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## INTERBASIN TRANSFERS: NEBRASKA LAW AND LEGEND

*Jarret C. Oeltjen\**, *Richard S. Harnsberger\*\**, and  
*Ralph J. Fischer\*\*\**

### PREFACE

The 1967 Nebraska Legislature directed the Nebraska Soil and Water Conservation 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 . . ."<sup>1</sup> The 1967 legislature also unanimously endorsed Legislative Resolution No. 5 which requires the development of a State Water Plan by the Soil and Water Conservation Commission. The Resolution specifically 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 resources development."

The authors were encouraged by the Commission to complete an independent study of numerous legal aspects of the Plan prior to the summer of 1972. However, because of recent interest in the subject of moving water from one water basin to another in Nebraska, the authors decided this section of the larger study should be published now. Of course, this article does not represent the official view of the Nebraska Soil and Water Conservation Commission and may even at points be contrary to possible future policy decisions of the Commission.

Before a comprehensive State Water Plan can be implemented in Nebraska, a decision must be made regarding whether to permit transfers of water from one drainage basin to another. This paper has been written to enlighten both laymen and trained lawyers about the bitter conflicts which have occurred in the past in attempting to obtain legislative authorization. A second goal has been to analyze legal impediments and to show how other states have approached the problem. Toward the end of the paper, an attempt

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<sup>1</sup> NEB. REV. STAT. § 2-1509(8) (Reissue 1970).

is made to give an enlarged perspective by briefly looking at the shifts in opinion over time and by suggesting criteria for possible legislation.

Hopefully, the information in this article will be useful to officials charged with understanding the problems of interbasin diversions, to citizens interested in the state's resources and to legislators engaged in the decision-making process.

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### INTRODUCTION

With the exception of a few small drainage basins in arid regions, no river system has been fully regulated or used. In fact, only a small part of the country's total flow volume has been harnessed and applied for human benefit,<sup>2</sup> though references are frequently made to water "shortages." Actually, in most geographical areas the problems involved in water resource development are not attributable to the shortage of water, but rather to a natural misallocation.

Even though additional water may be needed to develop particular sections, other unit areas may have more than sufficient water for long range development. This is especially true in Nebraska where each area of the state has one or more specific water problems which relate to irrigation, domestic water supply, flooding, drainage, navigation, pollution, wildlife, or power.<sup>3</sup> For instance, in one area groundwater is being "mined" because of heavy groundwater pumping, and in an adjoining area the water table is rising to the extent that bogging occurs because of extensive agricultural applications of surface water.<sup>4</sup>

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<sup>2</sup> See Fox, *Water: Supply, Demand and the Law*, 32 ROCKY MT. L. REV. 452 (1960); Milliman, *Water Law and Private Decision-Making: A Critique*, 2 J. LAW & ECON. 41 (1959); White, *A Perspective of River Basin Development*, 22 LAW & CONTEMP. PROB. 157 (1957).

<sup>3</sup> NEBRASKA STATE PLANNING BOARD, *WATER RESOURCES OF NEBRASKA* (1941).

<sup>4</sup> The counties of Adams, York, Clay and Webster all have areas which are experiencing shortages while Phelps and Gosper counties are experiencing just the opposite.

Much of the waste and hardship resulting from natural misallocation can be corrected by sound engineering plans designed to economically transfer water from points of plenty to areas of need. Ideally, such transfers would maximize benefits for the state and nation as a whole, stimulate growth in areas of need, and encourage the most efficient uses of water. The promotion of the optimum use of Nebraska's water resources by the elimination of misallocation problems is one of the goals of the Nebraska Soil and Water Conservation Commission's "State Water Plan."<sup>5</sup>

It is axiomatic that efficient allocation of water resources is subject to certain physical limitations, but the degree to which those limitations are muted is influenced by the current levels of technology, prevailing economic theory, political reality, and more subjective considerations such as motivation and ethics. Is a reallocation feasible? Would such a plan be economically and ecologically sound? What effect would the transfer have on third persons both in the areas of withdrawal and receipt? Is the water to be diverted from one "watershed"<sup>6</sup> to another? This last question, although appearing the most innocent and perhaps irrelevant, presents the specific issues to which the discussion in this paper will be directed.

This study is generally limited to the legal aspects of transbasin diversion, *i.e.*, the taking of water from the drainage area of one stream and using it in the drainage area of another. Law, however, and particularly natural resources law, does not function in a vacuum; technological, economic, political and ethical considerations must and will be noted, either expressly or impliedly.<sup>7</sup>

### TRANSBASIN DIVERSION AND RIPARIANISM

Throughout history the natural flow of a watercourse has re-

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<sup>5</sup> L.R. 5, 77th Neb. Leg. Sess. (1967).

<sup>6</sup> "Watershed" is used here in its general sense and not as a term of art. See *Ainsworth Irrig. Dist. v. Bejot*, 170 Neb. 257, 273, 102 N.W.2d 416, 426 (1960).

<sup>7</sup> "Ultimately, however, so far as Nebraska is concerned, the question is not so much of legality as it is of justice or morality." NEBRASKA LEG. COUNCIL COMM. REPORT NO. 2, REPORT OF THE COMMITTEE ON WATER DIVERSION 33 (1944). "[I]t seems to me that when God takes the valley here and the rivers, and the people settle in it, he intended (sic), and the Supreme Court of Nebraska said that it was so intended, that the waters of the river valley belonged to that river valley and no other river valley; and that is the law . . ." NEBRASKA IRRIG. ASS'N, PROCEEDINGS OF THE 44TH ANNUAL CONVENTION 169 (1936).

ceived varying degrees of legal protection.<sup>8</sup> Weatherford has observed that during Roman times running water in its natural state was classified as a resource common to all, and therefore, private severance was influenced by the wanderings of the stream.<sup>9</sup> Likewise, when the riparian theory was first introduced into the United States, riparianism approached a natural law rationale. Watercourses were viewed and protected as self-operative distribution systems. The riparian proprietors' correlative, usufructuary rights were but an incident of owning riparian land. While nonriparian owners were precluded from any use of the stream, riparian owners were limited to use on riparian land.<sup>10</sup> By definition, riparian land is "land which is contiguous to and touches a watercourse; it does not include land outside the watershed of the watercourse . . ."<sup>11</sup> The use is thereby limited to the boundaries established by nature for riparian ownership.<sup>12</sup>

"Water used within a watershed surely finds its way back to the stream."<sup>13</sup> But when water is exported for use in another watershed, both the initial use of the water and the benefit of the return flow accrue to the area of receipt. Since under the riparian system the

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<sup>8</sup> For a detailed discussion of the riparian system of water rights see Hutchins, *Background and Modern Developments in State Water-Rights Law*, in 1 WATERS AND WATER RIGHTS 57 (R. E. Clark ed. 1967); Doyle, *Water Rights in Nebraska*, 20 NEB. L. REV. 1 (1941); Doyle, *Water Rights in Nebraska*, 29 NEB. L. REV. 385 (1950).

<sup>9</sup> Weatherford, *Legal Aspects of Interregional Water Diversion*, 15 U.C.L.A. L. REV. 1299 (1968). See generally, *id.* at 1299-1300 & nn. 3-5. Weatherford makes the interesting observation that large-scale diversions via the aqueducts into Rome were an accomplishment of public law, as distinguished from the private law of the usufruct. The central notions of the Roman Doctrine were codified as the doctrine of riparian rights in the CODE NAPOLEAN art. 644 (1804).

Weatherford also notes the dispute as to the origin of the American law of riparianism, that is, whether it was a transplant of French civil or of English common law.

<sup>10</sup> 1 S. WEIL, *WATER RIGHTS IN THE WESTERN STATES* § 766 (3d d. 1911).

<sup>11</sup> VA. CODE § 62.1-104(5) (Reissue 1968). See, e.g., Clark & Martz, *Classes of Water and Character of Water Rights and Uses*, in 1 WATERS AND WATER RIGHTS § 53.5(c) (R. E. Clark ed. 1967); W. HUTCHINS, *THE CALIFORNIA LAW OF WATER RIGHTS* 202 (1956); 1 C. KINNEY, *THE LAW OF IRRIGATION* § 514 (2d ed. 1912); F. MALONEY, S. PLAGER & F. BALDWIN, *WATER LAW AND ADMINISTRATION, THE FLORIDA EXPERIENCE* 191 (1968); 2 S. WEIL, *supra* note 10, at §§ 768-75; NATIONAL RESOURCES PLANNING BOARD, *STATE WATER LAW IN THE DEVELOPMENT OF THE WEST* 6 (1943); Doyle, *Water Rights in Nebraska*, 29 NEB. L. REV. 385, 405 (1950). See also Lauer, *Reflections on Riparianism*, 35 MO. L. REV. 1, 5-7 (1970).

<sup>12</sup> 2 H. FARNHAM, *WATER AND WATER RIGHTS* § 463a (1904).

<sup>13</sup> 1 S. WEIL, *supra* note 10, at § 773.

water right is neither lost through nonuse nor limited to the amount presently being used, any loss due to transbasin diversion undermines the system even when sufficient amounts would remain for present inbasin needs. "If the irrigation of nonriparian lands was permitted by a riparian owner, even if there was not material injury to those below him on the stream, by prescription and adverse user, it might ripen into a right, which would result in great loss to the other owners on the stream."<sup>14</sup>

To give this "watershed limitation" meaning it became incumbent upon the courts to explain what was meant by "watershed." California gave the limitation its full effect. Each tributary as well as the stream below its junction with a tributary was to be considered, for the purposes of the doctrine, as a separate and distinct watershed.<sup>15</sup> If water were removed from the branch of the stream, the watershed limitation would not be satisfied by merely returning the surplus either directly to the main stream or via another branch.<sup>16</sup> This narrow definition results in maximum protection of the area of origin and is consistent with the logic of the riparian system, *i.e.*, to give rights to a riparian to use the flow of the stream which borders his land, diminished only by upstream riparian uses.

#### INTERBASIN TRANSFER BY APPROPRIATORS

Irrigation was practiced in the early "West" by Indians and Spanish settlers; appropriations were allowed under the Mexican regime, and the use of water was not confined to riparian land.<sup>17</sup> However, the essentials of the appropriative principle sprang not from Mexican law and custom but rather from regions of California where miners first applied the "first come, first served" theory of prior possession to their mining claims.<sup>18</sup> Later this concept of

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<sup>14</sup> 1 C. KINNEY, *supra* note 11, at § 517.

<sup>15</sup> *Anaheim Union Water Co. v. Fuller*, 150 Cal. 327, 88 P. 978 (1907). See also *Rancho Santa Margarita v. Vail*, 11 Cal.2d 501, 81 P.2d 533 (1938) (where plaintiff's lands are below the confluence, he cannot complain that a defendant riparian above the junction takes water from one branch to irrigate in the watershed of the other branch.).

<sup>16</sup> For a more expansive treatment of what comprises a "watershed" see W. HUTCHINS, *THE CALIFORNIA LAW OF WATER RIGHTS* 202-03 (1956); 1 S. WIEL, *supra* note 10, at § 773.

<sup>17</sup> See W. HUTCHINS, *SELECTED PROBLEMS IN THE LAW OF WATER RIGHTS IN THE WEST* 66-67 (1942). For a more thorough discussion of the development of the prior appropriation doctrine see Hutchins, *Background and Modern Developments in State Water-Rights Law*, in 1 *WATERS AND WATER RIGHTS* 57 (R. E. Clark ed. 1967).

<sup>18</sup> 1 S. WIEL, *supra* note 10, at § 71. See Clyde, *Current Developments in Water Law*, 53 *Nw. U.L. REV.* 725 (1959)

ordering rights was used to reserve large quantities of water for "sluicing" and other mining operations.<sup>19</sup> Eventually these early rules, based on necessity, evolved into the present system of prior appropriation.<sup>20</sup>

The appropriation system as it developed in the western United States did not generally adhere to the watershed limitation inherent in the riparian system. In fact, as one early writer stated, "There is no question now as to the right of an appropriator to divert the water from a stream flowing in one watershed and by any means conduct it for the irrigation of lands in another watershed."<sup>21</sup>

The divergent nature of the treatment accorded transbasin diversion is partially explained by the basic doctrinal differences between the riparian and appropriative systems. While under the riparian system the correlative right to use the stream water is incident to bank ownership, the appropriative system declares that the seizure of the water by diversion and the application of it to beneficial use creates the right. Situs of the land is of little, if any, legal relevance.<sup>22</sup> Thus, in an appropriative system the emphasis is shifted from issues of land ownership and incident rights to questions of proper possession and use.<sup>23</sup>

The departure from the "watershed limitation" was not purely accidental; it was thought that to impose watershed limits on appropriators was to unnecessarily perpetuate one of the undesirable characteristics of the riparian system. This feeling is clearly enunciated in an early Colorado Supreme Court decision:

<sup>19</sup> 1 S. WIEL, *supra* note 18, at § 73.

<sup>20</sup> See 1 R. CLARK, *WATERS AND WATER RIGHTS* §§ 4.2, 15.1, 18, 38.1, 51.5 (1967); W. HUTCHINS, *supra* note 17, at 66-67; 1 S. WIEL, *supra* note 18, at §§ 66-142.

<sup>21</sup> 2 C. KINNEY, *THE LAW OF IRRIGATION* § 866 (2d ed. 1912); 3 H. FARNHAM, *WATERS AND WATER RIGHTS* § 671a (1904); NATIONAL RESOURCES PLANNING BOARD, *supra* note 11, at 14-15.

<sup>22</sup> Doyle, *Water Rights in Nebraska*, 29 NEB. L. REV. 385, 405-06 (1950); see Hutchins & Steele, *Basic Water Rights Doctrines and Their Implications for River Basin Development*, 22 LAW & CONTEMP. PROB. 276 (1957). For a constitutional expression of the appropriation doctrine see NEB. CONST. art. 15, §b.

<sup>23</sup> Also, "[i]nstead of carrying out the primitive idea that water is *publici juris*, or the common property of all, [prior appropriation] overthrows that idea by giving its use exclusively to those who have appropriated the water in the first place. . . . [t]he door is shut to all who have not already passed in." Wiel, *Theories of Water Law*, 27 HARV. L. REV. 530, 533 (1914). See also *Lux V. Haggin*, 69 Cal. 255, 395, 10 P. 674, 756 (1886).

To apply the rule contended for [to prohibit transbasin diversion] would prevent the useful and profitable cultivation of the productive soil, and sanction the waste of water upon the more sterile lands. . . . Under the principle contended for [to prohibit transbasin diversion], a party owning land ten miles from the stream, but in the valley thereof, might deprive a prior appropriator of the water diverted therefrom whose lands are within a thousand yards but just beyond the intervening divide.<sup>24</sup>

This right of appropriators to transfer water across the watershed divide is not entirely without qualification. Initially, there is the limitation which forms the essence of the appropriative system, *i.e.*, rights vested prior in time cannot be adversely affected by later users.<sup>25</sup> In determining the relative effect of a diversion it must be remembered that since the benefit of the return flow and seepage accrues entirely to the receiving basin, the full amount of the transferred appropriation is lost to the basin of origin.<sup>26</sup> Also, statutes which restrict interbasin transfers have been enacted in states which adhere to the prior appropriation doctrine.<sup>27</sup> In states which are governed by a dual-system of water rights, combined riparian-prior appropriation system, *i.e.*, California, Nebraska and Texas, transbasin diversion receives either uneven or uncertain treatment.<sup>28</sup>

#### TRANS-RESERVOIR USE OF GROUNDWATER

The use of ground water on nonoverlying land, a trans-reservoir diversion, raises problems similar if not identical to those involved in transbasin diversion of surface water. Despite this similarity and the desirability of meshing the use of and laws relating to ground and surface waters, the transfer problems of each will be considered separately. This paper will be limited primarily to surface water

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<sup>24</sup> Coffin v. The Left Hand Ditch Co., 6 Colo. 443, 450 (1882). See Mettler v. Ames Realty Co., 61 Mont. 152, 159, 201 P. 702, 704 (1921). But see Galiger v. McNulty, 80 Mont. 339, 356, 260 P. 401, 405 (1927). See also Ide v. United States, 263 U.S. 497 (1923); Ramshorn Ditch Co. v. United States, 269 F. 80 (8th Cir. 1920); Offield v. Ish, 21 Wash. 277, 57 P. 809 (1899).

<sup>25</sup> 3 H. FARNHAM, *supra* note 21; W. HUTCHINS, *supra* note 16, at 142-43; 2 C. KINNEY, *supra* note 21, at §§ 866-870; NATIONAL RESOURCES PLANNING BOARD, *supra* note 11, at 14-15.

<sup>26</sup> Such a loss of return flow or seepage may be enough of an injury to prevent the diversion. See, *e.g.*, Southern Cal. Inv. Co. v. Wilshire, 144 Cal. 68, 72-74, 77 P. 767, 769-70 (1904).

<sup>27</sup> See, *e.g.*, COLO. STAT. ANN. § 150-5-13(2)(a),(d) 1963.

<sup>28</sup> For a discussion of the systems of transbasin regulation in dual system states, see pp. 115-18, 121-24, *infra*



problems. Ground water problems will be analyzed in a different section of the overall study.<sup>29</sup>

### THE NEBRASKA EXPERIENCE

Not all riparian states adhere to the "pure" riparian doctrine. Accordingly, several riparian states sanction interbasin transfers.<sup>30</sup> Similarly, states classified as espousing the appropriation doctrine have in some instances limited transbasin diversion.<sup>31</sup> Nearly twenty percent of the states have systems in which both doctrines of water rights are given effect.<sup>32</sup> In this latter group of states, of which Nebraska is a member, transbasin diversion receives varying treatment.<sup>33</sup>

### HISTORICAL DEVELOPMENT<sup>34</sup>

In 1877 the Nebraska Legislature's first attempt to further the cause of irrigation in Nebraska made no mention of transbasin diver-

<sup>29</sup> For a discussion of Nebraska ground water law and problems, see Harnsberger, *Nebraska Ground Water Problems*, 42 NEB. L. REV. 721 (1963).

<sup>30</sup> See, e.g., FLA. STAT. ANN. § 373.141(1) (Supp. 1971); IND. ANN. STAT. 27-1406 (Supp. 1971). See generally E. MALONEY, S. PLAGER & F. BALDWIN, *supra* note 11, at 191-93; Ellis, *Some Current and Proposed Water Rights Legislation in the Eastern States*, 41 IOWA L. REV. 237 (1956).

<sup>31</sup> NATIONAL RESOURCES PLANNING BOARD, *supra* note 11, at 14. See, e.g., COLO. REV. STAT. ANN. 150-5-13(2)(d) (1963). See generally Johnson & Knippa, *Transbasin Diversion of Water*, 43 TEX. L. REV. 1035 (1965).

<sup>32</sup> The following states have applied a dual-system of water rights:

1. California
2. Kansas
3. Nebraska
4. North Dakota
5. Oklahoma
6. Oregon
7. South Dakota
8. Texas
9. Washington

F. TRELEASE, *WATER LAW* 5 (1967).

"The application of both doctrines in these states is explained by their geographical location partly in humid and partly in semi-arid areas." Clark & Marty, *supra* note 11, at § 51, citing Beuscher, *Appropriation Water Law Elements in Riparian Doctrine States*, 10 BUFFALO L. REV. 448 (1961).

*infra*.

<sup>33</sup> For a discussion of several of the "dual system" states see pp. 114-25

<sup>34</sup> Many of the ideas and sources for this section were suggested by Neely, *Legislative History of Water Diversion in the State of Nebraska* (an unpublished paper on file at the Nebraska State Historical Society).

sion, nor was the legislation intended to influence the issue.<sup>35</sup> Prior to 1889, Nebraska operated almost solely under the common law riparian system of water rights.<sup>36</sup> Although it is only conjecture to indicate what the Nebraska Supreme Court would have done with an interbasin transfer issue at that time, a later Nebraska Supreme Court suggests that common law riparianism would have been found to prohibit such a diversion.<sup>37</sup>

In 1889, when the legislature first declared that water rights could be acquired in Nebraska by appropriation for a beneficial use,<sup>38</sup> a provision germane to the transbasin diversion issue was included. It provided that: "[T]he water appropriated from a river or stream shall not be turned or permitted to run into the waters or channel of any other river or stream than that from which it is taken or appropriated."<sup>39</sup> There can be little doubt that the intent of this section was to apply a watershed limitation to the fledgling appropriation system.<sup>40</sup>

In 1893, when the legislature amended certain sections of the irrigation laws, this strict prohibition was qualified, if not eliminated. The statute, as it emerged from the 1893 legislature, is identical to that in force today.

The water appropriated from a river or stream shall not be turned or permitted to run into the waters or channel of any other river or stream than that from which it is taken or appropriated, *unless such stream exceeds in width one hundred feet, in which event not more than seventy-five percent of the regular flow shall be taken.*<sup>41</sup>

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<sup>35</sup> This act, Neb. Laws 168 (1877), gave irrigation companies the power of eminent domain to acquire rights of way for canals, dams, reservoirs, etc.

<sup>36</sup> "So much of the common law of England as is applicable and not inconsistent with the Constitution of the United States, with the organic law of this state, or with any law passed or to be passed by the Legislature of this state, is adopted and declared to be the law within the State of Nebraska." NEB. REV. STAT. § 49-101 (Reissue 1968).

<sup>37</sup> See *Osterman v. Central Neb. Pub. Power & Irrig. Dist.*, 131 Neb. 356, 268 N.W. 334 (1936).

<sup>38</sup> NEB. COMP. STAT. ch. 93a, p. 844 (1889).

<sup>39</sup> NEB. COMP. STAT. ch. 93a, art. I, § 6 (1889).

<sup>40</sup> At this point in development, Nebraska was enacting only piecemeal legislation rather than a comprehensive water or irrigation code. A codified appropriation system, unlimited by riparianism, might well have specifically provided for transbasin diversion, or at least omitted inferences to the contrary.

<sup>41</sup> NEB. REV. STAT. § 46-206 (Reissue 1968) (emphasis added). The original section is NEB. COMP. STAT. ch. 93a, art. I, § 6 (1893).

With the addition of the modifying phrase, the section would seem to provide a legislative sanction for diversion and make the prohibition inapplicable to seventy-five percent of the regular flow in the major streams of Nebraska.

In 1895 the legislature undertook a complete revision of existing irrigation laws; using the Wyoming irrigation code as a model, a comprehensive statutory scheme was enacted. One of the few prior sections not repealed by the new code was the above quoted section.<sup>42</sup> The new code did contain another provision relevant to the diversion issue which is also currently in force.

The owner or owners of any irrigation ditch or canal shall carefully maintain the embankments thereof so as to prevent waste 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.*<sup>43</sup>

Although this section does not explicitly prohibit interbasin transfers, it does require all the surplus water to be returned to the stream of origin. In most instances this would have the practical effect of prohibition because of economic and practical considerations.

It is interesting to note that if the italicized portion of the statute were given its full effect, a substantial portion of the statute would be rendered nugatory. This assumes that the section was intended to prohibit transbasin diversion, as opposed to merely prohibiting waste. Since all of Nebraska lies in the Missouri River Basin, no matter which stream return surplus flowed into, it would find its way to the Missouri River. As will be discussed later, the section has not received such a broad interpretation.

It was not until the adoption of the amendments drafted by the 1919-20 Constitutional Convention that Nebraska had constitutional provisions relating to water resources and their utilization. The early constitutions, those of 1866 and 1875, made no mention of water, irrigation or any related subject. The control of such matters had been jointly exercised by the legislature and the courts as they modified or interpreted the English common law.<sup>44</sup> The amendments are now found in Article XV:<sup>45</sup>

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<sup>42</sup> Neb. Laws c. 69 (1895). Section 2037 of Cobby's Consolidated Statutes of Nebraska was not repealed by chapter 69; § 2037 is the same statute as that referred to in note 37 *supra*.

<sup>43</sup> NEB. REV. STAT. § 46-265 (Reissue 1968) (emphasis added). The original section is Neb. Laws c. 69, § 59 (1895).

<sup>44</sup> NEB. REV. STAT. § 49-101 (Reissue 1968).

<sup>45</sup> NEB. CONST. art. XV, §§ 4-7.

Sec. 4 Water a public necessity. The necessity of water for domestic use and for irrigation purposes in the State of Nebraska is hereby declared a natural want.<sup>46</sup>

Sec. 5 Use of water dedicated to people. The use of the water of every natural stream within the State of Nebraska is hereby dedicated to the people of the state for beneficial purposes, subject to the provisions of the following section.

Sec. 6 Right to divert unappropriated waters. 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 purposes, 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.

Sec. 7 Use of water for power purposes. The use of the waters of the state for power purposes shall be deemed a public use and shall never be alienated, but may be leased or otherwise developed as by law prescribed.

It is reasonable to conclude that there are no explicit constitutional prohibitions to transbasin diversion. In fact, as will be discussed later, the constitution leaves the matter to the discretion of the legislature.

The Nebraska constitutional and statutory law was set by 1920, but not until 1936 did the controversy become apparent. The Central Nebraska Public Power and Irrigation District, referred to as Tri-County, proposed construction of the Kingsley Dam and storage reservoir on the Platte River. The storage water was to be used to irrigate some 500,000 acres of land, less than half of which lay in the Platte Valley. The Department of Roads and Irrigation granted Tri-County an appropriation for 600,000 acre-feet of water from the Platte River. Sixty percent of this was to be used out of

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<sup>46</sup> The Supreme Court of Nebraska had defined a natural want to be one which is absolutely necessary to human existence and declared that legislative conservation and control of the water resources of Nebraska for such uses is a public purpose. *Nebraska Mid-State Reclamation Dist. v. Hall Co.*, 152 Neb. 410, 41 N.W.2d 397 (1950). This section also applies to ground water. *Metropolitan Util. Dist. v. Merritt Beach Co.*, 179 Neb. 783, 140 N.W.2d 626 (1966).

the Platte watershed in the basins of the Republican and Blue Rivers.<sup>47</sup>

Numerous "appropriators" and "riparians" appealed the Department's granting of the applications and eventually the controversy reached the Nebraska Supreme Court.<sup>48</sup> The supreme court overruled the Department of Roads and Irrigation and revoked the District's applications.<sup>49</sup>

The case, *Osterman v. Central Nebraska Public Power and Irrigation District*,<sup>50</sup> has thus become the starting point for almost any discussion of transbasin diversion in Nebraska. It will be analyzed later in the portion of this section dealing with Nebraska case law. Here attention will remain focused on the historical aftermath of the *Osterman* decision.

In 1943, Senators Bowman of Adams County, Neubauer of Harlan County and Osborne of Morrill County introduced a bill into the legislature for the express purpose of authorizing interbasin transfers. This bill, L.B. 253, as originally introduced, would have amended section 46-620, Compiled Statutes of Nebraska 1929, to read as follows:<sup>51</sup>

The owner or owners of any irrigation ditch or canal shall carefully maintain the embankments thereof so as to prevent waste 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; *Provided, that water stored in a reservoir constructed in accordance with an application duly approved by the Department of Roads and Irrigation may be used to irrigate land lying outside of the watershed of the stream from which such water was originally taken and nothing in this section shall be construed to prohibit such use.*

More than 700 persons crowded into the Public Works Committee hearings on L.B. 253, and residents from forty Platte Valley towns entered appearances to show their opposition to any measure which would have the effect of granting Tri-County's requests to divert stored Platte River water and use it for irrigation outside the Platte

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<sup>47</sup> NEBRASKA LEG. COUNCIL, COMM. REPORT NO. 2, FINAL REPORT OF THE COMM. ON WATER DIVERSION 24 (1944) [hereinafter cited as 1944 REPORT].

<sup>48</sup> *Id.* at 25.

<sup>49</sup> *Id.*; *Osterman v. Central Neb. Pub. Power & Irrig. Dist.*, 131 Neb. 356, 268 N.W. 334 (1936).

<sup>50</sup> 131 Neb. 356, 268 N.W. 334 (1936).

<sup>51</sup> See L.B. 253, 56th Neb. Leg. Sess. (1943) (emphasis added).

watershed in the Elmwood-Hastings area.<sup>52</sup> Of course, Tri-County was the prime mover behind the bill; the chief antagonists were irrigation districts. The proposed Nebraska Mid-State Public Power and Irrigation District and the Platte Valley Public Power and Irrigation District also vigorously opposed the measure.<sup>53</sup>

The hearings developed a number of issues and arguments, many supported by vast arrays of contradictory statistics. Evidence was presented regarding rainfall, the acre-feet of water available, the contractual obligation involved, and the quantity and quality of irrigable land. Additionally, the effect of the bill on the pending tri-state water dispute involving Nebraska, Colorado and Wyoming was debated.<sup>54</sup> Opponents argued that restricting the winter river flow would lower the groundwater level on which pump irrigation depended and that an intrastate policy of diversion would destroy one of Nebraska's objections to Platte River diversion in Wyoming.<sup>55</sup>

L.B. 253 was placed on general file, and when it finally came before the legislature, Senator Raecke of Merrick County immediately made a motion that it be indefinitely postponed.<sup>56</sup> After a hectic debate during the afternoon session, the vote on the motion was twenty-three affirmative, nineteen negative, and one not voting.<sup>57</sup> Perhaps it was a general distrust of the engineers who claimed there would be no water shortage that defeated the bill,<sup>58</sup> or perhaps sectional rivalry and hostility would have spelled defeat for any measure based on inter-regional trust and cooperation. An

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<sup>52</sup> Omaha World Herald, Feb. 25, 1943, at 1 (morning ed.). About 500 persons backed the Platte Valley Public Power and Irrigation District, arguing that diversion should not be considered until it is definitely established that enough water exists for present and future Platte Valley irrigation needs.

<sup>53</sup> 1944 REPORT, *supra* note 47, at 26.

<sup>54</sup> This dispute was finally resolved in *Nebraska v. Wyoming*, 325 U.S. 589 (1945).

<sup>55</sup> Lincoln Star, Feb. 25, 1943, at 2; Omaha World Herald, Feb. 25, 1943, at 1 (morning ed.). The pending tri-state dispute was used by the diversion opposition in *Osterman*. Brief for Appellant at 19-20, *Osterman v. Central Neb. Pub. Power & Irrig. Dist.*, 131 Neb. 356, 268 N.W. 334 (1936). For the rebuttal to the above argument see Brief for Appellee at 221-26, *Osterman v. Central Neb. Pub. Power & Irrig. Dist.*, 131 Neb. 356, 268 N.W. 334 (1936). See also, NEBRASKA IRRIG. ASS'N., PROCEEDINGS OF THE 44TH ANNUAL CONVENTION 167, 176-78 (1936).

<sup>56</sup> Hastings Daily Tribune, May 17, 1943, at 1.

<sup>57</sup> NEB. LEG. JOUR., 52d Sess. 1462 (1937).

<sup>58</sup> See Lincoln Evening Journal, May 19, 1943, at 6; Grand Island Independent, May 19, 1943, at 6.

examination of the voting pattern exemplifies the traditional clash between those counties north and those south of the Platte River.<sup>59</sup> Yet, what reasons prompted Frontier, Gosper and Phelps Counties to vote to kill can only be surmised. Perhaps it was selfishness or a fear that the "haves" are always hurt when the "have nots" are enriched. And, one wonders why Gage County would vote against a bill that would seem to help send water into its own Blue River watershed.

To encourage research, Senator Crosby of Lincoln introduced a resolution instructing the Legislative Council to study the diversion controversy and report its findings and definite recommendations at the next regular session of the legislature.<sup>60</sup> The resolution carried, and the Council appointed a special subcommittee made up of proponents, opponents and neutral interests. After an initial inquiry, the subcommittee voted to expand its investigation to cover the entire water resources picture, both surface and groundwater.<sup>61</sup>

During 1944 the subcommittee held four public hearings at Hastings, Kearney, North Platte and Grand Island. At the Hastings hearing, Mr. Ed Kent, an area farmer since 1940, expressed fear that diversion would interfere with successful well irrigation; but at the same hearing Mr. Forest Morrison, whose farm is located on the Platte watershed divide and impracticable for pump irrigation, could not understand why the law required some of his land (that beyond the watershed) to go dry.<sup>62</sup> This type of conflict was repeated throughout the hearings. The arguments of the proponents and opponents were not always eloquent, nor was any possible argument omitted.<sup>63</sup>

As could be expected, the subcommittee produced a voluminous report. The conclusions and recommendations of the final report to the legislature may be enlightening. The findings included, *inter alia*:<sup>64</sup>

- a) The total supply of water available for irrigation is less than the annual prospective demand for water at the rates currently charged.

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<sup>59</sup> See voter distribution chart, appendix *infra*.

<sup>60</sup> L. R. 36, 56th Neb. Leg. Sess. (1943).

<sup>61</sup> 1944 REPORT, *supra* note 47, at 2.

<sup>62</sup> *Hearings on H. Res. 36 before the Comm. on Water Diversion* 28, 34, in 1944 REPORT (Hastings hearings).

<sup>63</sup> *Hearings on H. Res. 36 before the Comm. on Water Diversion* 1-38, in 1944 REPORT (Kearney hearings).

<sup>64</sup> 1944 REPORT, *supra* note 47, at 53-71.

- b) The usable groundwater supply is less than generally believed, and state supervision is needed. However, people in affected areas are not convinced such supervision is desirable.<sup>65</sup>
- c) Government units must recognize water rights as property and give them full legal protection.
- d) By common consent, and without basis in existing law, the people living in a river valley, as distinguished from the people within the drainage basin but not in the valley proper, should have first call on appropriated water of that river. By like consent, people within the basin of a river should have, as they now have under existing statutes as interpreted by the Nebraska Supreme Court, a priority of consideration above those living beyond the watershed in other basins. If neither the residents of the valley proper, nor of the basin, make full use of all available water, then the state's policy should be altered to the extent necessary to permit such unused water to be used in other basins.<sup>66</sup>
- e) Within a reasonable time after the war ends, those Platte River facilities as yet unconstructed must construct their facilities or forfeit their preference of use to irrigable lands beyond the watershed.<sup>67</sup>
- f) The present law prohibiting transbasin diversion should be continued until it is established whether or not the available water in the Platte River will be put to beneficial use within the Platte basin. If it cannot or will not be so used, the law should then be amended to permit its use beyond the watershed.<sup>68</sup>
- g) Presently, no new legislation is indicated. Legislation required in the future must be based on further study and experience, and the legislature should make such study the duty of a specified agency.

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<sup>65</sup> Nebraska is still without an effective program of groundwater regulation.

<sup>66</sup> There is no system of priorities based on a three tiered approach, i.e., one, river valley, two, river basin, three, other. Systems that utilize place of use as determining criteria omit distinctions between numbers one and two. In fact, to implement such a proposal it may be necessary to divest persons whose diversions fall within the second class which would be inconsistent with finding (c) unless such vested "rights" were taken for compensation through an eminent domain procedure.

<sup>67</sup> This seems aimed rather directly at the proposed Mid-State facilities.

<sup>68</sup> Note that the basin of origin is given an absolute preference without regard to relative economics, shortages, etc.



- h) Maximum use of the water resources of Nebraska is not being made. The conflicting interests of neighboring communities or areas must not be allowed to jeopardize the welfare of the entire state. The luxury of quarreling over water rights, while the water goes to waste, has become too expensive to be borne much longer.

The report of the Committee appeared impressive, but it offered no recommendations for clarifying laws governing interbasin transfers. It even failed to provide a starting point for more extensive research and eventual proposals; instead, it only recognized a need for "careful study and research into all relevant factors" affecting transbasin diversion and eventual "definite recommendations." This same need was recognized earlier by the legislature in L.R. 36 which initiated the study and requested the research to be done and the recommendations to be made.<sup>69</sup> In any event, regardless of what other effects the report may have had, public controversy over the diversion question subsided for several years.

It was not until the 1947 legislative session that L.B. 257 was introduced by Senators Peterson (Lancaster County) and Seaton (Adams County).<sup>70</sup> This bill would have made possible temporary diversion of water beyond a basin of origin, repealing those provisions requiring unused water to be returned to the stream from which diverted.<sup>71</sup> When the Public Works Committee opened hearings on L.B. 257, over 1,000 persons were present. Sentiment was evenly divided.<sup>72</sup> After six hours the committee went into executive session. Senator Bevins' motion for advancement to the general file failed; Senator Proh's (Gering) motion to indefinitely postpone carried five to four.<sup>73</sup> Nevertheless, a week later, on Peterson's motion from the floor of the legislature, L.B. 257 was advanced to general file. Unlike its predecessor, L.B. 257 granted only a junior appropriation to transbasin diversions, thus protecting future expansion in the valley of origin. In spite of this concession and certain amendments to further pacify and satisfy anti-diversion forces, Senator Raecke and those he represented again opposed the bill. "People who have studied the matter have discovered there is no such thing

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<sup>69</sup> L.R. 36, 56th Neb. Leg. Sess. (1943).

<sup>70</sup> L.B. 257, 60th Neb. Leg. Sess. (1947).

<sup>71</sup> L.B. 257, 60th Neb. Leg. Sess. (1947).

<sup>72</sup> Lincoln Star, March 7, 1947, at 8.

<sup>73</sup> *Id.*

as waste in the Platte Valley. Temporary matters become permanent. Here is where the great danger lies."<sup>74</sup>

After five hours of debate, Senator Raecke moved, as he had in 1943, to postpone indefinitely any consideration of the measure. The vote on the motion was numerically the same as it was in 1943. Only a few districts changed votes and again there was a clear North-South Platte split.<sup>75</sup> As suggested by an editorial in the *Lincoln Evening Journal*,<sup>76</sup> few were ready to believe the factual data of experts produced by the "other side," and voting along territorial lines was the natural result.

The most recent attempt to enact transbasin legislation was in 1953 when Senator Marvel (Adams County) introduced L.B. 311.<sup>77</sup> Public hearings opened with a crowd estimated at nearly a thousand.<sup>78</sup> The issue was hotly debated, but the Public Works Committee delayed the bill's advance to allow time for its members to take an aerial tour over the Platte Valley.<sup>79</sup>

L.B. 311 attempted to formulate a public policy for Nebraska that would allow diversion of surplus water, but would make any such appropriations junior to all present and future appropriations in the basin of origin.<sup>80</sup> Still, the bill met with even less success than before, the motion to indefinitely postpone being carried with twenty-four ayes, ten nayes, and nine not voting.<sup>81</sup> The over-kill surprised even anti-diversionists as did the transfer of concentrated opposition<sup>82</sup> from the Scottsbluff-North Platte region to the Kearney, Grand Island and Fremont area. Since the defeat of L.B. 311, efforts to effect change have not reached the legislature. However, the recurrent problem soon moved back to the Nebraska courts as men sought to develop their resources through large scale projects.

<sup>74</sup> Hastings Daily Tribune, May 5, 1947, at 1 [This statement was made by Senator Raecke as spokesman for the anti-diversion forces.].

<sup>75</sup> See voter distribution chart and maps, appendix *infra*.

<sup>76</sup> Lincoln Evening Journal, May 6, 1947, at 6.

<sup>77</sup> L.B. 311, 65th Neb. Leg. Sess. (1953).

<sup>78</sup> Hastings Daily Tribune, March 26, 1953, at 1.

<sup>79</sup> Hastings Daily Tribune, March 27, 1953, at 1.

<sup>80</sup> L.B. 311, 65th Neb. Leg. Sess. (1953).

<sup>81</sup> Senator Bixer of Harrison had suggested that the issue be settled by a vote of the people. He argued that L.B. 311 had affected every bill introduced during the session, killing good ones and passing bad ones. See Omaha World Herald, May 26, 1953, at 1 (morning ed.).

<sup>82</sup> See voter distribution chart and map, appendix *infra*.

## TRANSBASIN DIVERSION IN THE COURTS

It will be remembered that the decision in *Osterman v. Central Nebraska Public Power and Irrigation District*<sup>83</sup> was credited for initiating the political struggles just discussed. An analysis of *Osterman*, "one of the most poorly reasoned opinions ever handed down by the court,"<sup>84</sup> seems in order, even though it has already received more than its fair share of scholarly criticism.<sup>85</sup>

Tri-County had applied to the Department of Irrigation and Roads for water rights, and had been granted an appropriation of 600,000 acre-feet of water from the Platte River. However, since about sixty percent of the water was to be diverted to land located beyond the Platte watershed and to the basins of the Republican and Blue Rivers, downstream appropriators and riparians objected to the Department's grant. The Department had found: (1) that diversion would not substantially deplete the groundwaters of any portion of the Platte Valley; (2) that there were unappropriated waters in the North Platte and Platte Rivers; and (3) that the appropriations were not in any manner detrimental to the public interest.<sup>86</sup> The objectors then appealed to the Nebraska Supreme Court.

In reversing the Department's action, the court: (1) disputed the facts found by the Department and espoused a judicially announced public policy; (2) found it necessary to greatly protect the subflow interest of riparian proprietors; and (3) set forth a statutory interpretation which developed a rule of positive law prohibiting diversion. Whether considered singly, or in conjunction, the reasons for the decision are unpersuasive.

First, the court seems to have been convinced that the evidence showing unappropriated waters in the Platte was incorrect, that diversion would lower the water table destroying the riparians'

<sup>83</sup> 131 Neb. 356, 268 N.W. 334 (1936).

<sup>84</sup> Yeutter, *A Legal-Economic Critique of Nebraska Watercourse Law*, 44 NEB. L. REV. 11, 54 (1965).

<sup>85</sup> See, e.g., Doyle, *Water Rights in Nebraska*, 29 NEB. L. REV. 385 (1950); Olsson, *Transwatershed Diversions*, 15 NEB. L. BULL. 271 (1937); Yeutter, *supra* note 84; Kastanek, Report on Transbasin Diversion (1968) (an unpublished paper prepared for Nebraska Soil & Water Conservation Comm'n).

<sup>86</sup> Brief for Appellant, vol. 1, at 27, *Osterman v. Central Neb. Pub. Power & Irrig. Dist.*, 131 Neb. 356, 268 N.W. 334 (1936).

sub-irrigation,<sup>87</sup> that the river would dry up leaving desolate farms, and that Kansas (through the Republican and Blue Rivers) would reap the benefits of Nebraska's losses.<sup>88</sup> These issues were questions of fact and, at best, mixed questions of law and fact (law application questions). The legislature having decided that the Department should determine them in the first instance, the court could not be expected to reverse a reasonable finding of the Department.<sup>89</sup> There is nothing in *Osterman* to indicate that the Department had acted unreasonably or in an arbitrary fashion. Though outside the normal scope of judicial review, the court decreed that as a matter of public policy it would protect the natural fertility and abundance of the valley of origin.<sup>90</sup>

Secondly, the court fashioned a riparian rationale to protect the sub-irrigation interests of the objectors. After citing *Meng v. Coffee*<sup>91</sup> for the propositions of correlative and reasonable use, the court hastily assumed that: (1) the groundwater involved was the sub-flow of the Platte, making the riparian doctrine applicable;<sup>92</sup> and

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<sup>87</sup> Sub-irrigation occurs when the ground water level is maintained to such a height that the root zone extends into the water thus having the effect of irrigation without the necessity of surface application of water. The Platte River Valley is an outstanding producer of alfalfa, and the crop's success is generally thought to depend on sub-irrigation. The court recognized this subirrigation issue as conferring standing on many of the objectors. *Osterman v. Central Neb. Pub. Power & Irrig. Dist.*, 131 Neb. 356, 364, 268 N.W. 334, 338 (1936).

<sup>88</sup> *Id.* at 362, 268 N.W. at 337.

<sup>89</sup> See Yeutter, *supra* note 84, at 54-55. "The rule is that where the action of the administrative officer of the state is not unreasonable or arbitrary, and does not exceed the duties and powers imposed, this court will not interfere with the findings of fact so made because to that extent they involve an administrative, as distinguished from a judicial function." *State ex rel. Cary v. Cochran*, 138 Neb. 163, 174, 292 N.W. 239, 246 (1940).

<sup>90</sup> "It would be a sad commentary on our political organization, upon the department of roads and irrigation, and upon this reviewing court, if in rationing this necessity of life this beautiful valley should be left with a dry river bed and ruined farms, because of any mistaken theory that the protection of its natural fertility did not constitute a public interest within the policy of our laws." *Osterman v. Central Neb. Pub. Power & Irrig. Dist.*, 131 Neb. 356, 362, 268 N.W. 334, 337 (1936).

<sup>91</sup> 67 Neb. 500, 93 N.W. 713 (1903).

<sup>92</sup> In addition, it is interesting to note that in years preceding this case, Nebraska had suffered several dry years in a row and rivers had the lowest annual flow since the turn of the century. These abnormally low flows were the basis of the objectors' statistics. The court seemed to accept these drouth statistics and thus took a very pessimistic view when it determined the diversion would affect sub-irrigation.

(2) riparianism prohibited interbasin transfers at common law. Consequently, any approval of transbasin diversion would have to be found in the statutes.<sup>93</sup>

Finally, turning to the statutes, the court resorted to a study of statutory history to resolve an uncertainty in meaning which did not exist. The Act of 1889<sup>94</sup> expressly required that unused water be returned to the stream of origin. However, this act had been amended in 1893 to allow diversion of up to seventy-five percent of the regular flow when a stream exceeded one hundred feet in width.<sup>95</sup> But the court concluded that the Act of 1889 had not been repealed by the Irrigation Code of 1895 even though these provisions of the 1893 law were a part of the new code. The Act of 1895 required ditch owners to "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."<sup>96</sup> This was held to be a recognition of the policy embodied in the Act of 1889 prohibiting diversion, and the Act of 1895 being the later pronouncement, it necessarily controlled.<sup>97</sup> In this process, the words "or to the Missouri River" were simply declared not applicable to this case.<sup>98</sup>

Most critics of the *Osterman* case realize that the result may have been correct at the time. Doyle views the construction given the statutes as a successful, if not skillful, avoidance of a constitutional question.<sup>99</sup> Yeutter similarly notes that a constitutional question

<sup>93</sup> In this section of the opinion, Yeutter suggests that the court confuses groundwater and surface water rules; "The appellants based their argument on the ground water issue of a lowered water table, but supported it on riparian theory." Yeutter, *supra* note 84, at 55. Additionally, the court did not refer to either *McCook Irrig. & Water Co. v. Crews*, 70 Neb. 115, 102 N.W. 249 (1905), or *Cline v. Stock*, 71 Neb. 79, 102 N.W. 265 (1905), which limited the relief available to riparians to damages.

<sup>94</sup> NEB. COMP. STAT. ch. 93a, art. I, § 6 (1889).

<sup>95</sup> *Id.*; NEB. REV. STAT. § 46-206 (Reissue 1968).

<sup>96</sup> NEB. COMP. STAT. ch. 93a, art. II, § 59 (1895); NEB. REV. STAT. § 46-265 (Reissue 1968).

<sup>97</sup> See Doyle, *supra* note 85, at 406-07: "The clarity of this reasoning is open to some question."

<sup>98</sup> *Osterman v. Central Neb. Pub. Power & Irrig. Dist.*, 131 Neb. 356, 368, 268 N.W. 334, 340 (1936).

<sup>99</sup> See Doyle, *supra* note 85, at 407: "The return flow augments the supply of ground and surface water and tends to protect the valuable right of riparians to the benefits of sub-irrigation. If riparians possess such a right it seems to follow that the legislature may not abrogate it except by procedure insuring the payment of just compensation therefor. Thus the construction given these provisions of the irrigation code avoided a constitutional question."

may have been lurking, but argues that the case should have been decided by "balancing the equities."<sup>100</sup> *Osterman*, still a leading case, has not been expressly overruled. Its authority as a precedent, however, has been severely challenged.

Twenty-four years after *Osterman*, in *Ainsworth Irrigation District v. Bejot*,<sup>101</sup> the court "clarified" its position on transbasin diversion.<sup>102</sup> The Ainsworth Irrigation District sought a permit to transport 91,800 acre-feet of water by canal out of the Snake River watershed into the basin of the Niobrara River to irrigate approximately 33,960 acres of land.<sup>103</sup> The Snake River runs north and slightly east into the Niobrara River, which empties into the Missouri River. The District's canal was to run for about fifty-six miles, intersecting and crossing several smaller streams en route. All these streams were tributary to the Niobrara, and no water was to be returned to the Snake. About forty-seven percent of the annual flow of the Snake River at the diversion site (Merritt Dam) was to be withdrawn.

The objectors, relying primarily on *Osterman*,<sup>104</sup> argued that the diversion would violate section 46-265<sup>105</sup> of the Nebraska Statutes because water from the Snake River would cross the watershed and the surplus would flow into the Niobrara River, effecting an inter-basin transfer. On the other hand, the Irrigation District claimed that the Snake and Niobrara Rivers were but one stream, comprising the same watershed or basin. The court agreed and accepted defendant's definition of a watershed:

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<sup>100</sup> See Yeutter, *supra* note 84, at 56-57. But see Olsson, *supra* note 85, at 286-89. Olsson suggests that the court really did "balance the equities" which it determined to be in favor of the basin of origin. Then rather than holding for complainants on this factual determination the "consideration was given effect by means of an application of the doctrine of riparian rights, to the complete disregard of the logical result which would be reached by an application of the doctrine of appropriation, but the recognition of such a factor [the balance in favor of protection of the basin of origin] seems none the less real because it was only tacitly given." *Id.* at 289.

<sup>101</sup> 170 Neb. 257, 102 N.W.2d 416 (1960).

<sup>102</sup> Some authorities argue that the *Bejot* case essentially nullified the *Osterman* holding. Johnson & Knippa, *supra* note 31, at 1039.

<sup>103</sup> The Ainsworth project was one of seven units in the Missouri River Basin Project, and it had the best cost-benefit ratio of any units in the project. *Ainsworth Irrig. Dist. v. Bejot*, 170 Neb. 257, 270-71, 102 N.W.2d 416, 424-25 (1960).

<sup>104</sup> *Ainsworth Irrig. Dist. v. Bejot*, 170 Neb. 257, 272, 102 N.W.2d 416, 425 (1960).

<sup>105</sup> NEB. REV. STAT. § 46-265 (Reissue 1968).

A river and all its tributaries constitutes a watershed, which may be defined as all the area lying within a divide, above a given point on a river or stream. The term watershed is synonymous with river basin, drainage basin, or catchment area, except in some instances, where by definition for specific purposes, in connection with specific agreements, the basin may have been extended upon the natural watershed.<sup>106</sup>

Having agreed with the District that only one stream, watershed or basin was involved, the court then stated that *Osterman* was entirely distinguishable as to both the facts and the law.<sup>107</sup> Consequently, it did not have to deal directly with either the *Osterman* decision or with the statutes construed in that opinion.

*Bejot's* effect on a factual situation that would involve an "actual" transbasin diversion is unclear. The case could be distinguished on the basis of defining watershed limits.<sup>108</sup> But as many commentators argue, such an analysis is superficial, and if *Bejot* does not nullify *Osterman*, it at best represents a new approach to the problem.<sup>109</sup> It appears that the court "balanced the equities" and, in so doing, upheld what might otherwise have been an illegal interbasin transfer. The Snake River Valley is not a farming area. No irrigation interests made any claim to the water involved. The only downstream appropriators were two small power plants which were to be compensated for their damages. On the other hand, the project was designed to irrigate 33,960 acres of good farm land in an area where rainfall is not adequate for full crop production.<sup>110</sup> And, as the court points out, "[i]t appears to be undisputed that there is plenty of water for all needs."<sup>111</sup> Thus, denial of diversion could

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<sup>106</sup> 170 Neb. at 273, 102 N.W.2d at 426.

<sup>107</sup> *Id.* at 276, 102 N.W.2d at 427

<sup>108</sup> California seems to have defined riparian use in relation to tributaries with more specificity than most jurisdictions. Hutchins points out the following guiding principles: Land which is not within the watershed of the river is not riparian thereto, and is not entitled, as riparian land, to the use or benefit of the water from the river, although it may be part of an entire tract which does extend to the river. . . . Each tributary is considered a separate stream with regard to lands contiguous thereto above the junction, so that land lying with the watershed of one tributary above that point is not riparian to the other stream. As against lower riparian owners located below the confluence of a main stream and a tributary, however, the watersheds of such main stream and of the tributary stream constitute parts of a single watershed. W. HUTCHINS, *supra* note 15, at 202-03 [citations omitted]. See also, *Saunders v. Robinson*, 14 Idaho 770, 95 P. 1057 (1909) (appropriator beyond the confluence cannot be heard to complain).

<sup>109</sup> See, e.g., *Johnson & Knippa*, *supra* note 31, at 1039; *Yeutter*, *supra* note 84, at 57.

<sup>110</sup> 170 Neb. at 270-71, 102 N.W.2d at 424-25.

<sup>111</sup> *Id.* at 271, 102 N.W.2d at 425.

not be based on the possibility of injury; instead, the diversion should be sustained because of the probable economic gains to the state.

Whether this cost-benefit analysis underpinned the conclusion that only one watershed was involved is uncertain. However, "[t]o hold otherwise would deprive 33,960 acres of irrigable land of needed water and permit it to be wasted in the Niobrara and Missouri Rivers, without authority of fact and law."<sup>112</sup> This approach, cost-benefit analysis or "balancing the equities," was applied in a later Nebraska case which adjudicated conflicting riparian and appropriation interests.<sup>113</sup> Further, it is the touchstone of the next and most recent Nebraska case to have considered transbasin diversion.<sup>114</sup>

The magnitude and complexity of the interbasin transfer issue is aptly illustrated by *Metropolitan Utilities District v. Merritt Beach Company*.<sup>115</sup> The Metropolitan Utilities District of Omaha hereinafter referred to as M.U.D. applied to the Department of Water Resources for a permit to augment its water supply with 60 million gallons per day of groundwater. By statute<sup>116</sup> the Director of Water Resources is authorized to grant and administer permits to municipal corporations supplying water to cities to develop groundwater supplies in the area to be served. After a hearing on the application and the several objections, the Director of Water Resources granted M.U.D.'s application. Several of the objectors lodged a direct appeal in the Nebraska Supreme Court.<sup>117</sup>

The wells from which M.U.D. sought to draw the 60 million gallons per day were located at a point on the Platte River about five miles from the confluence of the Platte and Missouri Rivers. Of the approximately thirty-five wells planned, eighteen were to be located on an island (Cedar Island) in the Platte and the remainder were to be taken directly from the river, the entire supply being

<sup>112</sup> *Id.* at 279, 102 N.W. at 429.

<sup>113</sup> "An appropriator . . . 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 outweighed the gravity of the harm." *Wasserburger v. Coffee*, 180 Neb. 149, 159, 141 N.W.2d 738, 745 (1966).

<sup>114</sup> *Metropolitan Util. Dist. v. Merritt Beach Co.*, 179 Neb. 783, 140 N.W.2d 626 (1966).

<sup>115</sup> *Id.*

<sup>116</sup> NEB. REV. STAT. §§ 46-638 to -650 (Reissue 1968).

<sup>117</sup> 179 Neb. at 785, 140 N.W.2d at 629.



drawn from, or at least through, the ground. Expert testimony explained that the amounts withdrawn from the well field would be replenished by both ground and surface water sources. Fifty-six million gallons per day would come from the Platte River, the remainder from groundwater. The loss to the river was shown to be less than a 1.1 inch lowering of the river's level. On the basis of the foregoing evidence, the Director of Water Resources concluded, and the court concurred, that the injury to the objectors was diminutive. The court then held that in the absence of proof of injury, the objectors could not argue the constitutional issues which formed the basis for several of their objections.<sup>118</sup>

However, the water that M.U.D. sought to develop was to be transported and used out of the Platte River watershed, and as riparian landowners in the Platte River watershed, the objectors were permitted to question the legality of such a diversion. The *Osterman* case was cited as sustaining this right to object,<sup>119</sup> even though the court was not necessarily bound by *Osterman* because there it was assumed that appropriators and riparians would be injured by the diversion.<sup>120</sup> Furthermore, surface watersheds are generally thought to be irrelevant when examining the place of use by pumpers of groundwater.<sup>121</sup>

The court began its resolution of the diversion issue by citing *Meng v. Coffee*<sup>122</sup> for the proposition that the common law was in force except as altered or modified by statute. After an examination of the state's groundwater legislation, which was nonexistent until 1957, the court concluded that what legislation did exist had developed in a patchwork fashion with the result that "[r]ights in the use of groundwater have not been determined nor protected, nor the public policy with reference to use of such underground waters legislatively declared."<sup>123</sup> A declaration of public policy was found in the Nebraska Constitution where it is provided that the necessity of water for domestic use and for irrigation purposes is a natural

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<sup>118</sup> 179 Neb. at 793, 140 N.W.2d at 633.

<sup>119</sup> 179 Neb. at 797, 140 N.W.2d at 635.

<sup>120</sup> *Osterman v. Central Neb. Pub. Power & Irrig. Dist.*, 131 Neb. 356, 268 N.W. 334 (1936).

<sup>121</sup> See Harnsberger, *Nebraska Ground Water Problems*, 42 NEB. L. REV. 721, 727-30 (1963).

<sup>122</sup> 67 Neb. 500, 93 N.W. 713 (1903).

<sup>123</sup> 179 Neb. at 799, 140 N.W.2d at 636.

want.<sup>124</sup> The problem with the declaration is that this section of the constitution, if read together with the sections that follow<sup>125</sup> and as limited by the cases that have interpreted it, would apply to surface water only.<sup>126</sup> Nevertheless, the court preferred the broader application, *i.e.*, including groundwater within the stated declaration, because “[s]uch waters are as much a part of the hydrologic cycle as the flow of water in a stream or river.”<sup>127</sup> It was then concluded that “[s]uch waters must be reasonably used for a beneficial purpose without waste,”<sup>128</sup> and that domestic use for health, convenience and comfort is a public use.<sup>129</sup> The ultimate conclusion was that “[w]here the taking of water beyond a watershed causes no injury to appropriators or riparian owners, no reason exists for not permitting the use of waters for a public and beneficial purpose which would be otherwise lost.”<sup>130</sup>

*Osterman* conferred standing to raise the issue of transbasin use. Yet, since the *M.U.D.* court assumed it was dealing with groundwater,<sup>131</sup> there was no discussion of the statutes, sections 46-206 and 46-265,<sup>132</sup> which formed the basis of the *Osterman* decision. Finally, *Osterman*, the case that conferred standing, was dismissed as inapplicable even “by analogy”;<sup>133</sup> the court chose to decide the case on another ground:

But we choose to decide the question on the ground of reasonable use and all the factors that enter into such a consideration including

<sup>124</sup> NEB. CONST. art. 15, § 4. *See* note 46 *supra*. The Supreme Court of Nebraska had defined a natural want to be one which is absolutely necessary to human existence and declared that legislative conservation and control of the water resources of Nebraska for such uses is a public purpose. *Mid-State Reclamation Dist. v. Hall Co.*, 152 Neb. 410, 41 N.W.2d 397 (1950). This section also applies to groundwater. *Metropolitan Util. Dist. v. Merritt Beach Co.*, 179 Neb. 783, 140 N.W.2d 626 (1966).

<sup>125</sup> *See* NEB. CONST. art. XV, §§ 4,5,6.

<sup>126</sup> *See* NEB. CONST. art. XV, § 4, and accompanying annotation in 2 NEB. REV. STAT. 185 (Reissue 1968).

<sup>127</sup> 179 Neb. at 799-800, 140 N.W.2d at 636.

<sup>128</sup> 179 Neb. at 800, 140 N.W.2d at 637.

<sup>129</sup> Of course, not all the water diverted to Omaha by *M.U.D.* would be for such use. Large amounts will be used for industry, air-conditioning, recreation, commerce, golf course irrigation, etc.

<sup>130</sup> 179 Neb. at 801, 140 N.W.2d at 637.

<sup>131</sup> NEB. REV. STAT. § 46-635 (Reissue 1968), defines groundwater as all waters beneath the surface of the land and may have forced the court into this posture.

<sup>132</sup> NEB. REV. STAT. §§ 46-206, -265 (Reissue 1968).

<sup>133</sup> 179 Neb. at 801, 140 N.W.2d at 637.

the reasonableness of a watershed diversion, thus preserving the right of the Legislature, unimpaired to determine the policy of the state as to underground waters and the rights of persons in their use. Under the record in this case and the applications of the declared law in this case, we can find no basis for holding the diversion from the well field to be unlawful. Under the evidence in this case the transwatershed diversion was reasonable, for a public purpose, beneficial, not against public policy, and in the public interest.<sup>134</sup>

At least two contradictory hypotheses can be made about the *M.U.D.* case. First, *Osterman* is "good law" and prohibits interbasin transfers of surface water. However, the *Bejot* definition of "watershed" tempers the severity of the *Osterman* rule, and *M.U.D.* applies a reasonable use test to *transbasin use of groundwater* when no substantial injury is caused to appropriators or riparians.

The second hypothesis is that *Osterman* has been impliedly overruled by: (1) the "balancing of the equities" which underlies the "watershed" findings in *Bejot*; (2) the express "balancing of the equities" in *M.U.D.* when the court combined the concepts of reasonable use and lack of substantial injury; (3) the recognition in *M.U.D.* that underground waters and surface waters are part of one hydrologic cycle; and (4) the court's awareness in *M.U.D.* that fifty-six million gallons per day or ninety-three percent of the recharge of the aquifer was coming directly from the Platte River.

The second hypothesis seems sounder even though the court has continually been scrupulous in retaining and distinguishing *Osterman*. But large expenditures for project planning cannot be justified on such an assurance.<sup>135</sup> The foregoing material accentuates the need for legislative clarification so that rational inquiry concerning alternatives for maximum water utilization will be encouraged.<sup>136</sup>

#### OTHER LEGAL OBJECTIONS

The Nebraska Supreme Court has not discussed the one remaining legal problem that is often raised and which deserves at least a cursory treatment: Is transbasin diversion an unconstitutional

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<sup>134</sup> *Id.* at 801-02, 140 N.W.2d at 637.

<sup>135</sup> The Nebraska Legislative Council Committee on Ground and Surface Water has characterized the Nebraska situation as one in which transbasin diversion is permitted by individual court decision. See note 152 *infra*.

<sup>136</sup> After the *Osterman* decision plans for other transbasin diversions in Nebraska were abandoned. See Hutchins & Steele, *supra* note 22, at 296 (1957).

intrusion of vested water rights in those jurisdictions which recognize the riparian doctrine?

It does not seem that any conceivable proposal would authorize either the disruption or destruction of presently used riparian rights or of prior appropriative rights without condemnation and the payment of adequate compensation. Therefore, these rights would not be an impediment. However, a riparian does not lose his right through non-use, nor is he limited to present use. Thus, it is argued that to permit interbasin transfers would jeopardize vested riparian rights to expanded future use, and it would thereby constitute a taking of property without due process of law,<sup>137</sup> in violation of both federal<sup>138</sup> and state<sup>139</sup> constitutions.

A number of jurisdictions have litigated the authority of a state legislature under its police power to shift from an existing common-law system of water rights to a statutory method of prior appropriation. These alterations of legal arrangements have almost always been sustained against attacks upon their constitutionality, and the basis generally has been that the losses inflicted upon non-using riparian owners are so infinitesimal that no compensation is due when such rights are subordinated or cut off.<sup>140</sup>

The claims of non-using riparian proprietors probably could not be sustained in Nebraska. The people of Nebraska by constitutional edict, the legislature by statutory mandate and the courts by refusing to strike down provisions limiting riparianism decided long ago to modify the riparian rules. Both the constitution<sup>141</sup> and the statutes<sup>142</sup> provide that the waters of the state are dedicated to the people for beneficial purposes and that the right to use them for beneficial purposes shall never be denied. It was on the date of the enactment of these and subsequent provisions instituting the appropriation doctrine<sup>143</sup> when the riparian suffered the "loss," if ever.

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<sup>137</sup> See, e.g., Lauer, *supra* note 11, at 19-20; Ellis, *supra* note 30, at 260; Yeutter, *supra* note 84, at 56; Doyle, *Water Rights in Nebraska*, 29 NEB. L. REV. 385, 407 (1950); Olsson, *supra* note 26, at 274. See generally, Waite, *Beneficial Use of Water in a Riparian Jurisdiction*, 1969 WIS. L. REV. 864; O'Connell, *Iowa's New Water Statute—The Constitutionality of Regulating Existing Uses of Water*, 47 IOWA L. REV. 549 (1962).

<sup>138</sup> U.S. CONST. amend. V; XIV, § 1.

<sup>139</sup> NEB. CONST. art. I § 3.

<sup>140</sup> Harnsberger, *Eminent Domain and Water*, in 4 WATER AND WATER RIGHTS 63 (R. E. Clark ed. 1970). See generally, *id.* at 61-64 and authorities cited therein.

<sup>141</sup> NEB. CONST. art. XV, § 5.

<sup>142</sup> NEB. REV. STAT. § 46-202 (Reissue 1968).

<sup>143</sup> NEB. CONST. art. XV, § 6; NEB. REV. STAT. §§ 46-203, -204 (Reissue 1968).

It was then that he was divested of his "interest" which reverted in the state and was made subject to appropriation. Under these provisions, as enforced by the Nebraska Supreme Court,<sup>144</sup> appropriators are *now* using water on lands which are in the watershed but are nevertheless non-riparian.<sup>145</sup>

Transbasin diversion which is consistent with the appropriation doctrine<sup>146</sup> presents only one additional factor to the present Nebraska situation, the used water is usually not capable of being returned to the basin of origin. But if the laws of Nebraska permit an appropriator to collect his seepage and beneficially reuse it, as one court suggests,<sup>147</sup> then so long as there is a beneficial use of *all* the water diverted,<sup>148</sup> there should be no distinction made on this basis.

To reduce the possibility of an unconstitutional "taking" when authorizing transbasin diversions, legislative provisions should be included to safeguard the area of origin and its future development.<sup>149</sup>

#### TRANSBASIN DIVERSION IN OTHER STATES

In 1967, at the request of the Nebraska Legislature, the Legislative Council appointed an interim committee to consider the proper utilization of ground and surface water.<sup>150</sup> During the course of the

<sup>144</sup> See *Crawford Co. v. Hathaway*, 67 Neb. 325, 93 N.W. 781 (1903); *Cline v. Stock*, 71 Neb. 79, 102 N.W. 265 (1905), *rev'g on rehearing*, 71 Neb. 70, 98 N.W. 454 (1904); *McCook Irrig. & Water Power Co. v. Crews*, 70 Neb. 115, 102 N.W. 249 (1905), *rev'g on rehearing*, 70 Neb. 109, 96 N.W. 996 (1903); *Wasserburger v. Coffee*, 180 Neb. 149, 141 N.W.2d 738 (1966). See also *Brummund v. Vogel*, 194 Neb. 415, 168 N.W.2d 24 (1969), *noted in* 19 NEB. ST. B.J. 64 (1970).

<sup>145</sup> It is interesting to note, as one commentator has observed, that in Nebraska a riparian is prohibited from using water on non-riparian lands, Doyle, *Water Rights in Nebraska*, 20 NEB. L. REV. 1, 14 (1941), but an appropriator is not so limited. Doyle, *Water Rights in Nebraska* 29 NEB. L. REV. 385, 403-05 (1950).

<sup>146</sup> See p. 91-93 *supra*.

<sup>147</sup> *United States v. Tilley*, 124 F.2d 850 (8th Cir. 1941).

<sup>148</sup> This could be accomplished by using the inbasin supplies as a vehicle to carry and apply the foreign water.

<sup>149</sup> In planning for future development the Nebraska Soil and Water Conservation Commission worked under the following assumption: "Transfer of water between river basins is permissible providing the basin of water origin has the opportunity to use water within the basin for reasonably full development." NEBRASKA SOIL AND WATER CONSERVATION COMM'N, REPORT ON THE FRAMEWORK STUDY, STATE WATER PLAN PUBLICATION No. 101, at 227 (1971).

<sup>150</sup> L.R. 44, 17th Neb. Leg. Sess. (1967).

investigation several committee members, together with representatives of the state water agencies, toured California, Colorado, New Mexico, and Texas where they studied problems of water utilization, administration and legislation.<sup>151</sup> Transbasin diversion was one of the issues reviewed by the committee; its report lists each of the four selected states as permitting diversion.<sup>152</sup> Therefore it is worthwhile to examine the principal provisions governing interbasin transfers in each of the states visited by the committee.

#### CALIFORNIA<sup>153</sup>

Since the early days of mining in the Sierra foothills, miners and farmers alike have diverted water from its regular channels for transfer to distant lands outside the basin. This right to divert water not needed to satisfy inbasin rights of prior appropriators and riparian proprietors was always recognized by the California courts.<sup>154</sup> In the early thirties, however, the legislature made statutory changes in the Water Code which imposed restrictions on the exportation of water from the areas of origin. The first restraint came in 1931 when the "county of origin" law was enacted. This statute prevented granting priority to appropriations made pursuant to a state water plan if the water was necessary to develop the county where the water originated.<sup>155</sup> Two years later the policy

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<sup>151</sup> NEBRASKA LEG. COUNCIL, COMM. ON GROUND AND SURFACE WATER, REPORT No. 165, at 1 (1968).

<sup>152</sup> *Id.* at 21. Interestingly enough, Nebraska is categorized as allowing diversion by "individual decision by court."

<sup>153</sup> See generally, W. HUTCHINS, *supra* note 16, at 142-45; C. MEYERS & A. TARLOCK, WATER RESOURCES MANAGEMENT 323-64 (1971); Johnson & Knippa, *supra* note 31; Weatherford, *supra* note 9; Comment, *Legal Planning for the Transfer of Water Between River Basins: A Proposal for the Establishment of the Interbasin Transfer Commission*, 55 CORNELL L. REV. 809, 821-23 (1970); 12 STAN. L. REV. 439 (1960); Wood, *Water Allocation and Social Institutions*, PROCEEDINGS OF THE CONFERENCE ON ECONOMICS OF CALIFORNIA'S WATER DEVELOPMENT 43 (1958); Ciriacy-Wantrup, *Some Economic Issues in Water Rights*, 37 J. FARM ECON. 875, 883-85 (1955); Johnson, *The Area of Origin and A. Columbia River Diversion*, 46 WASH. L. REV. 245, 250-55 (1971); Gindler & Holburt, *Water Salinity Problems: Approaches to Legal and Engineering Solutions*, 9 WAT. RES. J. 329, 373-75 (1969).

<sup>154</sup> W. HUTCHINS, *supra* note 16, at 142.

<sup>155</sup> "No priority under this part shall be released nor assignment made of any application that will, in the judgment of the board, deprive the county in which the water covered by the application originates of any water necessary for the development of the county." CAL. WATER CODE § 10505 (West Supp. 1971).

was expanded. The new restrictions applied to the construction and operation of the Central Valley Project:

[A] watershed or area wherein water originates, or an area immediately adjacent thereto which can conveniently be supplied with water therefrom, shall not be deprived by the department directly or indirectly of the prior right to all the water reasonably required to adequately supply the beneficial needs of the watershed area or any of the inhabitants or property owners therein.<sup>156</sup>

Then, in 1959, the California Legislature enacted as a part of General State Policy a provision suggesting further protection to areas of origin:

It is hereby declared to be the established policy of this State that in the development and completion of any general or co-ordinated plan prepared and published by the Department of Water Resources or any predecessor thereof or successor thereto, all uses, including needs of the area in which the water originates, of water shall be given consideration.

Whenever the Legislature authorizes the construction or acquisition by the State of any project which will develop water for use outside the watershed in which it originates, the Legislature shall at the same time consider the authorization and the construction or acquisition of such other works as may be necessary to develop water to satisfy such of the reasonable ultimate requirements of such watershed as may be needed at the time the export project is authorized or as will be needed within a reasonable time thereafter. The authorization with respect to such additional works may provide for state acquisition or construction, in whole or in part, of any such additional works, or financial assistance to other entities in connection with the acquisition or construction of such works, or a combination thereof.<sup>157</sup>

Several aspects of the California scheme are noteworthy. First, a political unit, the county, was first afforded water priority protection. It has been suggested that this unit was chosen because of fears that "vague and undefined" terms denoting natural boundaries, *e.g.*, "mountain regions," "watershed," would suffer constitutional infirmity.<sup>158</sup>

Both the "county of origin" and "watershed protection" statutes anticipate interim use by others until the water is needed to satisfy the priority.<sup>159</sup> But under the "county of origin" statute, if the Department of Water Resources makes a determination that the trans-

<sup>156</sup> CAL. WATER CODE § 11460 (West Supp. 1971).

<sup>157</sup> CAL. WATER CODE § 108 (West Supp. 1971).

<sup>158</sup> 25 OP. CAL. ATT'Y GEN. 8, 15 (1955).

<sup>159</sup> 25 OP. CAL. ATT'Y GEN. 8 (1955)

fer would not deprive the originating county of the water necessary for development and the board makes an unconditional release of the appropriation for uses in other areas, the use is then not subject to the statute.<sup>160</sup> No similar qualification appears in the "watershed protection" statute.

Both statutes have been criticized as repugnant to the California constitutional requirement that the state's waters be put to their fullest beneficial use, but the California Attorney General has ruled that neither law violates the constitution so long as interim use by others is permitted.<sup>161</sup> Lastly, it should be pointed out that the reservation statutes apply only to governmental projects.<sup>162</sup> Thus, public appropriations are subject to the uncertainty of eventual needs of the area of origin, whereas appropriations by private interests are not so limited. Consequently, state and federal appropriations may be encroached upon by later private appropriators. When joined with the uncertainty concerning future needs, such infringements can materially impede public development of water resources.<sup>163</sup>

It has been suggested that a governmental entity could nullify the recapture right by resorting to the power of eminent domain.<sup>164</sup> While this is a possibility, its usefulness is questionable because each time someone in the area of origin seeks to assert his reservation, either by expanding present uses or by creating new ones, a condemnation proceeding would have to be commenced.

The California reservation statutes raise serious questions, not only in the conception of workable methods of implementation and

<sup>160</sup> OP. CAL. LEG. COUNSEL, 1959 ASSEMBLY JOUR. 785.

<sup>161</sup> 25 OP. CAL. ATT'Y GEN. 8 (1955); 25 OP. CAL. ATT'Y GEN. 32 (1955). But: "[W]e should further recognize that neither the doctrine of the county of origin nor the watershed protection provisions have been tested against article 14 of the California Constitution in any California court and despite the opinions of Attorney General Brown in 1955 upholding the constitutionality, some constitutional lawyers feel that these code sections violate this article." Wood, *supra* note 153, at 47 (footnotes omitted).

<sup>162</sup> Both the "county of origin" and, watershed protection: statutes include the federal government in their provisions. CAL. WATER CODE §§ 10504, 11128 (West 1956). Whether such provisions could be enforced against the federal government is not at all certain. The federal government has, though, provided for similar type protection for exporting areas. See, e.g., Colorado River Basin Project Act, 43 U.S.C. § 1513 (Supp. V 1970).

<sup>163</sup> Ciriacy-Wantrup, *supra* note 153, at 883.

<sup>164</sup> Johnson & Knippa, *supra* note 31, at 1043; 12 STAN. L. REV. 439, 454 (1960).



regulation, but also because of the uncertainty with which such provisions must be regarded by planners and investors. But despite these doubts in both importing and exporting areas, California state courts have not reported a decision construing the provisions, and large scale diversions from the north to the south have not been halted. The approval of the Water Resources Development Bond Act,<sup>165</sup> financing the Feather River Project, may indicate a general belief that surplus water is and will continue to be available in the northern part of the state or that needs in the north can be supplied from alternate sources.

The "county of origin" provision has been cited as being responsible for at least one large pre-judgement settlement. This occurred when litigation between the East Bay Municipal Utility District and the Amador and Calveras Counties Water Districts was settled in 1968. Under the provisions, East Bay promised to pay each county 2 million dollars for release of 1927 priority filings.<sup>166</sup>

#### COLORADO<sup>167</sup>

Colorado, a state that strictly adheres to the prior appropriation doctrine, would not be expected to have legislative restrictions on transbasin diversion.<sup>168</sup> However, proposals in 1943 to divert water from the western to the eastern side of the continental divide resulted in a statute limiting diversions by water conservancy districts.<sup>169</sup>

[A]ny works or facilities planned and designed for the exportation of water from the natural basin of the Colorado River and its tributaries in Colorado, by any district created under this article, shall be subject to the provisions of the Colorado River Compact and the Boulder Canyon Project Act. Any such works or facilities shall

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<sup>165</sup> CAL. WATER CODE §§ 12930-44 (West 1971).

<sup>166</sup> Agreements between Amador County and East Bay Municipal Utility District, Aug. 22, 1958, and Dec. 26, 1958; Agreements between Calaveras County Water District and East Bay Municipal Utility District, Nov. 26, 1958, and Dec. 26, 1958; cited in Weatherford, *supra* note 9, at 1310 n.54.

<sup>167</sup> See generally, Johnson & Knippa, *supra* note 31, at 1040-42; Weatherford, *supra* note 9; Johnson, *supra* note 153, at 255-56; Beise, *Compensatory Storage*, 22 ROCKY MT. LAW REV. 453 (1950).

<sup>168</sup> See the discussion of diversion in appropriation doctrine states pp. 91-93 *supra*.

<sup>169</sup> Water conservancy districts are created under and governed by the Water Conservancy Act, COLO. REV. STAT. ANN. §§ 150-5-1 to -50 (1963). See also Kelly, *Water Conservancy Districts*, 22 ROCKY MT. L. REV. 432 (1950).

be designed, constructed and operated in such manner that the present appropriations of water, and in addition thereto prospective uses of water for irrigation and other beneficial consumptive use purposes, including consumptive uses for domestic, mining and industrial purposes, within the natural basin of the Colorado River in the State of Colorado, from which water is exported, will not be impaired nor increased in cost at the expense of the water within the natural basin. The facilities and other means for the accomplishment of said purpose shall be incorporated in, and made a part of any project plans for the exportation of water from said natural basin in Colorado.<sup>170</sup>

Unlike the California scheme, this statute applies its protection solely to the "natural basin of the Colorado River and its tributaries in Colorado . . ." The protection is very general, and it would seem difficult to define or enforce. In connection with the prohibition against impairment, it has been suggested by one author that, "[a] project proposing to divert water from the Colorado River Basin must construct a compensating reservoir that will leave the West Slope in as good condition for present and future development purposes as if the transporting project had not been constructed and the river involved had remained unregulated."<sup>171</sup> This may well be the case because the time when the protection is really meaningful is before construction has begun and before new "equities" are created. The statute does not include a recapture provision, and it is unlikely that a Colorado court would imply one. Therefore, if future needs are underestimated, the "natural basin" may eventually suffer shortages. Likewise, if future needs are over-assessed, unnecessary facilities may be constructed and unneeded water may be reserved.

Another part of the statute posing interpretational problems is the prohibition against increasing the cost of inbasin water use. It would seem to be a difficult task to determine at some future date what the cost of inbasin water should be "but for" the diversion. The statute, by its terms, applies only to water-conservancy districts. Thus, Denver, located east of the divide, is permitted to divert unappropriated western waters for municipal use.

Although one authority has questioned the statute's constitutionality, the Supreme Court of Colorado has not yet had an occasion to review it. However, the following language from a Colorado

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<sup>170</sup> COLO. REV. STAT. ANN. § 150-5-13(2) (d) (1963).

<sup>171</sup> Beise, *supra* note 167, at 459. In the Fryingpan-Arkansas diversion project, minimum stream flow and storage was required and an additional reservoir was considered. H. R. Doc. No. 130, 87th Cong., 1st Sess. 3-6 (1961).

Supreme Court case decided after the statutory enactment suggests that the anti-diversion statute may be unconstitutional.<sup>172</sup>

We find nothing in the Constitution which even intimates that waters should be retained for use in the watershed where originating.

The waters here involved are the property of the public, not any segment thereof, nor are they dedicated to any geographical portion of the state.

The right to appropriate water and put the same to beneficial use at any place in the state is no longer open to question.<sup>173</sup>

This suggestion may have validity if the statute were all-encompassing in its terms, but arguably the legislature has the power to regulate and control an entity that it created, *i.e.*, water-conservancy districts.<sup>174</sup>

#### NEW MEXICO<sup>175</sup>

At an early date, New Mexico repudiated riparian theories and adopted the appropriation system of water rights.<sup>176</sup> Consistent with the appropriation doctrine, there are no legal prohibitions against transbasin diversion but merely the usual statutory requirements governing appropriators.<sup>177</sup> In fact, New Mexico has enacted legislation which protects transbasin diverters in certain instances.

Whenever the owner of a ditch . . . or other works shall turn or deliver water from one stream or drainage into another stream or drainage, such owner may take and use the same quantity of water, less a reasonable deduction for evaporation and seepage . . . .<sup>178</sup>

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<sup>172</sup> Johnson & Knippa, *supra* note 31, at 1041; Weatherford, *supra* note 9, at 1314.

<sup>173</sup> Metropolitan Surban. Water Users Ass'n. v. Colorado River Water Conservation Dist., 148 Colo. 173, 202, 365 P.2d 273, 288-89 (1961). The court made this statement in the course of a rejection of an argument that Denver should be prohibited from diverting water across the divide to the possible detriment of the basin of origin.

<sup>174</sup> See note 169 *supra*.

<sup>175</sup> See generally Clark, *Water Rights Problems in the Upper Rio Grande Watershed and Adjoining Areas*, 11 NAT. RES. J. 48 (1971).

<sup>176</sup> *Id.* at 56-58; R. CLARK, NEW MEXICO WATER RESOURCES LAW 12 (1964); 1 S. WIEL, *supra* note 10, at 143-44.

<sup>177</sup> New Mexico adopted a modified form of the Wyoming permit system. Clark, *supra* note 175, at 57.

<sup>178</sup> N.M. STAT. ANN. § 75-5-24 (Repl. 1968).

TEXAS<sup>179</sup>

Transbasin diversions in Texas are subject to the limitations of two separate acts. The first of these, the Watershed Prejudice Act, was enacted as part of the 1913 irrigation code.<sup>180</sup>

It shall be unlawful for any person, association of persons, corporation, water improvement or irrigation district to take or divert any of the water of the ordinary flow, underflow, or storm flow of any stream, water course, or watershed, in this State into any other natural stream, water course or watershed, to the prejudice of any person or property situated within the watershed from which such water is proposed to be taken or diverted.<sup>181</sup>

Before any person, association of persons, corporation, water improvement or irrigation district shall take any water from any natural stream, water course, or watershed from this State into any other watershed, such person, association of persons, corporation, water improvement or irrigation district shall make application to the Board of Water Engineers for a permit so to take or divert such waters, and no such permit shall be issued by the Board until after full hearing before said Board as to the rights to be affected thereby . . . .<sup>182</sup>

Several commentators agree that the act has had little impact upon the many interbasin projects.<sup>183</sup> As water becomes more scarce and projects become more grandiose, this statute may take on added significance.<sup>184</sup>

The Watershed Prejudice Act, unlike the California provisions but similar to the Colorado act, does not provide a right of recapture for the basin of origin. Once the Texas Water Rights Commission<sup>185</sup>

<sup>179</sup> See generally Johnson & Knippa, *supra* note 31; Weatherford, *supra* note 9, at 1316-17; Johnson, *supra* note 153, at 257-58.

<sup>180</sup> Tex. Laws 1913, ch. 171, §§ 81-83, at 376-77.

<sup>181</sup> TEX. REV. CIV. STAT. ANN. art. 7589 (1954).

<sup>182</sup> TEX. REV. CIV. STAT. ANN. art. 7590 (1964).

<sup>183</sup> Johnson & Knippa, *supra* note 31, at 1044; Weatherford, *supra* note 9, at 1316; Comment, *supra* note 153, at 820. See also Trelease, *A Model State Water Code for River Basin Development*, 22 LAW & CONTEMP. PROB. 301, 321 (1957) (suggesting that projects are initiated and built without much regard for legal considerations).

<sup>184</sup> "Future water development by the Bureau of Reclamation in Texas is concentrated primarily in long-range planning of inter-basin and inter-state projects. These are the West Texas and Eastern New Mexico Import Project and the Texas Basins Project." RECLAMATION ERA, A WATER REV. Q., Nov. 1970, at 23.

<sup>185</sup> This agency was formerly called the Texas Water Commission. Prior to 1962 it was named the Board of Water Engineers. TEX. REV. CIV. STAT. ANN. art. 7477 (Supp. 1970).

grants an appropriation permit, with or without a planned interbasin transfer, the only manner of reversing it is through appeal procedures.<sup>186</sup> And under the Texas "substantial evidence" rule, an order issued by the Commission will be sustained if it is reasonably supported by substantial evidence; the test is not whether it is supported by a preponderance of the evidence.<sup>187</sup>

In *City of San Antonio v. Texas Water Commission*,<sup>188</sup> the city's application for a permit proposed a transbasin diversion of 100,000 acre-feet of water annually from the Canyon Dam Reservoir in the Guadalupe River watershed. In an opinion denying the application, the court considered a number of issues. One was whether the Act, although appearing to prohibit removal of any of a basin's water supply if there would be "prejudice" to "any person or property," should be given that interpretation. The court stated, "[s]uch a construction would have the intolerable consequence of defeating a project promising immense benefits to the receiving region or the State as a whole upon a mere showing of a slight harm to present or future interest."<sup>189</sup> The only diversions the legislature prohibited were those which impaired "*water rights in existence at the proposed diversion.*"<sup>190</sup>

[W]e have also concluded that as to any water in the originating basin found to be in excess of that amount required to protect existing rights, the Legislature intended that the Commission should, in a balancing process, take into consideration future benefits and detriments expected to result from a proposed trans-basin diversion and there would be "prejudice" only if the benefits from the diversion were out-weighed by detriments to the originating basin.<sup>191</sup>

The Commission drew a "balance" between granting part of the unappropriated water for multiple use in the Guadalupe River Basin, the place of origin, and San Antonio's application. The de-

<sup>186</sup> TEX. REV. CIV. STAT. ANN. art. 7477, § 12 (Supp. 1970).

<sup>187</sup> See, *City of San Antonio v. Texas Water Comm'n.*, 407 S.W.2d 752, 756, (Tex. 1966); *Johnson & Knippa*, *supra* note 31, at 1048; *Halsell v. Texas Water Comm'n.*, 380 S.W.2d 1, 13 (Tex. Civ. App. 1964) (In technical areas the Commission's findings are to be given "extraordinary weight.")

<sup>188</sup> 407 S.W.2d 752 (Tex. 1966).

<sup>189</sup> *Id.* at 758. See *Johnson & Knippa*, *supra* note 31, at 1045-48.

<sup>190</sup> *City of San Antonio v. Texas Water Comm'n.*, 407 S.W.2d 752, 759 (Tex. 1966) (emphasis added), *citing* TEX. REV. CIV. STAT. ANN. arts. 7506-07 (1954).

<sup>191</sup> *City of San Antonio v. Texas Water Comm'n.*, 407 S.W.2d 752, 759 (Tex. 1966).

cision to prohibit removal of the water was sustained, the court noting that water unappropriated and available for use within the originating watershed is not necessarily the equivalent of unappropriated water to be used outside the watershed.

Part of the evidence introduced by the Guadalupe-Blanco River Authority and the cities, counties, industries, and power companies in the basin of origin was that "the Guadalupe River Basin is a developing and growing industrial area and that urban communities within the basin are increasing in size."<sup>192</sup> Thus, when the interests are balanced in Texas, it is proper to consider not only existing and future rights and use in the originating basin, but also the consequential losses to that basin's economy.<sup>193</sup>

Another problem presented by the Watershed Prejudice Act and unique to the Texas situation is the lack of any provision defining "watershed."<sup>194</sup> Texas has some 7,500 named streams and tributaries; a joint state and federal report listed eleven major basins; a report by the Board of Water Engineers listed fifteen river basins.<sup>195</sup> Such a definitional question could conceivably obscure the more important determination, *i.e.*, balancing the intra- and extra-basin interests.

If the "Watershed Prejudice Act" did not adequately safeguard inbasin interests, they were certainly in mind when in 1965 full responsibility for water planning was given to the Texas Water Development Board.<sup>196</sup> The Board was charged with forming a "State Water Plan" for the state of Texas subject to the following provision:

However, the Board shall not prepare or formulate any plan which contemplates or results in the removal from the basin of origin of any surface water to some other river basin or area outside of such basin of origin if the water supply involved in such

<sup>192</sup> *Id.* at 762.

<sup>193</sup> *But see* Johnson & Knippa, *supra* note 31, at 1045.

<sup>194</sup> For further discussion of this definitional problem see notes 14-15 and accompanying text *supra*. To further complicate the situation the Texas Water Development Board, the agency in charge of water planning which neither governs nor is governed by the Texas Water Rights Commission, has been charged with formulating a "State Water Plan," "including a definition and designation of river basins and watersheds as separate units for purposes of water development and interwatershed transfers." TEX. REV. CIV. STAT. ANN. art. 8280-9 (3) (b) (Supp. 1970).

<sup>195</sup> Johnson & Knippa, *supra* note 31, at 1049, and authorities cited therein.

<sup>196</sup> TEX. REV. CIV. STAT. ANN. art. 8280-9, § 3 (b) (Supp. 1970-71).

plan or project will be required to supply the reasonably foreseeable future water supply requirements for the next ensuing fifty-year period within the river basin of origin, except on a temporary, interim basis. The board shall be governed in its preparation of said plan by a regard for the public interest of the entire state, and shall direct its efforts to plan for the orderly development and management of water resources in order that sufficient water will be available at reasonable cost to further the economic development of the entire state.<sup>197</sup>

It was first thought that this legislation might have the effect of placing a fifty-year moratorium on large scale diversion projects.<sup>198</sup> However, the Supreme Court of Texas has interpreted the act as applying only to the State Water Development Board and its efforts to formulate a "State Water Plan," and not to limit in any way the determinations of the Texas Water Rights Commission.<sup>199</sup>

#### OTHER STATES

One other state which has a dual-system of water rights similar to Nebraska is Oklahoma. In 1957, by legislative resolution, Oklahoma established the following guidelines to govern the State Water Resources Board:

Before an appropriated or adjudicated right may be granted for water to be ultimately used at a distant point, sufficient reserves should be set up to take care of the present and reasonable future needs of the area of origin.<sup>200</sup>

Limitations should be placed on transportation of water resources from any watershed or other source of supply until reasonable present and future beneficial needs of equal rank within the immediate area have been supplied.<sup>201</sup>

Though this statement expresses legislative concern for the basin of origin, it would seem in no manner to hamper large scale water developments. Rather, it would appear to merely restate obvious criteria for sound water planning.

Not only is it permissible for water to be transported and used out of the watershed of origin in most of the western appropri-

<sup>197</sup> *Id.*

<sup>198</sup> Johnson & Knippa, *supra* note 31, at 1050-53.

<sup>199</sup> City of San Antonio v. Texas Water Comm'n., 407 S.W.2d 752, 757 (Tex. 1966).

<sup>200</sup> H. J. Res. No. 502, at § 2(8), [1957] Okla. Laws 670. The text of this resolution may be found in a historical note to OKLA. REV. CODE ANN. tit. 82, § 1078 (1970).

<sup>201</sup> H. J. Res. No. 502, at § 2(9), [1957] Okla. Laws 670. The text of this resolution may be found in a historical note to OKLA. REV. CODE ANN. tit. 82, § 1078 (1970).

ation<sup>202</sup> and many of the dual-system states, but also, many of the traditionally riparian eastern states have enacted legislation which would seem to foster such diversions. Mississippi has adopted the prior appropriation system of water rights,<sup>203</sup> Iowa has enacted a comprehensive permit system,<sup>204</sup> and Florida,<sup>205</sup> Indiana,<sup>206</sup> Maryland,<sup>207</sup> Minnesota,<sup>208</sup> New York,<sup>209</sup> and Wisconsin<sup>210</sup> have all enacted legislation which could be viewed as authorizing or at least removing impediments to interbasin transfers.

#### FEDERAL INTERESTS IN TRANSBASIN DIVERSION<sup>211</sup>

Since only the internal water resource allocation problems of a single jurisdiction have been discussed, our consideration of federal interests is limited to two types of conflict.<sup>212</sup>

<sup>202</sup> Trelease, *supra* note 183, at 304; Hutchins & Steele, *supra* note 22, at 283.

<sup>203</sup> MISS. CODE ANN. § 5956 (Supp. 1968).

<sup>204</sup> IOWA CODE ANN. § 455A (Supp. 1971). See generally O'Connell, Iowa's New Water Law, Mich. State Univ. Water Rights Conferences. 54 (March 29, 1960); O'Connell, *supra* note 137.

<sup>205</sup> FLA. STAT. § 373.141(1) (1969). See generally F. MALONEY, S. PLAGER, F. BALDWIN, *supra* note 10, at 189-93.

<sup>206</sup> IND. ANN. STAT. § 27-1406 (1970). See generally, Waite, *supra* note 137.

<sup>207</sup> MD. ANN. CODE art. 96A §§ 1-22 (Supp. 1970).

<sup>208</sup> MINN. STAT. ANN. § 105.38-.64 (1964). See generally, Ellis, *supra* note 30, at 239-41.

<sup>209</sup> N.Y. CONSERV. LAW § 429-j (McKinney 1967): "[Any alteration of any watercourse or lake] is reasonable and lawful as against any person . . . having an interest in such watercourse or lake, unless such alteration is causing harm to him or it . . . ."

<sup>210</sup> WIS. STAT. ANN. § 30.18 (1964). See generally Ellis, *supra* note 30, at 239; Harnsberger, *Prescriptive Water Rights in Wisconsin*, 1961 Wis. L. REV. 47; Waite, *supra* note 137.

<sup>211</sup> See generally Johnson & Knippa, *supra* note 31, Weatherford, *supra* note 9; Comment, *supra* note 153. See also Goldberg, *Interposition—Wild West Water Style*, 17 STAN. L. REV. 1 (1964); Sax, *Problems of Federalism in Reclamation Laws*, 37 U. COLO. L. REV. 49 (1964).

<sup>212</sup> One of the problems on which textual discussion has been eliminated is that of interstate diversion of water from the state of origin. Nearly 30% of the states limit the diversion of water beyond state boundaries. Comment, *supra* note 153, at 826, and authorities cited therein.

"While there is no established law on this subject there is considerable authority to the effect that a state law prohibiting exportation of its resources beyond the state line is an unconstitutional impediment to interstate commerce. See *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911); *City of Altus v. Carr*, 255 F. Supp. 828 (W.D. Tex. 1966),



## INTRASTATE DIVERSION OF INTERSTATE STREAMS

States A and B share an interstate stream. The conflict usually arises when A, being located upstream from B, enacts legislation permitting transbasin diversion with the result that less water flows into B. B, urging the common law limitations, seeks relief in the federal courts. In this situation, the attempt of one state to invoke the riparian anti-diversion doctrine as limiting the water use of another state will probably be unsuccessful.

In *Wyoming v. Colorado*<sup>213</sup> the Court rejected Wyoming's argument that Colorado could not divert the waters of the Laramie River into the Poudre Valley, thereby denying Wyoming the use of the diverted portions of the Laramie River and its return flow. The Supreme Court did place a limitation on Colorado's divertable appropriation, but rejected any watershed limitation. Since neither state limited the place of use nor prohibited transbasin diversion, "[t]he objection . . . to the proposed diversion on the ground that it is to another watershed [is] . . . untenable."<sup>214</sup> In two later cases, both decided in 1931, the Supreme Court likewise rejected anti-diversion arguments.<sup>215</sup> In one of the cases, the Court's rejection was based upon the absence of a showing of damage,<sup>216</sup> and in the other the Court recognized that the beneficial use of water resources should take precedence over formal doctrine.<sup>217</sup>

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*aff'd per curiam*, 385 U.S. 35 (1966), noted, 47 ORE. L. REV. 228 (1968). See the discredited contrary view in *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908)." J. SAX, *WATER LAW PLANNING & POLICY* 90 (1968).

For more information on this topic, see generally *id.* at 89-90; Brown & Duncan, *Legal Aspects of a Federal Quality Surveillance System*, 68 MICH. L. REV. 1131, 1146 (1970); Johnson & Knippa, *supra* note 31, at 1056-57; Weatherford, *supra* note 9, at 1321-23; White, *Reasonable State Regulation of the Interstate Transfer of Percolating Water*, 2 NAT. RES. LAW 383 (1969); Comment, *supra* note 153, at 826-28.

<sup>213</sup> 259 U.S. 419 (1922).

<sup>214</sup> *Id.* at 466.

<sup>215</sup> *Connecticut v. Massachusetts*, 282 U.S. 660 (1931); *New Jersey v. New York*, 283 U.S. 336 (1931).

<sup>216</sup> *Connecticut v. Massachusetts*, 282 U.S. 660, 674 (1931). The court, after pointing out that both of the States involved in the controversy followed the riparian doctrine stated: "And every State is free to change its laws governing riparian ownership and to permit appropriations of the flowing waters for such purposes as it may deem wise . . ."

*Id.* at 670.

<sup>217</sup> *New Jersey v. New York*, 283 U.S. 336, 343 (1931): "The removal of water to a different watershed obviously must be allowed at times unless states are to be deprived of the most beneficial use on formal grounds. In fact it has been allowed repeatedly and has been practiced by the states concerned." (Citations omitted).

## FEDERAL PROJECTS

The second area of federal interest is the situation where the state's scheme of water law, whether it prohibits or permits removal from the originating basin, frustrates federal water planning or use. The most common case would be where the Bureau of Reclamation is planning a large scale project that cannot be built because of an anti-diversion law. Of course, any federal project involving navigable waters will supersede state protective measures,<sup>218</sup> so our discussion is limited to intrastate development of non-navigable waters.

Sax states that the federal government would have constitutional authority to wholly administer federal water development projects. Congress could govern the acquisition, loss and conditions of use of water rights.<sup>219</sup> However, Congress in many instances has not seen fit to exercise its full range of constitutional power but has, even for federally planned and financed projects, deferred to state water law.

The notion that state law *does* control is derived from section 8 of the Reclamation Act of 1902. The Act, though not dealing directly with transbasin diversion, states that it does not "in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder . . ."<sup>220</sup>

The United States Supreme Court has not given full effect to this all-embracing language and has made it clear that the Act does not place all federal interests at the mercy of state water law. In fact, "every controversy over the meaning of that section which has come to the United States Supreme Court has been resolved in favor of those who argued that federal law should prevail over and preempt inconsistent state law."<sup>221</sup>

At the present time a clear federal position on the interbasin transfer of water is lacking despite pressures for a policy favoring basin or area-of-origin protection.<sup>222</sup> In some instances, restrictive provisions have been incorporated into the particular projects.

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<sup>218</sup> See Harnsberger, *Eminent Domain and Water*, in 4 WATERS AND WATER RIGHTS 1, 130-49 (R. Clark ed. 1970); Trelease, *Federal Limitations on State Water Law*, 10 BUFFALO L. REV. 339 (1961).

<sup>219</sup> J. SAX, *supra* note 212, at 105.

<sup>220</sup> 43 U.S.C. § 371 (1964).

<sup>221</sup> J. SAX, *supra* note 212, at 106. See generally *id.* at 105-19; Johnson & Knippa, *supra* note 31, at 1055-56.

<sup>222</sup> See Johnson & Knippa, *supra* note 31, at 1053-55; Weatherford *supra* note 9, at 1323-31; Comment, *supra* note 153, at 824.

A recent example is . . . the statute authorizing the Fryingpan-Arkansas Project in Colorado, which commits federal construction and operation of the project to conformity with the Colorado watershed-of-origin statute, and even takes the extreme step of precluding the Secretary of the Interior to acquire Fryingpan basin water rights for use outside the basin.<sup>223</sup>

Other projects have been designed on certain assumptions made with regard to state law. For example, an early survey of the Bureau of Reclamation recognized that the laws of the State of Nebraska made it impossible to achieve maximum use of its waters. Using information gathered by the survey, the Bureau designed a far reaching plan which included interbasin transfers on the assumption that Nebraska would enact favorable legislation.<sup>224</sup> To date Nebraska has not done so nor have there been any interbasin transfers.<sup>225</sup>

Some further idea of Congressional intention might be gained by briefly noting two current acts. The Colorado River Basin Project of 1968<sup>226</sup> protects areas of origin by prohibiting the Secretary of the Interior from originating any studies of water importation until 1978:

*Provided*, that for a period of ten years . . . the Secretary shall not undertake reconnaissance studies of any plan for the importation of water into the Colorado River Basin from any other natural drainage basin lying outside the State of Arizona, California, Colorado, New Mexico, and those portions of Nevada, Utah, and Wyoming which are in the natural drainage basin of the Colorado River.<sup>227</sup>

Further, after the moratorium period of any transbasin diversion, plans must include protective provisions for the states and areas of origin.<sup>228</sup>

The Water Resources Planning Act of 1965<sup>229</sup> takes another approach to transbasin projects. The Act, though seeking to coordinate water resources planning through establishment of river basin commissions, provides that *no* commission may "study, plan or recom-

<sup>223</sup> Johnson & Knippa, *supra* note 31, at 1054.

<sup>224</sup> S. Doc. No. 191, 78th Cong. 2d Sess. 78-96 (1944) (report of Sec'y of Interior Harold L. Ickes), *discussed in* 1944 REPORT 48-52.

<sup>225</sup> The transfer which was the basis for the controversy in the *Ainsworth* case might be the only exception but even there the court permitted the diversion only after defining "watershed" to include that situation.

<sup>226</sup> 43 U.S.C. §§ 1501-56 (Supp. V, 1970).

<sup>227</sup> 43 U.S.C. § 1511 (Supp. V, 1970).

<sup>228</sup> 43 U.S.C. § 1513 (Supp. V, 1970).

<sup>229</sup> 42 U.S.C. §§ 1962 to -62d-11 (Supp. V, 1970).

mend the transfer of waters between areas under the jurisdiction of more than one river basin commission.<sup>230</sup> Though the Act was not intended to establish a transbasin diversion policy,<sup>231</sup> it (as well as the other examples) gives the impression that areas of origin will be given protection in federal development projects if there is either local law or strong local opposition to water exportation.

#### NECESSITY, PRACTICABILITY AND ACCEPTABILITY OF TRANSBASIN DIVERSION IN NEBRASKA

The status of transbasin diversion in Nebraska is uncertain but by looking at the examples set by other states, it can be seen that there is no inherent prohibition of interbasin transfers. However, before any proposal is made for Nebraska, it will be necessary to examine the particular needs of the state and determine whether interbasin transfer is an appropriate alternative—both from the standpoint of feasibility and of acceptability.

So far as economic theory is concerned, one of the most desirable aspects to include in a water system is flexibility.<sup>232</sup> By providing machinery for the transfer of water between uses and regions, the highest economic productivity of the water can be attained. Transbasin diversion, therefore, is one foundation upon which a flexible, highly productive system must build.<sup>233</sup>

Transfers to achieve full economic productivity are especially noticeable in Nebraska where projections show several areas which will have surplus water even after completion of all inbasin development under the State Water Plan.<sup>234</sup> These areas and the estimated stream flow available for exportation are shown on Figure 1. In contrast with these surpluses, there are other major areas

<sup>230</sup> 42 U.S.C. § 1962-1(d) (Supp. V, 1970).

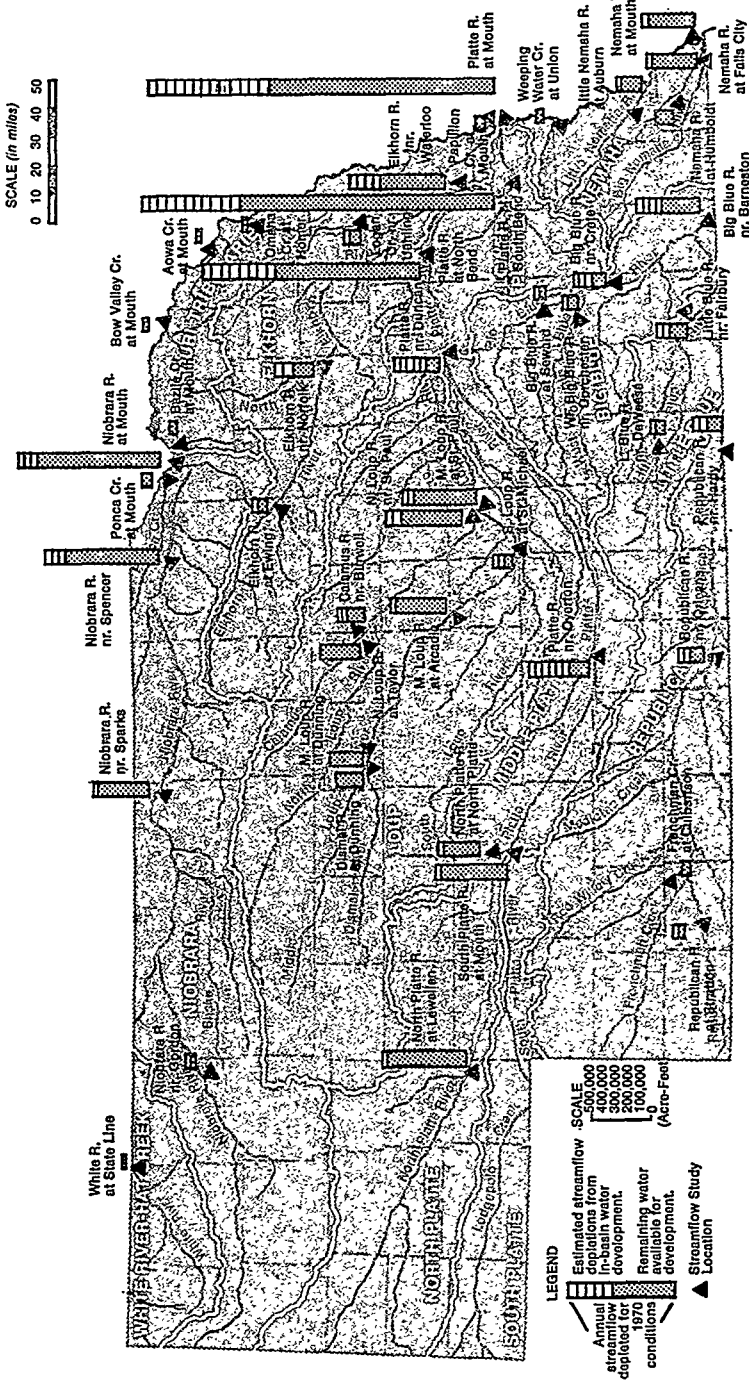
<sup>231</sup> 87 H.R. REP. No. 603, 89th Cong., 1st Sess. 12 (1965). See Johnson & Knippa, *supra* note 31, at 1055.

<sup>232</sup> See Smith, *Organizations and Water Rights in the Rural-Urban Transfer of Water*, in *ECONOMICS ON PUBLIC POLICY IN WATER RESOURCE DEVELOPMENT* 253, 260-63 (S. Smith & E. Castle eds. 1964); Bagley, *Some Economic Considerations in Water Use Policy*, 5 KAN. L. REV. 499, 506-10 (1957); Milliman, *supra* note 2; Weatherford, *supra* note 9, at 1305, 1334 *et. seq.*; Yeutter, *supra* note 84, at 49-53.

<sup>233</sup> Since the prohibition of transbasin diversion is a type of preference, a more thorough economic analysis of the problem will be presented in the section of the overall study dealing with preferential rights to water.

<sup>234</sup> NEBRASKA SOIL AND WATER CONSERVATION COMM'N, *supra* note 149, at 218-22.

FIG. 1./ESTIMATED STREAMFLOW REMAINING FOR DEVELOPMENT\*



Based on period 1954 through 1963

\*From NEBRASKA SOIL AND CONSERVATION COMM'n., REPORT ON THE FRAMEWORK STUDY, STATE WATER PUBLICATION No. 101 (1971).

in the state which will still need supplemental water for irrigation after full development of inbasin supplies. These areas as shown on Figure 2 are:

- (1) On the drainage divide between South and North Platte River Basins in Cheyenne, Deuel, and Garden Counties.
- (2) In Perkins and Chase Counties.
- (3) Throughout the Eastern Republican and upper Little and Big Blue River Basins.
- (4) In northeastern Nebraska, especially in Cedar and Knox Counties; in the southwestern part of the Elkhorn River Basin; and in the adjacent Shell Creek drainage area.<sup>235</sup>

The basic framework study also points out the need for recreational water surface areas beyond that provided for by inbasin development.<sup>236</sup>

In addition to identifying the areas of surplus and need, state water planners have devised several "concepts for interbasin water transfer that could be employed to more nearly balance water supplies and anticipated future demands on a statewide basis."<sup>237</sup> The transfer schemes, however, do not meet the needs of one major area that is suitable for irrigation. The high tableland in Cheyenne, Deuel and southern Garden Counties, bounded by the North and South Platte Rivers, are in an area of low rainfall where groundwater is not sufficient for development, and where both of the Platte Rivers are fully developed.<sup>238</sup>

In a recent speech to the Nebraska Irrigation Association, Commissioner Armstrong of the Bureau of Reclamation, United States Department of the Interior, related the following observations:

The northern portion of Nebraska is favored by an abundance of good quality water supplies, while the southern portion of the State is favored with large bodies of high quality arable lands. The in-state transfer of water from water-surplus areas to water-deficit areas has great promise. Whereas many Western States have all of their water supplies committed, Nebraska is in the enviable position of having a substantial water supply still available for development.

I know of no other Reclamation state which has such a favorable balance of water and land resources. Some states may look long-

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<sup>235</sup> *Id.* at 222. For a more accurate description of the areas included see *id.* at 228-30.

<sup>236</sup> *Id.* at 222-24. The study only mentions the need and suggests that it be a topic for more comprehensive studies in the future.

<sup>237</sup> *Id.* at 224. The proposals are set forth in the study, *id.* at 230-35.

<sup>238</sup> *Id.* at 238.



ingly to their neighbors or to neighboring counties to see any possibility of meeting their water needs. Or they must hope for some breakthrough in the realms of desalination or weather management.

Nebraska, on the other hand, has the potential of meeting its foreseeable future water needs by careful management of in-state supplies. I am quite excited about Nebraska's opportunities in this direction.<sup>239</sup>

Although interbasin transfers appear feasible and desirable, the question is whether the people of the state will accept the changes necessary to carry them out. Certainly the citizens were aroused by the legislative bills to permit such diversions in 1943, 1947 and 1953, for each proposal was defeated. It is possible, however, that trade-offs can now be arranged to make even the strongest opposition quiescent.

Arguably, a shift in attitude is shown by the modified position of the powerful Nebraska State Irrigation Association. In 1936 the Association resolved that it was "[o]pposed to any change in the laws of this state which would permit the diversion of the waters of any watershed within the state to be used within another watershed."<sup>240</sup> This position was reversed in 1948 when it was resolved that the association work together to *establish* a transbasin diversion scheme that would have the most benefit for all involved.

Having just one thought, that if it is true that a diversion law is necessary, and we believe it is, that we all want to see a comprehensive plan to put into effect, and we believe the easiest and quickest way to accomplish that, and to avoid the strife that is bound to arise over diversion, that such an early meeting and such an early approach will be effective to a degree, at least, we may have a bill introduced in which none of us are interested at all, or in which all of us are opposed. That has happened before, so we are proposing this resolution. It is an invitation, really, of nothing more than trying to get together before a bill is introduced and see how much common good we can write into that bill.<sup>241</sup>

Then in 1964, the president of the Association made the following comment as part of his address to the convention:

Another problem hindering water use in Nebraska is the Transbasin Diversion Law that is now in effect. This barrier to more

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<sup>239</sup> NEBRASKA IRRIG. ASS'N., PROCEEDINGS OF THE 78TH ANNUAL CONVENTION 76 (1970).

<sup>240</sup> NEBRASKA IRRIG. ASS'N., PROCEEDINGS OF THE 44TH ANNUAL CONVENTION 162-63 (1936) (Resolution No. 3).

<sup>241</sup> NEBRASKA IRRIG. ASS'N., PROCEEDINGS OF THE 56TH ANNUAL CONVENTION 121-22 (1948) (Resolution No. 9).



efficient and wider water use must be corrected. A dog that will stay in his manger to keep his bone is bound to die of thirst as well as starvation.<sup>242</sup>

There has been a similar, though less dramatic, transition in the Nebraska Legislative Council. In 1944 the Council's Committee on Water Diversion took a feeble stand when it determined that *at some future date there may be need* for legislative action to facilitate transbasin diversion, but that at the time of its report, no need for new legislation was indicated.<sup>243</sup> Twenty-two years later this position seemed virtually unchanged. The 1966 Committee on Ground and Surface Water Conservation and Utilization suggested that "[u]ltimately, programs *might* have to be seriously considered which involved the transportation of water from some areas to others. In this case, Nebraska *should re-evaluate* its present anti-diversion policy."<sup>244</sup> Finally, in 1968 the Committee on Ground and Surface Water concluded that:

1. The lack of authority for a transbasin diversion is a serious impediment to the full development of a state's water resources.
2. Legislative permission for transbasin diversion should contain adequate safeguards for the needs of the basin of origin for the foreseeable future. This protection should not be so extensive, however, as to maintain and encourage the continued non-use of surplus water. Some provision should be made for the effective utilization of water which is surplus at the present time, but which may later be necessary in the basin of origin.
3. Permission of transbasin diversion on a project-by-project basis would repeatedly generate serious diversion among large segments of Nebraska population and possibly result in an inconsistent policy on part of the Legislature. It is considered preferable that any Legislative permission for transbasin diversion set out the guidelines by which diversion may be accomplished and thereafter leave specific cases to administrative decision.<sup>245</sup>

One can merely speculate as to whether there will be a resurgence of the local opposition experienced in the past. Two relatively recent surveys would seem to indicate that even though there is still opposition to transbasin diversion a large majority of persons believe diversion should be permitted. The first survey was conducted at the annual meeting of the South Central Pump Irrigator's Asso-

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<sup>242</sup> NEBRASKA IRRIG. ASS'N., PROCEEDINGS OF THE 72D ANNUAL CONVENTION 11 (1964).

<sup>243</sup> 1944 REPORT 53-71.

<sup>244</sup> NEBRASKA LEG. COUNCIL, COMM. ON GROUND & SURFACE WATER CONSERVATION AND UTILIZATION, REPORT NO. 150, at 11 (1966).

<sup>245</sup> NEBRASKA LEG. COUNCIL, COMM. ON GROUND & SURFACE WATER, REPORT NO. 265, at 18 (1968).

ciation on February 16, 1970. Of the 80 to 85 persons attending the meeting, 60 completed the questionnaires. To the question "Do you think Nebraska should change its present law so that water could be diverted from one watershed to another for useful purposes?", 67 percent replied in the affirmative with the remainder replying in the negative.<sup>246</sup> The fact that the persons surveyed were pump rather than surface water irrigators might tend to discredit the survey except for the fact that many of the past arguments against diversion were prompted by the fear that the "surplus" water was needed for adequate groundwater recharge.<sup>247</sup>

The second survey, though less formal, indicated an even more favorable reception to a rule change. Of the persons surveyed, 75 percent thought transbasin diversion should be permitted.<sup>248</sup> Of course, this survey could also be discounted because it was taken among landowners within the Tri-County Project.<sup>249</sup> But in the past, rather than being for diversion, this area has opposed it,<sup>250</sup> so the survey may indicate a change of sentiment.

Many of the areas that refused to support past proposals would be benefited by the conceptual water transfers which are now part of the framework study of the State Water Plan. To take advantage of this additional development, these areas may well change their former position.<sup>251</sup> Furthermore, a great deal of effort is going into the State Water Plan, and the planners are developing additional areas only after they are convinced that existing and future inbasin development will not be jeopardized:

In-basin development will have the highest priority for the next 25 years in Nebraska. We have to assure basins with water of full development and any areas getting extra water will first have to

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<sup>246</sup> The questionnaire and a summary of the results can be found in an undated memo to Dan Jones, Director, Water Resources Department. A copy of this correspondence is on file with the authors.

<sup>247</sup> See discussion and accompanying notes *supra* pp. 104-06.

resources specialist, conducted the survey. It was reported in the Omaha World Herald, March 21, 1970, at 14. World Herald, March 21, 1970, at 14.

<sup>249</sup> Tri-County (Central Neb. Pub. Power & Irrig. Dist.) was the entity which in the mid-thirties started the whole diversion controversy by trying to remove Platte River Water from the basin.

<sup>250</sup> Most of the district's irrigable land is in Gosper and Phelps Counties both of which voted against all the proposed diversion bills. See voter distribution chart, appendix *infra*.

<sup>251</sup> Compare the voter distribution chart and map, appendix *infra*., with the conceptual transfer schemes found in NEBRASKA SOIL AND WATER CONSERVATION COMM'N., *supra* note 234, at 230-37.

learn how to use, under adequate management, all present supplies can expect to get extra water [sic].<sup>252</sup>

The extensive plans and apparent protection may convince many Nebraskans that they truly have nothing to lose and perhaps much to gain by supporting diversion legislation.

Diversion will not be free of critics, however. Many persons for one reason or another still have very strong feelings against it. In fact, prior to the adoption of the Report on the Framework Study, one individual appeared before a committee of the Soil and Water Conservation Commission to request that all mention of interbasin transfers be deleted from the report.<sup>253</sup>

One must conclude that the circumstances are more conducive for passage of a diversion bill than in the past. But, of course, success cannot be predicted with certainty. Much will depend on how the anti-diversionists conduct their campaign. Not only will appeals be made to anti-government and large project sentiments, but all possible evidence will be presented to convince the citizenry that there is no surplus water and that the state studies and predictions are, at best, unreliable. On the other hand, those who feel strongly that transbasin diversion is the answer to the state's growing water problems may carry the day.

#### ADMINISTRATION—BASIN OF ORIGIN PROTECTION

If an enabling statute is adopted, the legislature cannot adequately deal with every request to transport water outside the originating basin, and therefore it should delegate its authority. Presumably, the Department of Water Resources would be called upon to perform this function because of its present position as administrator of the water allocation laws, many of which would apply to interbasin transfers. *All* appropriators must apply to the Department and be granted a permit before they can legally divert water from a stream.<sup>254</sup> Like application must be made to change points of diversion.<sup>255</sup> And appropriations are limited in their use

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<sup>252</sup> Lincoln Sunday Journal and Star, Sept. 13, 1970, at 2B. This statement was made by Warren Fairchild, past Executive Secretary for the Neb. Soil & Water Conservation Commission. After 13 years with the Commission, Mr. Fairchild is now with the Department of Interior, Bureau of Reclamation. See, NEBRASKA SOIL AND WATER CONSERVATION COMM'N., *supra* note 234, at 227.

<sup>253</sup> Minutes, Nebraska Soil & Water Conservation Comm'n., Jan. 12, 1971.

<sup>254</sup> NEB. REV. STAT. §§ 46-233 to -245 (Reissue 1968).

<sup>255</sup> *Id.*

to the particular parcel of land described in the application.<sup>256</sup> Thus, even if the legislature would legalize interbasin transfers, there could be no such transfer until an application was filed and approved and a permit issued. Prior to approval or denial the applicant or objectors may request and receive a hearing,<sup>257</sup> and if the parties are not in agreement with the final action taken by the Department, they still have recourse to the Nebraska Supreme Court.<sup>258</sup>

Before granting any permit the Department must determine that the use is going to be "beneficial,"<sup>259</sup> that "there is unappropriated water in the source of supply named in the application, and if such application and appropriation when perfected is not otherwise detrimental to the public welfare."<sup>260</sup> This gives the Department wide discretion in granting or denying permits. In the case of transbasin diversion, this discretion may be too broad. The past bills, on the other hand, were very limited in scope. The 1943 bill merely authorized the transbasin diversion of storage water.<sup>261</sup> The 1947 rendition provided that:

Where an irrigation ditch or canal is located on or near the divide between the basins of two rivers of flowing streams, water may be used from such ditch or canal to irrigate lands on either side of the line dividing the watersheds of the rivers or streams, but the lands in the basin of the river or stream from which the water was originally taken shall have the prior right to use of the water over lands outside such basin, regardless of priority of appropriation.<sup>262</sup>

Both of these provisions were principally designed for the Tri-County project. Tri-County uses mostly storage water, and main supply canals follow the watershed divide. The 1953 proposal subordinated interbasin transfers to:

All appropriations now existing or hereafter granted within the drainage basin and that only such natural flow and storage water shall be deemed appropriated and used to irrigate such lands as is available each day during the irrigation season in excess of the daily requirements of those using water for domestic purposes within the drainage basin of such stream and its tributaries.<sup>263</sup>

All three of these bills sought to protect the areas of origin. This area-of-origin protection, as seen in the California, Colorado and

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<sup>256</sup> *Id.*

<sup>257</sup> NEB. REV. STAT. §§ 46-209, -235 (Reissue 1968).

<sup>258</sup> NEB. REV. STAT. § 46-210 (Reissue 1968).

<sup>259</sup> NEB. REV. STAT. § 46-229 (Reissue 1968).

<sup>260</sup> NEB. REV. STAT. § 46-235 (Reissue 1968).

<sup>261</sup> L.B. 253, 56th Neb. Leg. Sess. (1943).

<sup>262</sup> L.B. 257, 60th Neb. Leg. Sess. (1947).

<sup>263</sup> L.B. 311, 65th Neb. Leg. Sess. (1953).

Texas schemes, will surely be the focal point of any transbasin diversion proposal of local, regional or national significance.<sup>264</sup>

There is one additional method of protecting the future growth of areas of origin which has not yet been discussed. The legislation authorizing interbasin transfers could require the Department to restrict the appropriative permits to a limited period of time. Just prior to the expiration of the permit there would be an examination of all the data, testimony, etc., which prompted the original grant along with any other information that had subsequently become relevant. It would then be determined whether the permit should expire or be extended, with or without alteration; this determination would be subject to the same procedural safeguards as the disposition of an original application. Several of the model water codes require such a limitation on *all* water use permits.<sup>265</sup> The various acts provide for permit duration from 10 to 50 years.<sup>266</sup> But any permit of limited duration is going to be criticized because it may not provide adequate time for amortization of the initial project investment. One possibility would be to tie the length of duration of the permit to the time necessary to amortize the project investment. The burden of proof on this issue would be on the applicant, but quite often the amortization period would correspond to the repayment schedule or the term of the government loan. This proposal could also be used in conjunction with a fixed maximum of perhaps 50 years.

Whatever statutory scheme is finally selected, it is going to be not only desirable but politically essential to limit the discretion to grant transbasin diversion permits. The present statutory criteria, "beneficial use" and "not otherwise detrimental to the public welfare" is quite inadequate and needs to be bolstered by legislatively enacted standards.<sup>267</sup> The following, not intended to be all inclusive, are suggested:<sup>268</sup>

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<sup>264</sup> See, e.g., Johnson, *supra* note 153.

<sup>265</sup> E.g., MODEL WATER USE ACT § 406 (1958) (50 yr. max.); Maloney, Ausness & Morris, *The Model Water Code: Text and Commentary* § 2.06, in Florida Water Research Center Publication No. 8 (undated, unpublished draft on file with author) (20 yr. max.); *A State Statute to Provide Controls for Equitable Distribution of Water*, 4 HARV. J. LEGIS. 399 (1967) (10 yr. max.). See also IOWA CODE ANN. § 455A.20 (Supp. 1971) (10 yr. max.).

<sup>266</sup> *Id.*

<sup>267</sup> See Yeutter, *supra* note 84, and authorities cited therein. See also, Johnson & Knippa, *supra* note 31, at 1060-61.

<sup>268</sup> The basis for several of these criteria is N.C. GEN. STAT. § 162A-7C (1964).

- (1) The necessity of the proposed project to maximize state water use;
- (2) The feasibility of the proposed project and its economic benefit-cost ratio;<sup>269</sup>
- (3) The magnitude and distribution of potential project benefits;
- (4) The extent of the probable detriment to be caused by the proposed project to the present and potential beneficial use of water in the affected area and the effect on present and potential water related interests;
- (5) The feasibility and costs of alternative sources of supply for the applicant and for the area of origin;
- (6) Whether the proposal is consistent with the State Water Plan;
- (7) Whether the proposed project will promote the storage and conservation of water;<sup>270</sup>
- (8) Whether the proposed project will have any beneficial or detrimental ecological effects;<sup>271</sup>

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<sup>269</sup> Marshall, *The Evaluation of River Basin Development*, 22 LAW & CONTEMP. PROB. 237 (1957). See generally C. HOWE & K. EASTER, INTERBASIN TRANSFER OF WATER (1971).

<sup>270</sup> The consideration here should be broader than that in item number (1), i.e., the question should not only include Nebraska's interests but also those of downstream user states.

<sup>271</sup> "The Platte is unique and extremely important. While a great percentage of wildlife and attractive woodlands in Nebraska are associated with rivers and streams, the state's water laws do not adequately recognize these ecological values. Furthermore, some federal programs are helping to finance degradation of streams.

"In this case, the Platte is threatened by the Mid-State Reclamation Project.

...  
 "In the spring of 1970, the potential threat of the Mid-State project to the Platte River environment was brought to the attention of the National Audubon Society. Since then, we have been studying the ecology of the area and investigating various aspects of the project.

"If the project is constructed and carried out according to current plans, we believe that a drastic alteration in the river will take place. Under the present preliminary operation plan for irrigation diversion, the river will be dry for extensive periods and low most others.

"It follows that the dry river bed would grow up in weeds and willows. Then, in order to maintain flood capacity, it would probably be necessary to channelize the river and maintain it as an open ditch. With the river dry and a lower water table adjacent to the river, the wetlands and wet meadows would dry up. The islands would no longer exist as such, and it would be economically feasible to bulldoze the woodlands for more intensive cropland agriculture. Water pollution would be aggravated by reduced flow, and the the Platte River would end up as a polluted ditch, its natural beauty and wildlife destroyed." Klatske, *For the Record—Platte in Danger*, NEBRASKA-LAND, June 1971, at 3.

- (9) The extent to which the proposed diversion will facilitate water use corresponding to the state preference pronouncements;<sup>272</sup>
- (10) Whether the project, if approved, would jeopardize existing compacts or decrees involving Nebraska and other states.

### CONCLUSION

Regardless of the feasibility and desirability, the initial decision whether to permit transbasin diversion must be made by the people expressing their views through their elected representatives in the Nebraska Legislature. To assist the public in formulating an intelligent opinion, impartial, well-publicized studies and hearings should present relevant and adequate information about the risks and benefits. Unlike many situations involving technical matters, past experience indicates that both the merits and negative factors will be well articulated by interest groups with substantial financial support.

To make available the opinions of those in a position of impartiality, persons at the University of Nebraska and government officials should take more than a mere passive role. In other words, they should not simply present data essential for decision making, but they should explicitly state their opinions concerning the extent to which the contemplated diversions are optimum.

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<sup>272</sup> Since an area-of-origin protection may be inconsistent with constitutional or statutory preference provisions, a diversion project which will facilitate preferential use should be favored. The present Nebraska preferences of water use are: 1. domestic; 2. agriculture; 3. industry. NEB. CONST. art. XV, § 6; NEB. REV. STAT. §§ 46-204, -613 (Reissue 1968).

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APPENDIX

*Voting Chart*

	L.B. 253 (1943)	L.B. 257 (1947)	L.B. 311 (1953)
Adams	F	F	F
Antelope	A	A	NV
Arthur	A	A	A
Banner	F	A	A
Blaine	A	A	A
Boone	A	A	NV
Box Butte	A	A	A
Boyd	F	NV	A
Brown	F	F	A
Buffalo	A	A	A
Burt	F	A	A
Butler	A	A	A
Cass	F	F	NV
Cedar	A	A	A
Chase	F	F	NV
Cherry	F	F	A
Cheyenne	F	A	A
Clay	F	A	A
Colfax	A	A	A
Cuming	F	A	A
Custer	A	A	A
Dakota	A	A	A
Dawes	A	A	A
Dawson	A	A	A
Deuel	A	A	A
Dixon	A	A	A
Dodge	A	A	A
Douglas*	A	F	—
Dundy	F	F	NV
Fillmore	F	A	NV
Franklin	F	F	F
Frontier	A	A	A
Furnas	F	F	F
Gage	A	F	NV
Garden	A	A	A
Garfield	A	A	A
Gosper	A	A	A
Grant	A	A	A
Greeley	A	A	F



	L.B. 253 (1943)	L.B. 257 (1947)	L.B. 311 (1953)
Hall	A	A	A
Hamilton	F	A	A
Harlan	F	F	F
Hayes	F	F	NV
Hitchcock	F	F	NV
Holt	F	NV	A
Hooker	A	A	A
Howard	A	A	F
Jefferson	F	F	F
Johnson	A	F	NV
Kearney	F	F	F
Keith	A	A	A
Keyapaha	F	NV	A
Kimball	F	A	A
Knox	A	A	A
Lancaster**	F	F	F
Lincoln	A	A	A
Logan	A	A	A
Loup	A	A	A
McPherson	A	A	A
Madison	F	A	A
Merrick	A	A	A
Morrill	F	A	A
Nance	A	A	NV
Nemaha	F	F	A
Nuckolls	F	F	F
Otoe	F	F	A
Pawnee	A	F	NV
Perkins	F	F	NV
Phelps	A	A	A
Pierce	F	A	A
Platte	A	A	NV
Polk	F	A	A
Red Willow	F	F	F
Richardson	A	F	NV
Rock	F	NV	A
Saline	F	A	NV
Sarpy	F	F	NV
Saunders	A	A	A
Scotts Bluff	A	A	NV
Seward	F	F	A
Sheridan	F	F	A
Sherman	A	A	A

INTERBASIN TRANSFERS: NEBRASKA LAW-LEGEND 143

	L.B. 253 (1943)	L.B. 257 (1947)	L.B. 311 (1953)
Sioux	A	A	A
Stanton	A	A	A
Thayer	F	F	F
Thomas	A	A	A
Thurston	A	A	A
Valley	A	A	F
Washington	A	A	A
Wayne	A	A	A
Webster	F	F	F
Wheeler	A	A	F
York	F	F	A

F—Voted For Interbasin Diversion

A—Voted Against Interbasin Diversion

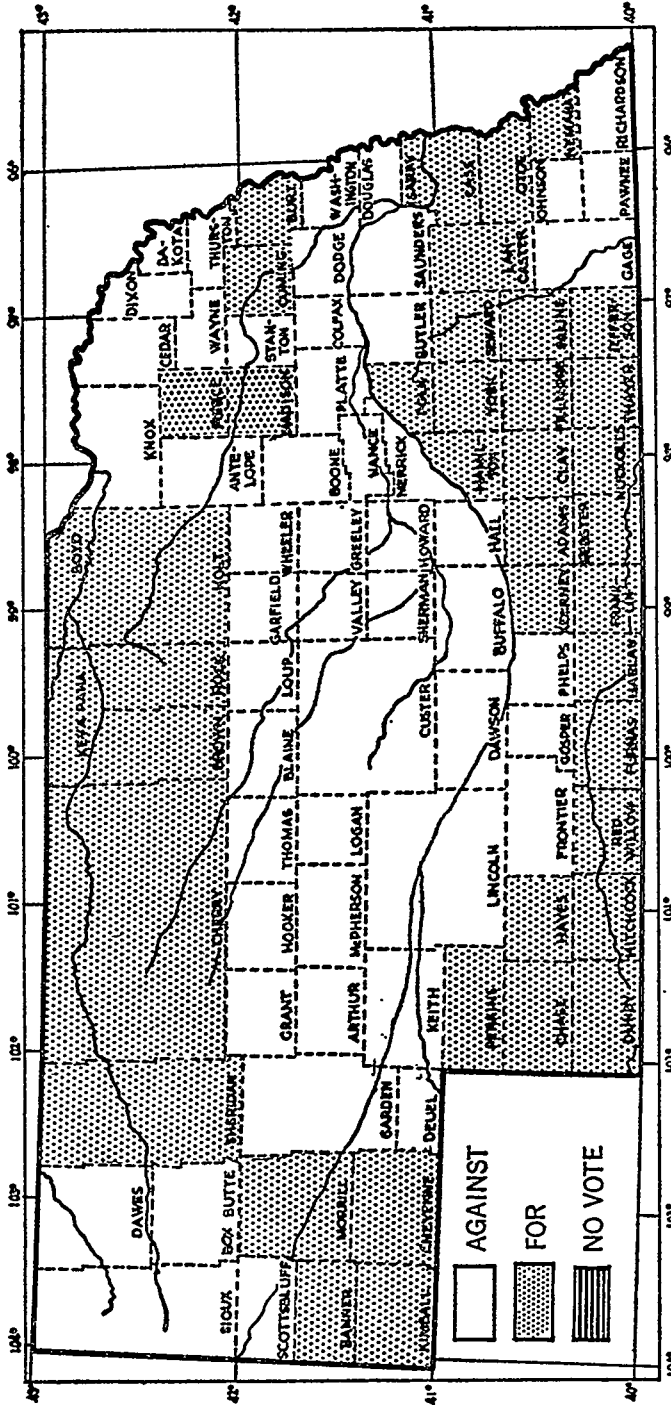
NV—Not Voting

In each of the three instances the vote was taken on a resolution to kill. Thus a legislator voting in favor of the resolution was in effect against interbasin diversion. This is reflected on the chart, i.e., those voting in favor of the resolution are listed as "against."

\*Since Douglas County has multiple representatives, if a majority of the representatives voted "for" or "against" interbasin diversion the county is charted as so voting. On L.B. 253 there were 5 votes "against" interbasin diversion, 1 vote "for," and 1 not voting. On L.B. 257 there were 4 votes "for" interbasin diversion and 3 votes "against." On L.B. 311 there were 3 votes "for," 3 votes "against," and 1 not voting; thus on this resolution Douglas County is not charted as voting in any manner.

\*\*Lancaster County also has multiple representatives and the same charting mechanisms used for Douglas County was used for Lancaster. On L.B. 253 and L.B. 257 all representatives voted for interbasin diversion. On L.B. 311, 2 representatives voted "for" and 1 voted "against."

*Voting Distribution Map*



L.B. 253, 56th Neb. Leg. Sess. (1943). Source: NEB. Leg. Jour., 56th Sess. 1291, 1293-94.



