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Spear T Ranch v. Knaub: The Reincarnation of Riparianism in Nebraska Water Law

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SPEAR T RANCH V. KNAUB: THE REINCARNATION OF RIPARIANISM IN NEBRASKA WATER LAW

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I. INTRODUCTION

Historically, Nebraska managed rights to ground water and surface water under separate legal regimes. Ground water was governed by the correlative rights doctrine and surface water by prior appropriation. Since 1895, riparianism has been effectively dead in Nebraska.[1] That is, until now. In *Spear T Ranch v. Knaub*,[2] the Supreme Court of Nebraska effectively reincarnated the riparian doctrine. Although the doctrine in Nebraska previously applied solely to surface water rights, the court adapted it to apply to ground water users and to create liability for otherwise lawful uses of ground water in disputes with surface water users. In a confusing piecemeal of water law regimes, ground water users are now subject to two doctrines: (1) correlative rights *vis-à-vis* ground water users, and (2) riparianism *vis-à-vis* surface water users. This article provides a discussion of *Spear T*, an analysis of its holdings, and an examination of its potential consequences.

II. BACKGROUND

Initially, to understand the significance of the court's decision in *Spear T*, it is important to review the basic regimes of water regulation at issue. Below is a brief review of traditional riparianism governing surface water rights, prior appropriation governing surface water rights, and correlative rights doctrine governing ground water rights.

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1. Although riparian rights to surface water are judicially recognized, they are largely only of historical relevance because all known surface water rights have been adjudicated by the Department of Natural Resources. The effect of such adjudication is arguably a conversion of the right to an appropriation. *See* Beerline Canal Co. v. Dep't of Water Resources, 240 Neb. 337, 482 N.W.2d 11 (1991).

2. 269 Neb. 177, 691 N.W.2d 116 (2005).

A. Traditional Riparianism

Rights to use surface water attached to all riparian parcels of land patented in Nebraska prior to April 4, 1895.[3] The right to use the waters of the stream was a derivative of the ownership of the bank of the stream:

> [E]very riparian proprietor, as an incident to his estate, is entitled to the natural flow of the water of running streams through his lands, undiminished in quantity and unimpaired in quality, although all have the right to the *reasonable use* thereof for the ordinary purposes of life, and any unlawful diversion thereof is an actionable wrong.[4]

The purpose of the reasonable use limitation was to "secure equality in the use of the water by riparian owners, as near as may be, by requiring each to exercise his rights reasonably, and with due regard to the right of other riparian owners to apply the water to the same or to other purposes."[5] In describing the practical effect of the reasonable use limitation, one commentator explains, "[t]he only real restriction on use by any one riparian then is that a use cannot inflict a 'substantial harm,' or, as courts more often say today, an 'unreasonable injury,' on any other riparian user."[6]

B. Prior Appropriation

For over 100 years, Nebraska regulated all new surface water rights under the doctrine of prior appropriation.[7] The Nebraska Constitution was amended over 80 years ago to require the "waters of every natural stream"[8] be administered in accordance with the prior appropriation doctrine. The substantive changes to the regulation of surface water included: (1) establishing a permitting process for ap-

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

4. Clark v. Cambridge & A. Irr. & Imp. Co., 45 Neb. 798, 64 N.W. 239, 241 (1895) (emphasis supplied); *see also* Slattery v. Harley, 58 Neb. 575, 79 N.W. 151, 152 (1899).

5. Meng v. Coffey, 67 Neb. 500, 93 N.W. 713, 718 (1903); *see also* Robert E. Beck, 1 Waters and Water Rights, § 7.02(d) (1991) ("Under the reasonable use theory each owner of riparian land is permitted to make use of the water in a waterbody regardless of the effect the use has on the natural flow so long as each user does not transgress the equal right of other riparians to use the water").

6. 1 Beck, *supra* note 5, at § 7.02(d).

7. 1895 Neb. Laws ch. 69, at 244-69.

8. Neb. Const. art. XV, § 6. The court has repeatedly held that only water physically located in a natural stream is subject to Section 6. *See* In re Application A-16642, 236 Neb. 671, 709-10, 463 N.W.2d 591, 615 (1990); Drainage Dist. No. I of Lincoln County v. Suburban Irr. Dist., 139 Neb. 460, 298 N.W. 131, 136 (1941) (holding the drainage ditches at issue in the case "are not natural streams or natural water courses, and their inherent nature exclude them from the class or kind of waters to which our laws of appropriation are now applicable"); Metropolitan Util. Dist. of Omaha v. Merritt Beach Co., 179 Neb. 783, 801, 140 N.W.2d 626, 637 (1966).

propriators of surface water; (2) placing quantitative limits on the amount of water that could be appropriated per acre for irrigation; (3) making appropriations for irrigation appurtenant to the land described in the permit application; and (4) creating statutory preferences that prefer domestic uses over agricultural and agricultural over manufacturing.[9] Surface water appropriation permits specify the amount of water that can be diverted and beneficially used, the purpose and location of the use, the location of the diversion works, and the priority date.[10]

Nebraska administers the rights[11] established by the prior appropriation system on the basis of the respective priority dates[12] for appropriations.[13] In times of water shortage, conflicts among users are resolved by junior rights yielding to senior rights. The operative rule is first in time, first in right.[14]

C. Correlative Rights to Ground Water

Nebraska regulated ground water under the rule of reasonable use with the addition of the California doctrine of apportionment in times of shortage.[15] The doctrine, now codified by statute,[16] was first adopted in *Olson v. City of Wahoo*:

> [T]he owner of land is entitled to appropriate subterranean waters found under his land, but he cannot extract and appropriate them in excess of a reasonable and beneficial use upon the land which he owns, especially if such use is injurious to others who have substantial rights to the waters, and if the natural underground supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole . . . .[17]

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9. 1895 Neb. Laws ch. 69, at 244-69. Several of these statutory provisions were added to the Nebraska Constitution in 1920. *See* Neb. Const. art. XV, §§ 4-7.

10. Neb. Rev. Stat. §§ 46-231, 46-233 (Reissue 2002).

11. Appropriation rights are rights of use only; the appropriator acquires no right apart from putting the water to a beneficial use. *See* Hitchcock & Red Willow Irr. Dist. v. Lower Platte North Natural Res. Dist., 226 Neb. 146, 153, 410 N.W.2d 101, 106-07 (1987); Frenchman Valley Irr. Dist. v. Smith, 167 Neb. 78, 112, 91 N.W.2d 415, 434 (1958).

12. The priority of an appropriation relates back to the date an application for a permit to appropriate was filed. Neb. Rev. Stat. § 46-205 (Reissue 2002).

13. Neb. Rev. Stat. § 46-203 (Reissue 2002).

14. *Id.*

15. Prather v. Eisenmann, 200 Neb. 1, 6, 261 N.W.2d 766, 769 (1978).

16. *See* Neb. Rev. Stat. § 46-702 (Cum. Supp. 2004) ("Every landowner shall be entitled to a reasonable and beneficial use of the groundwater underlying his or her land subject to the provisions of Chapter 46, article 6, and the Nebraska Ground Water Management and Protection Act and the correlative rights of other landowners when the ground water supply is insufficient for all users").

17. Olson v. City of Wahoo, 124 Neb. 802, 811, 248 N.W. 304, 308 (1933).

Ground water rights are derived simply from one's ownership of the overlying land.[18] Provided there is no shortage, a landowner is entitled to use the water under the land for any reasonable and beneficial use.[19]

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Spear T Ranch, Inc. ("Plaintiff") held two surface water appropriations for Pumpkin Creek in Morrill County, Nebraska. The rights totaled 876 acre-feet of water with priority dates of 1954 and 1956. In a tort action against several ground water users, the Plaintiff alleged ground water pumping from wells in the Pumpkin Creek basin upstream of its land had drained the water from the creek and deprived the Plaintiff of its surface water appropriations. Under a theory of conversion, the Plaintiff sought an injunction and compensation for the value of the surface water appropriations taken by the Defendants, or—in the alternative—special damages of $4,000,000 for the value of the water rights and other damages. The Defendants successfully moved to dismiss the action in district court for failure to state a claim, lack of subject matter jurisdiction, and failure to join necessary and indispensable parties.[20] The Plaintiff appealed the decision to the Nebraska Supreme Court where several interested parties participated as *amicus curiae*, including the Nebraska Attorney General, the Central Nebraska Public Power and Irrigation District, the Nebraska Groundwater Management Coalition, the Nebraska Farm Bureau Federation, and the Nebraska State Irrigation Association.[21]

The Plaintiff argued on appeal that it was entitled to relief because: (1) under the prior appropriation doctrine, surface water rights are property rights superior to ground water rights; or alternatively, (2) hydrologically connected ground water is subject to the prior appropriation doctrine governing surface water rights.[22] Because the ground water users hold no appropriative rights issued by the state, the Plaintiff argued the capture and use of hydrologically connected

18. *Id.*; *see also* Springer v. Kuhns, 6 Neb. App. 115, 121, 571 N.W.2d 323, 327 (1997).

19. Although the American rule traditionally prohibits use of the ground water off of the overlying land, the court upheld the transfer of ground water between basins for municipal use in Metropolitan Util. Dist. of Omaha v. Merritt Beach Co., 179 Neb. 783, 140 N.W.2d 626 (1966). Subsequently, the Legislature provided for the transfer of ground water off the overlying land for virtually all types of uses. *See* NEB. REV. STAT. §§ 46-638, 677, 691, 691.01, 691.03 (Cum. Supp. 2004).

20. *See* NEB. CT. R. OF PLDG. IN CIV. ACTIONS 12(b)(6) (Rev. 2004).

21. Spear T Ranch, Inc. v. Knaub, 269 Neb. 177, 179-80, 691 N.W.2d 116, 123 (2005).

22. *See* Brief of Plaintiff-Appellant at 10-16, Spear T Ranch, Inc. v. Knaub, 269 Neb. 177, 691 N.W.2d 116 (2005).

ground water by the Defendants was illegal and should be prohibited. The ground water users countered that Nebraska's water law does not favor one right over the other.[23]

III. THE SUPREME COURT HOLDING

A. The Prior Appropriation Doctrine Does Not Apply to Ground Water

For a claim of conversion to prevail, a party must show that its rights to the contested property are superior to those of any competitor. To meet this burden, the Plaintiff argued that Pumpkin Creek and all ground water hydrologically connected thereto is "one stream" and it had a superior right under the prior appropriation doctrine because the Defendants did not have such an appropriation or, if they did, the Plaintiff's right had a superior priority date. Effectively, the Plaintiff wanted the court to "apply legislatively created surface water priorities to ground water use."[24] The court properly rejected this argument because: (1) the "one stream" argument ignores the hydrologic reality that although the water is hydrologically connected, it rarely runs in a true underground stream; (2) no statutory or case law authority supports applying prior appropriation to hydrologically connected ground water; and (3) giving effect to the rule advocated by the Plaintiff "would give first-in-time surface water appropriators the right to use whatever water they want to the exclusion of later-in-time ground water users."[25]

Although the court declined "to apply the statutory surface water appropriation rules to conflicts between surface and ground water users,"[26] it suggested the Legislature could do so. In fact, the court recommended the Legislature do just that: "Ideally, the Legislature would develop a comprehensive administrative appropriation system, including procedures and remedies, to adjudicate direct conflicts between ground water and surface water users in Nebraska."[27]

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23. Indeed, the Nebraska Supreme Court previously ruled that the law was silent on this issue. *See* Metropolitan Util. Dist. of Omaha v. Merritt Beach Co., 179 Neb. 783, 795, 140 N.W.2d 626, 634 (1966) ("In situations whereby the right of the riparian landowner to take percolating [ground] waters which interfere with the prior appropriation rights of persons on a nearby stream, the law of this state is silent").

24. *Spear T*, 269 Neb. at 185, 691 N.W.2d at 126.

25. *Id.* at 184-85, 691 N.W.2d at 126.

26. *Id.* at 185, 691 N.W.2d at 126.

27. *Id.* at 201, 691 N.W.2d at 136.

B. A Surface Water User Cannot State a Claim for Conversion

The necessary premise of the Plaintiff's conversion claim is that the Defendants' use of ground water was wrongful.[28] However, every landowner is statutorily entitled to "a reasonable and beneficial use of the ground water underlying his or her land . . . ."[29] The Plaintiff could only prevail if it could prove the water used by the Defendants was surface water. This would be virtually impossible given the statutory definition of ground water[30] and the court's rejection of the one stream argument.[31] The court rejected the Plaintiff's conversion claim because a surface water appropriation is merely a right to use the water, not a property interest in the water.[32] Without a property interest in the molecules of water, the Plaintiff could not state a claim for conversion.

C. The Search for a Remedy

The court, having determined that existing Nebraska law did not provide a remedy to the Plaintiff, expressed its frustration with this result:

> Initially, we reject a rule that would bar a surface water appropriator from recovering in all situations. Such a rule would ignore the hydrological fact that a ground water user's actions may have significant, negative consequences for surface water appropriators.[33]

Apparently resolved to find a remedy for the Plaintiff,[34] the court examined a number of doctrines governing disputes between ground water users[35] and found its solution in the *Restatement (Second) of Torts* § 858 ("Section 858"). Section 858 provides:

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28. *See* Terra Western Corp. v. Berry and Co., 207 Neb. 28, 31, 295 N.W.2d 693, 696 (1980) ("[T]he essence of conversion is . . . the act of depriving the owner wrongfully of the property"); *see also* S. Speiser, et al., 1 The American Law of Torts § 1.10, at 34 (1983) ("The proper exercise of a legal right cannot constitute a legal wrong").

29. Neb. Rev. Stat. § 46-702 (Cum. Supp. 2004).

30. Ground water is defined as "water which occurs or moves, seeps, filters, or percolates through the ground under the surface of the land." Neb. Rev. Stat. § 46-635 (Reissue 2004).

31. *See* Section III. A., *infra*.

32. *Spear T*, 269 Neb. at 186, 691 N.W.2d at 127.

33. *Id.* at 193, 691 N.W.2d at 131-32.

34. Notably, the Plaintiff, in the four briefs it filed on appeal, never mentioned the *Restatement (Second) of Torts* as a potential remedy. The defendants quite possibly drafted their own demise by citing the provision to the Court. *See* Consolidated Supplemental Brief of Defendant-Appellees at 45, Spear T Ranch, Inc. v. Knaub, 269 Neb. 177, 691 N.W.2d 116 (2005).

35. The Court examined the English Rule, American Rule, and the correlative rights doctrine. *Spear T*, 269 Neb. at 186-89, 691 N.W.2d at 127-30.

> (1) A proprietor of land or his grantee who withdraws ground water from the land and uses it for a beneficial purpose is not subject to liability for interference with the use of water by another, unless (a) the withdrawal of ground water unreasonably causes harm to a proprietor of neighboring land through lowering the water table or reducing artesian pressure, (b) the withdrawal of ground water exceeds the proprietor's reasonable share of the annual supply or total store of ground water, or (c) the withdrawal of the ground water has a direct and substantial effect upon a watercourse or lake and unreasonably causes harm to a person entitled to the use of its water.[36]

Concluding the adoption of Section 858 is the "modern trend," the court followed suit and adopted Section 858(1)(c) to provide the Plaintiff with a remedy.[37] The application of the doctrine is expressly limited to "disputes between users of hydrologically connected ground water and surface water."[38] Although the Plaintiff did not allege a claim under Section 858, the court remanded the case to allow the Plaintiff to amend its complaint accordingly.[39]

The Defendants argued the Ground Water Management and Protection Act ("GWMPA")[40] abrogated any common-law claims previously available. The court noted the Legislature is free to create and abolish rights provided no vested right is disturbed,[41] but a statute that purportedly changes or abrogates a common law right is strictly construed.[42] The court rejected the Defendants' argument because neither the language of the GWMPA expressly provided for, nor did its operation compel, abrogation of common law rights.[43] Notably, although the Legislature had recently passed legislation substantially amending the GWMPA and providing for the integrated management of ground water and surface water in the basin at issue,[44] the court did not consider its application to this case.[45] Moreover, the court

36. RESTATEMENT (SECOND) OF TORTS § 858 (1979).
37. *Spear T*, 269 Neb. at 193-94, 691 N.W.2d at 131-32.
38. *Id.* at 204, 691 N.W.2d at 139.
39. *Id.*
40. NEB. REV. STAT. §§ 46-656.01 – 656.67 (Reissue 2002) (*amended and superseded by* 2004 NEBRASKA LAWS, Legislative Bill 962 ("L.B. 962"), *codified at* NEB. REV. STAT. §§ 46-701 – 753 (Cum. Supp. 2004)).
41. *See* Colton v. Dewey, 212 Neb. 126, 321 N.W.2d 913 (1982).
42. *See* Macku v. Drackett Products Co., 216 Neb. 176, 343 N.W.2d 58 (1984).
43. *Spear T*, 269 Neb. at 195, 691 N.W.2d at 133.
44. *See* L.B. 962, *supra* note 40.
45. *Spear T*, 269 Neb. at 201, 691 N.W.2d at 137 ("Although we note that L.B. 962 takes further steps to help prevent conflicts [between ground water and surface water users], we do not address the application of L.B. 962 because the act does not operate retroactively and, thus, does not affect this appeal"). Notably, the Court ordered an additional round of briefing and oral argument to consider the impact of L.B. 962 to this case. *See Spear T*, 269 Neb. at 182, 691 N.W.2d at 124.

failed to recognize, in its discussion of L.B. 962, that the law does in fact provide the Plaintiff with some retroactive relief.[46]

IV. ANALYSIS

A. SECTION 858: THE REINCARNATION OF RIPARIANISM

The rules governing the application of Section 858 are "precisely the same as applied under riparian rights to surface waters."[47] In fact, Section 858 explicitly requires the determination of a ground water user's liability to be made upon the principles governing riparian rights to surface waters.[48] The title of the chapter, "Interference with the use of water ('riparian rights')" also makes clear the principles set forth therein are riparian.[49]

In adopting Section 858, the court encouraged the use of these riparian principles in assessing liability under the provision.[50] However, these principles, troublesome enough when applied to the appropriate regime,[51] were not intended to be applied to disputes between a user governed by the correlative rights doctrine and a user governed by prior appropriation. The entire system contemplated by Chapter 41 of the *Restatement* is that of riparianism.[52] In fact, the states adopting Section 858 to replace their common law ground water regime are riparian surface water states.[53] More importantly, however, is what the system does not contemplate. The system does not contemplate the correlative right doctrine being used to regulate ground water, let alone the prior appropriation system for surface water.

Applying Section 858 to disputes in Nebraska, over and above existing law governing water rights, will prove to be troublesome. The interrelationship between, and the respective force of the regimes now at play in these disputes is unclear. Ground water users (e.g., farmers and municipalities) could be forced to pay large judgments to surface water users even when their use of ground water was lawful under Neb. Rev. Stat. § 46-702.[54] A surface water appropriator with a priority date of today could conceivably force a ground water user who has been pumping for over forty years to cease pumping or pay attorneys

46. *See* NEB. REV. STAT. § 46-715(4) (Cum. Supp. 2004).
47. 3 BECK, *supra* note 5, at § 22.04(c).
48. RESTATEMENT (SECOND) OF TORTS, § 858(2).
49. RESTATEMENT (SECOND) OF TORTS, Ch. 41.
50. *Spear T*, 269 Neb. at 194, 691 N.W.2d at 132 ("In making the reasonableness determination, the Restatement, *supra*, § 850A, provides a valuable guide").
51. One commentator has noted these factors "tell us practically nothing about how a court will, or should, decide a case." 1 BECK, *supra* note 5, at § 7.02(d)(3).
52. *See supra* note 50 and accompanying text.
53. 6 BECK, *supra* note 5, at 425 (Michigan), 566 (Ohio), and 857 (Wisconsin).
54. The statute codifies the Nebraska rule for ground water use of reasonable use as modified by the correlative rights doctrine.

to defend the case.[55] As the drought follows the plow[56] and litigation follows the drought, the uncertainties may be resolved in short order.

B. Section 858: Nothing Modern or Trendy About It

In support of its application of Section 858 to disputes between ground water and surface water users, the court stated, "Adoption of the *Restatement* is the modern trend."[57] The "modern trend" cases cited by the court are *Cline v. American Aggregates Corp.*,[58] *State v. Michels Pipeline Constr., Inc.*,[59] and *Maerz v. U.S. Steel Corp.*[60] Of these "modern" cases, none involved a ground water user *vis-à-vis* a surface water user. Rather, all involved disputes among ground water users. Moreover, the cases cited by the court adopted Section 858 to replace their entire common law-created ground water management regime. All three states formerly applied a form of the English rule[61] of absolute ownership to govern ground water use.[62] The courts overruled the English rule[63] because they found Section 858's reasonable use doctrine to be "much more equitable in the resolution of ground water conflicts."[64] The adoption of Section 858 by three states over twenty years ago suggests neither a trend nor modernity.

Moreover, courts recently faced with the adoption of Section 858 have refused to do so. In 1999, the Supreme Court of Maine declined to abandon the absolute dominion rule in favor of Section 858 because "there is no evidence the absolute dominion rule is the wrong rule for Maine" and "the question of whether to depart from our common law on groundwater issues is best left to the legislature."[65] The Supreme

55. In fact, case law supports the view that "temporal priority is at best only marginally relevant to balancing competing uses against each other" under Section 858. 1 Beck, *supra* note 5, at § 7.03(d). *See also* Peter Davis, *Eastern Water Diversion Permit Statutes: Precedents for Missouri*, 47 Mo. L. Rev. 429, 434-35 n.20 (1982) (noting that new users prevail in half the cases under the reasonable use factors in the Restatement).

56. Drought Follows the Plow (Michael Glantz ed., 1994).

57. *Spear T*, 269 Neb. at 193, 691 N.W.2d at 132.

58. 474 N.E.2d 324 (Ohio 1984).

59. 217 N.W.2d 339 (Wis. 1974).

60. 323 N.W.2d 524 (Mich. App. 1982).

61. The English rule was first established by the Court of Exchequer in Acton v. Blundell, 152 Eng. Rep. 1223 (1843).

62. Cline v. American Aggregates Corp., 474 N.E.2d 324, 325 (Ohio 1984); State v. Michels Pipeline Constr., Inc., 217 N.W.2d 339, 343 (Wis. 1974); Maerz v. U.S. Steel Corp., 323 N.W.2d 524, 527 (Mich. App. 1982).

63. Notably, the legislative bodies of Ohio, Wisconsin, and Michigan had not codified a ground water management regime. This left the courts free to overrule their previous decisions adopting the English rule.

64. *Cline*, 474 N.E.2d at 327.

65. Maddocks v. Giles, 728 A.2d 150, 153-54 (Me. 1999). Notably, the Court cited this case in *Spear T*, but did not compare its analysis to the modern trend cases or recognize Maine's refusal to adopt Section 858.

Court of Texas also recently refused to "fundamentally alter the common-law framework within which Texas has operated since . . . 1904" by declining to replace the absolute dominion rule with Section 858.[66] Finally, courts in Indiana have repeatedly declined to adopt Section 858 to replace its common law absolute dominion rule.[67]

C. Professor Harnsberger's Recommendation: Replace Correlative Rights With Section 858

In further support of its adoption of Section 858 for disputes between ground and surface water users, the court stated, "commentators have recommended the adoption of the *Restatement* to both this court and the Legislature."[68] This statement specifically referenced an article by Professor Richard Harnsberger. Although Professor Harnsberger did suggest the court adopt Section 858 over thirty years ago, his recommendation was to replace the correlative rights doctrine with Section 858.[69] Professor Harnsberger, moreover, did not expressly or impliedly recommend the use of Section 858 for disputes between ground and surface water users. Stranger still, Professor Harnsberger did not consider the portion of the *Restatement* that was adopted by the court in his recommendation:

> [W]e recommend that [the legislature] codify a modified version of the reasonable use rule along the lines suggested by Professor Frank Trelease in the 1971 tentative draft of the *Restatement of the Law of Torts*.[70] The proposed rule is that a landowner who withdraws water from his land and uses it for a beneficial purpose is not liable for interfering with utilization of the water by others unless the withdrawal causes unreasonable harm by *lowering the water table or reducing artesian pressure*.[71]

Clearly referring to disputes between ground water users, Professor Harnsberger continued:

> At the present time small well owners in Nebraska are protected against the large scale diversion to distant lands by municipalities and others, but they have no safeguards from

66. Sipriano v. Great Spring Waters of America, Inc., 1 S.W.3d 75, 79 (Tex. 1999).

67. Wiggins v. Brazil Coal and Clay Corp., 452 N.E.2d 958 (Ind. 1983); Natural Res. Comm'n of the State of Indiana v. Amax Coal Co., 603 N.E. 2d 1349 (Ind. App. 1993) *rev'd on other grounds and vacated by*, 638 N.E.2d 418 (1994).

68. *Spear T*, 269 Neb. at 194, 691 N.W.2d at 132 (citing Richard S. Harnsberger, et al., *Groundwater: From Windmills to Comprehensive Public Management*, 52 Neb. L. Rev. 179 (1973)).

69. Richard S. Harnsberger, et al., *Groundwater: From Windmills to Comprehensive Public Management*, 52 Neb. L. Rev. 179, 208-10 (1973).

70. Referring to Restatement (Second) of Torts, § 858.

71. Harnsberger, *supra* note 69, at 209 (emphasis supplied); *compare* Restatement (Second) of Torts, § 858(1)(a).

> large irrigation facilities or industries utilizing the water on overlying land. The proposed rule extends protection, whenever equitable, against large scale uses on overlying lands. The owner of a shallow domestic well who contributes only infinitesimally to the lowering of the water table in a heavily irrigated area would not be, as he is now, without a remedy.[72]

In the context of the recommendation, Professor Harnsberger made no mention of the provision adopted by the court in *Spear T*.

More importantly, Professor Harnsberger recommended the *Restatement* in lieu of what he viewed as the superior method of regulation, namely, "a system of comprehensive public adminstrative (*sic*) management" of ground water and surface water.[73] Presumably, since the Legislature has adopted such a comprehensive management regime through L.B. 962, Professor Harnsberger would not recommend the adoption of the *Restatement* today.[74]

D. THE JUDICIAL "COMMON LAW" CLAIM CREATED IN *SPEAR T* HAS NO FOUNDATION IN ENGLISH COMMON LAW

The court in *Spear T* concluded the Plaintiff has a common law claim against the Defendants under Section 858. In reaching this conclusion, the court necessarily found: (1) a claim by a surface water user against a ground water user existed under the common law;[75] and (2) the common law claim has not been abolished, expressly or impliedly, by the Legislature.[76] The court's findings in both respects were flawed.

1. The Common Law Did Not Provide a Claim for a Surface Water User Against a Ground Water User

In 1866, the Territorial Legislature adopted the common law of England: "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 territory, or with any law passed or to be passed by the legislature of this territory, is adopted, and declared to be law within said territory."[77] At common law, ground water rights were governed by the English rule of absolute ownership.[78] Under this

72. Harnsberger, *supra* note 69, at 209-210.

73. Harnsberger, *supra* note 69, at 209; *see also id.* ("If, however, the legislature decides that a system of comprehensive public adminstrative (*sic*) management is unacceptable, we recommend that it codify [Section 858]").

74. *See* L.B. 962, *supra* note 40.

75. *Spear T*, 269 Neb. at 193, 691 N.W.2d at 131-32.

76. *Id.* at 195, 691 N.W.2d at 133.

77. 2 COMPLETE SESSION LAWS OF NEBRASKA, 1866-1877, at 12. The provision, as amended, is now codified at NEB. REV. STAT. § 49-101 (Reissue 2002).

78. *Spear T*, 269 Neb. at 186, 691 N.W.2d at 127.

rule, a ground water user could "withdraw whatever quantity of water for any purpose he chose without regard to the possible effects on his neighbor."[79] In explaining the rule in *Spear T*, the court stated, "the English courts adopted the position that everyone was permitted to take and use all the ground water of which they could get possession."[80] This principle of law was the only substantive limitation on the landowner's use of subterranean waters under the common law. Moreover, although never applied by the court, the English rule was technically the law in Nebraska from 1866[81] until 1933.[82]

Under the English common law adopted by the Nebraska Legislature, any harm to a surface water user caused by a ground water user was a *damnum absque injuria* (harm without injury).[83] In *Chasemore v. Richards*,[84] the appellant owned a mill on the river Wandle. The respondent, the local board of health for the nearby town of Croydon, sunk a large well to provide water for its citizens. The well pumped between 500,000 and 600,000 gallons of water per day that would have otherwise found its way into the river Wandle and been available for use at the appellant's mill. The House of Lords first reiterated the law regarding water that is *not* flowing in a defined channel:

> No doubt all the water falling from heaven tied shed upon the surface of the earth at the foot of which the brook runs must, by the natural force of gravity, find its way to the bottom, and so into the brook; but this does not prevent the owner of the land on which the water falls from dealing with it as be (*sic*) pleases and appropriating it. He cannot, it is true, do so if the water has arrived at, and is flowing in some natural channel already formed, but he has a perfect right to appropriate it before it arrives at such channel.[85]

Although the rule had never previously been applied to ground water, the court held the principles established therein "are equally, if not more, strongly, applicable to subterranean water of the same cas-

79. Metropolitan Util. Dist. of Omaha v. Merritt Beach Co., 179 Neb. 783, 797, 140 N.W.2d 626, 635 (1966); *see also id.* at 798, 140 N.W.2d at 635 ("But under the common law doctrine, a riparian landowner could withdraw all the water he wanted from below the surface of his land, for any purpose, without regard to the effect on his neighbor, and he could transport it to where he chose").

80. *Spear T*, 269 Neb. at 186-87, 691 N.W.2d at 127.

81. *See* NEB. REV. STAT. § 49-101 (Reissue 2002).

82. In 1933, the court, in dicta, rejected the English rule. Olson v. City of Wahoo, 124 Neb. 802, 811, 248 N.W. 304, 308 (1933).

83. Although literally translated as harm without injury, *damnum absque injuria* is more properly a harm for which there is no remedy. *See* BLACK'S LAW DICTIONARY 420 (8th ed. 2004).

84. 7 H.L.C. 349, 5 Jur. (N.S.) 873 (1859).

85. Chasemore v. Richards, 7 H.L.C. 349, 5 Jur. (N.S.) 873 (1859).

ual, undefined and varying description."[86] In applying the rule to the case at hand, the court held:

> We think the present case . . . is not to be governed by the law which applies to rivers and flowing streams, but that it rather falls within that principle which gives to the owner of the soil all that lies beneath the surface; that the land immediately below is his property, whether it is solid rock, or porous ground, or veinous earth, or part soil, part water; that the person who owns the surface may dig therein, and apply all that is therein to be found to his own purposes, at his free will and pleasure; that if, in the exercise of such rights, he intercepts or drains off the water collected from underground springs in his neighbour's well, this inconvenience to his neighbour falls within the description of damnum absque injuria, *which cannot become the ground of an action*.[87]

In concluding the appellant could not maintain an action against the respondent, the court held: "It appears to me that reason and principle, as well as authority, are opposed to the claim of the appellant to maintain an action for the interception of the underground water which would otherwise have ultimately found its way to the river Wandle . . . ."[88] Simply stated, the common law did not provide a claim for a surface water user against a ground water user.[89]

2. *The Common Law Was Abrogated by the GWMPA*

Even if such a claim were recognized by the common law, it must have been abolished by the adoption of the GWMPA. The Legislature chose to regulate ground water under "the rule of reasonable use with the addition of the California doctrine of apportionment in time of shortage."[90] Under this regime, "the owner of land is entitled to appropriate subterranean waters found under his land, but he cannot extract and appropriate them in excess of a reasonable and beneficial use upon the land which he owns, especially if such use is injurious to others who have substantial rights to the waters . . . ."[91] Thus, Nebraska law limits the landowner's use of ground water in three sub-

86. *Id.*
87. *Id.* (emphasis supplied).
88. *Id.*
89. *Id.* Notably, one of the cases relied on by the court recognized Section 858 as "a departure from the common-law rule." *Michels Pipeline Constr., Inc.*, 217 N.W.2d at 349.
90. Prather v. Eisenmann, 200 Neb. 1, 6, 261 N.W.2d 766, 769 (1978), *codified at* NEB. REV. STAT. § 46-702 (Cum. Supp. 2004) ("Every landowner shall be entitled to a reasonable and beneficial use of the ground water underlying his or her land subject to the provisions of Chapter 46, article 6, and the [GWMPA] and the correlative rights of other landowners when the ground water supply is insufficient for all users").
91. Olson v. City of Wahoo, 124 Neb. 802, 811, 248 N.W. 304, 308 (1933).

stantive manners: (1) the use must be reasonable and beneficial; (2) the use must not be injurious to those with substantial rights to the waters; and (3) the landowner must curtail his proportional use during times of shortage.

In adopting the above rule of law, the Legislature has defined the parameters under which a ground water user must operate. It is only when the user goes beyond those parameters that liability may be imposed. This rule of law, well settled in Nebraska, was available to the Plaintiff in *Spear T*. To state a claim for relief, the Plaintiff could have alleged the Defendants' uses of ground water were not reasonable or beneficial and that the Plaintiff's substantial rights to the waters were injured by such unreasonable and unbeneficial use. In fact, the court previously suggested that the correlative rights doctrine provided a claim for an appropriator injured by a ground water user.[92] As such, the abrogation of any other common law rights is compelled, at the very least, by operation of the statute.

Moreover, the court in *Spear T* impliedly recognized the English rule, the American rule, the correlative rights doctrine, and Section 858 as alternatives to regulating ground water.[93] The Legislature has codified the correlative rights doctrine as *the* regime to govern ground water use in Nebraska.[94] Logically, the adoption of one alternative regime necessarily abrogates any claims otherwise available under the alternative regimes.

E. If the Common Law is Inadequate, The Proper Course for Change is Legislation

As a matter of public policy, the Legislature has chosen to treat and regulate ground water and surface water under separate regimes.[95] As noted above, the landowner's right to use ground water is

92. *Merritt Beach*, 179 Neb. at 801, 140 N.W.2d at 637 ("Under [the correlative rights doctrine] we conclude that where 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") (emphasis supplied); *see also id.* at 802, 140 N.W.2d at 638 (court affirmed granting utilities district permit to drill wells because the "[surface water] objectors failed to show any damage resulting from the pumping of the water from the well field in the quantity applied for"). Notably, the Supreme Court of Washington, in a correlative rights state, applied the correlative rights doctrine to determine a ground water user was not liable in a dispute with a surface water user, even where the ground water user diverted "practically all" of the water from the stream. Evans v. City of Seattle, 47 P.2d 984 (Wash. 1935).

93. *Spear T*, 269 Neb. at 186, 691 N.W.2d at 127.

94. Neb. Rev. Stat. § 702 (Cum. Supp. 2004).

95. *Compare* Neb. Rev. Stat. § 46-204 (Reissue 2002) (surface water users have "[t]he right to divert unappropriated waters of every natural stream for beneficial use"), *with* Neb. Rev. Stat. § 46-702 (Cum. Supp. 2004) (every landowner is "entitled to a reasonable and beneficial use of the ground water underlying his or her land").

only limited by the correlative rights doctrine. The court rejected this rule because "[s]uch a rule would ignore the hydrological fact that a ground water user's actions may have significant, negative consequences for surface water appropriators."[96] However, as recognized by the *Spear T* decision, the Legislature chose to ignore the hydrological facts as a matter of law:

> Nebraska water law ignores the hydrological fact that ground water and surface water are inextricably linked. Instead of an integrated system, we have two separate systems, one allocating streamflows and the other allocating ground water. Under constitutional and statutory provisions, streamflows are allocated by priority in time. *See* NEB. CONST. art. XV, § 6. Ground water, in contrast, is governed by a common-law rule of reasonableness and the GWMPA. Moreover, the lack of an integrated system is reinforced by the fact that different agencies regulate ground water and surface water. The Department of Natural Resources regulates surface water appropriations. *See* NEB. REV. STAT. § 61-201 *et seq.* (Reissue 2003 & Cum. Supp. 2004). In contrast, under the GWMPA, ground water is statutorily regulated by each Natural Resources District.[97]

Although this statement of law should have been the end of the matter, the court decided the "day has arrived" for *the court* to address the "tension between the two systems,"[98] despite its longstanding principle of judicial prudence that "[i]f the common rule is inadequate, the proper course is by legislation."[99]

In reconciling Nebraska's law with the scientific reality of hydrologically connected ground water, the court, by judicial legislation, created a cause of action for surface water users *vis-à-vis* ground water users. Such a declaration of a fundamental change from existing law and public policy is a deviation from the court's history of recognizing the Legislature as the proper means of such change. The court recently recognized that "it is the function of the Legislature through the enactment of statutes to declare what is the law and public policy of this state."[100] Moreover, regarding judicial prudence and laws governing the waters of Nebraska, the court has stated: (1)"[It is] the right of the Legislature, unimpaired, to determine the policy of the state as to underground waters and the rights of persons in their

96. *Spear T*, 269 Neb. at 193, 691 N.W.2d at 131-32.

97. *Id.* at 183-84, 691 N.W.2d at 125.

98. *Id.* at 184, 691 N.W.2d at 126.

99. Meng v. Coffey, 67 Neb. 500, 93 N.W. 713, 715 (1903).

100. In re Claims Against Atlanta Elevator, Inc., 268 Neb. 598, 611, 685 N.W.2d 477, 489 (2004).

use,"[101] (2) "[t]he public, through legislative action, may grant to private persons the right to the use of publicly owned waters for private purpose; but as the *Olson*[102] opinion demonstrates, with its emphasis on sharing in times of shortage, the public may limit or deny the right of private parties to freely use the water when it determines that the welfare of the state and its citizens is at stake,"[103] and (3) "[regarding changes to water law and policy in the state,] [t]he subject calls for legislative, not for judicial, action."[104] In deciding *Spear T*, the court wavered from its long-standing history of deferring such matters of law and public policy to the Legislature.

V. THE LEGACY OF *SPEAR T*

It is tempting to conclude that the actual impact of *Spear T* will be minor. Certainly, the standard for obtaining relief does not initially appear to be easily obtainable nor does the relief itself offer complete protection.[105] Viewed in that narrow light, one might think Section 858 will be sparingly used. Examined from a broader perspective, however, *Spear T* suggests a potential for much more widespread litigation. This potential is fueled by: (1) regulations being developed by the Department of Natural Resources pursuant to L.B. 962 to determine fully appropriated stream reaches;[106] and (2) the potential for significant financial rewards for bringing an action.

A. L.B. 962 REGULATIONS

Legislative Bill 962 requires the Department of Natural Resources to annually "complete an evaluation of the expected long-term availability of hydrologically connected water suppliers for both existing and new surface water uses and existing and new ground water uses . . . ."[107] The process by which this evaluation is to occur will be established by agency rule and regulation and will expressly deal with

101. *Merritt Beach*, 179 Neb. at 801, 140 N.W.2d at 637.

102. *See* Olson v. City of Wahoo, 124 Neb. 802, 248 N.W. 304 (1933).

103. State *ex rel.* Douglas v. Sporhase, 208 Neb. 703, 707-08, 305 N.W.2d 614, 618 (1981) *rev'd on other grounds* 458 U.S. 941, (1982); *see also Meng*, 67 Neb. at 506-07, 93 N.W. at 715 ("Where the precedents are unanimous in support of a proposition, there is no safety but in a strict adherence to such precedents. If the courts will not follow established rules, rights are sacrificed, and lawyers and litigants are left in doubt and uncertainty, while there is no certainty in regard to what, upon a given state of facts, the decisions of the court will be. If the common rule is inadequate, the proper course is by legislation").

104. *Meng*, 67 Neb. at 508, 93 N.W. at 716.

105. The standard established by *Spear T* requires a surface water user to show the defendant's use of ground water has had a "direct and substantial effect" upon the watercourse relied on by the plaintiff. *Spear T*, 269 Neb. at 194, 691 N.W.2d at 132.

106. *See* NEB. REV. STAT. § 46-748 (Cum. Supp. 2004).

107. NEB. REV. STAT. § 46-713(1)(a) (Cum. Supp. 2004).

the impact of ground water use on surface flows. Once adopted, this rule will have the force of law.[108]

While required for L.B. 962 implementation, the methodology codified by this rule could be used by a plaintiff to demonstrate that certain wells have a "direct and substantial effect on the watercourse" at issue.[109] This is a significant issue because most hydrologists have concluded that estimating the impact of wells on streamflows can be very difficult absent a numerical computer model. Such models generally take years to complete and are far too expensive to develop for most tort actions. If, however, a plaintiff uses the methodology adopted by the state to regulate individual well owners to protect streamflows, he may avoid a *Daubert*[110] challenge. Moreover, the methodology of the state will be available to the public so the cost of developing such proof should not be an obstacle. Accordingly, *Spear T* actions may be available to virtually any potential plaintiff.

B. Monetary Damages

In addressing the issue of remedies, the *Spear T* court offered a word of caution to trial courts:

> Although the issue of available remedies is not yet before us, courts should be cautious when considering remedies for interference with surface water. For example, because the recharge of a stream that has dried up because of well pumping could take years, an injunction against pumping might only serve to deprive everyone in a water basin. Such a remedy would be unreasonable and inequitable.[111]

While that caution is sound, it clearly left open the possibility for monetary damages. These damages would likely extend back in time as far as allowed by the appropriate statute of limitations, and could also include the impacted market value of the property to which the surface water right attached. In the case of *Spear T*, the Plaintiff claims $4,000,000 in such damages for a relatively small appropriation.

It remains to be seen whether the *Spear T* plaintiffs can demonstrate the damages it claims, but if successful, virtually every surface water user in Nebraska will be motivated to initiate a similar suit. On the other side of the equation, virtually every ground water user in Nebraska will be at significant risk of litigation. With a relatively

108. Sunrise County Manor v. Nebraska Dep't of Social Servs., 246 Neb. 726, 735, 523 N.W.2d 499, 504 (1994) (noting agency rules, properly adopted and filed with the Secretary of State, have the force and effect of law).

109. *Spear T*, 269 Neb. at 194, 691 N.W.2d at 132.

110. *See* Daubert v. Merrell Dow Farms, Inc., 509 U.S. 579 (1993).

111. *Spear T*, 269 Neb. at 194, 691 N.W.2d at 132.

easy way to demonstrate the impact to streamflow, coupled with the potential for significant financial rewards, Nebraska may see many more such suits in the near future.

If such suits do become commonplace, the resulting court decisions will have great impact on how water is managed under L.B. 962. That legislation requires the development of Integrated Management Plans ("IMPs") to coordinate the use of water in an integrated fashion.[112] With individual wells and groups of wells subject to separate court orders, developing an IMP may prove to be far more complicated than envisioned by the Legislature.

Finally, it is worth considering that *Spear T* will create a level of uncertainty with respect to real estate transfers. It is unclear whether any restrictions on well use arising from one suit will result in a permanent restriction that runs with the title to the land. This issue will need to be resolved through future case law, but at present, anyone purchasing property would be advised to consider the hydrologic characteristics of any irrigation wells on that property and the existence of any downstream surface water users. While a subsequent purchaser may not be liable for any past damages, they may be restricted in their ability to make use of the well. This development may impact agricultural lending considerations as well.

VI. CONCLUSION

By adopting the *Restatement*, the court not only revitalized the Riparian doctrine in Nebraska, it injected a host of new issues into Nebraska water law and management. Some of these issues may be addressed by the court in *Central Nebraska Public Power and Irrigation Dist. v. Irrigation Well Owners*,[113] now pending before the court.

112. NEB. REV. STAT. § 46-715 (Cum. Supp. 2004).
113. NEB. S. CT. CAUSE No. S-04-836 (2004).