

1978

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Recommended Citation

Lynn Parker Hendrix, *Minimum Streamflows: The Legislative Alternatives*, 57 Neb. L. Rev. 704 (1978)

Available at: <https://digitalcommons.unl.edu/nlr/vol57/iss3/5>

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Comment

Minimum Streamflows: The Legislative Alternatives

I. INTRODUCTION

The phrase "minimum streamflow" appears to have several different meanings. For some it carries the connotation of maintaining a constant flow of water in a stream bed. To others it means preserving a river or stream in its natural condition. And yet to others it means the preservation of instream values for the protection of fish, wildlife, and aesthetics. While maintaining a constant flow and preserving a stream in its natural condition are noble goals, they are unrealistic in Nebraska given the fact the Nebraska economy is dependent on agriculture which, in turn, is to a large extent dependent on irrigation.

Those who advocate a constant flow in Nebraska streams¹ must recognize that Nebraska streams, like virtually all natural drainage systems, have a history of seasonal fluctuations.² This is especially evident in the Platte River where the snowmelt in the Colorado and Wyoming mountains maintains a high flow level in the late spring and early summer.³ This high flow level practically ceases during late summer and fall, causing the Platte to dry up in several areas. In recent years this pattern of intermittency has increased due to the expanded use of irrigation by Nebraska farmers. As one commentator has pointed out, "the adverse environmental effects resulting from largely unregulated surface water withdrawals are becoming increasingly evident in Nebraska. Many streams are seasonally dry or nearly so due to diversions and/or direct pumping for irrigation purposes."⁴ Even though the dry periods have been expanded in recent years due to increased use of sophisticated irrigation

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1. Pesek, *A Case for Protected Streamflows*, NEB. RESOURCES, Sept. 1974, at 3. (Tom Pesek is a biologist with the Neb. Nat. Resources Comm'n.)
 2. Dirmeyer, *More on Protected Streamflows*, NEB. RESOURCES, June 1975, at 3. (Richard Dirmeyer is general manager of the Cent. Neb. Pub. Power & Irr. Dist.)
 3. *Id.*
 4. Pesek, *supra* note 1, at 3.

techniques, seasonal fluctuation was clearly a characteristic of the Platte River prior to the inception of large scale irrigation.⁵ Advocates of storage reservoirs point out that prior to 1900 the dry periods of the Platte were much longer than they are presently, and that the shortening of the dry spells is due in part to the construction of several major storage reservoirs in the Platte River basin.⁶ Because of the seasonal fluctuations, maintaining a constant flow in rivers such as the Platte would be impossible without the use of major storage reservoirs to store spring flood water for later discharge during the summer and fall dry spells.⁷ However, such artificial maintenance of constant flows would probably be as detrimental to the environment and fragile ecosystems as is the constant lowering of stream levels now taking place through the over-appropriation of Nebraska streams and groundwater mining. To maintain the quality of the environment, streams should not be artificially maintained or artificially reduced. Rather, the streams should be maintained as close to their natural state as possible.

Not all Nebraska streams have seasonal fluctuation like the Platte. The Loup River is known as one of the most even-flowing streams in the nation; however, in recent years even the Loup has exhibited signs which indicate excessive irrigation.⁸ In 1976, portions of twenty-one streams in northeastern Nebraska became totally dry and it was estimated that the fish kill during the summer of 1976 was the largest in recorded history.⁹ Although some of the dewatering of Nebraska streams is due to the drought which has plagued Nebraska in recent years, it is clear that irrigation, both surface and subsurface, has contributed a great deal to the dewatering. It is important to recognize

5. Dirmeyer, *supra* note 2, at 3.

6. The author states that "[t]he difference between now and then relates to the major storage reservoirs—such as Seminoe, Pathfinder, Alcova, Glendo and Guernsey in Wyoming and McConaughy in Nebraska." *Id.*

7. "Legally adopted" minimum streamflows in Nebraska as advocated by Mr. Pesek in the last issue of this magazine, in my opinion, cannot be achieved by legislation alone, at least, not on the Platte River.

. . . .

A much better approach to achieving minimum flow in the Platte River is to continue the process of river regulations started in the late 1800's.

Id.

8. Pesek, *supra* note 1, at 3.

9. Rupp, *An Argument for a Minimum Stream Flow Law*, NEB. NEW LAND REV., Winter 1977, at 1. (Lee Rupp is Dist. III fisheries supervisor for the Norfolk, Neb., office of the Game & Parks Comm'n.). See, *Where has all the Water Gone?*, NEBRASKALAND, July 1977, at 32.

that widespread mining of groundwater, as well as surface water withdrawals, has an adverse effect on Nebraska streams. It is a combination of drought, excessive stream withdrawals, and groundwater mining that contributes to the lowering of stream levels.

Those who advocate the use of minimum streamflow laws to maintain Nebraska rivers and streams in a natural state must realize that irrigation is a necessary component of the farm-based Nebraska economy.¹⁰ But the Nebraska environment must not be blindly sacrificed in the name of economic development. The use of water like the use of any "precious natural resource should proceed in an orderly, logical fashion, with a lot of good old-fashion 'common-sense' involved. The current irrigation development appears to be more of an unrestrained, headlong exploitation, reminiscent of the goldrush days."¹¹ Because maintaining a constant flow in Nebraska streams is an unrealistic goal given the seasonal fluctuation and the need for at least some irrigation, the phrase "minimum streamflow" as used in this article will mean the preservation of instream values—fish, wildlife, recreation, aesthetics, and the environment. The preservation of instream values is a realistic goal—one that can be accomplished through increased awareness and progressive legislation.

Most environmental groups realize that maintaining streams in a *totally* natural state is unrealistic, but they would like to maintain the streams in an "as close to natural state" as is possible. The National Audubon Society has set forth as one of its goals to "[w]ork to preserve natural stream ecosystems, opposing destructive channelization, dam, and diversion projects," and to advocate "floodplain and watershed management to replace costly and ecologically unsound flood-control projects."¹² The establishment of minimum streamflows is also one of the Sierra Club's top priorities. The Nebraska Chapter of the Sierra Club has issued a water statement which provides in part:

Legislation should be developed that recognizes and protects instream uses for scenic, recreational and fish and wildlife concerns.

.....

Minimum historical stream flows for all Nebraska's rivers to maintain current ecosystems should be immediately established.

10. "There is no question that irrigation has a tremendously beneficial and 'stabilizing' effect on our economy." Rupp, *supra* note 9, at 3.

11. *Id.*

12. Letter from Pauline D. Plaza, biologist for the Nat'l Audubon Soc'y, to Lynn Hendrix (Oct. 25, 1977). See also AUDUBON, March 1975, at 132.

A moratorium on all additional stream withdrawal in areas where the current ecosystem is in jeopardy should be immediately enacted. Except for domestic purposes.¹³

The Nebraska chapters of the Audubon Society and the Sierra Club, as well as other environmental groups, have been active in lobbying for minimum streamflow laws in the Nebraska Legislature.¹⁴

Despite the dewatering of many Nebraska streams through overappropriation, the Department of Water Resources continues to issue new permits to withdraw water from lakes and streams.¹⁵ At the present time the effective curtailment of excessive groundwater withdrawals does not appear foreseeable. It is therefore evident that the lowering and dewatering of Nebraska streams are products of water laws that fail to recognize the value of instream uses—laws which allow a stream to be appropriated until the bed is dry and laws which allow groundwater mining until an aquifer is empty. “Most of the few existing water laws we have on the books are either archaic, conflicting, or simply don’t go far enough. It has suddenly become obvious that development has overrun the controlling mechanisms.”¹⁶

There is no doubt that some form of minimum streamflow legislation is needed.

The present situation throughout Nebraska emphasizes the critical need for the establishment of a system of protected streamflows in the state. Such a system, legally adopted and enforced, could insure the maintenance of minimum flows in perennial streams and, at the same time, allow reasonable surface water withdrawals for agricultural and

13. A Water Statement by the Nebraska Chapter of the Sierra Club, *contained in* a letter from Robert Warrick, Chairman of the Neb. Chapter of the Sierra Club, to Lynn Hendrix (undated).

14. When the hearings were held on L.B. 149 before the Public Works Committee of the Nebraska Legislature, several people spoke in favor of defining “beneficial use” to include fish and wildlife, and recreation. Among the groups represented were the Izaak Walton League, the Game and Parks Commission, the Audubon Society, the Sierra Club, the League of Women Voters, and the Nebraska Wildlife Federation. *Hearing on L.B. 149 Before the Comm. on Public Works*, 85th Leg., 1st Sess. 31 (1977).

15. In 1974, the Department of Water Resources processed applications for 374 new permits to withdraw water from reservoirs and streams. In 1975 the number rose to 584. Incredibly, in 1976, they processed applications for an additional 696. In other words, as the streams progressively go drier each year, the permits to pump from them increases [*sic*]. The Department has the option of saying “no” when a stream is already over-appropriated, but it has no tools to allow them to determine which streams can tolerate more withdrawal, and which cannot.

Rupp, *supra* note 9, at 3.

16. *Id.*

other consumptive uses. This management measure would be directed toward insuring the best use of our surface water resources on an environmentally sound basis now, and insure their preservation for future use, development and quality of life.¹⁷

The problem is that minimum streamflow laws, by their very nature, are a balance—a balance between economic values (such as irrigation) and social values (such as fish, wildlife, recreation, and aesthetics).

It is the purpose of this article to describe the legal problems behind minimum streamflows and to determine whether a legislative solution exists. In so doing, this article will examine how two states, Idaho and Colorado, have approached the problem.

II. THE LEGAL MEANS OF ESTABLISHING MINIMUM STREAMFLOWS¹⁸

It is evident that the lowering and dewatering of streams is a national concern as well as a state concern. Not only Nebraska but every Western state has experienced the dewatering of streams to some extent. In some respects the federal government has perceived the problem much more quickly than the states and, through the reserved rights doctrine,¹⁹ and navigational servitude has acted to correct the problem. The most important congressional enactment is the Wild and Scenic Rivers Act of 1968.²⁰ Through this act many segments of streams and rivers have been set aside in their free-flowing condition. The purpose of the Wild and Scenic Rivers Act is aptly put in the congressional declaration of policy:

It is hereby declared to be the policy of the United States that certain selected rivers of the Nation which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historical, cultural, or other similar values,

17. Pesek, *supra* note 1, at 4.

18. For a discussion of the legal, environmental, and engineering concerns about establishing minimum streamflows, see *INSTREAM FLOW NEEDS* (J. Orsborn & C. Allman eds. 1976). *INSTREAM FLOW NEEDS* is the proceedings of the Symposium and Specialty Conference on Instream Flow Needs presented by the American Fisheries Society and the American Society of Civil Engineers in Boise, Idaho, in May 1976.

19. The reserved rights doctrine is premised on the United States' claim to sufficient minimum streamflows to support forest reserves and other federal reservations. See *United States v. Eagle County Dist. Court*, 401 U.S. 520 (1971); *Arizona v. California*, 373 U.S. 546 (1963). See also Reed, *Should Rivers Have Running? Toward Extension of the Reserved Rights Doctrine to Include Minimum Stream Flows*, 12 *IDAHO L. REV.* 153 (1976).

20. 16 U.S.C. §§ 1271-1287 (1976). See Tarlock & Tippy, *The Wild and Scenic Rivers Act of 1968*, 55 *CORNELL L. REV.* 707 (1970).

shall be preserved in free-flowing condition, and that they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations.²¹

Congress has enacted many other statutes which demonstrate federal concern over the environmental quality of national forests and federal reserves.²² Although the purpose of this article is to set forth state solutions to the minimum streamflow problem, it must always be kept in mind that the federal government has extensive power through the reserved rights doctrine to set minimum streamflows, at least where federal reservations are involved.

Although the federal government has demonstrated concern for the minimum streamflow problem through the enactment of statutes such as the Wild and Scenic Rivers Act, its action has been limited. Generally the federal government has chosen to let the states handle the minimum streamflow problem. But if the states do not act soon to rectify the situation, the federal government probably will. In the recent Water Resource Policy Study by the Water Resources Council,²³ it was made clear that the federal government will not remain on the sideline much longer. One of the problems recognized in the Water Resource Policy Study was that water laws "may impair the recognition of environmental values" and that "water law systems have not evolved to include instream flow needs or certain offstream environmental uses."²⁴ One of the options identified by the Water Resources Council to combat this problem provided: "State and local government could be required to adopt strategies providing for instream flow needs through state law. Federal sanctions, through contracting, licensing and permit approval could be used to implement this alternative."²⁵ Although a good policy

21. 16 U.S.C. § 1271 (1976).

22. See generally Comment, *Federal Protection of Instream Values*, 57 NEB. L. REV. 368 (1978); Kiechel, *Federal Instream Flow Rights*, in 1 INSTREAM FLOW NEEDS 55 (J. Orsborn & C. Allman eds. 1976). See note 18 *supra*.

23. 42 Fed. Reg. 36788-95 (1977).

24. *Id.* at 36793.

25. *Id.* The Water Resources Council also made it clear that expansion of the reserved rights doctrine was a viable option:

Establish institutions at the Federal level whereby instream flow needs could be identified, quantified, and effectively provided for through specific procedures. These procedures could include full recognition, exercise, and protection of Federally reserved rights to water, *compensation to holders of valid rights whose uses are discontinued*, either temporarily or permanently, when the water is needed for these instream uses and ensuring that in future Federal projects the instream uses have a greater priority than uses confirmed under contractual arrangements.

Id. (emphasis added).

argument can be made for not allowing the federal government to force states into enacting laws, the state legislatures have procrastinated long enough, especially in the area of establishing minimum streamflow laws.²⁶

A. Problems With Existing State Law

The water law systems of most of the states, both in the East and the West, are deficient in that they fail to give appropriate recognition to social values of water. These values arise primarily from such instream uses as fish and wildlife propagation, recreation, and esthetics. The appropriation law of the Western States generally requires diversion of water from the stream or lake and its application to beneficial use in order for a water right to be created. Instream values are thus heavily discounted; water has been diverted from streams to such an extent that instream values which should have been protected frequently have been impaired, and sometimes destroyed.²⁷

This statement from the National Water Commission tells the story of the inadequacy of state law in protecting minimum streamflows. Originally, the main purpose of water law was to preserve the natural flow of water. This theory which developed at the onset of the Industrial Revolution, served the purpose of allowing the water to flow from one mill down to the next without substantial change in condition.²⁸ In riparian states, the modern rule is that each riparian may make a reasonable use of the water flowing past his riparian land. Reasonable use no longer requires the natural flow to go undiminished.²⁹ In appropriation states the "actual diversion" requirement that water be physically diverted from the stream is diametrically opposed to maintaining the natural flow. Water law in the United States has, therefore, developed to the point of discounting instream uses.

New water rights in Nebraska, and in most other Western states, are obtained through appropriation.³⁰ Therefore, the

26. The National Water Commission has made the following recommendation:

Public rights should be secured through State legislation authorizing administrative withdrawal or public reservation of sufficient unappropriated water needed for minimum streamflows in order to maintain scenic values, water quality, fishery resources, and the natural stream environment in those watercourses, or parts thereof, that have primary value for these purposes.

NATIONAL WATER COMMISSION, WATER POLICIES FOR THE FUTURE 279 (1973) (recommendation 7-39).

27. NATIONAL WATER COMMISSION, NEW DIRECTIONS IN U.S. WATER POLICY 63 (1973). See also NATIONAL WATER COMMISSION, *supra* note 26, at 271-79.

28. Trelease, *The Legal Basis for Instream Flows*, in 2 INSTREAM FLOW NEEDS 1 (J. Orsborn & C. Allman eds. 1976). See note 18 *supra*.

29. See generally Davis, *The Right to Use Water in the Eastern States*, in 7 WATERS AND WATER RIGHTS § 611, at 36 (R. Clark ed. 1976).

30. NEB. CONST. art. XV, § 6.

starting point in any legal analysis of the minimum streamflow problem is to begin with the appropriation doctrine and explain why that doctrine has failed to adequately protect instream uses. "The law of appropriation was designed to encourage people to withdraw water from the stream and apply it to beneficial uses to promote economic development."³¹

To constitute a valid appropriation of water, three elements must always exist: (1) An intent to apply it to some existing or contemplated beneficial use; (2) an actual diversion from the natural channel by some mode sufficient for the purpose; and (3) an application of the water within a reasonable time to some beneficial use.³²

In a state, such as Nebraska, which requires a permit to appropriate, the "intent" requirement is of little significance. The "actual diversion" requirement and the "beneficial use" requirement have caused the most difficulty for those advocating minimum streamflows. To establish minimum streamflows under the traditional appropriation doctrine, the instream uses would have to be "beneficial" and the water would have to be "diverted."

1. Beneficial Use

The question to be answered is whether fish and wildlife, recreation, and aesthetics qualify as beneficial uses. "The requirement that a use be beneficial is a prohibition against practices which are excessively wasteful in comparison with competing uses. Instream uses are vulnerable to attack as non-beneficial because a considerable amount of water must be reserved in place and thus is not available for consumptive withdrawals."³³ It is this comparison between competing uses that has caused the courts of many states to determine that instream uses were not beneficial and thus not the proper object of appropriation.³⁴ These courts have traditionally compared

31. R. DEWSNUP, *LEGAL PROTECTION OF INSTREAM WATER VALUES* 10 (Nat'l Water Comm'n 1971).

32. 1 W. HUTCHINS, *WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES* 366 (completed by H. Ellis & J. DeBaal, U.S. Dep't Agric. Misc. Pub. No. 1206 1971) (quoting *Simons v. Inyo Cerro Gordo Mining & Power Co.*, 48 Cal. App. 524, 537, 192 P. 144, 150 (1920)). See F. TRELEASE, *WATER LAW* 36-37 (2d ed. 1974); Clark, *The Colorado Doctrine: Surface-Water Rights by Appropriation Only*, in 5 *WATERS AND WATER RIGHTS* § 409.2, at 107 (R. Clark ed. 1972); Tarlock, *Recent Developments in the Recognition of Instream Uses in Western Water Law*, 1975 *UTAH L. REV.* 871.

33. Tarlock, *supra* note 32, at 883.

34. What is beneficial use, of course, depends upon the facts and circumstances of each case. What may be a reasonable beneficial use, where water is present in excess of all needs, would not be a reasonable beneficial use in an area of great scarcity and great need. What is a beneficial use at one time may, because of changed

competing uses on the basis of economic value. A dollar value can usually be attached to a consumptive use such as irrigation or power generation, but instream uses are not capable of easy valuation. Because of this, instream uses have lost the battle with the more economically favorable consumptive uses. Not uncommon was the holding in the well known case of *Empire Water & Power Co. v. Cascade Town Co.*,³⁵ in which it was stated that a use could "not be unnecessarily or wastefully excessive."³⁶ Some of the early decisions declared such uses as irrigation,³⁷ domestic needs,³⁸ stock watering,³⁹ mining,⁴⁰ and power to be beneficial uses.⁴¹ While some courts continue to limit beneficial uses to such economic purposes,⁴² other courts have determined that fish, wildlife, and recreation constitute beneficial uses for the purpose of appropriation.⁴³ Several of the Western states have enacted statutes that define recreation to be a beneficial use: Alaska,⁴⁴ Arizona,⁴⁵ California,⁴⁶ Colorado,⁴⁷ Kansas,⁴⁸ Montana,⁴⁹ Nevada,⁵⁰ North Dakota,⁵¹ Oregon,⁵² Texas,⁵³ and Washington⁵⁴ all allow appropriation for recreation of

conditions, become a waste of water at a later time.

Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., 3 Cal. 2d 489, 567, 45 P.2d 972, 1007 (1935).

35. 205 F. 123 (8th Cir. 1913).

36. *Id.* at 129.

37. Water-Supply & Storage Co. v. Larimer & Weld Irr. Co., 24 Colo. 322, 51 P. 496 (1897).

38. Silver Peak Mines v. Valcalda, 79 F. 886 (D. Nev. 1897).

39. First State Bank of Alamogordo v. McNew, 33 N.M. 414, 269 P. 56 (1928).

40. Fitzpatrick v. Montgomery, 20 Mont. 181, 50 P. 416 (1897).

41. For a more extensive list of those uses held to be beneficial, see Clark, *supra* note 32, § 408.1, at 66.

42. *Id.* at 66 n.25.

43. Udall v. Federal Power Comm'n, 387 U.S. 428 (1967); Brasher v. Gibson, 2 Ariz. App. 91, 406 P.2d 441 (1965); Faden v. Hubbell, 93 Colo. 358, 28 P.2d 247 (1933); State *ex rel.* State Game Comm'n v. Red River Valley Co., 51 N.M. 207, 182 P.2d 421 (1945).

44. ALASKA CONST. art. VIII, § 13 (fish and wildlife).

45. ARIZ. REV. STAT. § 45-141 (Supp. 1977) (recreation, fish, and wildlife).

46. CAL. WATER CODE § 1243 (West Supp. 1977) (recreation, fish, and wildlife).

47. COLO. REV. STAT. § 37-92-103(4) (1973) (recreation, fish, and wildlife).

48. KAN. STAT. § 82a-707 (1973) (recreation).

49. MONT. REV. CODES ANN. § 89-867(2) (Interim Supp. 1977) (recreation, fish, and wildlife).

50. NEV. REV. STAT. § 533.030 (1973) (recreation).

51. N.D. CENT. CODE § 61-04-06.1 (Supp. 1977) (Recreation, fish, and wildlife).

52. OR. REV. STAT. §§ 536.300(1), 537.170(3) (a), 543.225(3) (1975) (recreation, fish, and wildlife).

53. TEX. WATER CODE ANN. §§ 5.023 to 5.024 (Vernon 1972) (recreation, fish, and wildlife).

54. WASH. REV. CODE ANN. § 90.54.020 (Supp. 1976) (recreation, fish, wildlife, and aesthetics).

some type. In fact, through court decree or statutory enactment "the recognition of recreation and scenic beauty as beneficial uses is now the rule rather than the exception."⁵⁵ But unlike the majority of its neighboring states, Nebraska has yet to define beneficial use to include recreation or fish and wildlife by either legislative action or judicial decree.⁵⁶

Because the traditional doctrine of prior appropriation still requires an actual diversion, the definition of such things as recreation, fish, and wildlife to be beneficial uses does not necessarily mean that instream values can be protected through appropriation. While it might be argued that a legislative declaration that recreation, fish, and wildlife are beneficial uses demonstrates an intent for instream appropriation, it must be remembered that these values can be served by lake and pond impoundments.⁵⁷ For this reason the most important hurdle for those advocating minimum streamflows to overcome is the actual diversion requirement.

2. Actual Diversion

When the appropriation doctrine was formalized, the actual diversion requirement served the purpose of imparting notice to others that a prior appropriation existed. Prior to the permit system an actual diversion was the only effective record that a person had appropriated water.⁵⁸ The cases that allowed stock watering and natural overflow irrigation were notable exceptions to the diversion requirement,⁵⁹ but stock watering was considered to require so little water that it did not impair the operation of the notice system.⁶⁰ With the permit system presently in effect in most states, it is doubtful whether the actual diversion requirement is still appropriate. Nevertheless, many courts continue to require at least some type of diversion to perfect a valid appropriation.⁶¹ The most recent case to do so

55. Casenote, *In-Stream Appropriation for Recreation and Scenic Beauty*, 12 IDAHO L. REV. 263, 270 (1976). The student author points out that only Montana allows appropriation by private parties for recreation or scenic beauty. *Id.*

56. See note 114 and accompanying text *infra*.

57. Lake and pond impoundments typically do require an actual diversion, as do recreational uses such as water skiing.

58. C. MEYERS, A HISTORICAL AND FUNCTIONAL ANALYSIS OF THE APPROPRIATION SYSTEM 7 (Nat'l Water Comm'n 1971).

59. *Steptoe Livestock Co. v. Gulley*, 53 Nev. 163, 295 P. 772 (1931) (stock watering); *In re Silvies River*, 115 Or. 27, 237 P. 322 (1925) (overflow irrigation).

60. C. MEYERS, *supra* note 58, at 7. Instream uses would also seem to require very little water. By their very nature they are nonconsumptive.

61. See *Clough v. Wing*, 2 Ariz. 371, 17 P. 453 (1888); *Sherlock v. Greaves*, 106 Mont. 206, 76 P.2d 87 (1938); *Gates v. Settlers' Milling, Canal & Reservoir*

was *State ex rel. Reynolds v. Miranda*.⁶² In *Miranda* the appropriator claimed he had a valid appropriation through the natural irrigation of grass which was used for grazing and harvesting. The New Mexico Supreme Court held that a "man-made diversion, together with intent to apply water to beneficial use and actual application of the water to beneficial use, is necessary to claim water rights by appropriation in New Mexico for agricultural purposes."⁶³

Colorado case law appears to require only that the water be put to a beneficial purpose; and while beneficial purposes usually require an actual diversion, such diversion is not necessary if the purpose is indeed beneficial.⁶⁴ The Colorado Supreme Court in *Genoa v. Westfall*⁶⁵ held that where a pond was formed by the natural flow of a river, an actual diversion was not required to perfect an appropriation.⁶⁶

While there is authority on both sides, the general weight of that authority is in favor of the actual diversion requirement.⁶⁷ This requirement will continue to defeat appropriations for in-stream uses until the courts and state legislatures realize that the purpose for it no longer exists. If a use is beneficial there appears to be no logical reason to require a diversion. The ultimate utility of water should not be determined by diversion but by what use carries the most benefit.

Co., 19 Okla. 83, 91 P. 856 (1907); *Hutchinson v. Stricklin*, 146 Or. 285, 28 P.2d 225 (1933); *Crawford v. Lehi Irr. Co.*, 10 Utah 2d 165, 350 P.2d 147 (1960); *McPhail v. Forney*, 4 Wyo. 556, 35 P. 773 (1894). *But see* *State Dep't of Parks v. State Dep't of Water Adm'n*, 96 Idaho 440, 530 P.2d 924 (1974). *See generally* 2 C. KINNEY, IRRIGATION AND WATER RIGHTS 1243-44 (2d ed. 1912); 1 W. HUTCHINS, *supra* note 32, at 366; 1 S. WIEL, WATER RIGHTS IN THE WESTERN STATES §§ 364-367, at 390-98 (3d ed. 1911); Clark, *supra* note 32, § 409.2, at 107.

62. 83 N.M. 443, 493 P.2d 409 (1972). *See* Comment, *The Prerequisite of a Man-Made Diversion in the Appropriation of Water Rights*, 13 NAT. RESOURCES J. 170 (1973).

63. 83 N.M. at 445, 493 P.2d at 411.

64. *Larimer County Reservoir Co. v. People ex rel. Luthe*, 8 Colo. 614, 9 P. 794 (1886) (natural depression in streambed may be used as a reservoir without actual diversion); *Thomas v. Guiraud*, 6 Colo. 530 (1883).

65. 141 Colo. 533, 349 P.2d 370 (1960).

66. *Id.* at 546-47, 349 P.2d at 378. The court relied on the Nevada Supreme Court decision in *Steptoe Livestock Co. v. Gulley*, 53 Nev. 163, 295 P. 772 (1931). *Gulley* involved livestock watering, which has long been recognized as an exception to the actual diversion requirement. *See* note 59 and accompanying text *supra*.

67. It appears that most of the cases that do not require an actual diversion either involve a natural impoundment or fit within the stock watering and natural overflow irrigation exceptions.

B. Legislative Alternatives within the Constitutional Framework

Idaho,⁶⁸ Colorado,⁶⁹ and Nebraska,⁷⁰ are the only appropriation states that have the term "divert" written into their constitutions. The basic constitutional provisions of these states provide that "the right to divert the unappropriated waters of any natural stream for beneficial purposes shall never be denied."⁷¹ Both Idaho and Colorado have taken the initial steps to establish minimum streamflows in the face of this constitutional provision and these steps will herein be analyzed. The Nebraska situation will then be compared with the situations in Idaho and Colorado in order to determine what legislative alternatives are open to Nebraska.⁷²

1. *The Idaho Approach*

In 1971 the Idaho Legislature authorized⁷³ the Idaho Department of Parks to appropriate for the people of Idaho the natural spring waters of the Malad Canyon.⁷⁴ With this single enactment the Idaho Legislature declared recreation and scenic beauty to be beneficial uses and authorized a state agency to make a valid appropriation for such use. By implication the legislature declared that an actual physical diversion was not required. This enactment took place in light of the Idaho constitution which

68. IDAHO CONST. art. XV, § 3.

69. COLO. CONST. art. XVI, § 6.

70. NEB. CONST. art. XV, § 6.

71. *Id.* The Constitutions of Idaho and Colorado contain similar language.

72. The legislative alternative is the only one analyzed here because it is obvious that if a state wants to revamp its constitution, any type of framework is possible. For this reason, this article focuses on what Nebraska can do within the constitutional framework.

73. The statute provided:

The state park board . . . is hereby authorized and directed to appropriate in trust for the people of the state of Idaho the unappropriated natural spring flow arising upon the area described as follows. . . .

. . . .

The preservation of water in the area described for its scenic beauty and recreational purposes necessary and desirable for all citizens of the state of Idaho is hereby declared to be a beneficial use of such water.

. . . .

The park board . . . or its successor, shall be deemed to be the holder of such permit, in trust for the people of the state, and the public use of the unappropriated water in the specific area herein described is declared to be of greater priority than any other use except that of domestic consumption.

IDAHO CODE § 67-4307 (1973) [hereinafter referred to as the Malad Canyon Statute].

74. The Malad Canyon is located in Gooding County, Idaho, in the southeastern part of the state.

provides in part: "The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes."⁷⁵ This provision then goes on to list the order of preferences. The order is domestic, which has the highest preference, followed by agriculture and manufacturing, with mining carrying a higher preference than agriculture and manufacturing when carried on in an organized mining district.⁷⁶

As a result of the enactment of the Malad Canyon statute the Idaho Department of Parks filed for a permit with the Idaho Department of Water Administration. Numerous complaints were received and the Department of Water Administration denied the permit because there was to be no actual diversion. This decision was appealed to the district court which found that a physical diversion was not required, and that the permit should be issued. This decision was in turn appealed to the Idaho Supreme Court in *State Department of Parks v. State Department of Water*.⁷⁷ The court was faced with three constitutional issues: (1) can a state agency appropriate water for the benefit of all the people; (2) are scenic beauty and recreation valid beneficial uses; and (3) is an actual diversion required to claim a valid water right?⁷⁸

The argument advanced for denying a state agency the right to appropriate water was that the constitution provided that the "right to divert and appropriate . . . shall never be denied" and the appropriation of water by a state agency was in effect denying the right of private parties to appropriate such water. The court pointed out that the constitution was not limited to private parties, and the state or state agencies had the authority to appropriate water for the public. The court noted that "[w]e deem it common knowledge and it is pointed out in the decision of the Department of Water Administration that in Idaho and throughout the western states, state agencies frequently appropriate water."⁷⁹

75. IDAHO CONST. art. XV, § 3.

76. *Id.*

77. *State Dep't of Parks v. State Dep't of Water Administration*, 96 Idaho 440, 530 P.2d 924 (1974). For a discussion of *Malad Canyon*, see Casenote, *supra* note 55.

78. 96 Idaho at 441-42, 530 P.2d at 925-26.

79. *Id.* There was no authority given for this proposition, but under a "see also" signal the court referred to 1 W. HUTCHINS, *supra* note 32, at 250-51. At this citation Mr. Hutchins discusses California, Montana, North Dakota, Oregon, and Utah. None of these states' constitutions provide that the "right to appropriate shall never be denied."

The next issue raised was whether scenic beauty and recreation were valid beneficial uses. The argument advanced against such uses being beneficial under the constitution was that the list of preferences contained in the constitution was exclusive, that is, only irrigation, domestic uses, power, mining, and manufacturing were beneficial. The court held that the list was not exclusive and that the legislature could define the generic term "beneficial use," concluding that it was for the legislature to determine which uses were beneficial.⁸⁰

The final issue determined by the court was whether an actual physical diversion was required by the wording of the constitution. The court noted that its prior holdings⁸¹ required an actual physical diversion but attributed this requirement to the statutes.⁸² Without actually discussing the wording of the constitution, the court held that the Idaho "Constitution does not require actual physical diversion."⁸³

There were two strong dissenting opinions in *State Department of Parks v. State Department of Water Administration*. In one of these opinions, it was argued that an appropriation by a state agency is just another name for denying the people the right to appropriate, which was forbidden by the Idaho Constitution.⁸⁴ This would appear to be a valid conclusion. Although it is clear from a reading of the constitutional provision that Idaho cannot withdraw water from appropriation, this is effectively what the Idaho Legislature has done. The dissenting

To hold that state agencies could appropriate water, the Idaho Supreme Court had to overrule the case of *Board v. Enking*, 56 Idaho 772, 58 P.2d 779 (1936). In *Enking* the court stated that a state agency could not appropriate water. The court in the *Malad Canyon* decision said that this was dicta on the part of the *Enking* court and that to the extent *Enking* was inconsistent, it was overruled. 96 Idaho at 443, 530 P.2d at 927-28.

80. 96 Idaho at 443-44, 530 P.2d at 927.

81. Glenn Dale Ranches, Inc. v. Shaub, 94 Idaho 585, 494 P.2d 1029 (1972); Hutchinson v. Watson Slough Ditch Co., 16 Idaho 484, 101 P. 1059 (1909); Sand Point Water and Light Co. v. Panhandle Dev. Co., 11 Idaho 405, 83 P. 347 (1905).

82. 97 Idaho at 444, 530 P.2d at 928.

83. *Id.*

84. *Id.* at 453, 530 P.2d at 937 (McFadden, J., dissenting). The dissent quoted with approval the following:

In Idaho the governor is authorized to appropriate the water of certain lakes in trust for the people, and the preservation of the lakes for scenic beauty, health, and recreation purposes is declared to be a beneficial use of the water, although in reality this is not an appropriation, but like the Oregon laws a reservation of the water to prevent its being appropriated for more mundane purposes.

Release, *The Concept of Reasonable Beneficial Use in the Law of Surface Streams*, 12 Wyo. L.J. 1, 12 (1957), quoted in *State Dep't of Parks v. State Dep't of Water Adm'n*, 96 Idaho at 453, 530 P.2d at 937.

opinion agreed with the majority opinion that scenic beauty and recreation are beneficial uses, but qualified this by stating that what is presently a beneficial use may not be one in the future and that a comparison between two conflicting uses must be made:

It is beyond dispute that scenic beauty and recreation are both of vital importance to modern day life in Idaho. . . . [T]he effect of a proposed appropriation upon scenic beauty and recreation can and should be considered in determining whether the use contemplated is "beneficial" within the meaning of the Constitution. . . . In other words, where the benefits of a proposed use are outweighed by the attendant detriment to scenic beauty and recreation, the use is not a "beneficial use," and the application for a permit to appropriate public waters for that use should be denied. As always, the question of beneficial use must be determined on a case by case basis.⁸⁵

The other dissenting opinion argued that an actual physical diversion was required to perfect a valid appropriation and, therefore, scenic beauty and recreation were not the proper objects of an appropriation. The first point raised by this dissenting opinion was that the general appropriation statutes of Idaho required a diversion in order to get a permit and license.⁸⁶ The second point was that the prior holdings of the court had required an actual physical diversion and that those cases rested upon the language of the constitution and not the statutes.⁸⁷

Through the Malad Canyon statute and the Idaho Supreme Court's holding in *State Department of Parks v. State Department of Water Administration*, the state of Idaho has provided for the preservation of instream values. It is interesting to note that the Malad Canyon appropriation was not the only appropriation that was authorized by the Idaho Legislature; several lakes⁸⁸ as well as streams⁸⁹ have been provided for—some by appropriation by the governor and some by the park and recreation board.

85. 96 Idaho at 453-54, 530 P.2d at 937-38 (McFadden, J., dissenting).

86. The majority handled this argument by stating that although the general appropriation statutes do require a diversion, the Malad Canyon statute was more specific and, therefore, should be given preference. For this reason the appropriation of the spring water in the Malad Canyon did not have to comply with the general appropriation laws requiring the location and description of the physical diversion to be included on the application for a permit to appropriate water. *Id.* at 445, 530 P.2d at 929.

87. The majority concluded that the prior cases relied only upon the statutory requirement of a diversion and not the Idaho Constitution. See notes 81-82 and accompanying text *supra*.

88. IDAHO CODE §§ 67-4301 to 4306 (1973).

89. IDAHO CODE §§ 67-4307 to 4311 (Supp. 1977).

2. *The Colorado Approach*

In 1973 the Colorado Legislature enacted into law what has been commonly referred to as a Senate Bill 97.⁹⁰ Senate Bill 97 accomplished three simple goals: (1) it removed the term "diversion" from the statutory definition of appropriation,⁹¹ (2) it substituted the word "use" for "divert" in the statutory definition of priority,⁹² and (3) it defined the appropriation of minimum streamflows as a beneficial use.⁹³ Most importantly, it authorized the acquisition of water rights by a state agency:

Further recognizing the need to correlate the activities of mankind with some reasonable preservation of the natural environment, the Colorado water conservation board is hereby vested with the authority, on behalf of the people of Colorado, to *appropriate* in a manner consistent with sections 5 and 6 of article XVI of the state constitution, or *acquire, such waters of natural streams and lakes as may be required to preserve the natural environment to a reasonable degree.* Prior to the initiation of any such appropriation, the board shall request recommendations from the division of wildlife and the division of parks and outdoor recreation. Nothing in this article shall be construed as authorizing any state agency to acquire water by eminent domain, or to deprive the people of the state of Colorado of the beneficial use of those waters available by law and interstate compact.⁹⁴

The Colorado Attorney General has put this statute to good use. As of March 1978, the Attorney General on behalf of the Colorado Water Conservation Board had made application for appropriations for 419 lakes and 2200 miles of natural stream segments within the state of Colorado.⁹⁵

90. Act Providing for the Appropriation of Water to Protect the Natural Environment, 1973 Colo. Sess. Laws 1521 (codified at COLO. REV. STAT. §§ 37-92-102 to 103 (1973)) [hereinafter cited as Senate Bill 97].

91. "~~'Appropriation' means the diversion of a certain portion of the waters of the state and the application of the same~~ A CERTAIN PORTION OF THE WATERS OF THE STATE to a beneficial use." 1973 Colo. Sess. Laws 1521.

92. "'Priority' means the seniority by date as of which a water right is entitled to ~~divert~~ USE or conditional water right will be entitled to ~~divert~~ USE" *Id.*

93. "Beneficial use" is the use of that amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish without waste the purpose for which the appropriation is lawfully made and, without limiting the generality of the foregoing, includes the impoundment of water for recreational purposes, including fishery or wildlife. *For the benefit and enjoyment of present and future generations, "beneficial use" shall also include the appropriation by the state of Colorado in the manner prescribed by law of such minimum flows between specific points or levels for and on natural streams and lakes as are required to preserve the natural environment to a reasonable degree.*

COLO. REV. STAT. § 37-92-103(4) (1973) (emphasis added).

94. *Id.* § 37-92-102(3) (emphasis added).

95. Telephone interview with David W. Robbins, Dep. Att'y Gen. of Colorado (Mar. 14, 1978). In May 1976, the Attorney General had made application for

There are several cases at the trial level which raise the constitutionality of Senate Bill 97. Although a decision from the Colorado Supreme Court will take some time, the constitutionality of Senate Bill 97 is being presently reviewed by a trial court.⁹⁶ The issues are basically the same as those decided by the Idaho Supreme Court in *State Department of Parks v. State Department of Water Administration*:⁹⁷ (1) whether it is constitutionally permissible for the legislature to authorize the appropriation of water by a state agency; (2) whether the legislature can constitutionally define beneficial use to include minimum streamflows; and (3) whether an actual diversion is constitutionally mandated in order to perfect an appropriation of water. The Colorado Constitution provides that the "water of every natural stream . . . is dedicated to the use of the people of the state, subject to *appropriation* as hereinafter provided."⁹⁸ It also states that the "right to *divert* the unappropriated waters of any natural stream to *beneficial* uses shall never be denied."⁹⁹

As to whether Senate Bill 97 is constitutional in its authorization of appropriation of water by a state agency, it is important to note that it allows the agency to appropriate the water it deems necessary to preserve the natural environment.¹⁰⁰ This is in contrast to the Malad Canyon statute in which the Idaho Legislature made the determination of which water to appropriate.¹⁰¹ It would seem that the Malad Canyon statute is more of a direct denial of the right to appropriate than is Senate Bill 97. In Senate Bill 97 the agency is really acting as a private citizen would, appropriating the water it deems necessary, while the Malad Canyon statute is a legislative determination of which water is no longer subject to appropriation. Another important

or received appropriations for 256 lakes and 87 stream segments. Robbins, *Quantification of Instream Flow Needs by Law in Colorado*, in 2 INSTREAM FLOW NEEDS 184, 200 (J. Orsborn & C. Allman eds. 1976). See note 18 *supra*.

96. Letter from David W. Robbins, Dep. Att'y Gen. of Colo., to Lynn Hendrix (Nov. 17, 1977). The parties to one of the lawsuits have stipulated to the facts necessary to determine the constitutionality of Senate Bill 97. The brief date for the opponents to Senate Bill 97 was Nov. 30, 1977, and the answering brief date for the Colorado Attorney General was December 30, 1977. *Id.*; *In re* Application of Water Rights of the Colorado Water Conservation Bd., W-2720, W-2721 & W-2776 (Water Court for Water Div. No. 5, 1977).

97. 96 Idaho 440, 530 P.2d 924 (1974).

98. COLO. CONST. art XVI, § 5 (emphasis added).

99. *Id.* § 6 (emphasis added).

100. See note 94 and accompanying text *supra*.

101. See note 73 and accompanying text *supra*.

distinction is that the Malad Canyon statute denied all appropriation by private citizens by requiring the agency to appropriate *all* the water of the canyon whereas Senate Bill 97, in effect, only denies appropriation of the minimum levels needed to protect the environment. That water over and above this minimum level is still open to appropriation by private individuals. It would appear that in this regard Senate Bill 97 is less of a denial to appropriate than was the Malad Canyon statute and, therefore, Senate Bill 97 is less suspect than the Malad Canyon statute.¹⁰²

As to whether it is constitutional for the legislature to define "beneficial use" to include minimum streamflows, the Colorado case law appears to be favorable to such a definition. The Colorado Supreme Court has held that the constitution does not define beneficial use and that what is a beneficial use is a question of fact to be determined by the trial court.¹⁰³ The more difficult hurdle for the proponents of Senate Bill 97 is the actual diversion requirement. Although the Colorado Legislature has removed the actual diversion requirement from the statutes,¹⁰⁴ a fairly recent Colorado Supreme Court decision held that a state agency could not appropriate for fish within a stream because there was no actual diversion.¹⁰⁵ It is uncertain whether this case relied upon statutory, common law, or constitutional grounds.¹⁰⁶

A constitutional issue raised by Senate Bill 97 that was not raised by the Malad Canyon statute is whether an agency can

102. Of course there is no requirement that a Colorado court give precedent value to an Idaho decision, but at least there is precedent for such a determination.

103. *Denver v. Sheriff*, 105 Colo. 193, 204, 96 P.2d 836, 842 (1939).

104. See notes 91-92 *supra*.

105. *Colorado River Water Conservation Dist. v. Rocky Mtn. Power Co.*, 158 Colo. 331, 406 P.2d 798 (1965).

106. "There is no support in the law of this state for the proposition that a minimum flow of water may be 'appropriated' in a natural stream for piscatorial purposes without diversion of any portion of the water 'appropriated' from the natural course of the stream." *Id.* at 335, 406 P.2d at 800. Of course if it is determined that diversion is a constitutional requirement of the Colorado Constitution, the legislature could not change this requirement.

For Colorado decisions requiring an actual diversion, see *Denver v. Miller*, 149 Colo. 96, 368 P.2d 982 (1962); *Denver v. Northern Colo. Water Conservancy Dist.*, 130 Colo. 375, 276 P.2d 992 (1954); *Board of County Comm'rs v. Rocky Mtn. Water Co.*, 102 Colo. 351, 79 P.2d 373 (1938). *Contra*, *Genoa v. Westfall*, 141 Colo. 533, 349 P.2d 370 (1960); *Larimer County Reservoir Co. v. People ex rel. Luthé*, 8 Colo. 614, 9 P. 794 (1886); *Thomas v. Guiraud*, 6 Colo. 530 (1883).

acquire water.¹⁰⁷ The word *acquire* implies the normal requirements of appropriation might not have to be met, that is, acquisition doesn't require an actual diversion to a beneficial use. Again, proponents of Senate Bill 97 will have problems. The Colorado Constitution states that all water in the state is subject to appropriation.¹⁰⁸

A non-constitutional question that is raised by Senate Bill 97 is how much water is actually needed to protect the environment. Under Senate Bill 97 only the water needed to preserve the natural environment to a reasonable degree is declared to be beneficial.¹⁰⁹ This means that the Colorado Water Conservation Board must prove what levels of flow are needed. The amount needed to protect fish and wildlife can be shown through the expert testimony of biologists,¹¹⁰ but the amount needed to protect recreation and scenic beauty is not as easily proved. For this reason the Colorado Water Conservation Board has not attempted to appropriate water for these purposes.¹¹¹

Not all legal questions raised by Senate Bill 97 have been discussed in this article.¹¹² Suffice to say that the Colorado Legislature has taken a giant step forward in the protection of minimum streamflows, but several questions, both legal and practical, remain to be answered.

3. Possible Approaches for Nebraska

As stated earlier, Idaho, Colorado, and Nebraska are the only states that have the word "divert" in their constitutional provisions directing that waters are subject to appropriation by the people.¹¹³ Idaho and Colorado have at least taken the initial steps to preserve minimum flows, but the Nebraska Legislature has not acted. In the eighty-fifth legislative session the Nebraska Legislature considered Legislative Bill 149 which defined

107. See note 94 and accompanying text *supra*.

108. See note 98 and accompanying text *supra*.

109. See notes 93-94 and accompanying text *supra*.

110. Robbins, *supra* note 95, at 190-91.

111. *Id.* at 192.

112. For a complete discussion of the anticipated problems that the proponents of Senate Bill 97 will have, see *id.* 184-201.

113. See notes 68-70 and accompanying text *supra*.

In fact, the requirement that appropriation be the means of acquiring water rights is only constitutionally mandated in ten of the Western states. ALASKA CONST. art. 8, § 13; ARIZ. CONST. art. 7, § 1 (by negative implications); CAL. CONST. art. 14, § 3; COLO. CONST. art. 16, § 6; IDAHO CONST. art. 15, § 3; MONT. CONST. art. IX, § 3; NEB. CONST. art. XV, § 6; N.M. CONST. art. XVI, § 2; UTAH CONST. art. XVII, § 1 (by implication); WYO. CONST. art. 8, § 3.

beneficial use to include "recreation, fish and wildlife."¹¹⁴ As a student commentator has pointed out, this bill would not have established minimum streamflows in Nebraska but would have been a step in the right direction.¹¹⁵ While the Nebraska Legislature has up to this point failed to act, it, more than the legislatures of Colorado or Idaho, probably has the constitutional framework which would allow great advances in the preservation of minimum streamflows. The constitution first declares the use of water for domestic uses and irrigation to be a natural want.¹¹⁶ The constitution then provides that "[t]he use of the water of every natural stream within the State of Nebraska is hereby dedicated to the people of the state for beneficial purposes, subject to the provisions of the following section."¹¹⁷ Section six of article fifteen of the constitution then provides:

The right to divert unappropriated waters of every natural stream for beneficial use shall never be denied except when such denial is demanded by the public interest. Priority of appropriation shall give the better right as between those using the water for the same purposes, but when the waters of any natural stream are not sufficient for the use of all those desiring to use the same, those using the water for domestic purposes shall have the preference over those claiming it for any other purpose, and those using the water for agricultural purposes shall have the preference over those using the same for manufacturing purposes. Provided, no inferior right to the use of the waters

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114. As used in chapter 46, article 2, Reissue Revised Statutes of Nebraska, 1943, and amendments thereto, beneficial use shall mean the use of water for domestic, livestock, municipal, irrigation, manufacturing, power, recreation, fish and wildlife, ground water recharge and storage, waste assimilation, navigation, and any other purpose having public value.

L.B. 149, 85th Leg., 1st Sess. (1977).

At present, the Nebraska Supreme Court has articulated only one definition of beneficial use: "While many elements must be considered in determining whether water has been put to beneficial use, one is that it shall not exceed the least amount of water that experience indicates is necessary in the exercise of good husbandry for the production of crops." *Enterprise Irr. Dist. v. Willis*, 135 Neb. 827, 832, 284 N.W. 326, 329 (1939). This definition, of course, goes not to what uses are beneficial but to the amount that is beneficial. Note, *The Impact of Defining "Beneficial Use" Upon Nebraska Water Appropriation Law*, 57 NEB. L. REV. 199, 201 (1978).

It is interesting to note that the declaration of legislative purpose for the Nebraska Environmental Protection Act states that it is the public policy "[t]o conserve the water in this state and to protect and improve the quality of water for human consumption, *wildlife, fish and other aquatic life, industry, recreation and other productive beneficial uses . . .*" NEB. REV. STAT. § 81-1501 (Reissue 1976) (emphasis added). Although this is not an actual "definition," it does demonstrate legislative consideration of the environmental importance of the state's wildlife. It also demonstrates that the legislature acknowledges that fish and wildlife are beneficial.

115. Note, *supra* note 114, at 207-08.

116. NEB. CONST. art. XV, § 4.

117. *Id.* § 5.

of this state shall be acquired by a superior right without just compensation therefore to the inferior user.¹¹⁸

It is readily apparent that this section is similar to the Idaho and Colorado provisions with one major exception. That exception is that the right to divert can be denied when "demanded by the public interest." Not only would the Colorado and Idaho alternatives to the minimum streamflow problem be within the reach of the Nebraska Legislature but this exception appears to allow the actual withdrawal of water from appropriation.

The history behind this exception demonstrates that the framers of the constitutional provision wanted the Nebraska Legislature to decide when a denial to appropriate was in the public interest. In 1895 the twenty-fourth session of the Nebraska Legislature enacted a similar statute which provided: "The right to divert unappropriated waters of every natural stream for beneficial use shall never be denied."¹¹⁹ At the time of the constitutional convention of 1919 and 1920, this provision remained in the statutes.¹²⁰ From this provision came the following proposal to the convention: "The right to divert unappropriated waters of every natural stream for beneficial use shall never be denied to the State, to any county and municipality within the state and to any district formed for that purpose by general law, nor to any other subdivisions of the State."¹²¹ The provision was then amended in committee to read as it presently does.¹²² Statements by the chairman of the committee explain the exception:

That is, if this becomes a part of the Constitution, the Legislature of the State of Nebraska will have no right to pass any law which will deny to any individual, corporation, association or district formed for that purpose, or municipal bodies, the right to appropriate unappropriated waters of the stream except when such denial is demanded by public interests.

118. *Id.* § 6 (emphasis added). The Nebraska Supreme Court has said of this provision that

[a] right of appropriating, under our Constitution, whether for irrigation or for power purposes, is a property right which is entitled to the same protection as any other property right. The right of property therein cannot be violated with impunity any more than that in any other type of property. This is so fundamental that citations of authority are unnecessary.

Loup River Public Power Dist. v. North Loup River Public Power & Irr. Dist., 142 Neb. 141, 152-53, 5 N.W.2d 240, 247-48 (1942).

119. 1895 Neb. Laws ch. 69, § 43, at 260 (codified at NEB. C.S. ch. 93a, art. 2, § 5486 (1897)).

120. NEB. REV. STAT. § 3372 (1913).

121. JOURNAL OF THE NEBRASKA CONSTITUTIONAL CONVENTION 193 (Proceedings of the Neb. Const. Conv'n, 1919-1920, Dec. 16, 1919).

122. *Id.* vol. 2, at 1913 (Mar. 8, 1920).

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 It would not affect vested rights in any manner It simply recognizes, as far as this proposal is concerned, the law as it is in existence now, *modified by this position that the legislature might deny an appropriation of water provided it is for the public interests.*¹²³

The clear import of these statements is that when the Nebraska Legislature determines that it is in the public interest, it may deny further appropriation. Therefore, the Nebraska Legislature probably has the constitutional means to preserve minimum streamflows. This would not have to be accomplished through agency appropriation as was done in Idaho and Colorado, but rather the Nebraska Legislature could accomplish such a goal by denying further appropriations when a stream level would be reduced beyond the level needed to sustain the natural environment.

III. THE ADMINISTRATION OF MINIMUM STREAMFLOW LAWS

After it has been determined that minimum streamflows should be preserved, and that the legal means exist to accomplish this goal, it must then be determined in what manner this goal should be accomplished. In other words, it must be determined what approaches and strategies exist to best effectuate minimum streamflows.¹²⁴ There are basically four such strategies: (1) the appropriation by private individuals, (2) legislative withdrawals, (3) agency withdrawals, and (4) agency appropriations.

Whether minimum flows should be accomplished through appropriation by private individuals is open to debate.¹²⁵ Yet a judicial or statutory decree that instream uses are beneficial and that an actual diversion is not a requirement of appropriation would allow such a result. Fish and wildlife, recreation, and especially aesthetics are public benefits; they should not be allowed to be monopolized by a few to the detriment of the public. To ensure the benefits, both direct and indirect, of

123. *Id.* at 1915-17 (statement of Mr. Beeler, Chairman of the Comm. on Irr., Drainage, Water Power & Nat. Resources) (emphasis added).

The legislative history does not indicate what actually is in the "public interest" or what factors the legislature must consider in making the determination that a denial of appropriation is in the public interest.

124. For a comprehensive list of possible techniques for protecting minimum stream flows, see Dewsnup, *Protecting Instream Flows Under State Laws*, in 1 *INSTREAM FLOW NEEDS* 17 (J. Orsborn & C. Allman eds. 1976). See note 18 *supra*.

125. *Id.* at 43-44.

minimum streamflows, instream uses should be protected by public rather than private rights.¹²⁶ It is the natural environment that is being protected by minimum streamflows and it is the public to whom this benefit runs. There are times when private rights should advisably be created, such as the appropriation of a waterfall for a resort,¹²⁷ but here again the public is the ultimate beneficiary. At present, only Washington has allowed an appropriation for instream uses by a private citizen.¹²⁸

The next possible approach to protecting minimum flows is by legislative withdrawal from appropriation. This is clearly a constitutional means of protecting instream uses in Nebraska.¹²⁹ Most of the existing data on streams are inconclusive. It is usually difficult to determine how much water from a stream has been appropriated and how much water is left in the stream. The withdrawal of a stream from appropriation would allow the protection of minimum flows without the specific data required to make an appropriation of the remaining water.¹³⁰ Oregon is one state in which the legislature has withdrawn certain waters from appropriation.¹³¹ But there are serious drawbacks to legislative withdrawal. First, the legislature does not have the expertise needed to determine what waters should or should not be withdrawn from appropriation. Second, the legislature is a political body influenced by its constituency. In time of shortage, when minimum flows are needed the most, legislators will likely bow to wishes of the irrigators who most likely make up a majority of their constituency. Finally, when it is determined

126. Tarlock, *supra* note 32, at 875.

127. Such was the case in *Empire Water & Power Co. v. Cascade Town Co.*, 205 F. 123 (8th Cir. 1913).

128. A biologist in Washington applied for a permit to appropriate water for the purpose of propagating fish. Although he was originally denied the permit because no actual diversion was to be used, he later obtained the permit to appropriate the water. Although this appears to be an appropriation by a private individual, the Pollution Control Hearing Board of Washington, in granting the permit, stated: "Nor do we regard this application as in any sense the establishment of minimum flow by private action." F. TRELEASE, *supra* note 32, at 37-38 (quoting 5 ROCKY MTN. MINERAL L. NEWSLETTER No. 8 (1972) (Water Law Issue), which quotes *In re Bevan v. Dep't of Ecology*, PCHB No. 48).

The author of Casenote, *supra* note 55, states that Montana allows appropriation by private individuals. *Id.* at 269-70. This no longer appears to be the case. In 1977 Montana enacted a new water code which provides that "[a]ppropriate' means to divert, impound, or withdraw (including by stock for stock water) a quantity of water or, in the case of a *public agency*, to reserve water in accordance with 89-890." MONT. REV. CODES ANN. § 89-867 (Cum. Supp. 1977) (emphasis added).

129. See § II-B-3 of text *supra*.

130. Dewsnap, *supra* note 124, at 31-32.

131. OR. REV. STAT §§ 538.110 to .300 (1975).

that a minimum flow level is needed in a stream, the time it would take to get a bill enacted to establish such minimum level would be unduly prohibitive.

The third possible approach to establishing minimum flow is to allow a state agency to withdraw water from appropriation.¹³² In Nebraska it is questionable whether such a system is constitutionally permissible. The Nebraska Constitution allows withdrawal only in the public interest.¹³³ Therefore, the question is whether the Legislature can delegate its authority to an agency to determine when a withdrawal is in the public interest or whether this determination is the sole function of the legislature. This problem could be minimized by having the legislature set up guidelines and policies outlining when the agency is to withdraw the streams from further appropriation. This is the type of system set up in Washington where the Department of Water Resources is authorized to reserve quantities of water for fish and wildlife and recreation upon the recommendation of wildlife agencies.¹³⁴ In Mississippi,¹³⁵ the Board of Water Commissioners is directed to reserve from appropriation the average minimum flow.¹³⁶ The average minimum flow is defined to be the "average of the minimum daily flow occurring during each of the five lowest years in the period of the preceding twenty consecutive years."¹³⁷ The main problem with agency withdrawal is that the agency that withdraws the water is usually the same agency that adjudicates water rights, thus creating a conflict of interest. Agency withdrawal has proved to be a valuable method for protecting minimum flows, but it does not offer the flexibility available through agency appropriation.

The fourth, and last, alternative is agency appropriation.¹³⁸ This is what Colorado¹³⁹ has done with Senate Bill 97, and to a lesser extent what Idaho¹⁴⁰ has done with the enactment of the Malad Canyon statute. In many respects this method is far superior to the other methods. Here again, one must question

132. Dewsnup, *supra* note 124, at 29-30.

133. See note 118 and accompanying text *supra*.

134. WASH. REV. CODE ANN. § 90.22.010 (Supp. 1976). See also Dewsnup, *supra* note 124, at 29-30.

135. Mississippi is one of the few Eastern states that uses the doctrine of appropriation.

136. MISS. CODE ANN. § 51-3-7(3) (1973).

137. *Id.* § 51-3-3(3)(i).

138. See Dewsnup, *supra* note 124, at 30-31.

139. See § II-B-2 of text *supra*.

140. See § II-B-1 of text *supra*.

the constitutionality of such a method.¹⁴¹ If such a system were adopted it would allow an independent state agency, such as the Game and Parks Commission, to determine what minimum flows are needed to preserve the natural environment. Such a determination would not have to rely on policies explicitly dictated by the legislature. Whereas agency withdrawal would most likely be the responsibility of the State Department of Water Resources, agency appropriation could be accomplished through the Game and Parks Commission or some other independent agency. This would allow the agency responsible for the appropriation to act as an advocate for the natural environment. This type of agency would also be more apt to have the expertise necessary to evaluate the minimum flow requirements and the needs of the environment.

It could be argued that legislative withdrawal, agency withdrawal, and agency appropriation are just different titles for the same method. However, whether the natural environment is protected to an adequate degree could depend on who is protecting it and how it is being protected. Therefore, probably the most important consideration when enacting minimum streamflow laws is how such laws should be administered and who should administer them.

IV. CONCLUSION

The past few years have demonstrated that water, like any other natural resource, is exhaustible. It is evident from the dewatering of Nebraska streams that the water laws of Nebraska have not kept up with the needs of the environment. The increased use of irrigation in the state has caused several streams to become seasonally dry, and eventually will cause others to do so if adequate laws are not enacted to prevent it. Because the dewatering of streams is caused by a combination of surface water withdrawals and groundwater mining, minimum streamflows can only be accomplished through a comprehensive water plan—a water plan in which groundwater¹⁴² as well as surface water withdrawals are limited to levels sufficient to protect the natural environment and one that re-

141. Of course there is authority that such an appropriation is constitutional. *See State Dep't of Parks v. State Dep't of Water Adm'n*, 96 Idaho 440, 530 P.2d 924 (1974).

142. Two states presently provide that the quantity of water withdrawn from a groundwater source cannot exceed the natural recharge. *See IDAHO CODE* § 42-237a(g) (1977); *S.D. COMPILED LAWS ANN.* § 46-1-2 (Supp. 1977). *See also Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 513 P.2d 627 (1973).

cognizes the connection between groundwater and surface water.

When enacting such a water plan, the legislature should first look at what is being protected by minimum streamflow laws. A plan should take into account the fact that irrigation and the environment must exist in harmony and, therefore, water laws must strike a balance between these two concerns. No person would question the benefits that irrigation has brought to the Nebraska economy, but irrigation cannot proceed unrestrained as it has in the past few years. If the use of irrigation continues to grow at the present rate it will not only cause streams to become dry but eventually aquifers as well. Thus minimum flow laws would not only protect the environment but existing water rights as well.

The means exist for establishing minimum streamflow laws, but the legislature must act quickly. Although much has been lost, much remains, and there is still time to protect what does remain. Water has been termed our most valuable resource. The law must now recognize that this valuable resource is limited. Dean Trelease has summed up the problem:

The law will protect and foster the greatest values of water. I have been called that rare bird, a legal optimist, for taking the position that the law is what people make it, that if the law doesn't suit you, you may change it. But I have grown tired of hearing that the law is a barrier to wise and good water use, as if the law were some malevolent creature with a life of its own, or as if it were the creation of lawyers whose aim was to complicate transactions and cause trouble between people in order to raise the demand for legal services. Laws are made by people: people with conflicting interests ask the judge to decide which person's interest is to be preferred, people with interests to foster elect legislators who will protect and further those interests. A person who grouses that the law is wrong is either wrong himself or in the minority; if he is right and in the minority he should persuade enough others of his rightness to procure a change.¹⁴³

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143. Trelease, *supra* note 28, at 2.