices issued had been lifted.[161] It further ruled that the claim was not ripe because the plaintiffs had failed to exhaust all administrative remedies available to them through the Department.[162] The claim was therefore dismissed because "[t]he administrative procedures clearly provided plaintiffs with a process to challenge and review the actions of [the Department] in issuing the subject closing notices," and the plaintiffs had failed to take advantage of such procedures.[163] In other words, because the plaintiffs did not petition for a declaratory order or request a contested case hearing, the district court dismissed the claim.[164]

1. First Appeal to the Eighth Circuit Court of Appeals

Plaintiffs appealed the district court's decision to the Eighth Circuit Court of Appeals,[165] which overturned the district court's holding that the plaintiffs' claim was not yet ripe.[166] Because there were no notices in place at the time, and therefore there was no live controversy over closing notices, it determined the issue was mootness, not ripeness.[167] The issue of mootness, however, contains an exception based on the facts that are "capable-of-repetition-yet-evading-re-

154. An opening notice is the inverse of a closing notice. *See supra* section II.E. By logical extension, an opening notice is issued to appropriators that previously receiving closing notices, notifying them that stream flow has reached a level which permits them to resume diversions.
155. *Keating III*, 713 F. Supp. 2d at 855.
156. *Id.* (noting that opening notices have since been issued).
157. *Keating I*, No. 7:07CV5011, 2007 WL 2248054, at *1 (D. Neb. August 1, 2007).
158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.* at *2.
164. *See supra* subsections II.E.i–ii.
165. Keating v. Neb. Pub. Power Dist. (*Keating II*), 562 F.3d 923 (8th Cir. 2009).
166. *Id.* at 927.
167. *Id.*

view."[168] This exception applies when "(1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again."[169]

Because the issued closing notices were only in effect for a short period of time, the Eighth Circuit held the "capable-of-repetition-yet-evading-review" exception applied and found the claim was not moot.[170] The court also found that it was not necessary to exhaust all available administrative remedies before bringing suit for any "*postdeprivation* remedies when the litigant contends that he was entitled to *predeprivation* process."[171] The court remanded the case back to the district court to determine whether the plaintiffs had been deprived of their property, whether that property right required a predeprivation hearing, and whether a predeprivation declaratory order would be a constitutionally adequate protection.[172]

2. Remanded to the District Court of Nebraska

On remand, the district court denied the plaintiffs' motion for summary judgment and granted the defendants' motion for summary judgment.[173] In deciding the first issue—whether a deprivation of a property right had occurred—the court looked to established Nebraska case law and found that it was "clear the plaintiffs do not hold any right in the waters of the Niobrara River prior to capture" because the Nebraska Supreme Court had repeatedly stated the holder of a surface water appropriation permit "does not acquire ownership of stream water prior to capture, as that water is public property."[174] It also ruled that the right was a right to "their place on the priority list" and not to the physical water.[175] Thus, the district court found the plaintiffs only property right was the *use* of the water.[176]

The second issue remanded was whether deprivation of the property right claimed by the plaintiffs was entitled to a predeprivation hearing.[177] The court answered this question with a resounding

168. *Id.*
169. *Id.* (quoting Spencer v. Kemna, 523 U.S. 1, 17 (1998)).
170. *Id.*
171. *Id.* at 929; *see also* Zinermon v. Burch, 494 U.S. 113 (1990) (holding that if a State can practicably provide a predeprivation hearing, then it is required to so even if a postdeprivation hearing would have been adequate).
172. *Keating II*, 562 F.3d at 930.
173. *Keating III*, 713 F. Supp. 2d 849 (D. Neb. 2010).
174. *Id.* at 857.
175. *Id.* at 858.
176. *Id.* ("[T]he prior rights of all persons who, by compliance with the laws of the State of Nebraska, have acquired the right to use the waters of the natural streams of the state must not be interfered with by the use of water under this permit.").
177. *Keating II*, 562 F.3d 923, 930 (8th Cir. 2009).

"no."[178] Because they had appropriation permits and the corresponding placement on the priority list—with their rights to the same amount of water preserved—the court ruled that the Department had not sought to deprive plaintiffs of their property rights.[179] The plaintiffs' property rights were not in the water itself, but in the "ability to exercise their senior preference rights."[180] Thus, the court found that there is no deprivation of a property right when the actions of the Department are within the scope of its police power: to protect the integrity of the appropriation system by enforcing priority dates and preference rights.

3. Back From the Eighth Circuit

The plaintiffs again appealed to the Eighth Circuit.[181] As the case stood before it, the Eighth Circuit had two options: it could rule that a predeprivation hearing was required before the Department could issue a closing notice, or it could affirm the district court's latest decision and hold that a postdeprivation hearing is sufficient. On November 7, 2011, it affirmed the district court's decision, ruling that a postdeprivation hearing is sufficient to satisfy an appropriator's right to due process.[182] The Eighth Circuit evaluated the property rights at issue and rightly decided the case by ruling that a predeprivation hearing was unnecessary.[183]

IV. THE EIGHTH CIRCUIT CORRECTLY FOUND THAT A PREDEPRIVATION HEARING WAS UNNECESSARY

The Eighth Circuit affirmed the district court and rightly ruled that a predeprivation hearing is unnecessary.[184] The decision in *Keating* is a critical one: the plaintiffs in the case are not the only plaintiffs to challenge the Department's administrative procedures. Shortly behind *Keating* was a challenge by junior appropriators of a senior appropriation held by the Nebraska Public Power District in *Bond v. Nebraska Public Power District.*[185] *Bond* had substantively the same arguments; however, the plaintiffs brought their claim in

178. *Keating III,* 713 F. Supp. 2d at 858.
179. *Id.* at 858–59.
180. *Id.* at 859.
181. *Keating IV*, 660 F.3d 1014 (8th Cir. 2011).
182. *Id.* at 1018 (citing Idaho Dept. of Water Res. Amended Final Order Creating Water Dist. No. 170, 220 P.3d 318, 331–32 (Idaho 2009)) ("A water user has no property interest in being free from the State's regulation of water distribution in accordance with the prior appropriation doctrine . . . .").
183. *Id.* at 1016.
184. *Id.*
185. 278 Neb. 137, 768 N.W.2d 420 (2009).

state court, as opposed to Keating's claims that were brought in federal.[186]

In *Bond*, junior appropriators challenged "the interplay of preference rights and appropriation rights."[187] NPPD argued that the appropriators could not challenge the validity of its appropriation right because prior condemnation hearings, albeit with different appropriators, had mooted the condemnation proceedings brought by the plaintiff, Bond.[188] The Director had agreed in departmental proceedings and rendered the proceedings moot.[189] Bond appealed to the Supreme Court of Nebraska which held the proceedings were not moot because state statutes do not require a junior appropriator to choose between condemnation proceedings—asserting his superior preference right—and challenging the validity of the senior appropriation right in order to maintain access to the water.[190] The court stated that "to hold that junior appropriators must choose between these procedures would force them into the precarious position of relinquishing their preference rights."[191] As a result, it remanded the case back to the Director for further proceedings.[192]

On remand, Bond challenged the sufficiency of the closing notices issued and "sought a determination of the validity of NPPD's water appropriations on the bases that NPPD had abandoned or statutorily forfeited all or a portion of its appropriations."[193] If the court determined that NPPD had abandoned or statutorily forfeited any portion of its appropriations, there would be no "legally sufficient foundation for the closing notices."[194] The Director denied Bond's challenge to the validity of NPPD's appropriations and Bond appealed to the Supreme Court of Nebraska. The court determined the Department erred in refusing to determine the validity of NPPD's appropriations and remanded the case back to the Department to determine "whether NPPD's appropriations have been abandoned or statutorily forfeited in whole or in part."[195] However, NPPD filed a motion for rehearing with the supreme court.

NPPD stated that the court is "obligated to dispose of cases on the basis of the theory presented by the pleadings on which the case was

186. *Id.*, 768 N.W.2d 420.
187. *Id.* at 138, 768 N.W.2d at 422.
188. *Id.* at 136, 768 N.W.2d at 420.
189. *Id.* at 136, 768 N.W.2d at 420.
190. *Id.* at 148, 768 N.W.2d at 428.
191. *Id.* at 148, 768 N.W.2d at 428.
192. *Id.* at 137, 768 N.W.2d at 420.
193. Bond v. Nebraska Public Power District (*Bond II*), 283 Neb. 629, 637, 820 N.W.2d 44 (2012).
194. *Id.*
195. *Id.* at 658, 820 N.W.2d at 67.

tried."[196] The motion asserted that because the issues of abandonment and statutory forfeiture were "integral parts of the case at all stages," the court must decide the case based on those issues.[197] Through its motion, NPPD was trying to force the court to determine that its appropriations remain valid. By forcing the court's hand, NPPD seemed to be attempting to avoid any further litigation regarding the manner by which the waters of Nebraska are administered and therefore lay to rest the issue it has been litigating for the past decade in both *Keating* and *Bond*. The court has since denied the motion for rehearing and the case is now before the Department once again.[198]

After the second remand, *Bond* has still not been decided on its ultimate issue. The Supreme Court of Nebraska must eventually determine whether the current appropriation system is effective and whether the rights afforded to junior appropriators satisfy the requirements of due process to protect the minimal property rights an appropriator holds in her water right. While the facts differ from *Keating*, the threat from an adverse decision in *Bond* is the same: if the Supreme Court of Nebraska rules in favor of the junior appropriators and overturns the preference system, the Department will be forced to create an entirely new system.

A. A Finding that a Predeprivation Hearing Is Necessary Would Be Wrong for Three Reasons

1. Not a Strong Enough Property Right

Property rights were the main issue in *Keating*. It is important for all future decisions to adhere to the Eighth Circuit's decision that the Department's procedures sufficiently protect the plaintiff's minimal property rights. Indeed, future plaintiffs will have an appropriation that only gives them a right to use the water that is specifically identified in their permit.[199] The Supreme Court of Nebraska has consistently ruled that appropriators have no ownership in the body of water from which they divert and thus are not protected by due process.[200] In fact, Nebraska's constitution explicitly declares that the state's waters are owned by the public.[201] The plaintiffs in *Keating* argued their

196. Motion for Rehearing & Memorandum Brief at 7, *Bond II*, 283 Neb. 629, 820 N.W.2d 44, No. S11–006 (citing Ashland State Bank v. Elkhorn Racquetball, Inc., 246 Neb. 411, 419, 520 N.W.2d 189, 194 (1994)).

197. *Id.*

198. Order Overruling Appellee's Motion for Rehearing, *Bond II*, 283 Neb. 629, 820 N.W.2d 44 (2012).

199. Frenchman Valley Irrigation Dist. v. Smith, 167 Neb. 78, 91 N.W.2d 415 (1958).

200. *Id.* at 99, 91 N.W.2d at 428.

201. NEB. CONST. art. XV, § 4.

constitutional right to due process had been violated.[202] However, Nebraska's constitution states there is no right to private ownership of the waters[203] and the Eighth Circuit unanimously agreed.[204]

2. Strong Interest in Quick Administration of Water

There is a strong public interest not only in the proper administration of the state's waters but also in their effective ministerial action.[205] The Department has statutory jurisdiction over all issues involving water rights.[206] Chapter 46 of the Nebraska Revised Statutes supports this jurisdiction "for the distribution of water among different appropriators according to their respective priorities by administrative officers of the state."[207] These statutes provide for a "wise public policy" in the interest of "an economical and speedy remedy" to all aggrieved appropriators.[208] The state also has an interest in putting its waters to a beneficial use.[209] By proper administration, therefore, the state avoids conflicts that could arise from having too many water users rely upon a limited water supply.[210]

The Supreme Court of Nebraska declared that the state has a duty "to administer the waters of streams and rivers to prevent waste, to protect prior appropriators against subsequent appropriators, and to enforce all adjudicated water rights in accordance with their terms."[211] Charged with this duty, the state and the Department clearly have an interest in enforcing the established system of water administration. This duty also gives these entities an interest in quick action, as it is their responsibility to effectively administer the water.

The Department, so charged by the legislature, has a duty to administer all unappropriated water in accordance with existing priorities.[212] If the Department and its officials fail to enforce the appropriation system, "it may be compelled to act by mandatory injunction or in appropriate circumstances by a timely action of manda-

202. *Keating I*, No. 7:07CV5011, 2007 WL 2248054, at *1 (D. Neb. Aug. 1, 2007).
203. NEB. CONST. art. XV, § 4.
204. *Keating II*, 562 F.3d 923, 930 (8th Cir. 2009) ("The property right held by appellants is expressly conditioned on the [Department's] determination of watershed capacity, and therefore appellants have no legitimate claim to the water . . . .").
205. State *ex rel.* Cary v. Cochran, 138 Neb. 163, 168, 292 N.W. 239, 244 (1940).
206. NEB. REV. STAT. § 61-206(1) (Reissue 2003).
207. *Cary*, 138 Neb. 168, 292 N.W. at 244 (discussing various statutory provisions in Chapter 46).
208. *Id.* at 168, 292 N.W. at 244.
209. *Id.* at 168, 292 N.W. at 244.
210. *Id.* at 168–69, 292 N.W. at 244.
211. *Id.* at 169, 292 N.W. at 244.
212. Platte Valley Irrigation Dist. v. Tilley, 142 Neb. 122, 5 N.W.2d 252 (1942).

mus."[213] Therefore, in order to avoid judicial remand, the Department has an interest in upholding the established system of water administration. Had the Eighth Circuit ruled against the defendants in *Keating*, the NPPD could have foreseeably sought a writ of mandamus to require the Department to enforce the district's senior priority date over the plaintiffs.[214] Consequently, faced with the threat of suit from both parties, an Eighth Circuit ruling adverse to the NPPD would not have solved the water administration issues. On the contrary, it would only have exacerbated the problem of effective water administration by forcing Nebraska and the Department to create an entirely new system of administration. Further, the prior appropriation system is favored above the riparian system that was once in place.[215] If future plaintiffs, as those in *Bond*, are successful and the Nebraska Supreme Court ignores the Eighth Circuit's precedent, Nebraska would be forced to adopt and institute an entirely new system for the second time in the state's history.

3. A New System Would Require Massive State Resources

Despite the decision in *Keating*, and because of cases such as *Bond*, the threat to Nebraska's water administration system has not yet passed. If a court rules that affording due process requires the Department to provide a predeprivation hearing before issuing a closing notice, it would effectively remove procedural steps that have historically been available to all water users. Since the implementation of the prior appropriation system as a result of the Act of 1895,[216] the legislature has provided procedural remedies for those senior appropriators not receiving their allotment of water.[217] The legislature has also charged the Department with the duty to enforce such laws.[218] If predeprivation hearings were required, the state and the Department would have to overturn over 115 years of developed administration.

In addition to creating an entirely new system, mandatory predeprivation hearings would create an excessive burden on both the Department and the state's judicial system. There are over 8,000 appropriations to the waters of Nebraska[219] and it would be almost impossible to effectively administer predeprivation hearings to each one. To illustrate, focus on the *Keating* case alone. A required predepriva-

213. HARNSBERGER & THORSON, *supra* note 5, at 113 (citing *Cary*, 138 Neb. 163, 292 N.W. 239, and *Platte*, 142 Neb. 122, 5 N.W.2d 242).
214. *Id.*
215. 7 REP. NEB. BD. IRRIGATION BIENNIAL REP. 11–12 (1907–1908).
216. *See supra* section II.B.
217. NEB. REV. STAT. § 46-203 (Reissue 2010).
218. *Cary*, 138 Neb. at 168–69, 292 N.W. at 244.
219. As of 2011, there were 8,197 appropriation permits in the State of Nebraska. Nebraska Department of Natural Resources, Surface Water Uses by Water Division Report (2011).

tion hearing would mean that the Department would have had to provide a predeprivation hearing twice, within a five-month period, for each of the four named plaintiffs.[220] Each time, moreover, the hearing might even come before or after any fluctuation in stream flow about which the parties were in dispute. The plaintiffs in *Keating* are only from one small, centrally located area around Spencer Dam.[221] In essence, it would be an undue burden to require the Department to offer predeprivation hearings to the multitude of appropriators numerous times a year.

V. EXCEPTIONS TO PREDEPRIVATION HEARINGS

Due process requires a person to be granted a hearing in order to contest the deprivation of their property interest.[222] However, due process only requires that a hearing be "granted at a meaningful time and in a meaningful manner,"[223] and be "appropriate to the nature of the case."[224] The Supreme Court of the United States has further established that the "formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings."[225]

A. *Boddie v. Connecticut*: Countervailing State Interest of Overriding Significance

The Supreme Court of the United States has held that due process protects citizens from a State's intervention or denial of rights.[226] In *Boddie v. Connecticut,* women on welfare assistance brought suit against the State of Connecticut, arguing a statute that required citizens to pay a fee prior to filing for divorce was unconstitutional.[227] The Court acknowledged the established precedent that due process requires individuals to be given a "right to be heard."[228] The Court held, however, that due process is not required if there is a "countervailing state interest of overriding significance."[229]

Here the exception in *Boddie* is directly applicable to the challenges of the appropriation system because the Department has a "countervailing state interest of overriding significance" in the effec-

220. *Keating III*, 713 F. Supp. 2d 849, 854–55 (D. Neb. 2010).
221. *Id.*
222. Boddie v. Connecticut, 401 U.S. 371 (1971).
223. Armstrong v. Manzo, 380 U.S. 545, 552 (1965).
224. *Boddie*, 401 U.S. at 378 (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950)).
225. *Id.*
226. *Id.*
227. *Id.* at 371.
228. *Id.* at 377 (quoting Hovey v. Elliot, 167 U.S. 409, 417 (1897)).
229. *Id.*

tive administration of water. The effective administration of water preserves the property values of senior appropriators and encourages Nebraska citizens and entities to use state waters in the most effective means possible. A closing notice, on the other hand, only prevents a junior appropriator from using water for a short period of time.[230] Nebraska's interest in preserving the system of administration, therefore, significantly overrode the plaintiffs' interests in *Keating* and should override any future plaintiff's interest. While challengers to the appropriation system are merely seeking water use for a limited time frame (one or two weeks), defendants such as NPPD and the Department are seeking to preserve their property value—a dollar value that could potentially extend into the millions. In essence, challengers like those in *Keating* and *Bond* would usurp the appropriation system, the interests of the state, and the property interests of appropriators.

Effective water administration is a compelling interest superior to that of the challengers. Thus, the Supreme Court has held that due process, at the very least, requires that deprivation of "property by adjudication be preceded by notice and opportunity for hearing *appropriate to the nature of the case*."[231] In *Keating*, the Department did not completely deprive the plaintiffs of due process, as the State did in *Boddie*; the Department always provides a postdeprivation hearing to any appropriator that requests it.[232] It is also important to note that a postdeprivation hearing is more than sufficient because the Department does not deprive an appropriator of a property right in water but the right to *use* the water, the demand of which can rapidly change from day to day.[233]

B. The Three-Part Inquiry in *Mathews v. Eldridge*

Subsequent to establishing a "countervailing State interest of overriding significance" exception to procedural due process, the Supreme Court of the United States established a three-part inquiry set forth in *Mathews v. Eldridge*.[234] There, a citizen on Social Security disability challenged the constitutional validity of procedures established by the Department of Health, Education, and Welfare.[235] The procedures challenged were those used in determining whether a citizen could continue to be declared disabled.[236] The three-part inquiry set forth

230. The average closing time in *Keating* was two weeks. *Keating III*, 713 F. Supp. 2d 849 (D. Neb. 2010).
231. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) (emphasis added).
232. *See supra* subsection II.E.ii.
233. *See supra* section II.G.
234. 424 U.S. 319 (1976).
235. *Id.* at 324–25.
236. *Id.*

in *Mathews* provides an analysis that assists in determining the adequacy of the hearing provided.

The first inquiry is whether the private interest of the plaintiff has been adversely affected by some governmental action.[237] It takes into account the type of property interest the plaintiff has, as well as the magnitude to which it has been affected.[238] The second inquiry is to determine if there is a risk of erroneous deprivation of the private interest and the effectiveness that any procedural safeguards might have on preventing error.[239] The final part of the inquiry is to analyze the government's interest and consider economic and "administrative burdens that the additional or substitute procedural requirement would entail."[240]

The plaintiffs in *Keating* pleaded that the closing notices issued by the Department harmed a private interest held in water use permits.[241] However, the private interest in water use permits is miniscule, as Nebraska case law has established that there is no direct property right to the waters specified in an appropriation, only to the *use* of such waters.[242] Moreover, there is very little chance of erroneous deprivation because the Department can identify each individual appropriator through the permit system.[243] A postdeprivation hearing is far more accurate due to the pressures associated with a predeprivation hearing's inherent time constraints. A postdeprivation hearing, on the other hand, has no time restrictions since there presumably would not be a pressing need for water. Thus, it would be better able to include all evidence necessary and allow parties ample time to prepare.

Lastly, under the final prong of the *Mathews* analysis, the Department's interest in preserving the prior appropriation system substantially outweighs the interests of any potential challengers. The economic and administrative burdens in providing "additional or substitute procedures" would be, at best, excessive. The entire appropriation system is established on the basis that closing notices must be issued immediately in the interest of preserving the appropriation system and the property values of other appropriators, and the Department provides a postdeprivation hearing for any junior appropriator that desires one.[244] To require the Department to rework the entire appropriation system would certainly impose undue economic and ad-

237. *Id.* at 334–35.
238. *Id.* at 341.
239. *Id.* at 334–35.
240. *Id.* at 335 (citing Goldberg v. Kelly, 397 U.S. 254, 263–71 (1970)).
241. *Keating I*, No. 7:07CV5011, 2007 WL 2248054 (D. Neb. Aug. 1, 2007).
242. *See supra* subsection II.G.ii.
243. *See supra* section II.C.
244. *See supra* section II.E.

ministrative burdens, which would defeat the final prong of the *Mathews* inquiry.

There are few recognized exceptions to providing a predeprivation hearing. The most pertinent one to this discussion is that predeprivation hearings are not be required in situations where a state's interest must be protected through quick and effective administration.[245] The Supreme Court has found "quick action" necessary—and thus a predeprivation hearing unnecessary—in situations such as the destruction of contaminated food[246] and the suspension of a driver's license as a result of refusing to submit to a breathalyzer.[247] Like those cases, the preservation of property values, the prior appropriation system, and compliance with interstate compacts require that the Department take quick action in issuing closing notices to junior appropriators.

C. Little Likelihood of Serious Loss

In addition to the noted exceptions, due process does not demand a predeprivation hearing "where the potential length or severity of the deprivation does not indicate a likelihood of serious loss and where the procedures underlying the decision to act are sufficiently reliable to minimize the risk of erroneous determination."[248] This exception directly applies to the facts in *Keating*, and would likely apply to any future challenges to the appropriation system. The closing notices issued to the plaintiffs in *Keating* were in place for a month at most.[249] A closing notice's length of time issued does not "indicate a likelihood of serious loss" because the plaintiffs would not be without water for a significant amount of time, and would not plead substantial damages. Further, "the issuance of Closing Notices does not impact the property right bestowed by the permit to use the surface water."[250] If there is no property right affected, then there can be no likelihood of serious loss.

D. Nebraska's Appropriation System is Not Violative of Due Process

Nebraska's system of water administration does not violate due process. "If the statute, regulation, or contract in issue vests in the state significant discretion over the continued conferral of that benefit, it will be the rare case that the recipient will be able to establish

245. *Mathews*, 424 U.S. at 347–49.
246. N. Am. Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908).
247. Mackey v. Montrym, 443 U.S. 1 (1979).
248. Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 19 (1978).
249. *Keating III*, 713 F. Supp. 2d 849, 854–55 (D. Neb. 2010).
250. *Keating IV*, 660 F.3d 1014, 1018 (8th Cir. 2011).

an entitlement to that benefit."[251] The Department had adopted the regulations at issue in *Keating* for the purpose of administering water.[252] The statutes upon which the Department relied when enforcing the prior appropriation system were also at issue.[253] The legislature has given the Department authority to administer the entire water system.[254] According to the Second Circuit, because these regulations and statutes vest discretion in the state, it is likely that the appropriation system will be upheld.[255]

Additionally, due process is "a flexible concept" which "calls only for such procedural protection as the particular situation demands."[256] Water administration must, by nature, be very flexible as well. Stream flow is by nature uncontrollable, as is the very concept of rain, precipitation, evaporation, and seepage, and the Department cannot be charged with controlling waters which flow through Nebraska's streams. As such, the system of water administration is a flexible concept, and the due process it provides conforms to the nature of the system.

The Nebraska Legislature requires only that the Department "make proper arrangements for the determination of priorities."[257] It does not charge it with a specific procedure for so doing. As such, the Eighth Circuit correctly ruled that the Department's actions were not violative of due process.[258] It wisely decided not to overrule its prior decision that due process is whatever "the particular situation demands."[259] Through its own experience of water administration, the Department has determined the availability of postdeprivation remedies most effectively affords due process. For this reason, the Eighth Circuit affirmed the district court's decision,[260] and future challengers, like those in *Bond*, are unlikely to be successful.

One may argue that, regardless of the established fluidity of due process, a predeprivation hearing is necessary to satisfy due process requirements. In other words, the availability of postdeprivation remedies is not a defense to the denial of procedural due process where

251. Kelly Kare, Ltd. v. O'Rourke, 930 F.2d 170 (2d Cir. 1991) (citing Plaza Health Labs., Inc. v. Perales, 878 F.2d 577, 581 (2d Cir. 1989), and RR Vill. Ass'n v. Denver Sewer Corp., 826 F.2d 1197, 1201 (2d Cir. 1987)).
252. *Keating III*, 713 F. Supp. 2d 849.
253. Sections 46-203 to 46-226 govern water administration through the appropriation system. NEB. REV. STAT. §§ 46-203 to 46-226 (Reissue 2010).
254. *Id.* § 46-226; *see also* Koch v. Aupperle, 274 Neb. 52, 737 N.W.2d 869 (2007) (explaining that the Department has statutory authority to determine priorities of right to use the state's public surface waters).
255. *Kelly Kare*, 930 F.2d at 175.
256. Moore v. Warwick Pub. Sch. Dist. No. 29, 794 F.2d 322, 327 (8th Cir. 1986).
257. NEB. REV. STAT. § 46-226(1).
258. *Keating IV*, 660 F.3d 1014, 1018 (8th Cir. 2011).
259. *Moore*, 794 F.2d at 327.
260. *Keating IV*, 660 F.3d at 1019.

predeprivation process is practicable.[261] But, predeprivation hearings are severely impracticable.[262] There are far too many water appropriations in the state for the Department to effectively afford a predeprivation hearing every time a closing notice is issued. The burden it would create on the Department and the judicial system renders a predeprivation hearing impracticable. Thus, postdeprivation hearings must necessarily satisfy due process.[263]

VI. ENTITLEMENT, EXPECTATION, AND PROPERTY RIGHTS

In *Keating*, the plaintiffs claimed a property interest in their water use permits that would require a predeprivation hearing before the issuance of a closing notice.[264] The Second Circuit has ruled that in order "to claim a protected property interest in a particular administrative benefit or measure, an individual must have 'a legitimate claim of entitlement' in receiving the benefit or measure, not merely 'a unilateral expectation' in a desired administrative outcome."[265] A party possesses an "entitlement" if an administrative procedure *requires* a certain outcome.[266] Therefore, there are only expectations in a statute as it is written. Plaintiffs have no cause of action when a statute is simply enforced as written; a statutory cause of action only exists if the statute is not enforced properly. Nebraska's system of water administration does not, however, require that any appropriator receive water; it only requires that appropriators be given a permit to divert water subject to the laws of the state.[267] The plaintiffs in *Keating*, or in similar suits challenging the appropriation system, displayed "a unilateral expectation" that the administration of water will always result in the receipt of sufficient water for their desired uses. In other words, similar to the rights held by the plaintiffs in *Sealed*,[268] appropriators are not entitled to any outcome beyond possession of an appropriation. Suits challenging the appropriation system are merely a result of disappointed "unilateral expectation[s]," and should not, therefore, be entertained by the courts.

While it may be argued that plaintiffs such as Keating and Bond rely on appropriated water for their very livelihood, courts have ruled that a claim of livelihood is not enough to establish a property right.[269] In *Kelly Kare*, the plaintiffs sought to enjoin the county from

261. *Moore*, 794 F.2d at 328.
262. *See supra* section IV.D.
263. *Moore,* 794 F.2d at 328.
264. *Keating III*, 713 F. Supp. 2d 849, 855 (D. Neb. 2010).
265. Sealed v. Sealed, 332 F.3d 51, 56 (2d Cir. 2003) (quoting Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972)).
266. *Id.*
267. 457 NEB. ADMIN. CODE, ch. 18, § 004 (2005).
268. *Sealed*, 332 F.3d 51.
269. Kelly Kare, Ltd. v. O'Rourke, 930 F.2d 170, 174–76 (2d Cir. 1991).

terminating their Medicaid reimbursement contract.[270] They argued that the benefit of the reimbursement contract was important to their business (i.e., livelihood), and thus, the county was depriving them of a property right.[271] The Second Circuit ruled that a "property interest does not exist solely because of the importance of the benefit to the recipient."[272] Thus, challengers to the appropriation system cannot argue that their unencumbered use of water is a property right that cannot be infringed upon simply because water is important to their livelihood. That argument is also not enough for a plaintiff's expectation "of continued receipt of the benefit sufficient to establish a property interest."[273] In order for plaintiffs to establish a property interest in the actual water, they must demonstrate a "legitimate claim of entitlement,"[274] which is clearly a weak, if not wholly irrelevant, argument.

VII. CONCLUSION

The Eighth Circuit correctly held that the plaintiffs in *Keating* did not suffer a due process violation through the denial of a postdeprivation hearing. While it is clear that the prior appropriation system will continue to come under attack, it is equally clear that the system should continue to be upheld by the courts, as it was in *Keating*. As established by over one hundred years of Nebraska case law, appropriators hold no property right to the waters. Appropriators have a property right in their seniority and in the use of the water therein. As such, appropriators cannot claim, as the plaintiffs in *Keating* and *Bond* attempted, that they have a right to the physical water specified in their permit.

The state, moreover, has a strong interest in the speedy administration of its waters. This interest is best accomplished by postdeprivation hearings. Requiring a predeprivation hearing would severely retard the administration of water and significantly injure senior appropriators' rights. There is an inherent value in proper senior appropriation and property values which would be significantly depreciated if seniority is rendered useless. Furthermore, if future challengers successfully obtain a judgment that requires predeprivation hearings, Nebraska would be forced to create and implement an entirely new system.

Additionally, the Department's system satisfies the exceptions to predeprivation hearing requirements the Supreme Court has established. First, the state's interests outweigh the interests of junior ap-

270. *Id.* at 173.
271. *Id.*
272. *Id.* at 175.
273. *Id.* (citing Bd. of Regents of State Colls v. Roth, 408 U.S. 564, 577 (1972)).
274. *Roth*, 408 U.S. at 577.

propriators.[275] Second, the postdeprivation hearings are appropriate to the effective administration of the water.[276] Third, the system satisfies the *Mathews* three-part inquiry.[277] Lastly, challengers claiming a property right to the water cannot claim that they have lost an expectation of that property right.[278] Any expectation is purely unilateral.[279] Thus, they are not entitled to due process.

Courts should uphold the Eighth Circuit's decision in *Keating IV*, because it correctly held that a postdeprivation hearing was sufficient to provide the plaintiffs with their due process rights. Requiring a predeprivation hearing before a closing notice can be issued would destroy the value of senior appropriations and render the State of Nebraska's entire appropriation system useless. While water may be for fighting over, challengers to the system do not have a place in the fight. Instead, they are bystanders claiming to have a right to the center of the ring.

275. Boddie v. Connecticut, 401 U.S. 371, 377 (1971).
276. Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 318–19 (1950).
277. Mathews v. Eldridge, 424 U.S.319 (1976).
278. *Id.* at 341–43.
279. *Roth*, 408 U.S. at 577.