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RIGHTS TO NEBRASKA STREAMFLOWS: AN HISTORICAL OVERVIEW WITH RECOMMENDATIONS

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ARTICLE OUTLINE

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I. PREFACE

The Nebraska Legislature in 1963 directed the Nebraska Soil and Water Conservation Commission, now the Nebraska Natural Resources Commission, to "plan, develop, and encourage the implementing of a comprehensive program of resource development, conservation, and utilization for the soil and water resources of this state. . . ."[1] The 1967 legislature unanimously endorsed Legislative Resolution No. 5 requiring development of a State Water Plan by the Natural Resources Commission.[2] The resolution states: "That this State Water Plan, [in] addition to an evaluation of the land and water resources, will also include an examination of legal, social and economic factors which are associated with resource development."[3]

The Commission encouraged the authors to complete an independent study, but this article is not the official view of the Com-

1. Neb. Laws c. 8, § 3 (1963), now NEB. REV. STAT. § 2-1507(7) (Reissue 1970).
2. 1967 NEB. LEG. J. 122-23, 163 (adopted 77th Leg. Sess., Jan. 18, 1967). The resolution authorized the Nebraska Soil and Water Conservation Comm'n to develop the water plan, but the commission's name was changed to the Nebraska Natural Resources Comm'n in 1972.
3. *Id.* at 122.

mission and may even contradict its future decisions. The article is the third of three analyzing legal aspects of water resource planning in Nebraska. The first, entitled *Interbasin Transfers: Nebraska Law and Legend,*[4] was published in the *Nebraska Law Review* last year. The second, entitled *Groundwater: From Windmills to Comprehensive Public Management,*[5] appeared in the last edition of the *Nebraska Law Review.*

The chief purposes of this article are to: (1) describe the present system of riparianism in Nebraska and show how it creates uncertainty and confusion; (2) recount the philosophy of the early settlers leading to passage of the Irrigation and Appropriation Act of 1895, which remains the basic law governing water rights in natural watercourses; (3) depict the 1895 Act; and (4) propose several major modifications.

II. INTRODUCTION

Nebraska's development of a system to regulate streams and lakes is in many respects similar to that of neighboring states, but numerous aspects are unique to Nebraska history. Even though the main objectives of this paper are to explain the existing legal framework and proposed changes for the future, we have included many social, economic, geographical and historical considerations in order to gain a better perspective of Nebraska water law. The article will focus on the problems related to irrigation, since this constitutes the predominant consumptive use of watercourses in Nebraska.

The history of Nebraska's laws governing use of stream water centers on two completely different sets of legal principles—the riparian system, inherited as part of the common law, and the doctrine of prior appropriation, as developed in arid California. Both of these govern water rights in Nebraska today. The following chart concisely compares and contrasts the customary operative features of the two systems in order to familiarize the reader with the nature of riparianism vis-à-vis appropriation. Neither system exists in pristine form in any jurisdiction so no attempt is made here to present the particularized rules as they developed in Nebraska.

4. Oeltjen, Harnsberger & Fischer, *Interbasin Transfers: Nebraska Law and Legend,* 51 NEB. L. REV. 87 (1971).
5. Harnsberger, Oeltjen & Fischer, *Groundwater: From Windmills To Comprehensive Public Management,* 52 NEB. L. REV. 179 (1973).

COMPARISON CHART[1]

	Riparian System	Appropriation Doctrine
How Are Rights Acquired?	Riparian rights are acquired by acquiring riparian land which is defined as property touching the water of a lake or stream. Riparians have only a right to use an indefinite quantity of water as distinguished from ownership of water as such.	The appropriator's right is also a right to use water as distinguished from ownership of water as such. The right may be acquired in a certain quantity of water by the act of appropriating and applying it to a beneficial use. Each appropriator receives a certificate of appropriation, or license. The basic principle is that when the supply is insufficient to fulfill the needs of all appropriators, the last perfected appropriations are in inverse order the first to be shut off. First in time is first in right. An appropriation right is independent of land ownership.
What Uses May Be Made?	Water may be used for any reasonable purpose.	Water may be used for any beneficial purpose. These are usually listed by the state legislature, and have been said to include irrigation, mining, manufacturing, hydroelectric power, propagation of fish, stock watering, municipal uses, domestic uses and recreational uses, particularly of a nonconsumptive character and when sponsored by a state municipality or some quasi-public entity.
May Water Be Impounded?	Some states permit storage of water for mill or hydroelectric operations, but generally it is unclear whether a right exists in other riparians to impound water at high flow for later use or release.	Impoundment for later use is common.
Where May Water Be Used?	Use is often limited to riparian lands, but most states permit use on nonriparian lands if others are not harmed. The definition of riparian land varies from one jurisdiction	Water may be used anywhere and as a general rule appropriations may be made for diversions outside the watershed if no injury results to vested rights.

1. This chart is substantially based on FINAL REPORT: STUDY OF LEGAL AND ECONOMIC ASPECTS OF WATER RIGHTS IN MINNESOTA, WISCONSIN, INDIANA AND OHIO 8-10 (Review Draft, Phase Rep. No. 23, Contract No. 12-14-100-1010(43) between the U. of Wis. and the U.S. Dep't of Agriculture, Beuscher & Ellis eds., 1961).

	to another and restrictive interpretations sometime limit the riparian right severely. A further common restriction limits use to the watershed.	
When May Water Be Used?	A riparian may use the water whenever it is available.	A right of appropriation is frequently restricted to a particular time, *e.g.*, day or night, summer or fall, etc.
What Is The Nature Of The Right?	Except for domestic uses, riparians on a watercourse are cosharers and have an equal right to make a reasonable use of the water. No riparian is ever assured of a definite quantity unless he secures a prescriptive right by making a use which is adverse to the other riparians for a specified number of years.	Appropriation rights are never equal because first appropriators are guaranteed an ascertainable amount of water. If an appropriator's needs can be met by use of less water, he is entitled only to the lesser quantity.
What Happens If The Water Right Is Not Used?	The right does not depend on use and therefore is not lost by nonuse, no matter for how long a time, and it is not subject to abandonment. The right, unless lost by prescription, is to have the water flow by the land undiminished in quantity and quality except for reasonable uses by other riparians. Nonusing riparians can begin use at any time even though others on the stream have to reduce their diversions. Thus those who invest large amounts in reliance on continued nonuse by others take a substantial risk. On the other hand, nonusing riparians may be denied judicial relief as against coriparians, at least until a use, and an interference with it are established.	The right is held only so long as proper beneficial use is continued and may be lost by nonuse or abandonment.
Is There A Right To Maintain Stream Flow Or Lake Levels?	Earlier case law emphasized more than current cases the natural flow requirement of a waterwheel economy, namely that after using water the riparian was to return it to the watercourse so the water would flow as it was 'wont' to flow. Today concepts of public rights or public trust (in navigable or public waters) are more effective in preserving minimum flows in streams or levels in lakes.	There is no natural flow notion. The appropriators can take as much water as they are entitled to take even though it exhausts the watercourse. Some western states, however, permit the states to file for and ultimately acquire a right to the unappropriated flow and thus preserve such flow, if desired.

III. RIPARIAN RIGHTS IN NEBRASKA

A. Requirement of Riparian Land

Persons who are legally entitled to possession or use of riparian land have, without further requirements, a riparian right to use water. Thus, in order to understand riparianism in Nebraska, it is necessary to know what constitutes "riparian land." The requisites, which are discussed more thoroughly below, may be summarized under Nebraska law as: (1) the land must border a natural watercourse or lake and carry with it rights in the bank and, possibly, the bed; (2) the land must have been severed from the public domain by patent from the United States Government to private ownership before April 4, 1895; (3) the land must have been held in a unitary possession (common ownership of contiguous land) on April 3, 1895, and it must not have subsequently lost its status by severence (conveyance of a portion away from the chain of title); and (4) the land must not have lost its riparian nature through any gradual change in the stream course.

1. Natural Watercourse or Lake

Riparian rights apply only to the use of water from a natural watercourse or lake. The size of the watercourse or lake is immaterial, but there must be a reasonably definite channel. The Nebraska Legislature has defined a "watercourse" as "any depression or draw two feet below the surrounding lands and having a continuous outlet to a stream of water, or river or brook. . . ."[2] Although this definition is contained in drainage laws which are separate and distinct from laws governing withdrawal and use, it may be determinative when there is doubt about whether there is a "reasonably definite channel." A watercourse includes the source of the water, such as springs, lakes and marshes, as well as the channel. A variety of factual situations has resulted in this statutory definition of watercourse being extrapolated by the Nebraska Supreme Court. These refinements have been collected and stated as follows:[3] "[A] watercourse must be a stream in fact, as distinguished from mere surface drainage;[4] . . . it must have banks and sides;[5] and . . . there must be a definite channel flowing in a par-

2. Neb. Rev. Stat. § 31-202 (Reissue 1968).
3. Yeutter, *A Legal-Economic Critique of Nebraska Watercourse Law*, 44 Neb. L. Rev. 11, 12 (1965) [hereinafter cited as Yeutter].
4. Pyle v. Richards, 17 Neb. 180, 182, 22 N.W. 370, 371 (1885).
5. Jack v. Teegarden, 151 Neb. 309, 315, 37 N.W.2d 387, 392 (1949), citing Morrison v. Bucksport & Bangor R.R., 67 Me. 353 (1877).

ticular direction,[6] although flow need not be constant."[7]

Overflow waters in the natural flood channel of a running stream are considered part of the watercourse and therefore are governed by the rules which apply to streams.[8] For example, proprietors of land bordering upon either the normal or the flood channel can acquire appropriative or riparian rights. If waters, after overflowing unto the flood plane in times of high flow, again return to the channel at lower points, they belong to the stream.[9] But once they become permanently separated they are classified as diffused surface waters.[10] Generally flood waters are not useful. Thus, the disputes typically arise from efforts to repel or otherwise protect against them rather than from a desire to claim use rights.

2. *Ownership of the Bank and Access to the Stream*

To be riparian, land must include a part of the stream bank[11] because only land abutting a watercourse is riparian land. In *Crawford County v. Hathaway*,[12] the Nebraska Supreme Court stated that "land, to be riparian must have the stream flowing over or along its borders,"[13] and Mr. Kinney in his treatise wrote:

> It must be remembered that riparian rights in no way depend upon the ownership of the soil over which the water flows, but upon the bank or banks down to the very edge of the water itself . . . . [T]he altitude of the land above the water, which makes it impossible to use the water thereon, except by means of pumps, does not make land nonriparian.[14]

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6. *Id.*
7. *Id. See also* Mader v. Mettenbrink, 159 Neb. 118, 125, 65 N.W.2d 334, 341 (1954); Cooper v. Sanitary Dist. No. 1, 146 Neb. 412, 19 N.W.2d 619 (1945).
8. Cooper v. Sanitary Dist. No. 1, 146 Neb. 412, 19 N.W.2d 619 (1945).
9. Frese v. Michalec, 148 Neb. 567, 573, 28 N.W.2d 197, 199 (1947).
10. W. HUTCHINS, SELECTED PROBLEMS IN THE LAW OF WATER RIGHTS IN THE WEST 3 (U.S. Dep't of Agriculture Misc. Pub. 418, 1942). *See* Cooper v. Sanitary Dist. No. 1, 146 Neb. 412, 419, 19 N.W.2d 619, 624 (1945).
11. It makes no difference how much of the land is in contact with the watercourse or lake. Joerger v. Mt. Shasta Power Corp., 214 Cal. 630, 7 P.2d 706 (1932) (40 acre tract with 250 foot contact with watercourse held riparian); Omnes v. Crawford, 202 Cal. 766, 262 P. 722 (1927). Professor Sato states:

    > Clearly under these cases . . . it is access to the stream, and not whether all surface drainage from the area in question drains directly into the stream at the point of access, that determines the riparian status of the land. These cases clearly refute the so-called "surface drainage theory."

    1 S. SATO, WATER RESOURCE ALLOCATION II-13 (1962).
12. 67 Neb. 325, 93 N.W. 781 (1903).
13. *Id.* at 354, 93 N.W. at 790.
14. 1 C. KINNEY, IRRIGATION AND WATER RIGHTS 775-76 (2d ed. 1912) [hereinafter cited as KINNEY].

Ownership of the bed was not considered a prerequisite to the attachment of riparian rights in Nebraska until 1966 when the supreme court said in dictum in *Wasserburger v. Coffee*[15] that a characteristic of riparian land is that it "must include a part of the bed of a watercourse or lake."[16] In support of this statement the court cited the *Restatement of Torts*.[17] Since, however, the rule of riparian ownership usually excludes any necessity of bed ownership[18] the dictum in *Wasserburger* should not be established as precedent.

In most land transactions, the bed is conveyed to the thread of the stream[19] and therefore the bed-bank distinction will rarely be a problem. However, experienced title examiners know that the uncommon does appear in abstracts. Thus, a conveyance of only the bed may result in not passing riparian rights to the grantee because there is no land to benefit from the rights.[20] As a corollary,

15. 180 Neb. 149, 141 N.W.2d 738, *modified*, 180 Neb. 569, 144 N.W.2d 209 (1966).
16. *Id.* at 156, 141 N.W.2d at 744.
17. RESTATEMENT OF TORTS § 843 (1939). The Restatement
> defines riparian land as a parcel of land which includes a part of the bed of the water course or which borders upon a public water course or lake, the bed of which is in public ownership. This position is explained as based on the necessity of lawful access to the water, and it is stated that when the water itself is on another's land, there is no access to it, for private use at least, without intruding on the land in which the water lies.

F. TRELEASE, CASES AND MATERIALS ON WATER LAW 13-14 (1967).
18. *See* Yearsley v. Gipple, 104 Neb. 88, 175 N.W. 641 (1919); Johnson & Austin, *Recreational Rights and Titles to Beds on Western Lakes and Streams*, 7 NAT'L RES. J. 1, 6 (1967). For a discussion of the problem, see Comment, *The Dual-System of Water Rights in Nebraska*, 48 NEB. L. REV. 488 (1968).
> " 'Riparian' is from the Latin word 'riparius,' of or belonging to the bank of a river, in turn derived from 'ripa,' a bank, and is defined as 'pertaining to or situated on the bank of a river;' the word has reference to the bank, and not to the bed of the stream." 56 AM. JUR. *Waters* § 273 (1947).

19. Grants of land on non-navigable streams include an exclusive right and title to the bed of that stream to the center line, unless the terms of the grant specify otherwise. McBride v. Whitaker, 65 Neb. 137, 90 N.W. 966 (1902), *aff'd*, 197 U.S. 510 (1904). Even if the federal government platted land by meander line on the bank of the stream, ownership extends to the thread. Higgins v. Adelson, 131 Neb. 820, 270 N.W. 502 (1936); Osterman v. Central Neb. Pub. Power & Irrigation Dist., 131 Neb. 356, 268 N.W. 334 (1936). The Nebraska statutes provide that beds of meandered lakes are owned by the state. NEB. REV. STAT. § 37-411 (Reissue 1968).
20. 1 S. WIEL, WATER RIGHTS IN THE WESTERN STATES 836 (3d ed. 1911) [hereinafter cited as WIEL].

the riparian owner who conveys the bed may jeopardize his riparian rights on the severed land[21] because of the language in *Wasserburger* and also because lawful access to the water has been lost.

3. *Statutory Abrogation of Riparian Rights*

In addition to requirements of physical location, the land must have been in private ownership before the Nebraska Legislature abrogated the common-law doctrine of riparian rights. For years experts had argued whether this happened in 1889 or 1895. In *Crawford County v. Hathaway*,[22] the Nebraska Supreme Court held the abrogation took place when the Rayner Irrigation Law was passed in 1889.[23] The opinion states:

> The irrigation act of 1889 abrogated in this state the common-law rule of riparian ownership in water, and substituted in lieu thereof the doctrine of prior appropriation. This legislation could not and did not have the effect of abolishing riparian rights which had already accrued, but only of preventing the acquisition of such rights in the future. The law of 1895 but continued in force the act of 1889 in so far as that act abrogated the common-law rule as to the rights of riparian proprietors, and since the taking effect of the act of 1889 those acquired rights to the waters flowing in the natural channels of the state are to be tested and determined by the doctrine of prior appropriation. . . . The substitution of the law of prior appropriation, instead of the common-law rule of riparian ownership, is applicable only to those waters in the state which are unappropriated, or, in other words, which have not become the property of riparian proprietors.[24]

In 1966, this holding was overruled in *Wasserburger v. Coffee*.[25] In *Wasserburger* several tracts owned by plaintiff riparians had been patented from the United States between 1890 and March 27, 1895, and thus could not be riparian unless the cutoff date were advanced from 1889 to April 4, 1895, the date when the irrigation laws of 1895 were enacted. The district court selected the 1889 cutoff. On appeal, the supreme court expressly overruled *Crawford County v. Hathaway* and stated: "In respect to parcels which were severed from the public domain prior to April 4, 1895, plaintiffs [riparians] may possess a superior right."[26]

21. If a riparian proprietor lost the right to natural subirrigation or natural overflow for irrigation, he might lose his right to challenge upstream activities detrimental to him. See Osterman v. Central Neb. Pub. Power & Irrigation Dist., 131 Neb. 356, 268 N.W. 334 (1936).
22. 67 Neb. 325, 93 N.W. 781 (1903).
23. Neb. Laws c. 68, p. 503 (1889).
24. 67 Neb. at 357-58, 93 N.W. at 792.
25. 180 Neb. 149, 141 N.W.2d 738, *modified*, 180 Neb. 569, 144 N.W.2d 209 (1966).
26. *Id.* at 155, 141 N.W.2d at 743.

This conclusion appears accurate because until passage of the comprehensive water code in 1895 there were no administrative procedures available to acquire and regulate appropriative rights. Further, the 1889 act specifically stated that it did not affect riparian rights in "streams not more than fifty feet in width."[27] Thus it was not until the 1895 code that Nebraska had a law clearly inconsistent with riparian doctrine. The court in *Wasserburger* therefore was correct when it determined that the legislative intent was only to chip away at riparian rights, not cut them off, before April 4, 1895.

4. *Restrictions on the Quantity of Riparian Land*

Court decisions in Nebraska have limited the amount of land which could be riparian at the time of the patent, and have subsequently imposed rules which reduced the size of many original riparian tracts. A Nebraska commentator writing in 1941 stated: "What limitation, if any, is imposed with respect to the area or size of the tract of land which may be called riparian? This question is a highly contentious one."[28] The situation is no more certain today because the Nebraska cases have been discordant regarding the quantity of land included in any given patent which will be considered riparian.

Between the years 1903 and 1966, it was assumed that the amount of land which could be riparian was limited to the area acquired by a single entry or purchase from the federal government, not to exceed forty acres, or in case of irregular tracts, a numbered lot designed in the government survey. This assumption came from analysis of *Crawford County v. Hathaway*[29] in which the supreme court concluded in dicta that since it had been the policy of the Government to dispose of the public domain in tracts as small as forty acres, or numbered lots in the case of the irregular tracts, the land which could be considered riparian should also be so limited. This limitation, known as the "source of title test," was again discussed and approved in *McCook Irrigation and Water Power Co. v. Crews.*[30]

Obviously, the source of title test results in sharply limiting riparian land. Under this test, if a parcel of riparian land is cut off by conveyance from access to a watercourse, the conveyed parcel

27. Neb. Laws c. 68, § 1, p. 504 (1889).
28. Doyle, *Water Rights in Nebraska*, 20 NEB. L. REV. 1, 10 (1941) [hereinafter cited as Doyle].
29. 67 Neb. 325, 93 N.W. 781 (1903).
30. 70 Neb. 109, 96 N.W. 996 (1903).

is declared to be non-riparian[31] unless the conveyance specifically provides otherwise.[32] Similarly, conveying a tract which intervenes between land contiguous to the watercourse and other tracts, makes both the tract transferred and the back tracts non-riparian.[33] The parcels cut off from the riparian holding are called "severed" lands. Land once made non-riparian by severence can never again regain riparian status even if the severed land is later united in single ownership with land abutting the watercourse. The philosophy behind this test is hostile to the riparian doctrine because the amount of riparian land in a jurisdiction can never increase; it can only decrease as land is severed.

In several jurisdictions the extent of riparian land is governed by the "unity of title test." Under this test riparian rights extend to the entire tract held in common ownership at the time of the claim, no matter how acquired; riparians can extend their water rights by purchase of property contiguous to parcels of riparian land owned by them.[34]

In 1966, in *Wasserburger*, the Nebraska Supreme Court specifically disapproved the source of title test and the arbitrary limitation to forty acres or, in the case of irregular tracts, a numbered lot designated in the government survey. In its place the court propounded the following rule:

> In such cases as a contest between an appropriator and a riparian, land has a riparian status only if two requirements are met. First, by common law standards the land was riparian immediately prior to the effective date of the Irrigation Act of 1895. Second, the land subsequently has not lost its riparian status by severence; consequently it ordinarily is a part of the smallest tract held in one chain of title leading from the owner of April 4, 1895 to the present owner.[35]

What does the court mean when it specifies that the land must be riparian immediately prior to April 4, 1895, and requires that "common law standards" be used? Although the question seemingly was left open, one may conclude the test is now that riparian rights will extend to an entire contiguous tract held in common

31. Anaheim Union Water Co. v. Fuller, 150 Cal. 327, 88 P. 978 (1907); Yearsley v. Cater, 149 Wash. 285, 270 P. 804 (1928), noted in 27 MICH. L. REV. 479 (1929); 2 H. FARNHAM, WATER AND WATER RIGHTS § 463a (1904).
32. Holmes v. Nay, 186 Cal. 231, 199 P. 325 (1921); St. Anthony Falls Water-Power Co. v. Minneapolis, 41 Minn. 270 (1889); Mallory v. Dillon, 18 Ohio L. Abs. 239 (Cir. Ct. 1934). *See* Rancho Santa Margarita v. Vail, 11 Cal. 2d 501, 81 P.2d 533 (1938); W. HUTCHINS, THE CALIFORNIA LAW OF WATER RIGHTS 192 (1956); Annot., 14 A.L.R. 330 (1921).
33. *See* 1 WIEL, *supra* note 20, at 842.
34. *Id.* at 841; KINNEY, *supra* note 14, § 465.
35. 180 Neb. at 158, 141 N.W.2d at 745 (1966).

ownership, no matter how acquired, as of April 3, 1895, subject to losses by severence.[36] In reality, this is the unity of title test, discussed above, with the inquiry into the riparian status of the land "frozen" as of April 4, 1895, rather than at the time of the claim. Under this test, a person researching a claim to a riparian right must stand in the shoes of the owner on April 4, 1895; and if there is a single ownership of a tract of land which has frontage someplace on the watercourse, that entire tract will be riparian. With this established, the claimant must then trace his chain of title down to the present to determine whether any of the land has subsequently lost its riparian status by severence.

5. *Accretion and Reliction*

Riparian lands may be increased or decreased by the natural process of accretion and reliction. Accretion is due to alluvial formation caused by the siltation or gradual and imperceptable change in the channel of the stream.[37] Reliction is the uncovering of land by a gradual lowering of a stream.[38] On the other hand, riparian land is not considered alterable by avulsion, which is the sudden and rapid change in a channel.[39]

B. GENERAL NATURE OF THE RIGHT

It is clear that the systems of riparian and appropriation rights coexisting in Nebraska have caused confusion in administrative and judicial attempts to reconcile these fundamentally opposed doctrines. The precise factual situations facing decision makers are infinitely varied, but all should fall into the following basic categories: appropriator v. appropriator; appropriator v. riparian; and riparian v. riparian. In many court actions involving rights to use stream water, at least one party is an irrigation district or public power and irrigation district which holds appropriations for the benefit of land severed.

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36. [A] tract of riparian land may be augmented by the purchase of contiguous tracts which have by themselves no actual contact with the stream, but which become riparian upon being added to the tract which actually touches upon the stream. This is the true rule of the common law.
KINNEY, *supra* note 14, § 465, at 792.

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

38. Krimlofski v. Matters, 174 Neb. 774, 119 N.W.2d 501 (1963).

39. Frank v. Smith, 138 Neb. 382, 293 N.W. 329 (1940).

It is also clear that 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. The comparatively sophisticated administrative mechanism attending appropriation rights is in sharp contrast to the allusive riparian rights, which can befuddle the most diligent attempts to adjudicate conflicting claims.

Discussion of rules applicable in the litigation classifications listed above are at part IV, D, *infra*. It is believed that the reader will be better served if fuller explanation of the appropriation system precedes analysis of the rights interacting.

A riparian proprietor does not own water, but merely has a right to use, in a reasonable manner the water of a stream as it flows past his land. The right to reasonable use is further subject to the same right of other riparians. Ownership of the water actually remains with the state;[40] however, it has been recognized that valid riparian rights are constitutionally protected,[41] and riparians may not be deprived of their rights without payment of "just compensation."[42]

A riparian may not take all of the water in the watercourse and may not demand of upper proprietors that the flow of water be strictly maintained in the natural channel.[43] A proprietor who transports water away from the watercourse must, when his use is completed, return the unused water back to the stream. Lastly, it is important to note that the riparian right to use water is not obtained by actual application of water to a beneficial use; therefore, a riparian right is not lost by nonuse.[44]

C. Riparian Uses and the Test of "Reasonableness"

It is often stated in many different ways that a riparian has a right to put the water flowing by his land to a "reasonable" use

40. *See* Farmers & Merchants Irrigation Co. v. Hill, 90 Neb. 847, 134 N.W. 929 (1912); Kirk v. State Bd. of Irrigation, 90 Neb. 627, 134 N.W. 167 (1912).
41. *See* City of Fairbury v. Fairbury Mill & Elevator Co., 123 Neb. 588, 243 N.W. 774 (1932).
42. Clark v. Cambridge & Arapahoe Irrigation & Improvement Co., 45 Neb. 798, 64 N.W. 239 (1895).
43. Meng v. Coffee, 67 Neb. 500, 503, 93 N.W. 713, 714 (1903).
44. 2 H. Farnham, Waters and Water Rights § 463 (1904). Also, in Nebraska there is no specific statutory method to terminate or fix the right of a riparian proprietor of land on which water has never been used. The uncertainty thus created makes new planned projects perilous.

and that his right is subject to the same right of other riparian proprietors. The question whether a specific use is "reasonable" is difficult to discuss in the abstract because the answer must be derived on a case-by-case basis as factual situations develop and are litigated. A decision at one point in time that a particular use is reasonable is subject to later being reversed as facts change. Even though the Nebraska cases assert that reasonableness is a question of fact which must be determined by considering all the circumstances bearing upon the rights of other riparians on the same watercourse,[45] whether the facts and necessary inferences establish an unreasonable use is a question of law.[46] Discussing reasonableness of use thirty years ago, a Nebraska commentator listed the following as important:[47]

> The size of the stream is a very important factor in deciding, not only whether the amount of water abstracted is reasonable, but also in determining the adaptability of the stream to the particular use in question. What may be a reasonable use upon a large stream or lake may be clearly unreasonable upon a small one. Secondly, the nature of the season must be considered inasmuch as riparians are entitled to share equitably in a diminished supply which is the result of a dry season affecting the sources of water. The diversion of a large quantity in a normal season may not unreasonably infringe the right of a lower mill owner whereas in a dry season the same use may result in the destruction of his use. Third, in a particular region the character of the soil and the quantity of water available may render a particular use of water unreasonable. For example, irrigation in some regions may result in a waste of water because there is adequate rainfall to produce a crop in the exercise of the art of good husbandry. In other regions the soil may be so poor or the supply of water so inadequate that a use for such a purpose would be unreasonable in the light of other uses for which the stream is more suitable.[48] Fourth, what may be a reasonable use when only a few riparians are making a beneficial use of water may become unreasonable when settlement increases or when irrigation or other uses become economically justifiable.[49] Fifth, the method by which water is put to use may occasion damage to other riparians and be unreasonable.[50] The issue may

45. Crawford Co. v. Hathaway, 67 Neb. 325, 93 N.W. 781 (1903); McCook Irrigation & Power Co. v. Crews, 70 Neb. 109, 96 N.W. 996 (1903); Meng v. Coffee, 67 Neb. 500, 93 N.W. 713 (1903).
46. Strobel v. Kerr Salt Co., 164 N.Y. 303, 58 N.E. 142 (1900).
47. Doyle, *supra* note 28, at 15-16.
48. If the use will involve a permanent diversion, the amount of water taken may be the most important factor. In Slattery v. Harley, 58 Neb. 575, 79 N.W. 151 (1899), it was held that a party claiming the right to irrigate had to plead and prove the necessity of irrigation in the region.
49. When the tillage of marginal lands becomes economically useful, what formerly was an unreasonable use may become reasonable.
50. Radford v. Wood, 83 Neb. 773, 120 N.W. 458 (1909) (use occasioned acceleration of stream); Red River Roller Mills v. Wright, 30 Minn.

> depend, therefore, upon the availability of an alternative less harmful method. Sixth, the riparian must prove that the use complained of results in injury to a beneficial use to which he is putting the water.[51] If he is not using water or proposing to use it he has no right of action. The existence of injury alone, however, does not conclusively establish unreasonableness of use. Since the riparian has no right to insist upon the natural integrity of the stream as such, he has no basis for complaint until he has suffered some injury. Injury or harm is implicit in the administration of water on the basis of an equality of use therein. Merely because a subsequent upper riparian in the employment of water reduces the quantity available to other users, though prior in time, does not necessarily give rise to any right of action.

In recent years a phenomenal interest has developed in taking a broad ecological approach to natural resources problems. For this reason, it is probable that future judicial examinations also will focus on environmental consequences in determining "reasonableness" of use.

Use which produces unacceptable levels of pollution is a nuisance and subject to being enjoined in Nebraska,[52] but prior to 1964 there were only vague common law standards of what constituted pollution of water quality. Under its statutory authority the Nebraska Water Pollution Control Council on November 8, 1968, in response to the Federal Water Quality Act of 1965, adopted *Water Quality Standards Applicable to Nebraska Waters* which superseded water quality standards promulgated in 1964. These standards are those of the Council and not binding on the courts in a riparian rights dispute wherein unreasonable use is asserted against an upstream riparian polluter. Nevertheless, the standards should be given judicial consideration and some persuasive weight considering the Nebraska Legislature has assigned responsibility for the maintenance of water quality in Nebraska to the Council.

249, 15 N.W. 167 (1883) (operation of sawmill in manner resulting in pollution of stream).

51. The riparian must prove substantial injury to his beneficial use. Meng v. Coffee, 67 Neb. 500, 93 N.W. 713 (1903). An upper riparian may use waters of millpond so long as such use does not interfere with or injure the rights of the lower riparian mill owner. City of Fairbury v. Fairbury Mill & Elevator Co., 123 Neb. 588, 243 N.W. 774 (1932). A riparian acquires no right to the use of a certain quantity of water merely because his use has continued for more than the prescriptive period. To acquire such a right his use must interfere unreasonably with the beneficial uses of other riparians. As long as there is sufficient water for all there is no adverse user. Meng v. Coffee, 67 Neb. 500, 93 N.W. 713 (1903); Burson v. Percy, 77 Neb. 654, 110 N.W. 544 (1906); Crawford Co. v. Hathaway, 67 Neb. 325, 93 N.W. 781 (1903).

52. *See* Barton v. Union Cattle Co., 28 Neb. 350, 44 N.W. 454 (1889), where downstream proprietors obtained an injunction against an upstream feedlot on the basis of polluting effluent constituting a nuisance.

Some types of uses are deemed reasonable without regard to the amount of water used. Domestic uses,[53] which include water for drinking, cooking and watering domestic livestock,[54] are not controlled by analysis applicable to other uses such as irrigation and water power. Because it is necessary to assure a supply of water for the basic sustenance of life, domestic uses have always been considered paramount to any other demand and riparians are allowed to divert all the water needed for such purposes.[55] Furthermore, these uses ordinarily involve taking small amounts of water and therefore cause little interference with the streams.[56]

In efforts to determine what constitutes a reasonable use in disputes between riparians, the Nebraska Supreme Court has, upon occasion, referred to article XV, section 6, of the Nebraska Constitution. That section[57] provides that as to matters of appropriation of water, domestic use shall have the first preference over agricultural and manufacturing uses, and an agricultural use shall have a preference over a manufacturing use. Such a reference to

53. A discussion of domestic uses at common law is found in Crawford Co. v. Hathaway, 67 Neb. 325, 93 N.W. 781 (1903).

54. How large a commercial herd can be before it loses its "domestic" nature is unclear. Certainly large commercial herds are not within any ordinary understanding of the term "domestic livestock" although there is dicta in Norman v. Kusel, 97 Neb. 400, 150 N.W. 201 (1914), that water for over 300 head of livestock was a domestic use. The implications are not well supported. The Nebraska Supreme Court was presented with an opportunity to give some answer to this question in Wasserburger v. Coffee, 180 Neb. 149, 141 N.W.2d 738 (1966), but declined to do so. The court, in *Wasserburger*, enjoined an appropriator for irrigation purposes from "interfering with the use of livestock water for the number of cattle held on riparian pasture in accordance with good husbandry, but we do so without . . . defining domestic use under the Constitution and the common law." *Id.* at 163-64, 141 N.W.2d at 748.

55. *See* Crawford Co. v. Hathaway, 67 Neb. 325, 93 N.W. 781 (1903).

56. *See* Meng v. Coffee, 67 Neb. 500, 93 N.W. 713 (1903).

57. 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 purpose, but when the waters of any natural stream are not sufficient for the use of all those desiring to use the same, those using the water for domestic purposes shall have preference over those claiming it for any other purpose, and those using the water for agricultural purposes shall have the preference over those using the same for manufacturing purposes. Provided, no inferior right to the use of the waters of this state shall be acquired by a superior right without just compensation therefor to the inferior user.

NEB. CONST. art. XV, § 6 (adopted 1920). This section was patterned after the irrigation law of April 4, 1895, Neb. Laws c. 69, § 43, p. 260 (1895), now NEB. REV. STAT., § 46-204 (Reissue 1968).

the constitution was seemingly made in *Brummond v. Vogel*[58] where, after citing the foregoing provisions, the court stated:

> We hold that the right of plaintiff to use water from the stream for domestic purposes is superior to the defendants' right to construct a dam to have a reservoir for either agricultural or recreational purposes, and the fact that defendants may also use it for domestic purposes will not justify any unreasonable dimunition of water resulting in harm to plaintiff.[59]

With this statement the court asserts that it has decided "the correlative rights of the parties."[60] The full impact and meaning of the *Brummond* case has yet to be determined; however, the opinion seems to indicate that the preference system as contained in the constitution determines the more reasonable of two competing uses. None of the litigants in *Brummond* were shown to be claiming riparian rights and, therefore, the court's statements do not bear directly upon the question of reasonableness of use as between competing riparian proprietors.

Prior commentators on Nebraska water law have indicated that the Nebraska preference system as contained in the constitution has the purpose of adjusting supply between users possessing water rights under the *appropriation* system, and that compensation is a requisite for the preferred user to obtain water.[61] This analysis seems more in accord with precedent and reason than the self executing preference system applied in *Brummond*.

D. Restrictions on Place of Use

1. *Use Upon Non-Riparian Land*

As has been discussed previously, a dispute between riparian proprietors is resolved through application of the reasonable use doctrine and examination of all the attending facts and circumstances of the dispute. A different legal problem is presented, however, when one of the disputing parties is using the water on non-riparian land.

Early consideration by the Nebraska Supreme Court produced

58. 184 Neb. 415, 168 N.W.2d 24 (1969).
59. *Id.* at 421, 168 N.W.2d at 28.
60. *Id.*
61. Doyle, *Water Rights in Nebraska*, 29 Neb. L. Rev. 385, 407-09 (1950) [hereinafter cited as *Water Rights*]; Yeutter, *supra* note 3, at 44-49. Thomas, *Appropriations of Water for a Preferred Purpose*, 22 Rocky Mt. L. Rev. 422, 425 (1950); Trelease, *Preferences to the Use of Water*, 27 Rocky Mt. L. Rev. 133, 137-38, 150-51 (1955). *See generally* Loup River Pub. Power Dist. v. North Loup River Pub. Power & Irrigation Dist., 142 Neb. 141, 5 N.W.2d 240 (1942).

dictum that a use of water by a riparian on non-riparian land would not be permitted as a matter of law;[62] this is in accord with the decisions of most courts which have considered the question. In the most recent case considering the question of riparian land, the Nebraska Supreme Court seems to have impliedly held that water claimed under a riparian right must be used upon riparian land, and that the extent of the riparian land must be properly proven by such claimant.[63]

2. *Trans-Watershed Diversions*

A watershed is another name for a drainage basin and is the land area from which water drains into a common watercourse. We are here concerned with the right of a user claiming under the riparian doctrine to transport water for use upon land which lies within a watershed other than the watershed of origin.[64]

It seems certain that in most factual situations the Nebraska rule prohibiting the use of water by a riparian proprietor on non-riparian lands would clearly resolve the issue against the use upon the land lying outside the watershed of origin. Conceivably, however, the situation could arise where a riparian proprietor owns riparian land which meets all the tests set out in *Wasserburger v. Coffee*, but which is in an adjacent watershed area. The Nebraska Supreme Court has not yet been confronted with this situation and, as far as we are aware, has not yet so qualified the definition of riparian rights. However, it seems quite certain that the court would choose to follow traditional riparian doctrine, which defines riparian land as embracing only land within the watershed[65] of the stream of withdrawal.

A riparian owner making a trans-watershed diversion of water for irrigation purposes also would be confronted with the following Nebraska statutory provision:

> The owner or owners of any irrigation ditch or canal shall carefully maintain the embankments thereof so as to prevent waste

62. *See* Crawford Co. v. Hathaway, 67 Neb. 325, 93 N.W. 781 (1903); Meng v. Coffee, 67 Neb. 500, 93 N.W. 713 (1903).
63. Wasserburger v. Coffee, 180 Neb. 149, 141 N.W.2d 738 (1966).
64. For a detailed discussion of trans-watershed diversion in Nebraska, see Oeltjen, Harnsberger & Fischer, *Interbasin Transfers: Nebraska Law and Legend*, 51 NEB. L. REV. 87 (1971) [hereinafter cited as *Interbasin Transfers*].
65. Anaheim Union Water Co. v. Fuller, 150 Cal. 327, 88 P. 978 (1907); Sayles v. City of Mitchell, 60 S.D. 592, 245 N.W. 390 (1932); Watkins Land Co. v. Clements, 98 Tex. 578, 86 S.W. 733 (1905); Johnson & Knippa, *Transbasin Diversion of Water*, 43 TEX. L. REV. 1035, 1036 (1965). *Contra*, Clark v. Allaman, 71 Kan. 206, 80 P. 571 (1905).

> therefrom, and shall return the unused water from such ditch or canal with as little waste thereof as possible to the stream from which such water was taken, or to the Missouri River.[66]

Even though this language appears in statutes which regulate appropriation rights, it governs any irrigation ditch or canal and no differentiation is made between riparian and appropriation users.

IV. THE NEBRASKA APPROPRIATION SYSTEM

A. Irrigation Development and the Law: 1860-1895

1. *The Settlement Years*

In the 1868 *Guide to the Rocky Mountains*, T. G. Turner evaluated the Great Plains as follows:

> A large portion of these plains are arable, and under proper system of irrigation, will undoubtedly produce in abundance. Where water cannot be produced from the surface, wells have only to be sunk a few feet in depth. Irrigation is, for the most part, not only easy, but comparatively inexpensive.[67]

While the statement indicates an optimism that was typical of the western frontier, the mention of "irrigation" was distinctly atypical. Popular indifference to irrigation during the early years of settlement in Nebraska is explainable. First, that part of the state east of the 100th meridian was situated in an area of generally sufficient rainfall. Second, the counties west of the 100th meridian were not well settled until the 1870s, and their settlement came at a time when rainfall gave illusions of sufficiency for agricultural purposes. Drought had no noticeable effect on the great plains of Nebraska until 1887 and the ensuing decade. There were, of course, some dry years, but the earlier myth of the Great American Desert was yielding to an optimistic dream that all of Nebraska was within a reliable rain belt. Pioneers were willing to believe that "rain follows the plow." Even the scientific explanations of the phenomenon were largely derived from the observation that rainfall had increased in Nebraska's western counties as the population had increased.[68]

Faith in extension of the rain belt was a part of the West, and to attract settlers, the desirable qualities of the land and climate were stressed. Any suggestion that irrigation was necessary for successful agriculture not only challenged the notion that Nebraska

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66. Neb. Rev. Stat. § 46-265 (Reissue 1968).
67. T. Turner, Guide to the Rocky Mountains 218 (1868).
68. M. E. Carlson, The Development of Irrigation in Nebraska, 1854-1910; A Descriptive Survey 20-22 (unpublished doctoral thesis, 1963, on file in U. of Neb.-Lincoln Love Library) [hereinafter cited as Carlson-thesis].

was naturally productive, but also raised fears that emphasis upon irrigation would indicate to the outside world that rainfall was naturally insufficient and thus would retard settlement.[69] Settlers came to Nebraska hoping for a change of climatic conditions and even when disappointed by drought, irrigation was not seriously considered: "[T]hrough these early years to speak of irrigation as the solution for crop raising was to invite condemnation upon oneself. One hardly dare advance such a theory in Nebraska . . . ."[70]

Another factor which discouraged large-scale development of an early irrigation industry in Nebraska was the sizable capital investments required for construction of irrigation works. Irrigation could not be practiced by most individuals without substantial expenditures for diversion works, canals and laterals—expenditures which few farmers were capable of making or financing. Nevertheless, a few settlers pioneered irrigation. One of the first irrigation ditches in the state was built under the direction of General Dudley at Fort Sidney in 1871. Other individuals irrigated prior to 1889,[71] but these works were usually limited and were not extensively used until the 1890's. The first large project in Nebraska was a canal in Lincoln County built in 1884-1885 by Lord Ogilvie of Denver. In spite of these and other early developments, irrigation had not gained general public recognition or support;[72]

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69. *Id.* at 62.

70. M. Daugherty, *The Struggle and Triumph of Irrigation in Nebraska,* in THE NEBRASKA IRRIGATION ANNUAL—1896 at 28-29 (published by A. G. Wolfenbarger, 1896) [hereinafter cited as Daugherty].

    Irrigation was not the only solution which had been suggested for the agricultural troubles of the arid states. Other competing ideas included: (a) moisture—conserving methods of cultivation, *e.g.*, subsoiling. See Younger, *Subsoiling,* in 1895 REP. NEB. BD. OF AGRICULTURE 76. (b) the planting of trees and underbrush to stimulate precipitation and ameliorate the effects of drought. See Barbour, *Report of the Geologist,* in 1896 REP. NEB. BD. OF AGRICULTURE 157, 167. (c) diversification into stock raising. Whitmore, *The Lessons of the Drought,* in 1895 REP. NEB. BD. OF AGRICULTURE 108. These alternatives to irrigation were to some degree less time consuming and less expensive and hence more attractive than irrigation.

71. The dates of the first recorded irrigation on the following Nebraska rivers and streams are: Big Blue River—1860; Wood River—1873; Lodgepole Creek—1876; Republican River—1877; Platte River—1882; Niobrara River—1883; and Frenchman River—1886. Appropriation Records, Neb. Dep't of Water Resources.

72. Carlson, *William E. Smythe: Irrigation Crusader,* 7 J. OF THE WEST 41 (1968). *See also,* F. MILLER & H. FILLEY, ECONOMIC BENEFITS OF IRRIGATION FROM THE KINGSLEY (KEYSTONE) RESERVOIR (Bull. 311, U. of Neb. College of Agriculture Experiment Station, Lincoln, Oct. 1937). Nebraska irrigation began as early as 1866 when small enterprises were

prior to 1889, irrigation was considered by most Nebraskans to be absolutely unnecessary.

Settlers of the states farther west were ahead of Nebraskans in developing irrigation, though they too were only beginning. William Ellsworth Smythe, an irrigation advocate of national reputation, suggested that Nebraska should emulate the successful examples of Colorado, New Mexico, Utah, and California, which were making the most of their natural water supplies by turning "arid acres into fertile gardens."[73]

2. *Prior Appropriation Recognized: The Act of 1877*

During the 1877 session, the Nebraska Legislature enacted a very limited law to accommodate irrigation projects.[74] A major provision gave corporations organized to use water for irrigation or power the right to use eminent domain to acquire necessary rights-of-way for canal construction. This right was granted by declaring canal construction a work of internal improvement and by making all laws applicable to works of internal improvements applicable to such canals.[75] The singular, most striking aspect of the 1877 Act is its brevity.

Although acquisition of vested water rights was not expressly provided for by the statute, the Nebraska Supreme Court later interpreted the 1877 legislation to imply that such a right could be acquired by appropriation of streamflow to a beneficial use.[76] After analyzing the 1877 law and later cases one Nebraska commentator concluded: "It is definitely established that as early as 1877, or before, it was possible for one who was not a riparian to acquire a water right by the construction of works and the application of water to a beneficial use."[77]

The first large appropriation of water in Nebraska, made for the Kearney Canal in 1882, was primarily for power purposes. The rate of diversion was 125 second-feet which easily surpassed the capacities of other, earlier and contemporary ditches. The early

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organized to serve tracts of land adjacent to the Platte River. Development was gradual; only 12,000 acres of land were being watered in 1890. *Id.* at 5.

73. W. E. Smythe, Irrigation in Nebraska, (Fourth in a series of seven articles) Omaha Weekly Bee, January 28, 1891, at 2, col. 1.
74. Neb. Laws p. 168 (1877), Complete Neb. Sess. Laws p. 968 (vol. 2 1866-77).
75. *Id.*
76. Kearney Water & Elec. Powers Co. v. Alfalfa Irrigation Dist., 97 Neb. 139, 149 N.W. 363 (1914).
77. Doyle, *supra* note 28, at 5.

diversions typically carried from one to ten second-feet and were used primarily for meadow irrigation as an adjunct to stockraising.[78]

Even though extensive irrigation was not practiced until the late 1880s, farsighted individuals were already concerned with regulating the use of the state's water resources. Professor Lewis Hicks of the University's Agricultural Experiment Station suggested that

> the use of water in arid regions is a proper subject of legislation, and that it is practicable to regulate its use so as to promote the general welfare. In the absence of statutory regulation disputes will arise, and injustice will be done. The water will not be used in the most profitable and economic way. Nor will the loss fall alone upon those farmers who are deprived of waters for irrigation by the selfishness or wastefulness of others. The whole state is interested in the development of its every resource. Nebraska will increase in population and wealth in proportion as its citizens make a wise, thrifty, and economical use of all its natural resources. We are all, as good citizens, deeply interested in securing the greatest good to the greatest number in the matter of irrigation.[79]

Such statutory regulation came a few years later when the Nebraska Legislature enacted the St. Rayner Irrigation Laws,[80] modeled after the California statutes[81] and based on the doctrine of prior appropriation.[82]

3. *The 1889 St. Rayner Irrigation Laws*

The St. Rayner Irrigation Laws of 1889 provided that any person, company or corporation could appropriate to a beneficial use any surplus waters in large streams which had not theretofore been appropriated. The retrospective effect of the act was limited to a confirmation of prior vested rights, without a determination

78. Fischer, *Irrigation Development in North Platte Valley*, in PROCEEDINGS NEB. IRRIGATION ASS'N 124, 125 (1920).
79. Hicks, *Irrigation in Nebraska*, in 1887 REP. NEB. BD. OF AGRICULTURE 122, 127.
80. Neb. Laws c. 68, p. 503 (1889).
81. Wasserburger v. Coffee, 180 Neb. 149, 154, 141 N.W.2d 738, 743 (1966) ("The 1889 law was taken substantially from a California act which provided that 'the rights of riparian proprietors are not affected by the provisions of this title.' "); Clark v. Cambridge & Arapahoe Irrigation & Improvement Co., 45 Neb. 798, 806, 64 N.W. 239, 241 (1895).
82. The 1889 Irrigation Law did not abolish or modify existing riparian rights, Crawford Co. v. Hathaway, 67 Neb. 325, 93 N.W. 781 (1903), and did not preclude the acquisition of future riparian rights, Wasserburger v. Coffee, 180 Neb. 149, 141 N.W.2d 738 (1966). Thus riparians and appropriators now shared the available water supply without a clarification of their respective rights.

of superior or inferior rights. No provision was made for unified administration of rights acquired under the act, and thus for the next several years irrigation expanded through private appropriation rather than on the basis of a comprehensive plan. Though the 1889 legislation gave some order to development, intensive appropriation of surface water soon would expose deficient areas in the law.

a. Appropriation Established

The doctrine of appropriation was established in terms of the acquisition of "the right of the use of running water, flowing in a river or stream or down a canyon or ravine . . . by appropriation by any person or persons, company or corporation. . . ."[83] This right of appropriation was restricted by the provision "that in all streams not more than fifty feet in width the rights of riparian proprietors are not affected by the provisions of this act."[84] Therefore, appropriation under the 1889 law applied only to the use of the waters of large streams; smaller streams and both groundwater[85] and diffused surface waters were excluded. Riparian rights were not extinguished, but the statute was silent on how they were to be reconciled with the new appropriations.

To appropriate water under the statute, an appropriator posted, at a conspicuous place at the point of diversion, a notice stating: (1) a claim to a specificed amount of water flowing at the point of diversion; (2) the purpose to which the water was to be applied and the location of use; and (3) the type and size of the diversion works. Within ten days after posting, the appropriator was required to record a copy of the notice with the county clerk of the county in which it was posted. If a claimant complied with these rules and completed the appropriation by an actual diversion of water, his appropriation related back to the time the notice was posted.[86] However, if a claimant failed to comply with the

83. Neb. Laws c. 68, § 1, pp. 503-04 (1889).
84. As a legislative compromise, this section was amended in 1893 to extend appropriation to all streams more than 20 feet in width. Neb. Laws c. 40, § 1 (1893).
85. For a discussion of the development of groundwater in Nebraska, see Harnsberger, Oeltjen & Fischer, *Groundwater: From Windmills to Comprehensive Public Management*, 52 NEB. L. REV. 179 (1973) [hereinafter cited as *Groundwater*].
86. Reclamation is not automatic, so this relation-back rule was especially important to extensive projects that were developed over a period of years. Actual diversion of water and application of the water to a beneficial use was not necessary to constitute an appropriation. If waters were conducted through a canal and were available to all who

rules, the date did not relate back; instead, the appropriation dated from the time the water was actually applied to a beneficial use.

b. Extent of the Right

To encourage maximum development of water resources, the statute limited appropriations to actual diversions and required commencement of physical construction of facilities within sixty days after notice of the proposed appropriation was posted. This provision barred speculation in bare water rights. Optimum use of water was further encouraged because "when the appropriator or his successor in interest cease[d] to use it for such a [beneficial] purpose, the right cease[d]."[87] Thus a water right could be automatically lost by non-use without an intent to abandon the appropriation.

The use of the water was not restricted to riparian lands, instead, "All persons, companies, and corporations owning or claiming any land situated on the banks or in the vicinity of any stream are entitled to the use of the waters of such stream for the purpose of irrigating the land . . . ."[88] Nor were water rights attached to specific lands;[89] appropriations were freely transferable to other lands within the watershed; and the appropriator could change the place of diversion if others were not injured by such change.[90]

Under the 1889 law, the character of use of an appropriation could be freely changed.[91] For example, water originally appropriated for power purposes could be later used for irrigation or municipal uses. Uses of one class were not favored over other uses.[92]

The statute expressly provided that it did not interfere with or impair rights to water which vested prior to its passage. The

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might use it, the appropriator had made the only application he could make, and all that the act of 1889 expected him to make. Rights to his appropriation continued as a developing right. Enterprise Irrigation Dist. v. Tri-State Land Co., 92 Neb. 121, 138 N.W. 171 (1912).

87. Neb. Laws c. 68, § 2, p. 504 (1889).
88. Neb. Laws c. 68, § 1, p. 506 (1889).
89. *See Water Rights, supra* note 61, at 404, for citation of supporting cases. For a judicial discussion of appropriative rights acquired under the 1895 Act, Neb. Laws, c. 69 (1895), and the common law rule of appropriation and place of use, see Farmers & Merchants Irrigation Co. v. Gothenburg Water Power & Irrigation Co., 73 Neb. 223, 227, 102 N.W. 487, 488 (1905).
90. Farmers & Merchants Irrigation Co. v. Gothenburg Water Power & Irrigation Co., 73 Neb. 223, 228, 102 N.W. 487, 488 (1905).
91. *Id.*
92. Kearney Water & Elec. Powers Co. v. Alfalfa Irrigation Dist., 97 Neb. 139, 149 N.W. 363 (1914).

quantity of these pre-1889 claims was measured by the amount of water previously applied to a beneficial use with the size of the diversion works establishing a maximum limit.[93]

The act explicitly provided that as between the appropriators the one first in time is first in right,[94] but no special remedy was provided. Accordingly, aggrieved appropriators were left to sue for money damages or an injunction. There was no administrative remedy available.

c. Administration of the 1889 Law

The St. Rayner Irrigation Laws of 1889, in response to the competitive demands of prospective water users and the consequent need for certainty, required that appropriations be executed according to a prescribed procedure and that formal notice be filed with the county clerk.[95] However, no provision was made for centralized, statewide records of the appropriations, and determination of the rights of senior appropriators was haphazard: "The settler driven by his repeated failures in dry farming to seek relief in irrigation had no means of determining what rights were established or what amount of water was unappropriated."[96] While his right of appropriation was firmly established pursuant to the law, the early irrigator was still uncertain of both the amount and priority of appropriations senior to his own. Even though the full force of the law supported every valid appropriation, priority beyond county lines could not easily be determined,[97] and if

93. Vonburg v. Farmers Irrigation Dist., 132 Neb. 12, 270 N.W. 835 (1937).
94. Neb. Laws c. 68, § 7, p. 504 (1889).
95. "The county clerk of each county must keep a book, in which he must record the notices provided for in this title." Neb. Laws c. 68, § 15, p. 506 (1889).
96. 2 REP. NEB. BD. IRRIGATION 212 (1897-98).
97. No provision was made limiting the amount appropriated by the respective claimants, neither was there any provision for the distribution of the water, nor for the protection of the appropriators. Under this law, the records of the county clerks soon showed the waters in most of the streams in the state appropriated many times over. Many of the streams of the state cross several counties. The record in each county only showed the filings made in that county, and there was no means of determining the total appropriation from such a stream except by an investigation of the records of every county through which the stream flowed. The filings in a single county would often show more water appropriated than could be found in the stream, even in time of flood. The would-be appropriator could only disprove this record by a careful examination of all the territory susceptible of irrigation from the stream. This was a tedious, expensive process, impracticable for the small appropriator. The result was a

a right was disputed, it could only be maintained by force or by litigation in the local courts.[98]

Most early enterprises were, by necessity, undertaken by private persons or mutual companies because enabling legislation authorizing formation of irrigation districts as governmental subdivisions was not enacted until 1895. The canal and mutual companies were troubled with uncooperative water users who often were reluctant to share the water with other irrigators, and operation assessments and maintenance costs were difficult to collect. But the most serious problem was the speculation in irrigable land. State officials explained the conditions with the illustration of a practical example:

> Under a mutual company or corporation a non-resident land owner may refuse to buy water rights and refuse to develop his holdings, but simply sit back and allow his land to increase in value, while the adjoining resident land owners are working hard and improving their holdings, and are thus assuming all the risk that there is to be taken. This is unfair and leads purely to speculation which should be avoided as far as possible. Many mutual companies have failed by reason of these non-resident land owners refusing to buy water and develop their lands.[99]

Speculation in the appropriative right was impossible, however, because such right did not vest until the water was applied to a beneficial use.

Despite the imperfections in the 1889 Irrigation Law, irrigation development gained momentum under the new appropriation system;[100] riparianism had not provided a method for achieving

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condition of hopeless confusion and discouragement for the real appropriators.

Id. at 213.

98. In states in which the adjudication of rights to the use of water has been left to the courts, endless litigation has been the invariable result. It has impoverished and discouraged irrigators and investors, and promoted discord between neighbors and jealousy and strife between communities.

. . . .

Mr. Elwood Mead, Irrigation Expert of the United States Department of Agriculture, states: "In 1890 a number of irrigators on Spanish Fork River in Utah, brought suit to quiet their title to its water. Two years later the decision establishing their right was entered on record. In 1893 other irrigators on the same stream brought suit to have the title to its waters again quieted. That lasted five years. In ten years the titles have been quieted four times, and another lawsuit to again settle them has just been instituted. Whether the water rights or the litigants will first be put to rest, is yet uncertain.

3 REP. NEB. BD. IRRIGATION 202-03 (1899-1900).

99. 10 REP. NEB. ENG'R 15 (1913-14).

100. *See* Wolfenbarger, *Irrigation in Nebraska,* in 1895 REP. NEB. BD. OF AGRICULTURE 139. While many acres listed in the pre-1895 claims

an efficient allocation of resources.[101]

d. Why Appropriation?

When the compelling need for irrigation was finally evident, development of underground water was not feasible because of technological limitations and prohibitive costs,[102] but fortunately surface waters were available in several areas where the land was adaptable to gravity irrigation. However, so long as use of stream water was governed by rules of riparianism, it could be used with certainty only on riparian lands adjacent to watercourses. Moreover, the inherent inexactness of riparianism and the fluctuating character of both the stream flow and the water requirements of other riparian proprietors caused riparian rights to be no more certain than either the needs of ambitious, enterprising riparians or the July flow of a western Nebraska stream. Such uncertainty discouraged capital expenditures for surveys and engineering plans and the construction of diversion works, headgates, canals and laterals. As the need for irrigation became more acute, riparian rules were critically examined. It became obvious that riparianism failed either to provide a system for efficiently allocating resources or to promote optimum use of surface waters in a semi-arid region where the business affairs of the settler were often governed by self-help, not laws.[103]

> There were manifest equities which demanded that the common law, adopted from a country so dissimilar in climate and conditions to that of the arid region, should not be made applicable when it imperils the most vital interest of some of the richest districts of the United States.
>
> . . . .
>
> That the riparian proprietors should have the right to the use of the waters of a stream for household or domestic use, including water for stock, should not be denied; but to permit great volumes of water that are in excess of the needs of riparian owners to run to waste, which if applied to the millions of acres of arid lands that are valueless for agricultural purposes without the artificial application of water, is a useless waste of one of the natural resources of the state.[104]

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never received water and planned works never became realities, the claims indicate the public was not only conscious of water law, but also actively seeking protection of the law.

101. "[F]rom the standpoint of economic analysis, appropriation comes out on top [of riparianism] on all counts which are relevant." Ciracy-Wantrup, *Concepts Used as Economic Criteria For a System of Water Rights*, in THE LAW OF WATER ALLOCATION IN THE EASTERN UNITED STATES 553 (D. Haber & S. Bergen eds. 1958).

102. *See generally Groundwater, supra* note 85.

103. *See* Meng v. Coffee, 67 Neb. 500, 519, 93 N.W. 713, 720 (1903).

104. *Rights of Riparian Proprietors*, 3 REP. NEB. BD. IRRIGATION 194-96 (1899-1900).

In other western jurisdictions the evolving principles of prior appropriation were being substituted for the riparian doctrine to encourage irrigation development. Prior appropriation emerged in California[105] at a time when government and law were not yet established, there were no agricultural interests and no riparian owners, and mining was the only practical use of stream flow. Through necessity miners held meetings in each locality and invented their own rules by which they collectively agreed to be governed. At that time, streams were useful only for mining, and large quantities of water were essential to the operations. Local practices developed into a mining custom that the right to a definite quantity of water and the right to divert it from streams or lakes could be acquired by taking or "appropriation."[106] The first to take had the first rights. This custom gained strength; rights were acquired under it and investments made. "Appropriation" was soon approved by the courts and local legislation.

e. Federal Recognition of Appropriation

The doctrine of prior appropriation was recognized by Congress in the Act of July 26, 1866:

> Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes have vested and accrued, and the same are recognized and acknowledged by local customs, laws, and decisions of courts, the possessors or owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified, is acknowledged and confirmed.[107]

This provision acknowledged rights to the use of water on the public domain that had previously been recognized by state law. The legislation did not sanction appropriative rights against the federal government on lands of the public domain or against owners of

105. One of the most interesting accounts is found in McGowen, *The Development of Political Institutions on the Public Domain*, 11 WYO. L.J. 1, 8-14 (1956). *See also* 1 WATER AND WATER RIGHTS §§ 15.1, 18, 39.1, 51.5 (R. Clark ed. 1967); 1 W. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 161 (1971).

106. Rights to land and the minerals under or on those lands were also determined by the rule of the prior claim. Both land and water are included in the genre of real property, so it is not surprising that property of both species should be governed by the same rules relating to abandonment of water and mining claims, beneficial use of water and mining claims (a miner could not claim more water than he could beneficially use nor could he claim a larger stake than he could reasonably work), and conveyance of these property rights.

107. Act of July 26, 1866, ch. 262, § 9, 14 Stat. 251, 253, now 43 U.S.C. § 661 (1971).

patents from the government. Protection of appropriative rights was extended to settlers of public lands when Congress, to confirm existing rights, further provided in 1870 that "All patents granted or preemptions or homesteads shall be subject to any vested and accrued water rights or rights of ditches or reservoirs used in connection with such water rights, as may have been acquired under or recognized by the [Act of 1866]."[108]

108. Act of July 9, 1870, ch. 235, § 17, 16 Stat. 217, 218, now 43 U.S.C. § 661 (1971).

> Taken together the two acts [1866 and 1870] settled the question of the validity of the appropriative rights recognized by state and territorial courts prior to 1866, but were not clear regarding the validity of appropriations made after that date.

Note, *Federal-State Conflicts Over the Control of Western Waters*, 60 COLUM. L. REV. 967, 971 (1960) [hereinafter cited as *Conflicts*]. *See also Hearings on Federal-State Water Rights Before the Senate Comm. on Interior and Insular Affairs*, 87th Cong., 1st Sess., § III, at 187 (1961).

The Desert Land Act of March 3, 1877, ch. 107, 19 Stat. 377, now 43 U.S.C. § 321 (1970), provided that all unappropriated water on non-navigable waterways on the public domain shall remain and be free for appropriation and use of the public for irrigation, mining and manufacturing purposes, subject to existing rights. In California Ore. Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935), the court held that "following the act of 1877, *if not before*, all non-navigable waters then a part of the public domain became publici juris, subject to the power of the designated states . . . ." *Id.* at 163-64. (Emphasis added.) Thus for purposes of private acquisition the Desert Land Act severed the water from the land and thereafter federal patents did not convey any water rights. The Desert Land Act, however, did not apply to Nebraska and it has been stated that consequently, the theory supporting the Nebraska appropriative system remains unclear. *Conflicts* at 976, n.59.

The rationale is that the federal government was the initial proprietor of the lands in Nebraska and any claim by the state or by others must derive from the federal title. United States v. Grand River Dam Authority, 363 U.S. 229, 235 (1960). Federal patents on non-navigable streams carried with them the government's water rights until they were severed from the land by action of the United States. If this severance occurred before 1877 as the Supreme Court indicated might have happened, then the Desert Land Act is superfluous. See *Conflicts* at 976, n.59. In the event severance never took place in Nebraska, action by the Nebraska Legislature in adopting an Appropriation Act in 1895 could not have divested the federal government of its property or interfered with its power of disposal under Article VI of the United States Constitution. Further, the Enabling Act of Congress for admission of Nebraska into the Union, Act of April 19, 1864, 13 Stat. 47, provided that "[t]he people inhabiting said territory do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within said territory, and that the same shall be and remain at the sole and entire disposition of the United States." Unless the patentees' rights have been lost by some theory of abandonment, they are still in existence; under

This legislation had three effects on the water rights within its coverage: first, those rights which were adverse to the federal government as owner of the public domain, were confirmed; second, a reference point was established from which the validity and priority of water rights could be determined; and third, water rights established by state legislation were confirmed.[109]

The absence of applicable judicial decisions and pertinent statutes in Nebraska before 1870 meant that appropriation as sanctioned by the federal government had to have been based on custom. But in 1903, the Supreme Court of Nebraska was of the opinion that no such general, well-recognized or widely respected custom had grown up in the state:

> The customs in the states to which congress had reference were wide-spread and notorious. The custom attempted to be proved in this case was at best very confined in its limits, known to few, admitted by few, and as the testimony shows, often disputed. The defendants testify that they began taking the water "by squatter's right." One witness says that in 1880 and 1881 it was usual for every man in northwestern Nebraska to "take what water he could." Others testify that at that time no one respected any other's rights in this regard, but each put in a ditch wherever he could. Another says: "About all the rule there was, if a man went and took out a ditch, he went and took it out." There is some testimony of a custom of respecting prior appropriations. But the weight of the evidence is to the effect that there were very few settlers, and all took what was at hand, without regulation or custom of any sort.[110]

Nonetheless, the State Board of Irrigation, predecessor to the present Department of Water Resources, adjudicated several claims for appropriations of water which antedate the earliest Nebraska legislation on water rights.

B. The Campaign for a Comprehensive Appropriation Law: 1890-1895

In 1890, Nebraska suffered from "the most disastrous drought

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the riparian doctrine, rights are not lost by non-use and utilization of the supply may be commenced at any time.

Thus to remove uncertainty and determine the maximum demands on watercourses in the state, riparian rights should be defined and incorporated into the appropriative system. So long as the threat of large scale riparian uses is present, stabilization of water rights is impossible. See Trelease, *Coordination of Riparian and Appropriative Rights to the Use of Water*, 33 Texas L. Rev. 24, 60, 68 (1954).

109. *See* 1 W. Hutchins, Water Rights Laws in the Nineteen Western States 172-75 (1971); 3 The President's Water Resources Policy Comm'n, Water Resources Law 35-37 (1950).

110. Meng v. Coffee, 67 Neb. 500, 519, 93 N.W. 713, 719-20 (1903).

the West had known."[111] The impact was especially felt in the newly settled western counties of Nebraska. As one Nebraska historian recounts:

> While political events [in 1890] were marching forward toward the new party campaign; . . . a new and compelling force appeared in the field. Hot winds and drought swept from the southwest across the Western plains. Day after day the farmer looked at a blazing sun in a brazen sky and saw his crops wilt and fall in the furrow. During the month of July more than twenty days the mercury registered above 100 degrees and upon two days 110 and 115 degrees Fahrenheit. From the western border eastward past the center the corn crop was a failure. Average rainfall for the state sunk from 26 inches to 12 inches for the entire year and for the western section to 12 inches for the year. Upon thousands of farms there were no crops to harvest and upon hundreds of them there was distress for food. By the first week in August appeals were coming from Western Nebraska for the bare necessities of life . . . .[112]

Not merely individuals but whole colonies of individuals abandoned farms as the deep and widespread tragedy threatened future development and forced consideration of new methods which could support an agricultural economy. "Magnificent crops grown in 1890 under irrigation in Western Nebraska alongside abject failures on dry land were an object lesson not lost."[113] The 1890 drought was clearly the most important single factor that stimulated expansion of the irrigation movement.[114]

1. *The Rise of the Irrigation Crusade*

Although early irrigation proponents naturally stressed the economic advantages of irrigation, the irrigation movement became a social movement as well. Interest was not limited to educating farmers in irrigation practices and enacting one or two pieces of legislation. Rather, goals were described in grander terms of state and even national destiny: fulfillment of the American dream and assurance that the irrigationists would create the utopia which had eluded the earlier settlers. The optimism of the West which vanished during the drought of 1890 reappeared with the irrigationists as its new heirs. Their battle for recognition of irrigation's advantages was more than a mere political or economic movement. For instance, William E. Smythe, an editorial writer for the *Omaha Bee News*, founder of *Irrigation Age* and chairman of the com-

111. W.C. DARRAH, POWELL OF THE COLORADO 308 (Princeton 1951).
112. A. SHELDON, HISTORY OF NEBRASKA 688 (1931) [hereinafter cited as SHELDON].
113. *Id.* at 708.
114. Carlson-thesis, *supra* note 68, at 238.

mittee to arrange the first National Irrigation Conference, wrote in the 1890's:

> I had taken the cross of a new crusade. To my mind, irrigation seemed the biggest thing in the world. It was not merely a matter of ditches and acres, but a philosophy, a religion, and a programme of practical statesmanship rolled into one. . . . I was deeply impressed with the magnitude of the work that had fallen to my hand and knew that I must cut loose from all other interests and endeavor to rouse a nation to a realizing sense of its duty and opportunity.[115]

The aim was to establish irrigation in the arid West—the last major area of America which was largely unsettled. In 1903, one of the movement's leaders, Elwood Mead, wrote:

> The arid West is the nation's farm. It contains all that is left on the public domain, and is the chief hope of those who dream of enjoying landed independence, but who have little beside industry and self-denial with which to secure it.[116]

Even though irrigation was not a panacea for all frontier ills, the promise of opportunity, financial security and personal independence gave it broad popular appeal. Hindsight shows that both the early pioneers and the irrigationists were overly optimistic, the former because they believed agriculture would be highly successful in western Nebraska without irrigation and the latter for believing that with irrigation there could be no failure.

2. *The Political Background for the Movement*

The drought of 1890 precipitated the unleashing of a major political force in Nebraska:

> There never has been such a political campaign in Nebraska as the campaign of 1890 and there never can be such another. The later presidential campaigns of 1892 and 1896 were full of fire and enthusiasm, but none of them approaches the sublime energy of the human tornado which swept the prairies from August to November in 1890. As one of the speakers in that campaign said from the platform in the hearing of the writer: "We farmers raised no crops, so we will just raise hell." There was a great deal of truth in the observation. The long endured economic grievances of the farmer class, the earnest debates of the Farmer's Alliance in the county schoolhouses; the accumulated sense that favored classes in Nebraska and elsewhere were living in extravagance upon the projects of labor, carried the cheering multitudes from one Alliance picnic to another throughout the length of the state.[117]

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115. W. WEBB, THE GREAT PLAINS 357 (1931), *citing* W. SMYTHE, THE CONQUEST OF ARID AMERICA (1911).

116. E. MEAD, IRRIGATION INSTITUTIONS—A DISCUSSION OF THE ECONOMIC AND LEGAL QUESTIONS CREATED BY THE GROWTH OF IRRIGATED AGRICULTURE IN THE WEST 3 (1903) [hereinafter cited as MEAD].

117. SHELDON, *supra* note 112, at 688.

The offspring of this agitation and dissatisfaction was the People's Party (Populists) which was formed in St. Louis in 1892. The 1892 platform of the party summed up the political demands shaped by the Farmers' Alliance over several years.[118] Not only had the "harshness and unpredictability of nature" brought heavy losses to the farmers, but the pressures of industrialization—the economic pressures exerted on the plainsmen by heavy railroad costs, fluctuating and often glutted markets, and the high price of carrying mortgages and other debts[119]—had fostered near universal feelings of exploitation. When the agrarians revolted in the 1890's under the banner of the Populists, they directed their hostility against the agents of the new industrial society: railroad corporations, Wall Street bankers and industrial monopolists.[120] The tenor of the movement was well expressed in the preamble to the 1892 platform:

> The conditions which surround us best justify our cooperation; we meet in the midst of a nation brought to the verge of moral, political and material ruin. Corruption dominates the ballotbox, the Legislatures, the Congress, and touches even the ermine of the bench. The people are demoralized; most of the states have been compelled to isolate the voters at the polling places to prevent universal intimidation and bribery. The newspapers are largely subsidized or muzzled, public opinion silenced, business prostrated, homes covered with mortgages, labor impoverished, and the land concentrating in the hands of capitalists . . . . The fruits of the toil of millions are boldly stolen to build up colossal fortunes for a few, unprecedented in the history of mankind; and the possessors of these, in turn, despise the Republic and endanger liberty. From the same prolific womb of governmental injustice we breed the two great classes—tramps and millionaires.[121]

While it is difficult to estimate the relationship between the irrigation crusade and the rise of populism, it is certainly clear that both movements rose at approximately the same time and stressed anti-monopolism and individualism. Support for the aims of the irrigationists was not limited to the Populists—perhaps in large measure because irrigation promised economic benefits for all. Nor is there any indication that the irrigation leaders attempted to wed the movement to a particular political party.

In the first two decades of Nebraska's statehood it had been considered almost slanderous to advocate irrigation. But following the droughts of 1890 and 1894, the situation had so reversed itself

118. M. MYERS, A. KERN, J. CAWELTI, SOURCES OF THE AMERICAN REPUBLIC—A DOCUMENTARY HISTORY OF POLITICS, SOCIETY, AND THOUGHT 85 (1961).
119. *Id.*
120. *Id.* at 3.
121. *Id.* at 85-86.

that those who had objected to it as a poor advertisement of Nebraska's natural productivity and even those in the eastern part of the state who had no intention of irrigating, were willing to concede that irrigation would benefit the state's arid regions.

An earlier series of local Nebraska irrigation conventions gave way to stronger and more permanent organization when in December, 1893, the Nebraska State Irrigation Association was formed at North Platte.[122] With formation of national and local irrigation organizations, interchanges of methodology and technology became common place.

3. *Passage of the 1895 Law*

As has already been noted, irrigators were particularly critical of the common law doctrine of riparianism, which had not been displaced by the 1877 and 1889 legislation. William E. Smythe commented: "The treasure that has been wasted in lawsuits growing out of this doctrine [riparianism], and the brood of evils to which it gave rise would construct many canals, reclaim great areas, and make homes for thousands of people."[123] Thus a principal goal of the irrigationists was to replace both the riparian system of water rights and the early legislation with a new system which would "establish just and stable titles to water and provide for their efficient protection in times of need . . . ."[124]

To achieve this goal the Lincoln irrigation convention of 1891 drafted comprehensive irrigation legislation.[125] However, the 1891 bill failed—largely because of cattlemen's opposition and the threat of additional taxation which some feared would result.[126]

Passage of new legislation was again attempted and failed in 1893. Perhaps even some of the exponents would have been disappointed by passage of a law in 1893 because their enthusiasm was not always accompanied with a recognition of the limits of legislation. For example, one proponent of the 1893 legislation came close to laying the blame for the droughts of 1894 and 1895, and

122. NEBRASKA IRRIGATION ANNUAL—1896, at 5 (published by A.S. Wolfenbarger, 1896).
123. Smythe, *The Struggle for Water in the West,* 86 ALTANTIC MONTHLY 646, 647 (1900).
124. MEAD, *supra* note 116, at vi.
125. For a copy of the bill written in 1891, see PROCEEDINGS NEB. IRRIGATION CONVENTION 9 (Lincoln, Neb., Feb. 11-13, 1891).
126. W. Zimmerman, Legislative History of Nebraska Populism—1890-1895 at 33 (unpublished thesis, 1926, on file in U. of Neb.-Lincoln Love Library).

the resulting widespread crop failures, on the shoulders of the legislators who had failed to pass the bill.[127]

In the state elections of 1894 irrigation became a major issue. The Populists in August, 1894, demanded both state and national laws for the encouragement and promotion of the irrigation of arid and semi-arid lands.[128] In fact, feelings in the western counties of Nebraska were so strong that in the spring of 1894, because of the failure of the state legislature to pass needed irrigation legislation, "a movement to annex the Nebraska panhandle to Wyoming [which had adopted comprehensive laws of appropriation] gained considerable impetus . . . ."[129]

After the elections, Senator Akers, together with J. S. Hoagland and R. B. Howell, were appointed by the Nebraska State Irrigation Association to a Committee on Irrigation Legislation. This Committee prepared a bill and presented it to the legislature in 1895.[130] Akers, who apparently was the primary author, later explained to the Nebraska State Irrigation Association:

> We took for our guidance the law of control of Wyoming, which, by the way, I have been assured today by the most eminent irrigator in the northwest was as near perfect as a bill could possibly be. We took this almost perfect law for our guide and made it the law of Nebraska.[131]

Akers prepared the bill almost verbatim from the Wyoming statute.[132]

When the bill was introduced in January of 1895, it was assured of support from five Republican members of the House and two of the Senate. Governor Lorenzo Crounse in his last message before leaving office after the 1894 elections urged that irrigation legislation be enacted, and Governor Silas Holcomb suggested in his

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127. Daugherty, *supra* note 70, at 54 said:
> Early in the session of the winter of 1893 the friends of irrigation again appeared on the scene and prepared a bill similar to the bill defeated in the former session. . . . The bill was defeated on a test vote. . . . This delay proved disastrous, the two succeeding years being years of calamity to the whole state.

128. Carlson-thesis, *supra* note 68, at 246. The Republican party in Nebraska somewhat belatedly recognized the increased sentiment for irrigation, but its candidates from the western counties of Nebraska made it a major issue.
129. *Id.* at 248.
130. NEBRASKA IRRIGATION ANNUAL—1896, at 11 (A. G. Wolfenbarger pub. 1896).
131. *Id.* at 23.
132. Crawford Co. v. Hathaway, 67 Neb. 325, 365-66, 93 N.W. 781, 795 (1903). *See also* Note, 67 Neb. 382-83 (1903).

inaugural address on January 3, 1895, that irrigation was one of the most important subjects the legislators would have to deal with.[133] Despite such strong support, the bill ran into last minute opposition from those who feared altering existing irrigation procedures,[134] but nevertheless it was passed and became law on April 4, 1895.

C. The 1895 Appropriation and Irrigation Law

The 1895 Appropriation and Irrigation Law[135] was more than expansion of the principle of prior appropriation legislated in 1889; it was a new, comprehensive work. Cognizant of the dual purposes of the doctrine of prior appropriation, the legislature brought order to water rights to allocate water by use and to establish relative rights to this resource.[136] By 1895 appropriative rights to the natural flow had been granted on many streams, but new problems of competition and conflict between water users were developing. The question arose whether the act was properly designed as a comprehensive solution to these emerging legal problems. The Nebraska Supreme Court considered this question in 1904 and concluded:

> It is the evident purpose of the law, taken as a whole, to enforce and maintain a rigid economy in the use of the waters of the state. It has been, and is, 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. The urgent necessities of the situation compel this policy by the very force of circumstances. One of the main objects of the system of administration of public waters prescribed throughout the arid regions is to restrain unnecessary waste, and to provide for an economic distribution of that element so necessary to the very existence of agriculture in those regions. This is also the policy of the State of Nebraska in its regulation of the use of the waters of the state, and the law should be construed so as to effect a reasonable just and economic distribution of water for irrigation purposes.[137]

The 1895 act had five salient features: (1) it replaced inadequate judicial procedures for determining and enforcing water rights with state administrative control; (2) it declared the water

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133. Carlson—thesis, *supra* note 68, at 249.
134. Daugherty, *supra* note 70, at 32.
135. Neb. Laws c. 69 (1895).
136. Prior appropriation is based on two principles: beneficial use is the basis of the right; priority of time is the basis of allocation in times of shortage. Trelease, *Law, Water and People: The Role of Water Law in Conserving and Developing Natural Resources in the West*, 18 Wyo. L.J. 3 (1963).
137. Farmers Canal Co. v. Frank, 72 Neb. 136, 159, 100 N.W. 286, 294 (1904).

of every natural stream, not heretofore appropriated, to be the property of the public, subject to appropriation for a beneficial use;[138] (3) it provided statutory controls to prevent waste and an uneconomical distribution of water;[139] (4) it established subject to a preference for domestic use, a preference for agricultural uses over manufacturing uses;[140] and (5) it protected existing rights to water appropriated and acquired prior to passage of the act.[141] The legislation also incorporated additional provisions prohibiting transbasin diversion and change of location of use,[142] limiting the application of the act to water from natural streams;[143] encouraging investment in irrigation works, and providing a uniform method for measuring streamflow.[144]

1. *Administrative Control*

The 1895 Appropriation and Irrigation law transferred jurisdiction over water rights from the courts to a state administrative agency, the State Board of Irrigation, whose modern counterpart is the Department of Water Resources. Experiences with uncertainty, confusion and abuse of superior rights within a laissez-faire system had been reinforced by widespread frustration with inadequate court remedies. Therefore, rather than try to improve judicial and ancillary recording procedures, the legislation instituted state administrative controls to provide continual, comprehensive regulation. The traditional pioneer suspicion and distrust of state regulation was overcome, in part, because it had been clearly demonstrated that the existing system was unsatisfactory.

The State Board of Irrigation, composed of the Governor, Attor-

138. Neb. Laws c. 69, § 42 (1895), now NEB. REV. STAT. § 46-202 (Reissue 1968).
139. Neb. Laws c. 68, § 18 (1895), now NEB. REV. STAT. §§ 46-229 to -229.02 (Reissue 1968).
140. Neb. Laws c. 69, § 43 (1895), now NEB. REV. STAT. § 46-204 (Reissue 1968).
141. *See* Gearhart & Benson v. Frenchman Valley Irrigation Dist., 97 Neb. 764, 151 N.W. 323 (1915); Crawford Co. v. Hathaway, 67 Neb. 325, 93 N.W. 781 (1903); Neb. Laws c. 69, § 49 (1895).
142. Neb. Laws c. 69, § 59 (1895), now NEB. REV. STAT. § 46-265 (Reissue 1968). *See also* Neb. Laws c. 68, § 6 (1889), Neb. Laws c. 40, § 3 (1893), NEB. REV. STAT. § 46-206 (Reissue 1968). For a history of these provisions, see Osterman v. Central Nebraska Pub. Power & Irrigation Dist., 131 Neb. 356, 268 N.W. 334 (1936). See also NEB. REV. STAT. § 46-233(2) (Reissue 1968); Farmers Canal Co. v. Frank, 72 Neb. 136, 100 N.W. 286 (1904).
143. Neb. Laws c. 69, §§ 42, 43 (1895), now NEB. REV. STAT. §§ 46-202, -204 (Reissue 1968).
144. Neb. Laws c. 69, § 32, now NEB. REV. STAT. § 46-228 (Reissue 1968).

ney General and Commissioner of Public Lands and Buildings,[145] was responsible for: (1) appointing a hydraulic engineer to the position of secretary of the board; (2) adjudicating the priority of appropriations made before April 4, 1895; (3) issuing new appropriation permits on application by potential users; (4) attending to ministerial duties including streamflow measurement and dam inspection; and (5) enforcing the laws relating to distribution of water according to priority of right.[146] To facilitate administration, the state was divided into two geographical areas designated Water Division Number One (generally including the Platte basin and the region south of the Platte) and Water Division Number Two (the region north of the Platte basin) with appropriate officers of the State Board of Irrigation administering water rights in each division.[147]

a. The Adjudication of Vested Rights

The State Board of Irrigation's first duty was to determine the priority and the amount of each appropriation made prior to April 4, 1895.[148] In determining the priority of vested water rights, the Board recognized statutory rights, quasi-statutory rights and prescriptive rights, and promulgated rules to protect individual and public interests in each case. An appropriation made under the 1889 Irrigation Law was granted a priority fixed by the date that notice was posted at the point of diversion. Where evidence established that construction was not prosecuted with diligence, the priority dated from the time when beneficial use began. Where the appropriation was established by prescription, the appropriation also dated from the time beneficial use of the water began. In the case of an uncompleted appropriation, a priority was assigned to the claim according to the applicable rule and subject to the condition that construction be completed in reasonable time.[149]

To determine the amount of a vested water right, the board first determined the capacity of the diversion works, *e.g.*, the headgate, canal and laterals. If the ditch's capacity would not allow a diversion in excess of the rate of one cubic foot per second for

145. Neb. Laws c. 69, § 4 (1895).
146. Neb. Laws c. 69, §§ 7, 16, 17, 20, 21 (1895), now NEB. REV. STAT. §§ 46-226 to -231, 46-244 to -278 (Reissue 1968). The constitutionality of the act was upheld in Crawford Co. v. Hathaway, 67 Neb. 325, 93 N.W. 781 (1903).
147. Neb. Laws c. 69, §§ 1-3 (1895), now NEB. REV. STAT. §§ 46-215 to -224 (Reissue 1968).
148. Neb. Laws c. 69, §§ 16-21 (1895).
149. 2 REP. NEB. BD. IRRIGATION 215 (1897-98).

each seventy acres to be irrigated, the statutory limits, the ditch capacity established the amount of the appropriation. If the capacity exceeded this limit, the amount of land irrigated determined the amount of the appropriation at a rate of one cubic foot per second for each seventy acres.[150] The total quantity of water diverted under a pre-1895 appropriation could not exceed, under any circumstances, the amount which could be beneficially used.

This "beneficial use" concept, though expressly recognized in both the Nebraska Constitution[151] and state statutes[152] was not defined by either the legislature or the Nebraska Supreme Court until 1939. In *Enterprise Irrigation District v. Willis*,[153] the application of statutory restrictions to water rights vested prior to 1889 was challenged by the holder of such a right as beyond the intent of the 1895 legislation, or alternatively, as being unconstitutional and void as a deprivation of property without just compensation. The court found that in view of the express disclaimer of any infringement of prior vested rights, the quantity limitations in the 1895 Act were not intended to apply to water rights vested before 1895.[154] However, the pre-1895 appropriations were still subject to the common law limitation of beneficial use. In defining beneficial use, the court observed:

> 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. The extent to which landowners need and are entitled to have the benefit of irrigation water under a vested appropriation ordinarily depends upon aridity, rainfall, location, soil porosity, adaptability to particular forms of production and the use to which the irrigable lands are put.[155]

The adjudication of claims under the prior law progressed satisfactorily in spite of a shortage of personnel and resources. By November 30, 1898, 947 claims to water rights had been disposed of and only forty-eight filed claims remained to be adjudicated.[156]

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150. In Nebraska, appropriated waters are measured at the point of diversion. Loup River Pub. Power Dist. v. North Loup River Pub. Irrigation Dist., 142 Neb. 141, 151, 5 N.W.2d 240, 247 (1942).
151. NEB. CONST. art. XV, § 6.
152. Neb. Laws c. 69, § 20 (1895), now NEB. REV. STAT. § 46-229 (Reissue 1968).
153. 135 Neb. 827, 284 N.W. 326 (1939).
154. *See also* Winters Creek Canal Co. v. Willis, 135 Neb. 825, 284 N.W. 332 (1939).
155. *Id.* at 832, 284 N.W. at 329.
156. 2 REP. NEB. BD. IRRIGATION 7 (1897-98).

These determinations involving vested rights were quasi-judicial in nature, so the board could act only if all interested parties were accorded an opportunity to protect their claims. The procedure adopted by the board provided for filing claims, investigation, introduction of evidence, a public hearing, and then a determination of priority. A procedure for appeal of unfavorable decisions was also provided.[157]

When the determination of priorities on a given stream was completed, the appropriations were listed in order of priority and published so that existing appropriators could determine their respective rights to water and prospective appropriators could evaluate development potential. The recorded priorities became the basis for distribution of surface waters and for necessary state enforcement of superior water rights in time of shortage.

b. Applications for New Appropriations

The State Board of Irrigation realized at the outset that it would be difficult to determine the merits of new claims before existing claims were finally adjudicated. Rational disposition of pending applications was hindered because no means were available to determine which water was unappropriated or which land was not already covered by an existing claim for water.

By December of 1898, more than 360 new applications for water covering some three million acres were pending before the board. Another 103 applications had been granted by the board and twenty-four had been dismissed.[158] In the interim, the board sought to minimize the adverse effects of the delay by (1) explaining the necessity of timely adjudication to applicants; (2) warning applicants that water might not be available for appropriation; and (3) advising applicants that if they were certain there was unappropriated water available for diversion, the board would neither seek to prevent construction nor allow the appropriation to be prejudiced because of the early diversion.

By filing an application to appropriate water with the State Board of Irrigation and furnishing the necessary information,[159]

157. Neb. Laws c. 69, §§ 22 to 27 (1895).
158. 2 REP. NEB. BD. IRRIGATION 7 (1897-98).
159. Such information includes the proposed use of the water, the sources of the water, the quantity of water desired, the location of the diversion, a description of the canal and laterals, the estimated cost of the proposed construction, a description of the land to be irrigated, the dates when construction will commence and terminate and the estimated life expectancy of the use. Neb. Laws c. 69, § 28 (1895), now NEB. REV. STAT. § 46-233 (Reissue 1968).

the applicant was entitled to an appropriation if the board found unappropriated water in the stream and the proposed use was proper under the statute. In cases where it was found that the amount of water requested exceeded either the maximum rate of diversion (one cfs per seventy acres) or the dictates of beneficial use, the appropriation was limited to a lesser quantity. When there was no unappropriated water available or when the land was already benefited by another perfected appropriation, the requested appropriation was denied.

Within six months after approval of the appropriation, the applicant was required to file a plat of the diversion works and the lands to be irrigated.[160] Construction had to be initiated within this six-month period and prosecuted diligently to completion.[161] When the appropriation was completed by the beneficial use of water in compliance with these requirements, the right became perfected and the date of the appropriation related back to the date of the filing of the application with the board.[162]

c. Administration and Enforcement of Appropriative Rights

The 1895 Act directed the board to enforce the laws relative to distribution in accordance with priority of appropriation. In times of shortage, the board would issue closing orders directing junior appropriators to voluntarily close the headgates of their canals in order that senior appropriators might have water. When dry weather threatened crops, the junior appropriator was often most reluctant to close his headgate, allow the water to flow past his canal and then watch his crops wither. However, the power and authority of the state stood behind the closing order, and officials were authorized to close headgates of junior appropriators when necessary. Also, unlawful tampering with irrigation works was a criminal offense.[163]

The senior appropriator could now rely on the state to enforce his right to water. No longer was he confronted with the expense and delay of court proceedings, nor was there reason for a senior appropriator to resort to a remedy outside the law. A complaint to the board guaranteed the preservation of his rights without delay. One official reported:

> I have found a general disposition among the people to accept the rulings of the board in all disputed points without further appeal

160. Neb. Laws c. 69, § 62 (1895).
161. Neb. Laws c. 69, § 62 (1895).
162. Neb. Laws c. 69, § 31 (1895).
163. Neb. Laws c. 69, § 50 (1895).

> to the law. This gives promise of peaceable settlement of most or all points of dispute that may arise.[164]

This prediction was borne out by subsequent acceptance of and respect for the irrigation law. Ten years later, the report of the State Board of Irrigation announced:

> There have been very few complaints in regard to the distribution of water in accordance with the priorities. This is probably largely due to the fact that the rights of different appropriators have been determined and each one knows just what he is entitled to. In a few cases, however, on the smaller streams, it has been necessary to close many of the headgates in order to secure water for the lower appropriators and for domestic purposes along the stream.[165]

2. *Publici Juris*

The 1895 Act declared the unappropriated water of every natural stream to be the property of the public and dedicated the use of these waters to the people of the state, subject to appropriation for a beneficial use.[166] This was a legislative expression of the doctrine of *publici juris*, the corpus of naturally flowing water is not the subject of private ownership.[167] Declaring unappropriated waters to be public property provided an express basis for state supervision of the use of surface water in order to protect the public interest. The use of the water was subject to private ownership by appropriation for a beneficial use and, under the doctrine of appropriation, it is this beneficial use of water, not land ownership, which is the basis of the right.[168]

3. *Statutory Controls to Prevent Waste*

The 1895 Act provided that no appropriation could exceed the amount of water which could be beneficially used,[169] and for irrigation, a rate of diversion of one cubic foot for each seventy acres of land for which appropriation was made.[170] The latter limitation is often referred to as the "duty of water" and reflected the re-

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164. Pickens, *Report Undersecretary, Div. 1-A*, in 2 REP. NEB. BD. IRRIGATION 202, 207 (1897-98).
165. 7 REP. NEB. BD. IRRIGATION 11-12 (1907-08).
166. Neb. Laws c. 69, § 42 (1895), now NEB. REV. STAT. § 46-202 (Reissue 1968).
167. 1 WIEL, *supra* note 20, § 277 at 289.
168. Kirk v. State Bd. of Irrigation, 90 Neb. 627, 134 N.W. 167 (1912); Meng v. Coffee, 67 Neb. 500, 93 N.W. 713 (1903).
169. Neb. Laws c. 69, §§ 18, 20, 43 (1895), now NEB. REV. STAT. §§ 46-229, -231, -235 (Reissue 1968).
170. Neb. Laws c. 69, § 20 (1895), now NEB. REV. STAT. § 46-231 (Reissue 1968).

lationship between the quantity of water appropriated and the area to be irrigated. It is apparent that such a relationship varies with the season, the soil, the crop, the weather, and farming practices, and that these conditions are far from uniform across the state. Such a statutory limit has been subject to much criticism because of its rigidity;[171] in eastern regions of the state the limit is excessive, and in western regions the limit is inadequate.[172]

This initial limitation was expressed in terms of a rate of diversion rather than as a limitation on quantity.[173] However, it was effective as a limitation on quantity because, for irrigation, the rate of diversion governs the amount of water available during the irrigation season. This in turn controls the total amount of land which can be irrigated. To measure an appropriation in terms of cubic feet per second reflects the nature of an appropriation as a right to an absolute quantity of water at any time subject to the demands of senior appropriators.[174] While this static water right limitation often does not optimize benefits where requirements are not constant, the practice simplifies water administration.

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171. *See* Yeutter, *supra* note 3, at 28. *See also* Comment, *Determining Quantity in Irrigation Appropriations*, 4 LAND & WATER L. REV. 501 (1969).

172. For a description of other problems inherent in the duty of water, see 9 REP. NEB. BD. IRRIGATION 11 (1911-12).

173. In 1911 the legislature specified a quantity limitation by providing that in addition to the restriction of 1 cfs for each 70 acres, an appropriation cannot exceed

> three acre-feet in the aggregate during one calendar year for each acre of land for which such appropriation shall have been made; neither shall it exceed the least amount of water that experience may hereafter indicate is necessary, in the exercise of good husbandry, for the production of crops.

Neb. Laws c. 153, p. 505 (1911), now NEB. REV. STAT. 46-231 (Reissue 1968). The limitations do not apply to storage water. The statutes also provide that where the amounts allowable are unuseable on tracts of 40 acres or less, an appropriator may divert as much water as he can use without waste for limited periods. NEB. REV. STAT. § 46-231 (Reissue 1968).

174. In a model situation, more efficient use might be made of water if the diversion was made at a rate of 10 cfs for 12 hours rather than at a constant 5 cfs for 24 hours. In practice, a state official reported:

> [M]ost of the streams are small and the appropriations are small and when you appropriate the water at the rate of 1 cfs/70 acres cultivated, the seepage is so great that the user gets practically no benefit, whereas if it could be divided by acre-foot so that the full amount of the stream could be turned, or an amount equal to the full capacity of the ditch, the same volume of water could be made to irrigate a great deal more land than it will under the present manner of division.

Francis, *Report Undersecretary, Div. 2*, in 6 REP. NEB. BD. IRRIGATION 161 (1905-06).

Where water demand is assumed to be constant, administrative attention is focused on a single variable—water supply—and appropriators are regulated accordingly.

The concept of beneficial use provides a flexible limitation on the quantity appropriated below the one cfs per seventy acre ceiling. This limitation should regulate waste,[175] uses with a low or negative marginal productivity, and excessive applications of water. As a practical matter, enforcement of this standard is difficult. Reasonable men can differ—and a standard of "beneficial" leaves ample room for divided opinions.

4. *Preferential Uses*

The 1895 act provided that:

> Priority of appropriation shall give the better right as between those using the water for the same purposes but when the waters of any natural stream are not sufficient for the use of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have the preference over those using the same for manufacturing purposes.[176]

In contrast, the 1889 St. Rayner Irrigation Law had provided that in time of shortage, water was to be distributed among appropriators on the sole basis of priority. Appropriations for power purposes were as favorably regarded as those for irrigation.[177] The relative social or economic values of competing uses were immaterial, and superiority of right was fixed only by priority of appropriation. The 1895 irrigation law replaced this laissez faire distribution with a legislative judgment of social and economic utility which accorded domestic use[178] the first preference and agricultural uses the second.

Under the "preference doctrine," when water is not available for a use accorded a preference by the statute, interference with the non-preferred use of a senior appropriator is sanctioned if the holder of the preferential use holds the power of condemnation

175. Court House Rock Irrigation Co. v. Willard, 75 Neb. 408, 106 N.W. 463 (1906).

176. Neb. Laws c. 69, § 43 (1895), now NEB. REV. STAT. § 46-204 (Reissue 1968).

177. Kearney Water & Power Co. v. Alfalfa Irrigation Dist., 97 Neb. 139, 149 N.W. 368 (1914).

178. The meaning of domestic use under the statute is identical with the meaning of domestic use at common law: the use of small quantities for drinking, cooking and stock watering which have a minimal amount of interference with streamflow. Crawford Co. v. Hathaway, 67 Neb. 325, 93 N.W. 781 (1903).

and satisfies the three specific prerequisites for operation of the doctrine. The three prerequisites are: (1) the inferior user holds a post-1895 appropriation (the preference doctrine does not operate against riparians or holders of vested pre-1895 appropriations); (2) the preferred user is an appropriator; and (3) the available water supply is being allocated to the exclusion of the preferred user. Of course, the condemnor also has to satisfy the constitutional requirements that the taking be for a public purpose and that just compensation be paid to the owner of the right condemned.

Two independent considerations have limited the practical importance of the preference doctrine in Nebraska. First, irrigation use has predominated and only a limited amount of natural flow was appropriated for manufacturing purposes. Thus, there has been minimal interference with the preferred domestic and agricultural uses. Not until the advent of public power in Nebraska in the 1930's, and the development of large hydro-electric projects, were preferred agricultural rights threatened. Second, the preference doctrine has not been available to private individuals because condemnation for a private purpose does not satisfy the strict public use requirement imposed by the courts.[179] However, a private irrigation company furnishing water to landowners for agricultural purposes for compensation has been said to be vested with a public purpose because its operations are in the nature of a "common carrier of water" and subject to state control.[180]

5. *Protection of Existing Rights*

By express disclaimer, the 1895 Act did not "interfere with or impair the rights to water appropriated and acquired prior to passage of this act."[181] Thus the Act enhanced the value of early unrestricted appropriations vis-á-vis post-1895 regulated appropriations. Rights that had vested before 1895 were not subject to operation of the preference doctrine or to limitations on quantity other than those existing at common law. Additionally, rights vesting prior to 1889 were not subject to the statutory limit of beneficial use. Thus, the primary value of a pre-1895 appropriation was not only the early time priority but also the consequent superiority of the rights.

179. Vetter v. Broadhurst, 100 Neb. 356, 160 N.W. 109 (1916).
180. *Id.* at 363, 160 N.W. at 112. *See also* Hickman v. Loup River Pub. Power Dist., 173 Neb. 428, 113 N.W.2d 617 (1962) (dictum indicates that a private person holding a superior right can condemn rights of an inferior user); Loup River Pub. Power Dist. v. North Loup River Pub. Power & Irrigation Dist., 142 Neb. 141, 5 N.W.2d 240 (1942).
181. Neb. Laws c. 69, § 49 (1895).

6. *Miscellaneous Provisions*

The requirement that an appropriator return unused water to the stream from which such water was taken or to the Missouri River[182] has been interpreted by the Nebraska Supreme Court as supporting a public policy prohibiting diversion of surface water from the watershed of origin.[183] The statute also specified that an application for an appropriation for irrigation must specifically describe the land to be watered. This requirement has been interpreted by the Nebraska Supreme Court as indicative of a legislative intent that water rights attach to the land upon which the water is used,[184] and, therefore, the right cannot be transferred to benefit other lands.

D. REDRESS AND REMEDIES

No discussion of appropriative and riparian rights is complete without considering remedies. The purpose of this section is to examine the nature and forms of redress available to proprietors who prove an illegal interference with their use of water.

An analysis of the Nebraska cases in which a water user claiming under a riparian right has alleged an interference discloses that the nature of the wrongdoer's use and the source of his claim determine the form of remedy. The following categories provide convenient guidelines for analysis: (1) complaints not involving use of the water; (2) complaints against another riparian user; (3) complaints against an appropriator.[185]

1. *Acts Not Involving Use*

Rules of "water law" do not apply to controversies falling within this classification. Rather, these are settled by resort to the law of nuisance and drainage. Types of harmful activity which have been successfully enjoined by a riparian proprietor include: pollution of the stream,[186] obstruction of stream flow[187] and willful diversions of the flow.[188]

182. Neb. Laws c. 69, § 59 (1895), now NEB. REV. STAT. § 46-265 (Reissue 1968).
183. Osterman v. Central Neb. Pub. Power & Irrigation Dist., 131 Neb. 356, 268 N.W. 334 (1936). *See generally Interbasin Transfers, supra* note 64.
184. Farmers Canal Co. v. Frank, 72 Neb. 136, 100 N.W. 286 (1904).
185. *See* Doyle, *supra* note 28, at 20.
186. Barton v. Union Cattle Co., 28 Neb. 350, 44 N.W. 454 (1889).
187. Flader v. Central Realty & Inv. Co., 114 Neb. 161, 206 N.W. 965 (1925).
188. Norman v. Kusel, 97 Neb. 400, 150 N.W. 201 (1914).

2. *Riparian v. Riparian*

As noted earlier, each riparian proprietor is entitled to put the water to a reasonable use. In situations where one riparian user complains that his reasonable use of the water is being interfered with by the use of another riparian, the inquiry is directed to the reasonableness of the other riparian's use and his intent in making such use. Only if the interfering use is unreasonable in light of all the facts presented will it be enjoined.

Meng v. Coffee,[189] an opinion written by Roscoe Pound in his capacity as a commissioner of the Nebraska Supreme Court, is a classic case of an intrariparian dispute. In *Meng*, a lower riparian was seeking to enjoin several upper riparians who were diverting all the water from Hat Creek and its tributaries for irrigation, thereby depriving plaintiff of any use of the stream during times of shortage and greatest need. The district court denied an injunction but on appeal to the Nebraska Supreme Court, the district court was reversed and directed to enjoin the defendants from wasting, unreasonably diminishing or consuming all the waters of Hat Creek and its tributaries. In reaching this conclusion, the court held that the defendants were making an unreasonable use of the water.

Injunction is a necessary remedy for settling intrariparian disputes. To allow only damages for the injured riparian would have the undesirable effect of giving the power of eminent domain to a private person.

It seems clear from the *Meng* case that if the use complained of is found to be reasonable, then neither an injunction should issue nor money damages be granted. Also, there are situations where an unreasonable use by one riparian is imminent but has not yet occurred. In such cases an injunction may be available, but money damages should certainly be denied as no harm has yet occurred.

However, an injunction will not be available in any case unless the usual rules governing such equitable relief are satisfied.

3. *Riparian v. Appropriator*[190]

The dual-system of riparian and appropriative rights poses special problems of adjudicating conflicting claims between users. Before *Wasserburger v. Coffee*,[191] appropriators held a preferred po-

189. 67 Neb. 500, 93 N.W. 713 (1903).
190. For more detailed treatment of the problems, see Rozmarin, *The Dual-System of Water Rights in Nebraska*, 48 NEB. L. REV. 488 (1969).
191. 180 Neb. 149, 141 N.W.2d 738 (1966).

sition over riparians in Nebraska[192] because injunctions would not issue against appropriators for violating riparian rights. The "law" was:

> A riparian who desired to protect his existing uses of the water that antedated appropriations was forced to comply with the irrigation laws and claim as an appropriator, for otherwise his only right against a later appropriator would be the collection of money damages, and he would have no protection for his water at all.[193]

In *Wasserburger*, however, the supreme court adopted a new test of balancing the equities between the parties,[194] and enjoined upper irrigators diverting pursuant to appropriation permits from injuring lower riparian proprietors.

When vested riparian rights are destroyed or impaired by the activities of an appropriator, the injured riparian is entitled to some remedy. The distinction between the remedies of damages and injunction, as applied to these conflicts, has not been based upon the doctrine that equity permits injunctions only if there is no adequate remedy at law. Rather, the Nebraska Supreme Court centered its earlier decisions on the overall benefit to the state when deciding whether to grant an injunction or to limit relief to damages. Under this "beneficial purpose" rationale, riparians could be limited to recovery of money damages even though their lands were irreparably damaged, perhaps even rendered worthless. *Wasserburger* changed this; now the outcome depends solely upon the relative equities of the parties as determined by the court.

The fundamental change in outlook can be seen by a brief examination of the leading cases. The first case in which a riparian

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192. The rule for damages prior to *Wasserburger* was:

> In order to entitle the riparian owner to compensation, he must suffer an actual loss or injury to the use of the water which the law recognizes as belonging to him, and to deprive him of which is to take from him a substantial property right. It is for an interference with or injury to his usufructuary estate in the water for which compensation may rightfully be claimed where the water of the stream is diverted and appropriated for the use of irrigation . . . .

Crawford Co. v. Hathaway, 67 Neb. 325, 353, 93 N.W. 781, 790 (1903).

193. Trelease, *Coordination of Riparian and Appropriative Rights to the Use of Water*, 33 TEX. L. REV. 24, 61-62 (1954).

194. An appropriator who, in using water pursuant to a statutory permit, intentionally causes substantial harm to a riparian proprietor, through invasion of the proprietor's interest in the use of the waters, is liable to the proprietor in an action for damages if, but only if, the harmful appropriation is unreasonable in respect to the proprietor. The appropriation is unreasonable unless its utility outweighs the gravity of the harm.

Wasserburger v. Coffee, 180 Neb. 149, 159, 141 N.W.2d 738, 745-46 (1966).

owner was denied an injunction against an appropriator was *Clark v. Cambridge & Arapahoe Irrigation & Improvement Co.*[195] In *Clark* a lower-riparian-mill operator, prior in time, sought to enjoin an upper-appropriator-irrigator from diverting water according to his appropriation. The court refused the injunction, but did so on the theory that the plaintiff was barred by laches. Laches was considered an especially strong defense since the defendant was engaged in a work of public interest.

In *Crawford County v. Hathaway*,[196] where a subsequent upper-appropriator brought an action to enjoin a lower-riparian from tearing down a diversion dam, the court discussed at great length the rights and remedies available in conflicts between riparians and appropriators and then allowed an injunction to issue against the riparian. On the riparian's cross-petition, however, the appropriator's irrigation was prohibited until adequate damages were paid to the riparian owner by the appropriator. The court believed that damages were an adequate remedy for the riparian, and that by allowing only damages, the state-wide community would continue to benefit from the irrigation appropriation. The effect, of course, is the same as though the appropriator had the power to condemn riparian water rights upon paying just compensation; the court decided this was contemplated by the enabling statutes. This interpretation of the appropriation acts provided a method to develop arid or semiarid land by applying stream waters "to the more useful and beneficial purposes of fructifying the soil for the comfort and blessing of mankind."[197]

The next important case was *McCook Irrigation & Water Power Co. v. Crews*,[198] in which a prior lower-appropriator was granted an injunction against a subsequent upper-riparian-irrigator. The court stated that such a holding did not mean that the riparian's right to irrigate was destroyed. It simply meant that this private right should be subordinated and, when required for public use, taken by eminent domain.[199] Thus, the court held riparian rights were subject to condemnation when necessary for use by an irrigation company. Therefore, since the approriator's rights were superior to the riparian's,[200] it could enjoin the riparian or, in a suit by the riparian, the appropriator could resist an injunction.

195. 45 Neb. 798, 64 N.W. 239 (1895).
196. 67 Neb. 325, 93 N.W. 781 (1903).
197. *Id.* at 350, 93 N.W. at 789.
198. 70 Neb. 115, 102 N.W. 249 (1905), *rev'g on rehearing* 70 Neb. 109, 96 N.W. 996 (1903).
199. *Id.* at 121, 102 N.W. at 251.
200. *Id.* at 118, 102 N.W. at 251.

The *Crews* case was clear since, under a priority of time test, the appropriator's rights were superior.

Finally, in *Cline v. Stock*,[201] a prior riparian-manufacturer was denied an injunction against diversions by subsequent appropriator-irrigators. The court decided that the appropriator had acquired superior rights. If the appropriator carried out his permit in the manner allowed "a lower riparian owner could not enjoin the continued use of such water, but must rely upon his action at law to recover such damages, if any, as he might sustain . . . ."[202]

Despite these decisions, riparians argued that *Vetter v. Broadhurst*[203] gave them a right to an injunction against private appropriators. *Vetter* was an eminent domain proceeding in which the plaintiff, an individual farmer, sought to condemn defendant's land for a reservoir to be used for irrigation purposes pursuant to an appropriation permit. The court denied the condemnation because the plaintiff, as an individual rather than an irrigation company, was incapable of appropriating for a public purpose.

In *Wasserburger* the court distinguished the facts before it from the prior cases, *Clark, McCook* and *Cline*, by using the rationale of *Vetter*: "We think that these cases have been misread . . . . Defendants are private appropriators—not champions of the public interest."[204] The court pointed out that the appropriators in *Clark, McCook* and *Cline* were irrigation companies offering a public service, in good faith and at great cost. It might be noted, however, that in the *Cline* case some of the appropriators were private individuals, not public corporations.[205]

It was argued in *Wasserburger* that the appropriators made their appropriations at great expense without the riparians bringing any action, when they surely should have realized that any water shortage would leave them without an adequate supply. But laches was never referred to in the opinion. This may have been because the court believed that as with a prescriptive right, the riparians did not need to commence an action until there was a use so adverse to their own as to deprive them of vested rights. It is unknown whether the court took all this into consideration in its balancing of the equities, but it may be irrelevant in light of the

201. 71 Neb. 79, 102 N.W. 265 (1905), *rev'g on rehearing* 71 Neb. 70, 98 N.W. 454 (1904).
202. *Id.* at 81, 102 N.W. at 266.
203. 100 Neb. 356, 160 N.W. 109 (1916). For a contrary philosophy, see Clark v. Nash, 198 U.S. 361 (1905).
204. Wasserburger v. Coffee, 180 Neb. 149, 162, 141 N.W.2d 738, 747 (1966).
205. *See* Brief for Appellant for Rehearing at 13, Wasserburger v. Coffee, 180 Neb. 149, 141 N.W.2d 738 (1966).

court's wide discretion to determine priorities in Nebraska's dual-system after *Wasserburger*.

The test used in *Wasserburger* to determine the suitability of an injunction was that used in enjoining an ordinary tort. We submit that it is illogical to use the tort test when dealing with a judicially regulated system of water rights such as in Nebraska. Except in extremely patent situations, one would have great difficulty knowing whether he were committing a tort against another party without first having his uses adjudicated under the tests set forth in *Wasserburger*. This situation gives rise to the dominant problem of unpredictability. Private-appropriator-irrigators may be unwilling to expend large sums of money to divert water in reliance upon Department of Water Resources' permits if there is any possibility of detriment to riparian owners. Appropriators may be willing to compensate riparians for damages to vested rights, but injunctions against large diversions could be disastrous. In a specific case, the court would probably take this into consideration, but *Wasserburger* does not make it absolutely clear that it would do so.

E. 1895 TO 1973

Although the administrative structure has been altered,[206] the major provisions of the 1895 act have remained basically the same despite vigorous attempts to obtain changes. The prime example of failure was the long, bitter conflict over proposals to authorize trans-basin diversions.[207] Because the changes that did occur have been described elsewhere,[208] it is unnecessary to do more here than set out the most significant conclusions to be drawn from an overview of the Nebraska law between 1895 and 1973 and make several recommendations.

One major change has been the assumption by state and federal entities of the responsibility for furnishing irrigation water.[209] This,

206. The State Bd. of Irrigation created in 1895 was superseded by the Dep't of Roads and Irrigation. Today the powers and duties are exercised by the Dep't of Water Resources. NEB. REV. STAT. § 46-208 (Reissue 1968).

207. *Interbasin Transfers, supra* note 64.

208. L. ORTON, R. FISCHER & J. COOK, REPORT ON THE FRAMEWORK STUDY: SURVEY OF NEBRASKA WATER LAW app. D (Neb. Soil & Water Conservation Comm'n State Water Plan Pub. No. 101D, June 1971); Doyle, *supra* note 28; *Water Rights, supra* note 61; Yeutter, *supra* note 3.

209. For an itemization of projects in the state, see Address by Cyril P. Shaughnessy, Natural Resources Section of the Neb. Bar Ass'n meeting, in Lincoln, Sept. 30, 1971, on file with the authors.

Since the federal Reclamation program began, $201,670,000 has

however, does not lessen the impact of the substantive appropriation laws and the doctrine of riparianism, both of which continue to proscribe the rights of public irrigation districts to claim, store, transport, and deliver water to irrigators within district boundaries. In addition, the riparian doctrine and appropriation system directly affect the increasingly frequent claims and demands of those desiring water for industries, municipalities, fish, wildlife, recreation, and scenic preservation.

A second broad observation shows the appropriation system functioning well. Therefore most of the basic principles adopted in 1895 will and should remain intact throughout the foreseeable future. We believe, however, that some changes in the framework would be desirable to accommodate the ever increasing water demands.

V. RECOMMENDATIONS

The recommendations which we propose may be controversial, but they are not drastic when viewed in historical perspective. The development of a comprehensive system of water rights was accomplished in a short span of years, and then for seventy-seven years little was done to make Nebraska's water laws more dynamic.

A. Riparian Rights

The extent to which Nebraska law limits riparian rights has already been shown. The most obvious illustration is the 1895 cutoff date for acquiring riparian lands. However, most of the state's irrigable acres were in private ownership before that date and may have latent rights because riparian rights are neither acquired through use nor lost by non-use.

How far the Nebraska Supreme Court will go in recognizing riparian claims remains undetermined. It does appear clear that recent opinions of the court have turned the judicial philosophy of earlier years on its head. Decisions before 1966 had stabilized the incompatible appropriative and riparian systems by restricting the riparian remedy to damages, but today the court would probably not hesitate to issue injunctions in behalf of riparian proprietors against those diverting and using water pursuant to appropriative permits from the Nebraska Department of Water Resources.[210]

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been invested in Nebraska. During the past eight years, crops having a gross value of $362,933,000 have been grown on Reclamation land in the state. Address by Bureau of Reclamation Commissioner Ellis L. Armstrong, Four States Irrigation Council, in Denver, Colo., Jan. 14, 1971.

210. *See* Wasserburger v. Coffee, 180 Neb. 149, 141 N.W.2d 738 (1966).

We made an attempt to ascertain how much riparian proprietors use water in reliance on riparian status vis-à-vis the acquisition of an appropriation permit from the Department. Reliable information is unavailable and apparently unobtainable short of a full scale personal survey of every stream. The Department of Water Resources has complete reports on all appropriations, but riparian uses are not a part of the administrative system regulating use of water in Nebraska. Thus, the Department has neither the authority nor resources to obtain the data.

There is no way to accurately know what riparian water rights exist in the state today, but the available information indicates that:

(1) most riparian proprietors who were using water for irrigation when the 1895 Appropriation and Irrigation Law was enacted forsook reliance of their common law rights and acquired appropriation permits;[211]

(2) after April 4, 1895, new irrigation projects developed on the basis of the appropriation system which quantified, identified and adjudicated rights to water;

(3) at the present time, most proprietors who rely on riparian rights are non-competing small-scale users who primarily water livestock;[212]

(4) many potential riparian claims lay dormant. It also must be kept in mind that many appropriators may be using water on riparian land and could attempt claims as riparians as well as appropriators;[213]

(5) during future drought or periods of shortage caused by increased use, riparians could begin to assert their riparian claims to the jeopardy of existing public projects and private appropriators.

See also Brummund v. Vogel, 184 Neb. 415, 168 N.W.2d 24 (1969), discussed in *Report of Special Comm. on Water Resources,* 19 NEB. B.J. 63 (1970).

211. Between the years 1895 and 1898, 995 applications for appropriation permits were processed by the state. See 2 REP. NEB. BD. IRRIGATION 7 (1897-98).

212. An exception is Hat Creek in Sioux County, Neb., where livestock uses made in reliance on riparian rights create strongly conflicting claims. See Wasserburger v. Coffee, 180 Neb. 149, 141 N.W.2d 738 (1966).

213. For a case in which both litigants were claiming the right to use water under a dual appropriator-riparian status, see City of Fairbury v. Fairbury Mill & Elevator Co., 123 Neb. 588, 243 N.W. 774 (1932). The expense, delay and social conflicts which could be expected are illustrated by Wasserburger v. Coffee, 180 Neb. 149, 141 N.W.2d 738 (1966).

If such claims were to develop on a large scale the conflicts would prove detrimental to the functioning of the appropriation system and to development of a State Water Plan.[214]

Riparianism causes needless confusion and results in conflicts which would be avoided by imposing administrative supervision over all water allocations except domestic uses.[215] The troublesome aspects of operating two incompatible systems could be eliminated by requiring riparian users to file specified information and obtain a water use permit from the Department of Water Resources within a certain period of time. If a statute is properly drafted to abolish the unused rights and to provide a method of substituting permits for rights currently in use, then the constitutionality should be upheld on the basis of experience in Kansas, South Dakota, North Dakota, California, Oregon, and Washington.[216] Riparians would have more security with a permit and planners and regulators would be able to accurately identify existing water rights in the state. Whether the costs would justify the benefits involves a legislative judgment. In our opinion, registration of riparian claims is worth the effort and would immediately result in greater stability of all water rights.

B. PREFERENCES

Since 1895 Nebraska statutes have specified a hierarchy of preferences whenever water is in short supply.[217] And in 1920 they became a part of the constitution.[218] Domestic uses are preferred over all others, and agricultural uses are preferred over manufacturing and power production uses.[219] A preference is exercised

214. *See* Wasserburger v. Coffee, 180 Neb. 149, 141 N.W.2d 738 (1966).
215. "Domestic use" should be exempt from regulation. Such uses are so small that they have little or no effect on other users and regulation would only impose excessive burdens on the Dep't of Water Resources.
216. A number of articles discuss abolishment of riparian rights. For a particularly valuable analysis, see Corker & Roe, *Washington's New Water Rights Law—Improvements Needed,* 44 WASH. L. REV. 85 (1968). For citations, see Harnsberger, *Eminent Domain and Water,* in 4 WATERS AND WATER RIGHTS 63 n.12 (R. Clark ed. 1970); C. MEYERS & A. TARLOCK, WATER RESOURCE MANAGEMENT 154-55 (1971); J. SAX, WATER LAW, PLANNING & POLICY 211-12 (1968); F. TRELEASE, WATER LAW 197-201 (1967). *See also* 4 LAND & WATER L. REV. 185 (1969).
217. Neb. Laws c. 69, § 43 (1895), now NEB. REV. STAT. § 46-204 (Reissue 1968). *See also* NEB. REV. STAT. § 70-668 (Reissue 1971).
218. NEB. CONST. art. XV, § 6.
219. Discussions of the system appear in *Water Rights, supra* note 61, at 407-09; *Groundwater, supra* note 85; *Report of Special Comm. on Water Resources,* 19 NEB. B.J. 63 (1970); Yeutter, *supra* note 3, at 44-53.

by condemning the inferior use and paying its owner just compensation.[220]

The major drawbacks of the system in Nebraska are that it is not only cumbersome and practically unworkable, but it is also static and frequently out of tune with economic reality. For these reasons we believe that the matter of preferences would be handled better by utilizing an administrative, case by case approach, subject to direct appeal to the supreme court. We recommend, however, that domestic use be statutorily defined and accorded an "absolute" preference. Domestic uses of water, both from underground and watercourse sources, are so important to human survival that the legislature should provide injunctive relief for such users against interference by nondomestic users.[221]

Domestic use should be defined to include all legitimate modern personal uses, *e.g.*, air conditioning and watering of lawns, flow-

220. Except when the inferior use is for power purposes, the statutes do not provide a procedure for condemnation. The Nebraska Supreme Court has stated, however, that the constitutional statement of preferences "is a self-executing provision and the courts, in the absence of a statutory method, would be obliged to provide the means for enforcing its provisions." Loup River Pub. Power Dist. v. North Loup River Pub. Power & Irrigation Dist., 142 Neb. 141, 153, 5 N.W.2d 240, 248 (1942). In the case, the supreme court indicated the appropriative right would be divested and permanently transferred to the condemnor with the superior or higher preference. However, in Nebraska the appropriation is appurtenant to the land and consequently the actual procedure might be to leave the records in the Dep't of Water Resources unchanged and provide for payments of compensation during times when the holder of the senior preference is exercising rights obtained in the eminent domain proceedings. For example, assume two users on a stream which has a normal flow of 100 cfs. X Mfg. Co. uses 50 cfs pursuant to an appropriation from the Dep't of Water Resources. B Irrigation Dist. located downstream with a later priority in time uses the same quantity. Stream flow drops to 50 cfs and B, exercising its higher preference, commences eminent domain proceedings against X. Rather than transfer X's appropriative rights, X would be ordered to pass sufficient flow to permit B to receive 50 cfs at all times and B would pay compensation whenever X had to close its intake for the purpose of supplying B. At the present time, irrigators in the Loup River basin purchase power rights under contractual agreement but this raises a number of questions. See Yeutter, *supra* note 3, at 47.

221. The Nebraska Supreme Court may have already recognized such an absolute right. In Brummund v. Vogel, 184 Neb. 415, 168 N.W.2d 24 (1969), rights of a downstream stock-waterer with 28 head of cattle, who proved neither riparian nor appropriator status, were given a preference over an upstream appropriator's right to construct a dam for either agricultural or recreational purposes. Plaintiff showed no legal claim to have the water nor was he required to pay compensation.

ers and vegetable gardens, in addition to the "survival" requirements and realistic assessments of farm and ranch livestock needs.[222] Commercial herds, however, should be excluded. A statutory cutoff point should be established; though debate in the forum will settle such matters, any number in excess of ten but less than fifty would seem to be a reasonable cutoff size for a domestic herd.

C. The Three-Year Non-Use Rule

The Department of Water Resources may conduct an investigation to determine whether a water appropriation has been used for some beneficial or useful purpose within the past three years.[223] If a Department engineer reports that an appropriation has not been used for more than the three year period, a hearing may be conducted after notice to the landowner of record.[224] At the hearing either part or all of the appropriation may be forfeited should the landowner fail to "show cause" why it should not be.[225]

An appropriator defending against a forfeiture of his water rights has no guidelines for determining which facts are sufficient to "show cause." One Nebraska case indicates that destruction of diversion works by a natural disaster is such cause,[226] but no other criteria are available in either Nebraska case law or in the rules and regulations of the Department. Usually, however, forfeiture provisions are given effect only when the facts show that the nonuse is voluntary or is the result of neglect by the appropriator.[227]

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222. *See* Crawford Co. v. Hathaway, 67 Neb. 325, 93 N.W. 781 (1903). In the groundwater preference statute, domestic use is defined as all uses "required for human needs as it relates to health, fire control, and sanitation and shall include the use of ground water for domestic livestock as related to normal farm and ranch operations." Neb. Rev. Stat. § 46-613 (Reissue 1968).

223. Neb. Rev. Stats. §§ 46-229 to -229.05 (Reissue 1968). The supreme court held the procedure constitutional at an early date. Kersenbrook v. Boyer, 95 Neb. 407, 145 N.W. 837 (1914).

224. State v. Nielsen, 163 Neb. 372, 79 N.W.2d 721 (1956).

225. The procedure for cancelling an appropriation is not exclusive. State v. Nielsen, 163 Neb. 372, 79 N.W.2d 721 (1956). In addition to the three-year nonuse provision, rights under an appropriation permit may be lost by abandonment or by nonuse for ten years. Abandonment comprehends intent by the holder to relinquish the right, and the length of time the water has not been used is immaterial. The third method of loss is based upon nonuse of the water right for the prescriptive ten-year period of statutory limitation in Neb. Rev. Stat. § 25-202 (Reissue 1964), referred to in *Nielsen*.

226. State v. Oliver Bros., 119 Neb. 302, 228 N.W. 864 (1930).

227. Trelease, *A Model State Water Code for River Basin Development*, 22 Law & Contemp. Prob. 301, 316 (1957).

Although such a result may not have been intended by the legislature, an appropriator in Nebraska runs the risk that his water rights will be forfeited even though the nonuse was a prerequisite to participation in a government acreage limitation or production quota program, or was the result of compliance with the permit terms.[228] In fact, nonuse occurs whenever the department orders a junior appropriator to stop diverting so water can be furnished to senior users.

To alleviate obvious injustices, we recommend that the following periods of time not be considered as "nonuse" for purposes of forfeiture, cancellation or annullment of water rights proceedings:[229] (1) when irrigated farmlands are placed under an acreage reserve or production quota program or otherwise withdrawn from use as a requirement of participation in any federal or state government program; (2) when federal, state or municipal laws impose land or water use restrictions; (3) when the available water supply is inadequate to enable the owner to use the water for a beneficial or useful purpose; (4) when climatic conditions cause irrigation to be unnecessary or when circumstances are such that a prudent man, following the dictates of good husbandry, should not be expected to use the water; or (6) when caused by destruction of works, diversion or facilities for use by a cause not within the control of the owners of such water appropriation, and when good faith efforts to repair or replace such works, diversion or facilities are being made.[230]

Other periods which might be added include those when the nonuse occurs as a result of active service in the armed forces of the United States during a military crisis, nonvoluntary service in the armed forces, and during the operation of legal proceedings which affect the appropriation.[231]

Such provisions would eliminate the present uncertainty and

228. For example, appropriation permits in Nebraska are expressly limited to "the least amount of water necessary for the production of crops in the exercise of good husbandry." There are certainly those years, especially in the more humid eastern portion of Nebraska, when a prudent farmer would consider irrigation to be wholly unnecessary for the production of crops. See Fisher, *Western Experience & Eastern Appropriation Proposals*, in THE LAW OF WATER ALLOCATION IN THE EASTERN UNITED STATES 75, 119 (D. Haber & S. Bergen eds. 1958).

229. NEB. REV. STAT. §§ 46-229 to -229.05 (Reissue 1968).

230. *See generally* N.M. STAT. ANN. § 75-5-26 (1953); MODEL WATER USE ACT § 306, in U. OF MICH. LAW SCHOOL LEG. RESEARCH CENTER, WATER RESOURCES AND THE LAW 570 (1958); J. SAX, WATER LAW, PLANNING & POLICY 284-86 (1968); F. TRELEASE, WATER LAW 157-58 (1967). For a good analysis of the New Mexico law, see Comment, 6 NAT'L RES. J. 127 (1966).

231. *See* WASH. REV. CODE ANN. § 90.14.140 (Supp. 1972).

give the department and appropriators guidelines to utilize in a show-cause hearing. In addition, the courts would have the guidance of legislative standards when deciding appeals from the administrative decisions.

D. FLEXIBILITY OF USE

Water rights in Nebraska are institutionalized to such an extent that they cannot be voluntarily transferred even though neither the public interest nor third parties are injured.[232] Riparian rights are not transferable because they are tied to specific lands, but an owner could agree, of course, not to use all or a portion of the water.[233] In the case of appropriative rights, the Nebraska laws have been designed since 1895 to tie water to the land, *i.e.*, "all water distributed for irrigation purposes shall attach to and follow the tract of land to which it is applied."[234] Other statutes also freeze the water and its use to particular land by requiring the application for a permit to contain a description of lands to be irrigated.[235] South Dakota, Oklahoma and Nevada have similar restrictions,[236] but unlike Nebraska, they provide that if it becomes impracticable to beneficially or economically use the water on the land to which it is attached, then the right may be transferred to other land without loss of priority. Changes must not be detrimental to others and approval of the state water authorities is needed.[237]

There can be no doubt that water law should be flexible; it should permit water not only to move from place to place but from

232. *See* Yeutter, *supra* note 3, at 34 n.98.

233. This is a minority view. See Farnham, *The Permissible Extent of Riparian Land*, 7 LAND & WATER L. REV. 31, 33 n.5 (1972). A conveyance of riparian land transfers the seller's water rights to the buyer. To a limited extent, riparian proprietors can transfer rights apart from the land but the right itself is so uncertain it could not become the basis of an active market system. See generally C. MEYERS, MARKET TRANSFERS OF WATER RIGHTS: TOWARD AN IMPROVED MARKET IN WATER RESOURCES 15-17 (Nat'l Water Comm'n Rep. NWC-L-71-009, July 1, 1971) [hereinafter cited as MEYERS]. See also 1 WATERS AND WATER RIGHTS 53.4 (R. Clark ed. 1967).

234. Neb. Laws c. 70, § 9 (1895), now NEB. REV. STAT. § 46-122 (Reissue 1968). Farmers' & Merchants' Irrigation Co. v. Gothenburg Water Power & Irrigation Co., 73 Neb. 223, 102 N.W. 487 (1905). Appropriative rights obtained before 1895 may be transferred subject to control of the Dep't of Water Resources. See NEB. REV. STAT. § 46-250 (Reissue 1968); United States v. Tilley, 124 F.2d 850 (8th Cir. 1941).

235. NEB. REV. STAT. §§ 46-233, -242 (Reissue 1968).

236. NEV. REV. STAT. §§ 533.040, .325 (1971); OKLA. STAT. ANN. tit. 82, § 34 (1970); S.D. COMP. LAWS § 46-5-34 (1967).

237. *Id. See* Trelease & Lee, *Priority and Progress—Case Studies in the Transfer of Water Rights*, 1 LAND & WATER L. REV. 1, 23 (1966) [hereinafter cited as Trelease & Lee].

one use to another without the artificial restraints now existing. Some changes can take place as a result of eminent domain proceedings and pursuant to forfeiture, abandonment and prescription rules, but these methods neither function automatically nor easily and none provide efficiency criteria for either transfer or allocation.

We believe that statutory prohibitions against transfers (*e.g.*, preference systems, appurtenancy standards, use restrictions, and prohibitions against transbasin diversions) should be relaxed. These concepts are based on political value judgments which assume that a market system cannot operate to allocate water and that society will suffer if citizens are permitted to buy and sell water rights as they do their other property. We think the fears are ill-founded. Many oppose industrial purchases but to our knowledge no empirical data indicates or even suggests that transfers to satisfy industrial demands would cause large scale diseconomies.

To emphasize our beliefs, we have selected the following statements from among those made recently by others who have carefully analyzed the institutional structures through which water is allotted. All concur that artificial restrictions should be reduced; we agree. Holders of appropriation rights are entitled to nothing more than a guarantee "that no acts of man will ever reduce their chances to obtain water with the priority they have established according to the time they (or their predecessors in title) first put water to beneficial use."[238]

> We recommend that state laws prohibiting irrigation and conservancy districts from transferring water rights be repealed. We also recommend repeal of the appurtenancy doctrine, which prohibits an individual appropriator from transferring a water right from one parcel of land to another. Neither restriction serves the modern desideratum of reallocation of the resource to more productive use.[239]

> We support the use of the market—where it can be made to work relatively efficiently—on three grounds: (1) tradition, (2) greater likelihood of maximizing the productivity of resources, and (3) less interference by government in people's lives.[240]

> Restrictions upon the transfer of water rights, just as those upon the transfer of any property, should be viewed with suspicion. As a general rule all transfers of water rights between individuals should be permitted except in cases where damage to third parties can be clearly demonstrated.[241]

238. Ellis, *Water Transfer Problems*, in WATER RESEARCH 243 (A. Kneese & S. Smith eds. 1966).
239. MEYERS, *supra* note 233, at vi.
240. *Id.* at iv.
241. Milliman, *Water Law and Private Decision-Making*, 2 J. LAW & ECON. 41, 54 (1959).

A water right is granted perpetuity, but the right is transferable so that it can move to higher uses in response to economic forces. Under idealized concepts of prior appropriation law the elements of priority of right, specificity of quantity, transferability and perpetuity make the water right a property right of a higher order. The theory behind this doctrine is that by permitting persons to carve out for themselves private property rights from the public-owned assets, each person will attempt to achieve the greatest possible benefit for himself, and the total result of these individual actions will tend to produce maximum welfare for the state or nation. Problems of reallocating the water from the purpose of the original appropriation to a new and higher purpose are presumably handled as are similar problems relating to land resources. Today, land originally patented to an individual as a homestead and used for agricultural purposes might be better used as a factory site or as a city airport. No administrator runs the farmer off his land and terminates his property rights on the ground that he is making an inefficient and wasteful use of a natural resource. The industrialist simply offers to buy the land, tendering enough money to make it attractive to the farmer to leave. The city does the same, though it has the additional power to condemn the land to insure its transfer at a fair price if the farmer is for some reason able to hold out for an exorbitant sum. The sale will be made to the highest bidder and the land will serve its optimum use. In theory the same process holds true for transfers of western water rights held by irrigators, when industrial or municipal uses are more valuable. If the industrialist or the city cannot pay the price, then by definition the transfer of the water to them would not produce greater benefits. If in fact it will produce greater benefits, the value to the purchaser is greater than the value to the seller, and the transfer can be made as in the purchase of the land. The movement of water to its highest beneficial use is supposed to be thus insured by economic forces, rather than by legal processes or governmental intervention.[242]

With most streams overappropriated, the only way that a potential water user in Nebraska can obtain a secure water right is to purchase land bearing an appropriation of early priority. The water right itself cannot be transferred because of an unwise statutory prohibition that may discourage water-using industries from entering the state. All the locational advantages of a particular area or city are meaningless if water rights are unavailable.

But aside from the issue of economic development, such a prohibition negates the possibility of shifting water from one irrigator to another or from an irrigator to a power plant or manufacturing company, even though such shifts might be economically justified. This is a most serious shortcoming in Nebraska law.[243]

On September 12, 1972, Ellis L. Armstrong, then Commissioner of the United States Bureau of Reclamation, observed that fre-

242. Trelease & Lee, *supra* note 237, at 4-5. For a fuller discussion, see Trelease, *Policies for Water Law: Property Rights, Economic Forces, and Public Regulation,* 5 NAT'L RES. L. REV. 1, 29-34 (1965).

243. Yeutter, *supra* note 3, at 34.

quently legal restrictions on the allocation, use and pricing of water must be changed before technical measures can be effectively applied. One of the changes he suggested was:

> Elimination of the appurtenancy concept and administrative red tape which preclude transfer of water rights. These changes would: (a) allow irrigators to use their water on the lands that yield the highest economic returns; (b) permit rental, lease, or sale of surplus water rights to other irrigators with inadequate supplies, or to entities who can put water in a "higher" or socially more desirable use; and (c) encourage elimination of water waste resulting from excessive diversions and irrigation applications made by individuals to protect surplus rights from loss through abandonment or forfeiture.[244]

So long as water remains an immobile resource, costs and benefits cannot be associated. We therefore recommend that present restrictions be modified so water can move more freely among users, uses and locations.

E. Protected Rivers and Minimum Flows

Individual rights to use water for recreational activities such as swimming, fishing and boating are outside the scope of this article. A brief reference to the matter is, however, in order since recommendations nine and eleven of the Framework Study portion of the State Water Plan provide:

> 9. In the interest of environmental quality of life and to assure the continued attractiveness of Nebraska, certain river reaches should be designated as Protected River Reaches and receive protection as appropriate, and certain water related areas of historic, scientific and cultural value should be preserved.[245]
>
> 11. The fish and wildlife resources of the State should be further protected and enhanced in all water resource developments and associated land use programs with special emphasis on the *maintenance* of proper water quality and *adequate minimum flows* in critical stream reaches, and the continued maintenance of proper quality and a real extent of water related habitat.[246]

The reasons for these recommendations, and for others in the Study relating to environment, were the increasing demands for aesthetic and recreational use.[247] Also, during drought periods

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244. Address by Bureau of Reclamation Commissioner Ellis L. Armstrong, Annual Meeting of Western State Eng'rs, in Sun Valley, Idaho, Sept. 12, 1972.

245. Nebraska Soil and Water Conservation Comm'n, Report on the Framework Study 261 (State Water Plan Pub. No. 101, May 1971) [hereinafter cited as Framework Study].

246. *Id.* at 262.

247. Bechter, *Tenth District Recreational Water*, in Monthly Review 3 (Fed. Reserve Bank of Kansas City, Mo., March, 1971).

stream appropriations are "used to the fullest extent possible and as a result many streams are completely dried up."[248] Such absence of flow causes irreversible damage including the killing of fish and aquatic plant life. To avoid these consequences, or at least lessen them in selected places the Framework Study recommends giving consideration to preservation of the following watercourses in their existing free flowing state:

1. Niobrara River—from its confluence with Antelope Creek downstream to the headwaters of the proposed Norden Reservoir, including the lower 8 miles of the Snake River tributary.

2. Snake River—from its headwaters to the headwaters of Merritt Reservoir.

3. North Loup River—from its headwaters to 18 miles west of the Taylor Diversion Dam.

4. Middle Loup River—from its headwaters to the Milburn Diversion Dam.

5. Dismal River—from its headwaters to its mouth.

6. Missouri River—from Lewis and Clark Reservoir west and north along the Nebraska border.

7. Missouri River—from Yankton to South Sioux City.

8. Platte River—from the mouth of the Loup River to the confluence of the Missouri River.

9. Big Blue River—from Crete to Beatrice.[249]

Before scenic and recreational areas can be developed by preserving streams in their natural state and requiring minimum flows, certain constitutional interpretations would be necessary. At the present time, article XV dedicates the water of every natural stream to the people of the state for beneficial purposes[250] subject to the provision that 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."[251] Although a permit to a private person can issue for only domestic, agricultural or manufacturing purposes, a permit might be issuable either to the state or to a public agency for recreational use or maintenance of flow levels if the legislature declared it was for

248. FRAMEWORK STUDY, *supra* note 245, at 87.
249. *Id.* at 99. *See generally* Tarlock, *Preservation of Scenic Rivers*, 55 KY. L.J. 745 (1967). Wisconsin has a special statute for protection of the Brule River, WIS. STAT. ANN. § 31.30 (1964); Oregon protects streams for fish and scenic waterfalls, ORE. REV. STAT. §§ 538.110 to .300 (1953); Idaho preserves certain lakes, IDAHO CODE ANN. §§ 67-4301 to -4303 (1949).
250. NEB. CONST. art. XV, § 6.
251. NEB. CONST. art. XV, § 7.

beneficial purposes and demanded by the public interest.[252] Several states have statutes providing that recreational use is beneficial,[253] and Iowa and Mississippi, for example, have adopted minimum streamflow laws.[254]

Under minimum flow regulations, withdrawals would be prohibited when water levels were below those necessary to protect fish and wildlife, scenic beauty, recreational use, water quality, or other uses of a public nature. Special authorizations could be made for ordinary household and domestic animal use, for municipal users, and in cases of use where the water would be immediately returned to the stream in substantially the same amount to insure the maintenance of the average minimum flow.[255]

V. CONCLUSION

It has been our intention to depict, in an epochal manner, the development of Nebraska law governing rights to the use of watercourse water. Special attempts have been made to account for geographical, political, economic, and general social factors which induced or attended changes in the law.

Riparianism, inherited with adoption of the common law of England as the law of Nebraska, could not survive the pressures for certainty of one's "right" to an allotted supply of water. Pressures mounted because of (1) the semi-arid nature of the western portion of Nebraska, (2) the high cost of planning, constructing and maintaining diversion facilities, (3) a need for speedy resolutions of conflicting claims, (4) several drought crises between 1881 and 1895, and (5) rapidly increasing faith in irrigation as an indispensable agricultural tool.

Several minor legislative chips were made in the riparian doctrine before 1895. These were insufficient, however, and after intense efforts by spirited crusaders, the legislature in 1895 enacted a law for appropriation of water—a system adopted from sister states of the West whereby unallocated water could be claimed and rights secured on the basis of first-in-time, first-in-right. This system has remained the keystone of Nebraska water law to the present.

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252. *See* F. TRELEASE, A WATER CODE FOR ALASKA 101-02 (1962) [hereinafter cited as TRELEASE].
253. *E.g.*, IDAHO CODE ANN. §§ 67-4301 to -4305 (1949); KAN. STAT. ANN. § 82a-707 (1964); ORE. REV. STAT. § 536.310 (1965); TEX. REV. CIV. STAT. ANN., art 7471 (1964). *See also* TRELEASE, *supra* note 252, at 42.
254. IOWA CODE ANN. § 455A.1 (1970); MISS. CODE ANN. § 5956-04(c),(d) (Cum. Supp. 1971).
255. *See.* N. HINES, A DECADE OF EXPERIENCE UNDER THE IOWA WATER PERMIT SYSTEM 40-56 (U. of Iowa Agriculture Law Center Monograph No. 9, Sept. 1966).

Many legislative additions and changes, both procedural and substantive, have been made in the basic appropriation law since 1895; however, attempts to shift major policies have consistently failed.

In Parts IV C and D, and in references to contemporary works and comments in the recommendations, the existing laws governing rights to use water from Nebraska streams have been analyzed with concern for contemporary expectations and demands. Principal conclusions are: (1) latent riparianism causes needless confusion and is detrimental to the functioning of the appropriation system and full development of the State Water Plan; (2) the existing "preference" provisions define domestic use inadequately, ignore the cohesiveness of municipal uses and do not reflect evolving economic realities; (3) the "three-year non-use rule" is needlessly vague and potentially oppressive in the absence of additional guidelines for its application; (4) the place, time, manner, and choices for appropriators' use of water pursuant to their respective rights should be made more flexible; and (5) public demands pertaining to conservation and ecological concerns will require increased planning, co-ordination of efforts and statutory recognition.

Our recommendations in Part V may in some instances seem controversial—actually, debate among the decision-makers is inevitable and usually proves constructive. However, the changes advanced are not drastic considering that little has been done in the past seventy-seven years to make the water-law framework more dynamic.