

Water Law Changes and Their Effects on the State of the State

by LeRoy W. Sievers



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LeRoy W. Sievers grew up in Blair, and graduated *with honors* from Doane College in 1970. He served three years in the U.S. Army, spending two years at The White House. In 1975 he received a Masters Degree in management in computer science from The American University in Washington, D.C. Sievers gradu-

ated from the University of Nebraska College of Law in December 1977, having been a member of the Moot Court Board. From 1978-1984, Sievers was in private practice in Lincoln. In 1984, he joined the Nebraska Attorney General's Office where he represented the State in water resources, banking and appellate litigation. In 1991, Sievers moved to the Nebraska Department of Water Resources where he worked on a variety of water-related issues. A primary responsibility was his work on the *Nebraska v. Wyoming* litigation in the U.S. Supreme Court concerning the North Platte River. Sievers joined Knudsen, Berkheimer, Richardson & Endacott in January 2000. Sievers is active in the Lincoln Bar Association, including serving as president in 2000-2001.

Nebraska's most valued natural resource, water, is undergoing dramatic changes in its use. These changes are occurring as a result of the law partially catching up with the scientific understanding of the interrelated nature of much of the state's surface and ground water. How these changes in use are implemented is likely to change not only the mind-set of many and their view of water, but quite possibly the economy of the state.

In this article, a very brief history of surface water law and ground water law will be provided. Causes of changes in use will then be described. In conclusion, the likely consequences will be outlined.

History of Surface Water and Ground Water Law

In Nebraska, as in virtually every other western state, surface use is governed by statutes which embody the prior appropriation doctrine. In order to provide some measure of predictability in the availability of surface water, the doctrine provides that the oldest water right on a stream is supplied with the available water to the point at which its state granted right is met and then the next oldest right is supplied with the available water and so on in date order until the available supply is exhausted. The prior appropriation doctrine was developed as a means of providing the necessary certainty so that investments would be made in the costly physical works that are required to divert and deliver water from a stream to farm fields. In Nebraska surface water rights date from the 1800's and have resulted in significant surface water projects in the North Platte River, Platte River, Republican River, Loup



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River, and Niobrara River basins. Projects like the North Platte Project, the second project developed by the U.S. Bureau of Reclamation, changed the face of Nebraska's agriculture by allowing large scale irrigated agriculture to develop. Very large investments by both the federal government and local entities (such as the Central Nebraska Public Power and Irrigation District) resulted not only in increased agricultural production but also the spreading of benefits throughout the state's entire economy. However, local irrigation districts are still paying the federal government for the costs of operation and maintenance of such facilities and, in some cases, their share of the costs of construction of the projects. Thus liability remains with the local districts to pay significant ongoing costs typically without regard to whether they receive any water or not.

The development of the law in Nebraska regulating the use of ground water has occurred independently from the development of the law regulating the use of surface water. While regulation of surface water was comprehensively codified in statute by 1895,¹ the regulation of ground water was initially based only on the common law. Ground water regulation was governed by the common law doctrine of correlative use, which has evolved to reasonable use with a sharing in times of shortage.² Very limited statutory registration of ground water use was adopted beginning in 1957 with irrigation well regulation and spacing.³ Not until 1975, with the adoption of the Ground Water Management Act, did the state's Natural Resources Districts have a comprehensive set of laws through which they could regulate ground water usage.⁴

The adoption of statutory laws allowing regulation of ground water usage reflected the dramatic changes in water usage for agriculture. Thousands of irrigation wells were developed after the advent of the center pivot. There are now over 85,000 irrigation wells registered in Nebraska⁵ that supply water to an estimated nine million acres.

Causes of Changes in Nebraska's Use of Water

In addition to the development of ground water usage which has occurred over the last approximately 40 years, more recent events are driving what may be the most significant change in the state's approach to water usage. Historically, if a person wanted to start a new use of water, especially ground water, she typically needed only to register the new use and comply with well spacing requirements or obtain a permit for surface water use from the Department of Natural Resources. Now, however, moratoriums on the issuance of new surface water rights are in place in much of the state and the ability to secure permission to drill new irrigation wells is on hold in the basins of the Republican River, North Platte River, South Platte River, much of the Platte River, and part of the Niobrara

River. What used to be a resource viewed as abundant and nearly inexhaustible is now recognized to be limited. How has this change come about? The following constitutes our view on some of the significant causes.

The Nebraska v. Wyoming Litigation

In 1986, Nebraska petitioned the U.S. Supreme Court for permission to sue Wyoming for alleged violations of the 1945 Decree entered by the Court apportioning the flows of the North Platte River among Nebraska, Wyoming and Colorado. After years of litigation, various reports by the Special Master appointed by the Court, and several arguments to the U.S. Supreme Court, the case was settled on the eve of the start of trial.⁶

The North Platte River, especially west of Bridgeport, has been a highly integrated system. After the development of the North Platte Project in the early 1900s, the local ground water aquifer was filled by surface supplies and thereafter filled and spilled each year. In Nebraska, the North Platte River east from approximately the state line with Wyoming is a river which was created by the surface water return flows from the fields irrigated in the area plus the ground water discharges from the aquifer filled by the surface water irrigation system.

The settlement of *Nebraska v. Wyoming* effectively recognized the effects of ground water usage in Wyoming on surface water flows to be divided with Nebraska. As a result, the methodology agreed upon in the settlement (28% reduction in stream flows from pumping over 40 years) has found its way into other proposals; one of which will be discussed later.

The Kansas v. Nebraska Litigation

In May of 1998, Kansas filed its complaint with the U.S. Supreme Court alleging that Nebraska was violating the compact entered into among Kansas, Nebraska and Colorado apportioning the water supply of the Republican River. As a result of that litigation, a settlement was reached in which ground water usage that depleted water that would otherwise discharge into a stream was to be counted as a part of each state's usage of surface water. The U.S. Supreme Court approved the settlement on May 19, 2003.⁷ Historically, neither Nebraska nor the natural resources districts in the Republican River Basin have controlled ground water users for the purpose of preventing adverse effects on surface water flows. However, as a part of the settlement, Nebraska will now have to assure that the proper amount of surface flows reach Kansas, but so far has not provided the same assurance to Nebraska surface water rights in the Republican River Basin, some of which date from the 1880s and 1890s.⁸

Based on reports to the Republican River compact commission for the first two years operating under the

settlement agreement, Nebraska has used more than 60,000 acre feet more than its share. For the year 2005, the figures have not yet been calculated, but some sources guess that Nebraska's use may exceed its compact allocation by 30,000 acre feet or

“Cooperative Agreement,” which was intended to develop a Platte River Recovery Implementation Program (Program) within three years. The Program's primary purpose was to constitute a voluntary agreement among the parties which

would provide the means to work towards solutions meeting the needs of federally designated threatened and endangered species and of the federally designated critical habitat along the Platte River in central Nebraska. Nine years



more. If that is correct, for the first three years operating under the settlement, Nebraska may have exceeded its allocation by more than 90,000 acre feet. The result is that in order to avoid violating the compact and the settlement, Nebraska is going to have to reduce consumption in Nebraska to assure Kansas that it will receive its share of the Republican River supplies.

LB 962

This bill was adopted in 2004⁹ and has become the mechanism for the state to require Natural Resources Districts (NRDs) to develop plans for the purpose of assuring that ground water consumption does not exceed ground water recharge. In areas where the water supply is over appropriated, consumption of ground water has to be decreased to a point of equilibrium. How the reduction is to be accomplished remains to be determined by the locally governed NRDs. Whether the plans developed are deemed adequate is first determined by the State through the Department of Natural Resources (DNR). If the DNR finds a plan to be inadequate, then an NRD can either change its plans or the matter is given to a specially selected panel to resolve any differences.

Platte River Recovery Implementation Program

In July 1997, the States of Nebraska, Wyoming, and Colorado and the Department of Interior entered into a

later, after several million dollars have already been spent, the Program has not yet been finalized nor approved by any of the parties. However, with the tremendous expenditure of time and other resources, the efforts are likely to result in the Program being entered into by all of the parties.

One of the key provisions of the Program is each state's proposal to address mitigating new depletion occurring subsequent to July 1997 and seeking to better meet the instream flows prescribed by the U.S. Fish and Wildlife Service (*without agreeing they are appropriate but funding additional research to develop data to support what is hoped to be supportable instream flows*). The 28% in 40 years concept has played a role in both Wyoming's and Nebraska's new depletion plans. How the State of Nebraska will assure that depletions subsequent to July 1997 are mitigated remains to be established. What is clear is that thousands of acre feet of new depletions will have to be offset by reductions in consumption of water or another source of replacement water.

Consequences

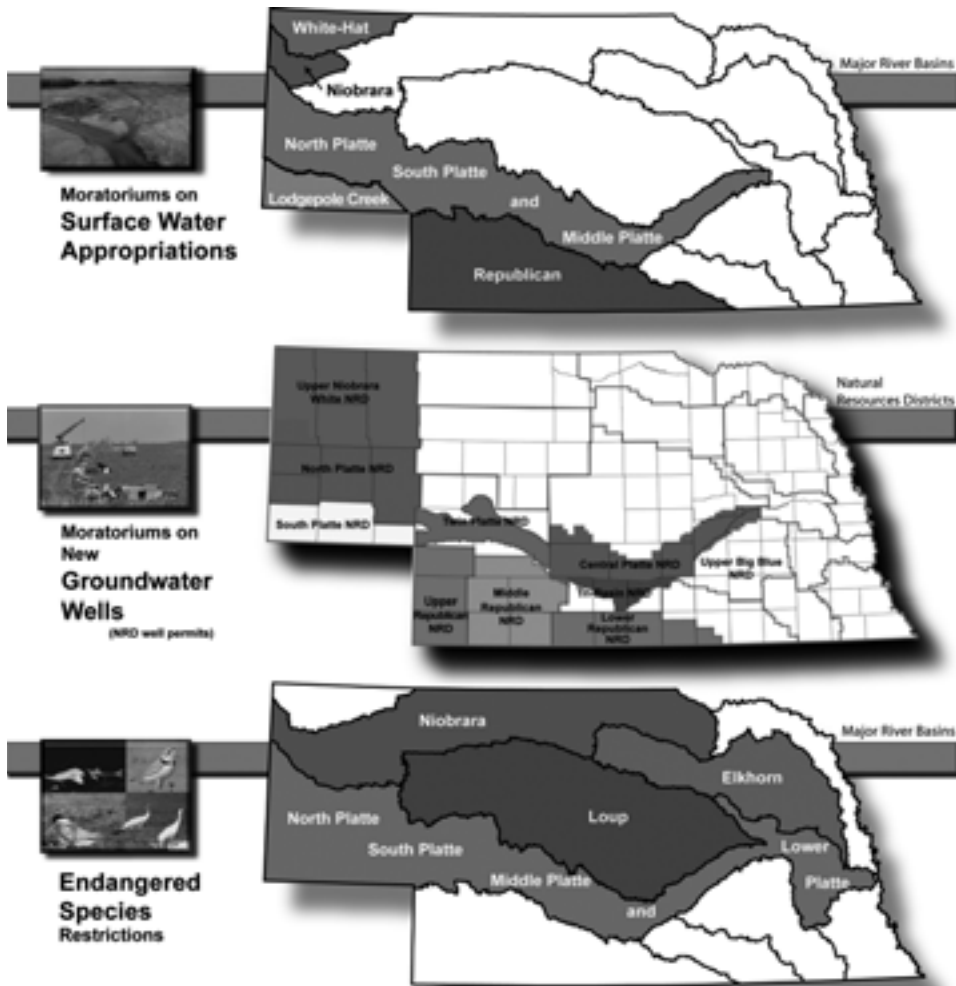
The number of irrigation wells has increased to the point that in some locations the water supply is now inadequate for surface water and ground water users to meet historic uses. As a result, consumption of water will have to be reduced. The needed reduction cannot be accomplished by a more



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efficient delivery of water to the plants, such as, for example, through developing more efficient center pivots. More efficient

effects may also impact businesses dependent on agriculture such as seed dealers, chemical providers (*fertilizer, herbicides, insecticides, etc.*) crop insurance, farm equipment sales and repairs, etc. Production of certain crops may decline, thus affecting storage facilities, availability of commodities for grain alcohol facilities, cost of feed for livestock, and the like.




Nebraska Department of Natural Resources
PO Box 34675-Lincoln, NE 68529-Phone 402-471-2363
www.dnr.state.ne.us

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delivery of water does not reduce consumption. Rather consumption by plants has to be reduced. How such reduction is accomplished can have significant impacts that can ripple throughout the economy. Property values may be reduced. If that happens, impacts will be felt by all entities that depend on property taxes. Reduction in property values may also affect banks and other financial institutions if their collateral values decline. If agricultural land is taken out of production, then the

Conclusion

Nebraska is faced with very difficult challenges. What will it do to be in compliance with the settlement of the *Kansas v. Nebraska* litigation? What will be the provisions of integrated management plans developed by the various NRDs that are implemented? Will Nebraska enter into the "Platte River Recovery Implementation Program" and, if so, how will it implement its promise to restrict new developments in the affected portion of the Platte River basin in Nebraska? Not only will consumption of water have to be decreased but the means selected to accomplish the reduction may affect the future face of the state and its economic vitality. 

Endnotes

- ¹ 1895 Neb. Laws Ch. 69, at 244-69.
- ² *Prather v. Eisenmann*, 200 Neb. 1, 261 NW 2d 766 (1978).
- ³ 1957 Neb. Laws Ch. 260, at 701 and at 704.
- ⁴ 1975 Neb. Laws LB 577 at 1145.
- ⁵ Table of Registered Irrigation Wells in Nebraska 1966-2001, Nebraska Agricultural Statistics. Nebraska Department of Agriculture, Lincoln, NE. Found at: www.neo.state.ne.us/statshhtml/73a.html
- ⁶ *Nebraska v. Wyoming and Colorado*, 534 U.S. 40, 122 S.Ct. 420, 151 L.Ed.2d 356 (2001).
- ⁷ *Kansas v. Nebraska*, 538 U.S. 720, 123 S.Ct. 1898, 155 L.Ed.2d 951 (2003).
- ⁸ D 159 dated 8/31/1885; D 179 dated 12/31/1887; D 1025 dated 4/4/1890; D 117 dated 10/16/1890; D 4 dated 12/22/1890.
- ⁹ 2004 Neb. Laws. LB 962.