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"Whiskey is for Drinkin' but Water Is for Fightin' About": A First-Hand Account of Nebraska's Integrated Management of Ground and Surface Water Debate and the Passage of L.B. 108

by

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"WHISKEY IS FOR DRINKIN' BUT WATER IS FOR FIGHTIN' ABOUT": A FIRST-HAND ACCOUNT OF NEBRASKA'S INTEGRATED MANAGEMENT OF GROUND AND SURFACE WATER DEBATE AND THE PASSAGE OF L.B. 108

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> "One afternoon [he] Potato Brumbaugh took his son Kurt aside and said, 'Report to Joe Beck in Greeley tomorrow and start to read law.' His son, then eighteen, demurred on the grounds that he wanted to work the farm, but Potato saw the future clearly: 'The man who knows the farm controls the melons, but the man who knows the law controls the river.' And it was the river, always the river, that would in the long run determine life."‡

I. INTRODUCTION: CONJUNCTIVE USE VS. INTEGRATED MANAGEMENT

No phrase has been more consistently misapplied and wrongfully maligned in Nebraska water law than "conjunctive use." At its most basic, "conjunctive" use means little more than the use of either ground or surface water. What the phrase "conjunctive use" does not naturally mean is regulation or management of those supplies of water. Nebraskans have used conjunctively ground and surface water for most of its unique history in the area of water law. For the last fifty years, and in earnest for the last three, the citizens of the State of Nebraska have been caught up in an argument about the phrase "conjunctive use." In reality, the entire "conjunctive use" debate has been miscast when the real argument has been about something entirely

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‡ JAMES A. MICHENER, CENTENNIAL 569 (1974).

different — the integrated management of Nebraska's ground and surface water supplies.

This Article addresses the real issue — not how to conjunctively use Nebraska's ground and surface water supplies (as a state we are already adept in that endeavor) — but how the State will integrate its divergent ground and surface water laws. It focuses not necessarily on the first, but certainly on the greatest step in that integration: the passage of LB 108 in the 95th Session of the Nebraska Legislature.[1]

II. DEVELOPMENT OF NEBRASKA SURFACE WATER LAW

A. THE EARLY YEARS

Nebraska's surface water law developed in a fashion like most of its fellow Western states. Irrigation development followed closely on the heels of, or in conjunction with, agricultural development, most notably in Nebraska's Panhandle region.[2] The diversion of water from the rivers and streams lacing central and western Nebraska and the attendant organization of irrigation districts advanced rapidly from 1888, the year the Ford-Akers Canal was constructed.[3] This canal marked the first diversion of water for irrigation from the North Platte River in Nebraska.[4] Much of Nebraska lies west of the 98th meridian, technically a semi-arid region, which renders most row crop production highly speculative without irrigation.[5] Irrigation truly became the life blood of the state with an estimated eight million irrigated acres in Nebraska by 1990, seven million of which were irrigated by ground water.[6]

The earliest surface water law in Nebraska was the English doctrine of riparianism which focuses on the reasonable use of the stream

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1. *See infra* notes 154-216 and accompanying text.

2. For an excellent discussion of the origins of surface water irrigation in Nebraska, see ROBERT MANLEY, *Land and Water in 19th-Century Nebraska*, *in* FLAT WATER: A HISTORY OF NEBRASKA AND ITS WATER 9 (Conservation and Survey Division, Institute of Agriculture and Natural Resources, University of Nebraska-Lincoln, Resource Report No. 12, March, 1993) [hereinafter MANLEY].

3. MANLEY, *supra* note 2, at 21.

4. *Id.* at 21, 273. The Ford-Akers Canal, later known as the Farmers Ditch and, finally, the Tri-State Ditch, was the first diversion project on the North Platte River. "Akers" referred to W. R. Akers, an irrigation pioneer, for which Nebraska's major surface water law was also named. *See infra* note 13 and accompanying text.

5. ANN SALOMON BLEED, PH.D., *Climate and Hydrology*, *in* FLAT WATER: A HISTORY OF NEBRASKA AND ITS WATER 45, 48 (Conservation and Survey Division, Institute of Agriculture and Natural Resources, University of Nebraska-Lincoln, Resource Report No. 12, March, 1993) [hereinafter BLEED].

6. VINCENT H. DREESZEN, *Water Availability and Use*, *in* FLAT WATER: A HISTORY OF NEBRASKA AND ITS WATER 82, 84 (Conservation and Survey Division, Institute of Agriculture and Natural Resources, University of Nebraska-Lincoln, Resource Report No. 12, March, 1993).

as it flows by one's land, subject to a like right belonging to other riparian proprietors.[7] The riparian doctrine became part of Nebraska law when the territorial legislature adopted the common law of England in 1866.[8]

Early settlers realized that while the riparian doctrine may be well fitted to "England's green and pleasant land," it would hinder development in the West.[9] Laws passed in 1877 had provided for limited prior appropriation rights for power purposes to support Nebraska's then thriving mill industry.[10] The bill also allowed the formation of irrigation companies and gave them the power of eminent domain.[11] The St. Rayner Bill, passed by the Nebraska Legislature in 1889, allowed irrigation water to be diverted upon the posting of a notice at the diversion point and work beginning on the ditch within 60 days.[12]

B. The Process: From Chaos to Order

The year 1895 brought Nebraska the legal doctrine governing surface water which is still the bedrock principle in effect today. In that year's session, the Nebraska Legislature passed the 1895 Irrigation Code, commonly known as "Aker's Law," which codified the doctrine of prior appropriation for the use of surface water.[13] Prior appropriation is distinguished from riparianism by its "focus on the application of the water to a beneficial use, rather than on the ownership of riparian land, and its use of a first-in-time, first-in-right approach to conflicts between users, as opposed to the riparian's system of equality among riparians."[14] Prior appropriation is the dominant legal system for regulating surface water use in the West, with variations of the doctrine found in all 17 of the Western water states.[15]

In order to regulate users under the prior appropriation system, the seminal 1895 Irrigation Code formed the State Board of Irrigation,

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7. Jesse Dukeminier & James E. Krier, Property 40-41 (3d ed. 1993).

8. 2 Complete Session Laws of Nebraska, 1866-1877, ch. VII at 12.

9. *In re* Application A-16642, 236 Neb. 671, 683, 463 N.W.2d 591, 601 (1990) (citing Meng v. Coffee, 67 Neb. 500, 93 N.W. 713 (1903); Crawford Co. v. Hathaway, 67 Neb. 325, 93 N.W. 781 (1903)).

10. *In re Application A-16642*, 236 Neb. at 683, 463 N.W.2d at 601.

11. Act of Feb. 19, 1877, Neb. Unicameral, 14th Leg., (repealed 1895) 1877 Neb. Laws 168.

12. St. Rayner Bill, ch. 68, Neb. Unicameral, 21st Leg., 1889 Neb. Laws 503 (substantially repealed, however, portions of the bill are presently enacted at §§ 46-203, -206, & -207).

13. Aker's Law, ch. 70, Neb. Unicameral, 24th Leg., 1895 Neb. Laws 244, 260 (substantially repealed, however, portions of the bill are presently codified at §§ 46-201, -202, -204, -205, -215, -216, -217, -253).

14. *In re Application A-16642*, 236 Neb. at 684, 463 N.W.2d at 601.

15. A. Dan Tarlock, Law of Water Rights and Resources, § 5.05 at 5-21 (1988).

Water Power and Drainage.[16] The powers and duties of this board were then transferred to the Nebraska Bureau of Irrigation, Water Power and Drainage in 1919; then to the Department of Roads and Irrigation in 1933; and, finally to the Department of Water Resources in 1957.[17]

The Nebraska Constitution also strongly endorses the prior appropriation doctrine for surface water regulation. Sections 4, 5 and 6 of Article XV of the Nebraska Constitution are similar to provisions found in the constitutions of other Western states.[18] Section 4 states, "The necessity of water for domestic use and for irrigation purposes in the State of Nebraska is hereby declared to be a natural want."[19] Section 5 dedicates the water of every natural stream to the people for beneficial purposes, subject to section 6 which declares, "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."[20] It has never been clear that these constitutional provisions are to be applied to ground water, notwithstanding dicta in *Metropolitan Utilities District v. Merritt Beach* which may suggest otherwise, at least concerning Article XV, section 4.[21]

Under Nebraska surface water law, the priority date of an appropriation is the date an application to divert water is filed with the Department of Water Resources, or its predecessor.[22] The application must be filed prior to commencing work on the diversion.[23] An application to appropriate surface water must contain:

> (a) the name and post office address of the applicant, (b) the source from which the appropriation shall be made, (c) the estimated amount of the appropriation desired, as nearly as it may be estimated, (d) the location of any proposed work in connection with the appropriation, (e) the estimated time required for [the work's] completion . . ., (f) the time estimated at which the application . . . shall be made . . ., (g) the purpose for which water is to be applied and (i) if for induced ground water recharge by a public water supplier, a statement of the

16. Aker's Law, 1895 Neb. Laws at 245.

17. State of Nebraska, History of the Department of Water Resources, January 1994. (See Appendix A).

18. NEB. CONST. art. XV, §§ 4, 5, 6. *See* WYO. CONST. art. 8, §§ 1, 3; IDAHO CONST. art. XV, §§ 1, 3.

19. NEB. CONST. art. XV, § 4.

20. NEB. CONST. art XV, §§ 5 and 6.

21. Metropolitan Utils. Dist. v. Merritt Beach Co., 179 Neb. 783, 799, 140 N.W.2d 626, 636 (1966) [hereinafter *M.U.D.*] ("Underground waters, whether they be percolating waters or underground streams, are a part of the waters referred to in the Constitution as a natural want.").

22. NEB. REV. STAT. § 46-235(1) (Reissue 1993).

23. NEB. REV. STAT. § 46-233(1) (Reissue 1993).

> times . . . and location . . . where flows for induced ground water recharge are proposed, and (ii) if for irrigation, a description of the land to be irrigated by the water and the amount, and (h) other facts necessary for an induced recharge appropriation.[24]

If the application is approved by the Department of Water Resources, the applicant is granted an appropriation.[25] The Department may also hold a hearing prior to granting an appropriation in the case of an induced recharge application.[26] A surface water right in Nebraska is a vested property right.[27] The Department of Water Resources has exclusive original jurisdiction to hear and adjudicate all matters relating to water rights with appeals of its decisions going to the Nebraska Court of Appeals.[28]

The prior appropriation system thus set up a scheme with a degree of certainty for Nebraska surface water users, subject only to the incredible whims of Mother Nature and increasing pressure from the Federal Government and upstream states. Later, uncertainty developed in that grey area where surface and ground water supplies are interrelated.

III. DEVELOPMENT OF NEBRASKA GROUND WATER LAW BY THE NEBRASKA SUPREME COURT

Nothing approaching the degree of certainty in surface water law has ever been present in Nebraska ground water law. The ability to pump sufficient supplies of ground water to irrigate crops in Nebraska came much later than the ability to divert large quantities of surface water for irrigation.[29] It was not until the mass production of the turbine pump in the 1940's and the pioneering work of Nebraska manufacturers in the area of center pivot development that the ground water explosion blasted across the state.[30] The development of

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24. NEB. REV. STAT. § 46-233(2) (Reissue 1993).

25. NEB. REV. STAT. § 46-235 (Reissue 1993).

26. NEB. REV. STAT. § 46-235(1) (Reissue 1993).

27. Enterprise Irr. Dist. v. Willis, 135 Neb. 827, 831, 284 N.W. 326, 329 (1939) ("[A]n appropriator of public water, who has complied with existing statutory requirements, obtains a vested property right. . . .").

28. NEB. REV. STAT. § 46-686.01 (Reissue 1993).

29. STEVE SCHAFER, *Economics and Finance*, *in* FLAT WATER: A HISTORY OF NEBRASKA AND ITS WATER 113, 117 (Conservation and Survey Division, Institute of Agriculture and Natural Resources, University of Nebraska-Lincoln, Resource Report No. 12, March, 1993) [hereinafter SCHAFER].

30. LESLIE F. SHEFFIELD, *Technology*, *in* FLAT WATER: A HISTORY OF NEBRASKA AND ITS WATER, 87 (Conservation and Survey Division, Institute of Agriculture and Natural Resources, University of Nebraska-Lincoln, Resource Report No. 12, March, 1993). The article contains a fascinating description of the early work of Frank Zybach and A.E. Trowbridge in developing the center pivot system. *Id.* at 93-95. The first center pivot system in the world was installed in Holt County in 1955. *Id.* at 95. Nebraska

ground water law in Nebraska fell well behind the development of millions of acres in the state irrigated by ground water.[31]

A. Ground Water Use Outstrips Common Law

The earliest pronouncements on ground water law in Nebraska were judicial; the Nebraska Legislature left little mark in the area of ground water law for years. In the seminal case of *Olson v. City of Wahoo*,[32] the Nebraska Supreme Court rejected the English common-law rule of ownership and adopted instead the American rule.[33] "The American rule is that 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. . . ."[34] Not content with a strict adherence to the American rule, the Nebraska Supreme Court then added its own twist in the *Olson* holding, "[I]f the natural underground supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole. . . ."[35] This became the modified doctrine of correlative rights based upon users sharing alike in times of shortage. The modified correlative rights doctrine, of which the exact phrasing is unique to Nebraska, is similar to the common law scheme found in California.[36] Later cases reinforced and restated the Nebraska rule with relation to ground water.[37] The restating of the rule did not clarify one important issue, how to regulate ground water which was hydrologically related to stream flows.

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companies still control the lion's share of the international center pivot market. *Id.* at 99.

31. *See generally* Schafer, *supra* note 29, at 117 (explaining the differences between development of surface water and ground water use and regulation).

32. 124 Neb. 802, 248 N.W. 304 (1933).

33. Olson v. City of Wahoo, 124 Neb. 802, 810-12, 248 N.W. 304, 307-08 (1933).

34. *Olson*, 124 Neb. at 811, 248 N.W.at 308.

35. *Id.*

36. *See* Katz v. Walkinshaw, 74 P. 766, 771 (1903) (stating that the doctrine of reasonable use "limits the right of others to such amount of water as may be necessary for some useful purpose in connection with the land from which it is taken.").

37. *See, e.g.*, Prather v. Eisenmann, 200 Neb. 1, 9, 261 N.W.2d 766, 771 (1978) (stating that the Nebraska rule, while a combination of the American rule and the correlative rights rule from California case law, must be read in light of the Nebraska statute governing preference for use of ground water); Sorensen v. Lower Niobrara Natural Resources Dist., 221 Neb. 180, 188-89, 376 N.W.2d 539, 546 (1985) (stating the common law rule of permitting landowners to use ground water removed from under the owner's land is qualified by the Nebraska rule of reasonable use and correlative rights. The decision also stating "Disputes between overlying landowners, concerning water for use on the land, to which they have an equal right, in cases where the supply is insufficient for all, are to be settled by giving to each a fair and just proportion.").

An early, creative effort to integrate the two systems was found in the Metropolitan Utilities District's efforts to gain water rights to protect their "ground water" wells immediately adjacent to the Platte River. M.U.D.'s effort were approved by the Nebraska Supreme Court in *Metropolitan Utils. District v. Merritt Beach Co.*,[38] a muddled decision discussing all manner of rights to water in Nebraska — riparian, appropriative and the correlative rights doctrine.[39] In *M.U.D.*, the court affirmed the Director of Water Resources Order granting a permit under the then version of the Municipal Permit to Withdraw, Transport and Use Ground Water.[40] Metropolitan Utilities District ("M.U.D.") had filed to withdraw 60,000,000 gallons of ground water daily from a well field positioned adjacent to the Platte River and on an island located in the river.[41] The five objectors argued the well field would reduce the water table under lands, thereby causing them damage.[42] Their legal arguments included assertions that the grant amounted to a diversion of water in violation of the court's holding in *Osterman v. Central Nebraska Public Power and Irrigation District*,[43] and that the grant would violate their vested rights as riparian property owners.[44]

Citing with approval language from *Tulare Irrigation District v. Lindsay-Strathmore Irrigation District*,[45] the court rejected the objector's claim that use of the Platte River water by M.U.D. would interfere with their subirrigation rights.[46] In *Tulare*, the California Supreme Court said that "The use of the entire flow of a stream surface or underground, for subirrigation cannot be held to be a reasonable use of water in an area of such need. . . ."[47] However, the Nebraska Supreme Court held that "[E]very appropriation of water

38. 179 Neb. 783, 140 N.W.2d 626 (1966).

39. Metropolitan Utils. Dist. v. Merritt Beach Co., 179 Neb. 783, 140 N.W.2d 626 (1966) [hereinafter *M.U.D.*].

40. *M.U.D.*, 179 Neb. at 802, 140 N.W.2d at 638.

41. *Id.* at 785, 140 N.W.2d at 629.

42. *Id.* at 785-86, 140 N.W.2d at 630.

43. 131 Neb. 356, 268 N.W. 334 (1936).

44. *See* Osterman v. Central Nebraska Pub. Power & Irr. Dist., 131 Neb. 356, 268 N.W. 334 (1936), *overruled by* Little Blue Natural Resources Dist. v. Lower Platte N. Natural Resources Dist., 206 Neb. 535, 294 N.W.2d 598 (1980). The *Osterman* decision turned Central's plans for a four-county irrigation district into a three-county district. *Osterman*, 131 Neb. at 357-70, 268 N.W. 335-41. The Court held that 60 percent of the district lands to be irrigated (including all the land in Adams County) were outside the Platte Watershed and could not irrigated with Platte River water. *Id.* at 358, 366, 268 N.W. 335, 339. The decision was eventually overturned in Little Blue Natural Resources Dist. v. Lower Platte North Natural Resources Dist., 206 Neb. 535, 548, 294 N.W. 2d 598, 604 (1980).

45. 45 P.2d 972 (Cal. 1935).

46. *M.U.D.*, 179 Neb. at 794-96, 140 N.W.2d at 634.

47. Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., 45 P.2d 972, 987 (Cal. 1935).

from a stream would be defeated by lower riparian owners having sub-irrigated lands because of the lowering of the water table which every diversion does to some extent."[48]

In regards to the claim that the permit violated *Osterman*, the court approached it as a question of "reasonable use."[49] Ignoring the limitations imposed on diverting water from one watershed to another found in *Osterman*, the court concluded 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 that otherwise would be lost.[50] The court held,

> [W]e choose to decide the question on the ground of reasonable use and all the factors that enter into such a consideration, including the reasonableness of a watershed diversion, thus preserving the right of the [l]egislature, unimpaired to determine the policy of the state as to underground waters and the rights of the persons in their use. . . . [W]e can find no basis for holding the diversion from the well field to be unlawful.[51]

The *M.U.D.* decision was internally inconsistent, holding on one hand that the recharge of 56,000,000 gallons per day would be from surface waters of the Platte River.[52] But on the other hand, since the "appropriations" were reasonable, the prohibitions found in *Osterman* on appropriating water from a stream in one watershed and transferring it to another watershed, did not apply.[53] These inconsistencies were not lost on Justice Spencer, the sole dissenter in *M.U.D.*[54]

Justice Spencer found that the act in question applied only to ground water and that "[W]e ignore the obvious when we describe the water involved herein as ground water and say no water is taken directly from the river."[55] Quoting Farnham, *Waters and Water Rights*, Justice Spencer argued that "what cannot be done directly cannot be done indirectly . . . by sinking wells so close to the stream that water is drawn [to them]."[56] Since the case involved subflow of the Platte, the dissent argued that it should be treated as surface water.[57] Justice Spencer also argued that *Osterman* should apply since the court was

48. *M.U.D.*, 179 Neb. at 796, 140 N.W.2d at 634.
49. *Id.* at 801, 140 N.W.2d at 637.
50. *Id.* at 801-02, 140 N.W.2d at 637.
51. *Id.*
52. *Id.* at 794, 140 N.W.2d at 634.
53. *Id.* at 801-02, 140 N.W.2d at 637.
54. *Id.* at 802, 140 N.W.2d at 638 (Spencer, J., dissenting).
55. *Id.* at 803, 140 N.W.2d at 638 (Spencer, J., dissenting).
56. *Id.* at 803-04, 140 N.W.2d at 638 (Spencer, J., dissenting) (citation omitted).
57. *Id.* at 804, 140 N.W.2d at 639 (Spencer, J., dissenting).

dealing with surface waters and riparians and "the distinction drawn by the majority opinion is a distinction without a difference."[58]

Following the *M.U.D.* decision, the Nebraska Supreme Court never again clearly addressed the inconsistencies in Nebraska's laws when it came to ground and surface water. In *Central Platte Natural Resource District v. Wyoming*,[59] the court abdicated in favor of the legislature, holding that Wyoming's arguments concerning ground water being withdrawn from the Platte River valley need not be considered when addressing an instream flow appropriation on the Platte.[60] The court said,

> Wyoming's evidence regarding ground water depletion does not establish a direct conflict, but, rather, an anticipated conflict. [The] anticipated conflict is best resolved by the policy-based decisionmaking process that is the province of [the] [l]egislature. . . . It is the [l]egislature, and not the courts, which can paint a water rights picture with broad strokes and bold colors. It is to the [l]egislature that Wyoming must direct its argument regarding future ground water depletion.[61]

B. "RIGHTS" TO GROUND WATER IN NEBRASKA

The right then to use ground water is for the most part tied to the overlying land. Nebraska's common law was that ground water could not be transferred off overlying land.[62] Statutory exceptions for municipalities, industrial and, finally, agricultural purposes were enacted.[63] In most areas of the state if a landowner wishes to begin using ground water for irrigation or domestic purposes, the landowner need only make sure that no well spacing laws are being violated.[64] Provided that the landowner does not violate spacing laws, in order to begin using ground water, the landowner merely drills a well and files a well registration with the Nebraska Department of Water Re-

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58. *Id.* (Spencer, J., dissenting).

59. 245 Neb. 439, 513 N.W.2d 847 (1994).

60. Central Platte Natural Resources Dist. v. Wyoming, 245 Neb. 439, 450-52, 513 N.W.2d 847, 857-58 (1994).

61. *Central Platte*, 245 Neb. at 451-52, 513 N.W.2d at 858.

62. *Ponderosa Ridge L.L.C. vs. Banner Country*, 250 Neb. 944, ___ N.W.2d ___ (1996). "[T]he transportation of Nebraska ground water from the underlying land for any use, interstate or introstate, is severly curtailed. The transportation of ground water for intrastate use is prohibited except for specific statutory exceptions." *Id.* at 962.

63. *See* Municipal and Rural Domestic Ground Water Transfers Permit Act, NEB. REV. STAT. §§ 46-638 to -650 (Reissue 1993); Industrial Ground Water Regulatory Act, NEB. REV. STAT. §§ 46-675 to -690 (Reissue 1993); NEB. REV. STAT. § 46-691 (Supp. 1995). For a thorough discussion of the statutory transfer exceptions in Nebraska, *see*, *Ponderosa Ridge L.L.C.*, supra.

64. NEB. REV. STAT. § 46-609 (Reissue 1993).

sources.[65] However, the Department does nothing to either grant or deny the registration and the registration is used mainly for informational purposes. The landowner then begins using the well, with no formal process for approval of any application, unlike the process used for surface water appropriations.

In one of the latest Nebraska Supreme Court decisions on the subject, the court further clarified the rights of ground water users in Nebraska. In the face of a constitutional challenge to the Groundwater Management and Protection Act and a takings claim, the court held,

> [G]round water, as defined in section 46-657, is owned by the public, and the only right held by an overlying landowner is in the use of the ground water. Furthermore, placing limitations upon withdrawals of ground water in times of shortage is a proper exercise of the State's police power.[66]

Conflicts between well users are governed by the court system using certain statutory guidelines. For instance, the Nebraska Legislature has passed a statutory ground water preference scheme with the following preferences: first, domestic; second, agricultural; and third, manufacturing.[67] Domestic uses include normal livestock operations.[68] Although conflicts are inevitable under this system since no authority grants the right to use ground water outside of the limited ground water control areas, only one actual dispute has made it to the Nebraska Supreme Court. In *Prather v. Eisenmann*,[69] the court held that domestic users of water were entitled to damages when a subsequent agricultural use cut off their artesian pressure.[70] However, the court found that there was enough ground water available for all competing uses.[71] Damages were awarded only to dig deeper domestic wells.[72] The court stated in dicta that there would be no cause of action available if the users had been on the same statutory preference level.[73]

An anticipated conflict was also discussed in *Sorensen v. Lower Niobrara Natural Resource District*.[74] In that case, the Natural Resources District instituted condemnation proceedings for a rural water

65. NEB. REV. STAT. § 46-602 (Reissue 1993).
66. Bamford v. Upper Republican Natural Resources Dist., 245 Neb. 299, 313, 512 N.W. 2d 642, 652 (1994) (citations omitted).
67. NEB. REV. STAT. § 46-613 (Supp. 1995).
68. *Id.*
69. 200 Neb. 1, 261 N.W.2d 766 (1978).
70. Prather v. Eisenmann, 200 Neb. 1, 10-11, 261 N.W.2d 766, 771 (1978).
71. *Prather*, 200 Neb. at 8-9, 261 N.W.2d at 770.
72. *Id.* at 11-12, 261 N.W.2d at 772.
73. *Id.* at 10, 261 N.W.2d at 771.
74. 221 Neb. 180, 376 N.W.2d 539 (1985).

district.[75] The court found that compensation was required for the taking of ground water by the district from under the overlying land of the agricultural user being condemned.[76]

Finally, a district court decision addressed the type of conflict at issue in this article — conflict between ground water and surface water use. In *Johnson v. Edwards*,[77] the District Court of Sioux County relied on the Restatement (2d) of Torts Section 858A to hold that a surface water user was entitled to damages when a later ground water use depleted the surface supply and ground water adjacent to Dry Spotted Tail Creek.[78] One of the attorneys for the successful plaintiffs in the case maintains that localized conflicts between ground and surface water users may still be addressed more efficiently by resorting to the courts rather than using the cumbersome procedure found in Section VIII.A. of this Article.[79]

The drastic differences between Nebraska's surface and ground water management schemes have been outlined. The gray area between the two now comes into focus. Borrowing a phrase from the *M.U.D.* dissent: it would now be up to the Nebraska Legislature to draw the difference between the distinction drawn by the majority opinion in *M.U.D.*[80]

IV. LEGISLATIVE PRONOUNCEMENTS

With the supreme court remaining silent, the Nebraska Legislature took some limited steps in integrated management. The legislature passed no laws regulating ground water until 1957. In that session, the legislature provided for the registration of irrigation wells, the spacing of wells and preferences for the use of ground water.[81] Only six years later, a limited recognition of integration was found when the legislature defined ground water and required that a permit be obtained to pump underground water within 50 feet of the bank of a natural stream.[82] It would be twenty-three years before the next true step at integration was taken.

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75. Sorensen v. Lower Niobrara Natural Resources Dist., 221 Neb. 180, 182, 376 N.W.2d 539, 542 (1985).

76. *Sorensen*, 221 Neb. at 195, 376 N.W.2d at 550.

77. No. 2465 (Sioux County Dist. Ct. Jan. 8, 1991) (journal entry of Dist. Judge Robert Moran).

78. Johnson v. Edwards, Case No. 2465 (Sioux County Dist. Ct. Jan. 8, 1991) (journal entry of District Judge Robert Moran).

79. Steven C. Smith, Esq., Remarks at the Natural Resources Law Seminar in Lincoln, Nebraska (July 26, 1996).

80. *M.U.D.*, 179 Neb. at 804, 140 N.W.2d at 639 (Spencer, J., dissenting).

81. NEB. REV. STAT. § 46-602 (Supp. 1995); NEB. REV. STAT. § 46-609 (Reissue 1993); NEB. REV. STAT. § 46-613 (Supp. 1995).

82. NEB. REV. STAT. §§ 46-636 to -637 (Reissue 1993).

A. THE NRD SYSTEM DEVELOPS

In 1975, the legislature passed the Groundwater Management Act.[83] Building upon the framework of the Natural Resources Districts ("NRDs") which had been created by the legislature in 1969 and came into being in 1972, the Act gave the NRDs primary responsibility for managing the quantity of Nebraska's ground water.[84] The Act was later renamed the Groundwater Management and Protection Act to reflect additional responsibilities given to the NRDs in the area of ground water quality protection.[85] The Act allowed the NRDs to set up groundwater "Management" or "Control" areas in which the local boards were provided a number of tools to address ground water quantity issues.[86] The tools became increasingly expansive over the years but include requirements allocating the amount of ground water use, reducing the number of irrigated acres, and mandating best management practices among others.[87] In a similar vein, "Special Protection" or "Management" areas could be formed to regulate water quality issues, primarily nitrate contamination in various parts of the state.[88] Only one NRD, the Upper Republican, has instituted and regulated ground water use in a Control Area to address ground water mining in the area.[89] Another Control Area was ordered by the Department of Water Resources in the Little Blue NRD but was disbanded when water tables in that area rebounded.[90] The basic constitutionality of the Ground Water Management and Protection Act was upheld by the Nebraska Supreme Court in *Bamford v. Upper Republican Natural Resource District*.[91]

The legislature's next step at integration came in 1983 with the passage of L.B. 198.[92] L.B. 198 recognized surface water rights for both incidental and intentional ground water recharge resulting from surface water storage, diversion and transportation.[93] In effect, seep-

83. Ground Water Management Act, L.B. 577, 84th Leg., 1st Sess., 1975 Neb. Laws 1145 (amended in 1981 to 1986, 1993 and presently codified at NEB. REV. STAT. § 46-656 to -674.20).

84. *Id.*

85. Nebraska Ground Water Management and Protection Act, NEB. REV. STAT. §§ 46-656 to -674.20 (Reissue 1993).

86. NEB. REV. STAT. §§ 46-658, -673.05 to -673.14.

87. NEB. REV. STAT. § 46-666.

88. NEB. REV. STAT. §§ 46-673.05 to -674.20.

89. For a comprehensive discussion of the Control Area established in the Upper Republican N.R.D., see Bamford v. Upper Republican Natural Resources Dist., 245 Neb. 299, 309-12, 512 N.W.2d 642, 649-51 (1994).

90. State of Nebraska Department of Water Resources, Order Granting a Request to Create a Ground Water Control Area (January 2, 1979); Order of Dissolution of Ground Water Control Area (December 22, 1993).

91. *Bamford*, 245 Neb. at 312, 512 N.W.2d at 651.

92. L.B. 198, 88th Leg., 1st Sess., 1983 Neb. Laws 526 (repealed 1989).

93. *Id.*

age from surface irrigation projects, which had found its way into the underground aquifer, was given leakage recognition as surface water by L.B. 198. The bill originally allowed project operators who incidentally recharged aquifers to charge a fee for ground water irrigation withdrawn from such stored water.[94] This authority was repealed in 1989.[95] The scheme was found to be constitutional in *In re Application U-2*[96] in response to a takings challenge, among others.[97]

B. Municipalities Enter the Mix

The next step towards integration was taken at the behest of Nebraska municipalities which had become increasingly concerned about their rights to induced recharge for their well fields. With the population of Nebraska shifting to cities such as Omaha, Lincoln, Grand Island and Kearney, these municipalities were increasingly investing in expensive well fields located adjacent to the Platte River.[98] Understandably insecure in their reliance on *M.U.D.* as the source of their water rights to recharge these well fields, the municipalities looked to the legislature.

The search focused originally on the instream flow laws passed in 1984.[99] These laws recognized an instream, rather than a diverted, use of water for fish, wildlife and recreation.[100] Under the instream flow scheme, the Nebraska Game and Parks Commission and the natural resources districts were allowed to apply for such a right that would be administered in the same fashion as a diversionary right. Instream flow rights were found to be constitutional by the Nebraska Supreme Court in *In re Applications A-16642*.[101] This challenge focused mainly on the argument that instream flow rights violated the

94. *Id.*

95. L.B. 45, 91st Leg., 1st Sess., 1989 Neb. Laws 231 (amended sections 33-105, 46-295, -2,100, -2,101, -2,102 of Neb. Rev. Stat.).

96. 226 Neb. 594, 413 N.W.2d 290 (1987).

97. In re Application U-2, 226 Neb. 594, 606-07, 413 N.W.2d 290, 298-99 (1987).

98. *See* Metropolitan Utils. Dist. v. Twin Platte Natural Resources Dist., 250 Neb. 442, 550 N.W.2d 907 (1996) (indicating M.U.D.'s attempt to recharge its Platte River well field); City of Lincoln v. Twin Platte Natural Resources Dist., 250 Neb. 452, 551 N.W.2d 6 (1996) (concerning Lincoln's application to recharge it's Ashland Platte River well field). *See generally* L. Kent Wolgamott, *Future Control of Water Resources*, in Flat Water: A History of Nebraska and Its Water 249 (Conservation and Survey Division, Institute of Agriculture and Natural Resources, University of Nebraska-Lincoln. Resource Report No. 12, March 1993) (describing the municipalities' efforts to supply water) [hereinafter Wolgamott].

99. Neb. Rev. Stat. §§ 46-2,107 to -2,119. (Reissue 1993).

100. *Id.*

101. 236 Neb. 671, 463 N.W.2d 591 (1990).

Nebraska constitutional provisions dealing with the right to divert water.[102]

The municipalities reasoned that they could fit naturally into the instream flow scheme and drafted L.B. 306, introduced in the 1991 session.[103] Under L.B. 306, public water suppliers were added to the list of potential holders of instream flow rights, while "public water supply" was added to fish, wildlife and recreation as an accepted purpose of an instream flow.[104] The bill also contained a policy statement that the legislature acknowledges an interrelated ground and surface water system that "may need to be managed differently from either ground water or surface water. . . ."[105] L.B. 306 failed to pass to final reading in the 1992 session.[106]

The 1992 session also saw the introduction of L.B. 889.[107] This bill may have been the first direct effort at integrated management introduced in the Nebraska Legislature. L.B. 889 was a product of a Natural Resources Commission Study in 1986.[108] It basically added integrated management of ground and surface water as one of the tools a NRD could use to manage water within either its district or a neighboring one.[109] By the time it was introduced, however, it had the support of virtually no interested groups. The only group appearing as a proponent at the required public hearing was the Nebraska Audubon Council.[110] Thus, L.B. 889 withered on the vine.

L.B. 306 was substantially rewritten as L.B. 301 and came roaring back in 1993.[111] During the 1993 session, the entire approach of the bill shifted. Rather than using the instream flow scheme, the bill followed the traditional appropriation approach. Eventually passing, the bill allowed municipalities to appropriate surface water to provide induced ground water recharge for their "public water supplier" wells.[112] Municipalities quickly sought to take advantage of the law, setting up a land office rush at the Department of Water Resources ("DWR"). Applications from M.U.D. and the City of Grand Island

102. *In re* Application A-16642, 236 Neb. 671, 674-75, 463 N.W.2d 591, 596-97 (1990).

103. L.B. 306, Neb. Unicameral, 92d Leg., 1st Sess. (1992) [hereinafter L.B. 306].

104. *Id.* at 6.

105. *Id.* at 3.

106. *Id.* at 1.

107. L.B. 889, Neb. Unicameral, 92d Leg., 2d Sess. (1992) [hereinafter L.B. 889].

108. Telephone Interview with Jim Cook, Legal Counsel, Natural Resources Commission (August 13, 1996).

109. L.B. 889.

110. *Public Hearing on L.B. 889*, Neb. Unicameral, 92d Leg., 2d Sess. 30-36 (1992).

111. L.B. 301, 93rd Leg., 1st Sess., 1993 Neb. Laws 1304 (codified as amended in scattered sections of 46 NEB. REV. STAT.) [hereinafter L.B. 301].

112. L.B. 301, *supra* note 11, at § 3.

were couriered to DWR before the office even opened on September 9, 1993, the day the law went into effect.[113]

Also offered in the 1993 Session was L.B. 751, introduced by Senator Chris Beutler.[114] The bill's purpose was to alert future ground and surface water users that they may be treated differently under new integrated management legislation.[115] Hotly debated in front of the Natural Resources Committee, the bill failed to advance to the floor of the legislature.[116] However, Senator Beutler's point was not lost on the legislature: integrated management was an issue that was not going to go away.

C. The Sea Change

L.B. 306 was the most direct pronouncement by the legislature on the relationship between ground and surface water. Clearly, if surface water could be appropriated by a municipality to recharge its "ground water" wells, the water must be interrelated. However, L.B. 306 was less about science than about politics. The hydrologic relationship, at least for the existing M.U.D. wells which sought to take advantage of the law, had already been established much earlier as recognized in the Supreme Court's *M.U.D.* holding. It was the political relationships that were shifting. As noted above, the shifting population in Nebraska and redistricting following each census brought increasing clout to municipal delegations from Omaha and Lincoln to the detriment of rural Nebraska representation.[117] The legislature's Public Works Committee, which had handled most of the water-related bills, had been chaired for years by Senator Loran Schmitt, a strong advocate of water development.[118] In 1987, the legislature was reorganized with the formation of the Natural Resources Committee which then assumed primary responsibility in this area.[119] Senator Schmitt chaired this committee until 1990, but was replaced in his direct role as Chair by Senator Rod Johnson, a farmer from Harvard, Nebraska who served for two years.[120] However, Senator Johnson left

113. Telephone Interview with Don Blankenau, Assistant Director and Legal Counsel, Nebraska Department of Water Resources (August 13, 1996).

114. L.B. 751, Neb. Unicameral, 93rd Leg., 1st Sess. (1993) [hereinafter L.B. 751].

115. L.B. 751, *supra* note 114.

116. *Hearing on L.B. 751 Before the Comm. on Natural Resources*, Neb. Unicameral, 93rd Leg., 1st Sess. 12-13, 21-23, 39 (1993).

117. Wolgamott, *supra* note 98, at 249.

118. Roster, Neb. Unicameral, 88th Leg., 1st Sess. 5 (1983); Roster, Neb. Unicameral, 89th Leg., 1st Sess. 5 (1984); Roster, Neb. Unicameral, 90th Leg., 1st Sess. 5 (1985); Roster, Neb. Unicameral, 89th Leg., 2d Sess. 5 (1986) (Senator Schmitt chaired the Public Works Committee from 1983 to 1986).

119. Roster, Neb. Unicameral, 90th Leg., 1st Sess. 5 (1987).

120. *Id.*, Roster, Neb. Unicameral, 90th Leg., 2nd Sess. 5 (1988); Roster, Neb. Unicameral, 91st Leg., 1st Sess. 5 (1989); Roster, Neb. Unicameral, 91st Leg., 2nd Sess. 5

the body in 1992 to run for the Public Service Commission. The sea change took place in 1993 with the election of Senator Beutler of Lincoln as chair of the Natural Resources Committee.[121] Few would dispute that Senator Beutler's intellectual passion for addressing what he perceived as weaknesses in Nebraska water law played an important role in the passage of L.B. 306. Senator Beutler's role in the coming debate over integrated management would be even more pronounced.

V. THE GOVERNOR'S NEBRASKA WATER COUNCIL

Governor Ben Nelson was first elected in 1990 and his administration concentrated on the three "E's" — education, economic development, and the environment.[122] By 1993, Senator Beutler chaired the Natural Resources Committee from his district in central Lincoln.[123] While these two would be key players in the early discussions of integrated management, another player was not a person, but a state.

A. KANSAS FLEXES IT MUSCLE

The State of Kansas, Nebraska's southern neighbor, had been agitating for several years regarding rights to water under the Republican River Compact.[124] The Compact was signed in 1942 by three states — Nebraska, Colorado and Kansas — and approved by the United States Congress in 1943.[125] The Compact, considered by few to be clear and unambiguous, was further muddled by the date of its inception. In 1942, some diversion projects on the Republican River and its tributaries were already in place. There was some understanding about the amounts of water diverted from the Republican. However, the area had not yet felt the impact of ground water development to come in most areas of the Republican watershed.

The Compact was based upon the amount of virgin water supply in the Republican River watershed. To further complicate matters, early records of the compact deliberators concerning the formula for allocating the amount of virgin water supply (if there ever was a formula) have been lost in the mists of time.[126] Kansas began ques-

(1990); ROSTER, Neb. Unicameral, 92nd Leg., 1st Sess. 5 (1991); ROSTER, Neb. Unicameral, 92nd Leg., 2nd Sess. 5 (1992).

121. ROSTER, Neb. Unicameral, 93rd Leg., 1st Sess. 5 (1993).

122. *State Needs Cooperation*, OMAHA WORLD-HERALD, September 13, 1991, at 11.

123. ROSTER, Neb. Unicameral, 93rd Leg., 1st Sess. 5 (1993).

124. Telephone Interview with Don Blankenau, *supra* note 113.

125. NEB. REV. STAT. Appendix § 1-106 (Reissue 1995) (Republican River Compact).

126. Telephone Interview with Don Blankenau, Assistant Director and Legal Counsel, Nebraska Department of Water Resources (August 21, 1996).

tioning whether Nebraska was providing its proper allocation under the Compact at the annual compact meetings. As early as the 1970's, the questions turned to arguments in the 1980's; the minutes of the Compact meetings of the 1990's first reflect Kansas' threats to sue.[127] Most of Kansas' arguments were based upon what they perceived were problems arising from massive ground water development in Nebraska. It was not even clear, at least from Nebraska's position, that ground water was to be included in the Compact.

Kansas' legal position was strengthened by a United States Supreme Court Special Master's decision in Kansas' dispute with Colorado under the Arkansas River Compact.[128] The Special Master decision held that ground water was to be included in the Arkansas River Compact.[129] This decision was affirmed by an unanimous Supreme Court on May 15, 1995.[130] The liability phase of that decision ruled that Colorado ground water wells located in the Arkansas River alluvial valley had caused material depletions in the amount of flow in the Arkansas River available to Kansas and thereby violated the Compact.[131] The comparisons between the language in the Arkansas and Republican River Compacts are not direct. However, Kansas had begun to turn up the heat on Nebraska concerning the use of ground water in the Republican watershed. It was widely rumored that any monetary damages received by Kansas from Colorado might also find their way into funding litigation against Nebraska under the Republican River Compact.

B. The Debate Begins

Although Governor Nelson never publicly stated so, some response to Kansas' arguments was needed to head off impending litigation. In response to the recent passage of L.B. 306, Governor Nelson issued Executive Order No. 93-4, forming the Governor's Nebraska Water Council on June 7, 1993.[132] The Council was comprised of representatives from various groups with a stake in the debate — state government, the University of Nebraska, natural resources districts, federal agencies, municipalities and production agriculture.[133] In re-

127. Telephone Interview with Don Blankenau, *supra* note 113.
128. Kansas v. Colorado, 514 U.S. 1733 (1995).
129. Kansas, 514 U.S. at 1738-39.
130. *Id.* at 1745.
131. *Id.* at 1739.
132. Exec. Order No. 93-4 (June 7, 1993) (Governor E. Benjamin Nelson).
133. Paul Hammel, *New Committee Will Study Water Laws*, Omaha World- Herald, June 9, 1993, at 17 [hereinafter Hammel]. The Governor originally appointed the following: Co-chair, Senator Chris Beutler, Chair of Legislature's Natural Resources Commission, Lincoln; Co-chair Director J. Michael Jess, Department of Water Resources, Lincoln; Senator Janis McKenzie, Harvard; Senator Joyce Hillman, Gering;

sponse to criticism that ground water irrigators were slighted in the selection of Council members, Governor Nelson later appointed to the Council Bob Hilger, a David City farmer, and President of Nebraskans First.[134] Nebraskans First was an aggressive, newly formed group of ground water irrigators that was organized as a direct response to the debate over municipal water rights and integrated management.[135] The Governor appointed Senator Beutler and the Director of the Department of Water Resources, J. Michael Jess, to co-chair the Council.[136] The Council's charge was to "study the hydrologic relationship between ground water and surface water and make specific legislative recommendations, if any, regarding how ground water and surface water in the state might be more efficiently and effectively managed."[137] The Council was eventually critized for exceeding the scope of this broad charge. However, this criticism produced very little smoke, and no fire.

The Council aggressively discussed the issue of integrated management through a series of educational meetings, beginning June 25, 1993.[138] The meetings moved from education to testimony from various interested parties and occasionally were held outside of Lincoln.[139] The debate then began. Early on, the discussion from non-

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Senator Curt Bromm, Wahoo; Clayton Lukow, farmer, Holstein; Rob Raun, former state agriculture director, farmer, Minden; Arnie Stutham, Nebraska Pork Producers, Platte Center; Ron Milner, manager, Upper Republican NRD, Imperial; Ron Bishop, manager, Central Platte NRD, Grand Island; Richard Harnsberger, University of Nebraska Law Professor, Lincoln; Dave Sands, Nebraska Audubon Society, Lincoln; Lynn Rex, executive director, League of Nebraska Municipalities, Lincoln; Bryce Neidig, Nebraska Farm Bureau, Madison; Anne Mathern, University of Nebraska-Lincoln Conservation and Survey Division, Lincoln; Bob Kutz, U.S. Bureau of Reclamation, Grand Island; Jim Cook, legal counsel, Nebraska Natural Resources Commission, Lincoln; Bill Head, governor's policy research division, Lincoln; Steve Schafer, state budget office, Lincoln; Andy Jensen, Nebraska Corn Growers, Aurora; Pat Madsen, Omaha Tribe, Macy; Tom Wurtz, Metropolitan Utilities District, Omaha; John Hansen, Nebraska Farmers Union, Tilden; Lincoln Mayor Mike Johanns, Lincoln. (Senator Bob Wickersham, Harrison, and Vince Shay, The Nature Conservancy, Omaha, were appointed between the first and second meeting. A few members also left the Council during its existence.). *Id.*

134. Letter from Bob Higler, President, Nebraskans First, to J. Michael Jess, Director, Department of Water Resources (May 4, 1994) (on file with Department of Water Resources). In the letter, Bob Hilger formally accepted the Water Council appointment. *Id.*

135. BRAD RUNDQUIST, *Nebraskans First: Advocacy for Conservation and Groundwater Users*, *in* FLAT WATER: A HISTORY OF NEBRASKA AND ITS WATER 237 (Conservation and Survey Division, Institute of Agriculture and Natural Resources, University of Nebraska-Lincoln, Resource Report No. 12, March, 1993).

136. Hammel, *supra* note 133, at 17.

137. Exec. Order No. 93-4 (June 7, 1993) (Governor E. Benjamin Nelson).

138. NEBRASKA WATER COUNCIL, INTERIM REPORT TO GOVERNOR E. BENJAMIN NELSON 5-6 (December, 1994) [hereinafter NEBRASKA WATER COUNCIL].

139. June 25, 1993, Lincoln; July 20, 1993, Grand Island; August 27, 1993, Holdrege; October 6, 1993, Lincoln; November 8, 1993, Lincoln; December 14, 1993, Lincoln; May 12, 1994, Grand Island; July 15, 1994, Lincoln; September 14, 1994, Lincoln;

production agriculture members was clearly in favor of taking aggressive steps to institute some manner of integrative management. The representatives of farmers and ranchers favored a more deliberate approach. At least one member, Nebraskans First President Bob Hilger, steadfastly maintained that no problem existed with current Nebraska ground water laws and the Council was debating a crisis that did not exist.[140] To many observers, the Council's seemingly endless "discussions" about the issue of integrated management began to be a waste of time.

C. Sometimes, Debates Lead to Drafting

However, it was the deliberativeness of the Council which led to its ultimate success. The Council began drafting legislation proposals while continuing to hear the charge that the Council's mandate did not include the drafting of any proposed legislation. Council members Ron Milner, the Upper Republican NRD Manager, and Ron Bishop, the Central Platte NRD Manager, were the first to put pen to paper in a drafting effort.[141] The proposal was unveiled at a Council meeting in November 8, 1993; however, the draft never seemed to receive its due credit as a starting point for discussions.[142] After being debated at one meeting, the Bishop/Milner draft was discussed very little.

It was not until the May 12, 1994, Council meeting that the body voted on the question of whether integrated management was an issue "worthy of resolution."[143] The Council also voted at this meeting to appoint a Drafting Committee.[144] The Committee was composed of Council Member and Legal Counsel to the Natural Resources Commission, Jim Cook; Natural Resources Committee Legal Counsel, Nate Donovan; Assistant Director and Department of Water Resources ("DWR") Legal Counsel, Don Blankenau; and the author of this article, a Lincoln attorney in private practice.[145] The Committee was assisted mainly by the following Council members: Senator Curt Bromm of Wahoo; Senator Bob Wickersham of Harrison; Holstein

October 26, 1994, Lincoln; November 23, 1994, Lincoln. *See* Nebraska Water Council, *supra* note 138, at 5-6.

140. *Public Hearing on L.B. 108*, Neb. Unicameral, 94th Leg., 1st Sess. 35 (1994) (testimony of Bob Hilger, Water Council member, stating that "Nebraska is not experiencing a water crisis.").

141. Minutes of the Governor's Nebraska Water Council Meeting (November 8, 1993).

142. *Id.*

143. Nebraska Water Council, *supra* note 138, at 7.

144. *Id.*

145. Minutes of Governor's Nebraska Water Council Meeting (May 12, 1994); *Draft Conjunctive Use Water Bill Expected This Fall*, Nebraska Farmer, September, 1994, at 80-81.

farmer Clayton Lukow; MUD Legal Counsel Tom Wurtz; and Bishop and Milner.

The Council's deliberations did not gain momentum until the initial work of the Drafting Committee was first debated during a meeting on July 15, 1994. The Committee's draft focused on building an integrated management scheme based upon the Nebraska Ground Water Management and Protection Act. Initially the Council appeared to endorse at least one idea not specifically related to integrated management — the merger of Special Protection, Management and Control Areas under the Act into one area simply called "Management" Areas. By building on the Ground Water Management and Protection Act, the Council was able to endorse the merging of these areas with minimum controversy.

Using the Act as the building block also helped maintain local control, arguably the element most essential to pass any integrated management legislation in Nebraska. If any member of the Water Council ever said publicly at a meeting that maintaining local control of ground water resources was not paramount, this author certainly never heard this Nebraska heresy. The relative success of ground water management by the local natural resources districts was balanced by the perceived lack of political will by some boards to address local problems. On the other hand, one of the most vocal Council members was Ron Milner of the Upper Republican NRD which had aggressively been allocating the use of ground water in the district since 1977. Milner's outspoken support of adding integrated management to the tools of local NRD boards was crucial to its acceptance by the rest of the Council.

The Water Council's bill, in its early form, maintained the NRD system as the front line in addressing integrated management. The scheme, as proposed by the Drafting Committee, gave the NRDs the initial opportunity to designate a management area and adopt controls for the integrated management of ground and surface water. The state was then given oversight authority with DWR designing an action plan for surface water. At the Council's July 15, 1994, meeting it was determined that "NRD's should have the initial and primary responsibility with State involvement for arbitration and appeals process[es]."[146] Only Bob Hilger voted against proceeding with the Drafting Committee's work at this meeting.[147]

The spark at the next Council meeting, on September 14, 1994, was provided by Wyoming State Engineer Gordon Fassett. Fassett proposed a novel solution to address Wyoming's responsibilities for

146. Minutes of the Governor's Nebraska Water Council Meeting (July 15, 1994).
147. *Id.*

providing water for fish and wildlife habitat in the Platte River's Great Bend Region in Central Nebraska. The concern behind the proposal was a perceived lack of assurance that Platte River water would reach the habitat because of ground water development in Nebraska. Fassett's controversial solution involved Wyoming drilling ground water wells into Wyoming-owned land in or adjacent to the central Platte in Nebraska, and pumping that water into the river to satisfy federal concerns.[148] This solution, which Fassett related to the author to be somewhat "tongue-in-cheek," may have prompted the Council to debate more thoroughly the Drafting Committee proposal before them.[149] By the end of this meeting, the Council voted to have the Committee prepare a draft bill and report and to prepare for hearings of the Natural Resources Committee across the state.[150]

The Committee's work was also debated at the October 26, 1994, meeting. Much of the debate regarding the NRD-based draft was on two important issues: the role of state oversight and whether a "grandfathering" provision should be included. The term "grandfathering" is as much a misnomer as "conjunctive use." In its simplest sense, "grandfathering" means that a new law can never regulate those already engaging in the activity prior to the law taking effect. It was argued that because much of the irrigable land in the state was already in production, a pure "grandfathering" scheme would never accomplish the goals of any new law. The issues of state oversight and the grandfather clause were not reconciled until the integrated management scheme proposed by the Council made it to the Nebraska Legislature. In fact, the state's role in the process was not finalized until the last hours of debate in the legislature. At the October meeting, the Council agreed at the behest of farm groups to put off a final decision on the legislation and report being drafted until the November 23rd meeting.[151]

The stage was now set for the final Water Council meeting on the proposed bill and report. Responding to fears from agricultural groups that an integrated management bill was being railroaded through the Council to the legislature; Natural Resources Committee Chair Beutler agreed to introduce, but not to attempt to advance, the bill in the 1995 legislative session. With this agreement in place, the Nebraska Water Council voted unanimously to send the draft bill and

148. James Allen Flanery, *Wyoming Might Dig Wells Near Kearney*, OMAHA WORLD-HERALD, September 22, 1994, at 23.

149. Interview with Jeff Fassett, Wyoming State Engineer, in Lincoln, Nebraska (September 14, 1994).

150. Minutes of the Governor's Nebraska Water Council Meeting (Sept. 14, 1994).

151. Minutes of the Governor's Nebraska Water Council Meeting (Oct. 26, 1994).

interim report to the Governor.[152] The draft legislation was endorsed by the Council "as an appropriate starting point for the legislature and the Governor's consideration."[153] The Council also suggested a hearing schedule on the legislation in front of the legislature's Natural Resources Committee and offered to continue to serve at the Governor's pleasure in response to public and legislative input.

VI. THE 1995 LEGISLATIVE SESSION AND THE RETURN OF THE GOVERNOR'S WATER COUNCIL

When the work of the Water Council was finished, the Natural Resources Committee held five hearings across the state and the Council's draft legislation was put into final bill form as L.B. 108.[154] L.B. 108 was introduced on the second day of the 93rd Legislative Session by the Natural Resources Committee.[155] True to his word, Senator Beutler did not attempt to move L.B. 108 in 1995. The big event of the session was the required public hearing in front of the Committee, held on February 23, 1995. The hearing was held in front of an over-capacity crowd. The entire spectrum of opinion regarding L.B. 108 was offered, including many specific concerns about state authority and the treatment of existing wells. Many argued that new integrated management law was not needed because there was no crisis.[156]

A. GAMES AND PARKS INSTREAM FLOW APPLICATIONS DARKEN THE HORIZON

The first session of the 93rd Legislature did see the passage of several water-related bills, including L.B. 871.[157] Among a laundry list of other issues, L.B. 871 delayed until January 1, 1997, most new surface water appropriations in order for the Legislature to consider the possible legal relationship between ground and surface water.[158] The delay provision of the bill was aimed at five applications filed by the Nebraska Game and Parks Commission for instream flows in a 222 mile stretch of the Platte River from the J-2 Return near Lexing-

152. *Id.*

153. NEBRASKA WATER COUNCIL, *supra* note 138, at 7.

154. L.B. 108, Neb. Unicameral, 94th Leg., 1st Sess. (1995), 1996 Neb. Laws 46 (codified as amended in scattered sections of 2 and 46 of NEB. REV. STAT.) [hereinafter L.B. 108].

155. *Id.*

156. *Public Hearing on L.B. 108*, Neb. Unicameral, 94th Leg., 1st Sess. 35 (1994) (testimony of Bob Hilger, Water Council member stating that "Nebraska is not experiencing a water crisis.").

157. L.B. 871, 94th Leg., 1st Sess., 1995 Neb. Laws 1265 (codified as amended in scattered sections of 46 NEB. REV. STAT.) [hereinafter L.B. 871].

158. *Id.*

ton to the Platte's mouth.[159] The size and scope of Game and Parks Applications created bitter opposition by agricultural groups, many NRDs, irrigation districts and the public power industry and threatened the future of L.B. 108. Many of the opponents of the applications believed that L.B. 108 would be a vehicle to restrict ground water use in the Platte River Valley if the applications were approved.

At the close of the 1995 Legislative Session it became apparent that there was still much work to be done. Issues such as the regulation of existing wells and possible compensation to affected users, the role of state oversight, and increasingly, the impact of the Game and Parks instream applications, were still largely unresolved. The Natural Resources Committee again held public hearings. Although its interim report and draft legislation had been submitted to Governor Nelson in December 1994, the Governor's Water Council was pressed back into service and met twice with members of the Natural Resources Committee.

At the first meeting between the Water Council and the Natural Resources Committee on November 31, 1995, representatives of NRDs and agricultural groups came forward with specific amendment proposals dealing with existing wells, compensation for affected ground water users, the role of state authority, and the rights of instream flow holders. Water Council co-chairs announced that the amendments would not be voted on until the December meeting and lamented the fact that only 17 of the Council's 28 members attended the meeting.[160]

B. The Council Reaches Consenus

At the final Water Council meeting on December 21, 1995, Governor Nelson appeared to report that he had asked the Game and Parks Commission to "withdraw," "delay" or "reconsider" their still pending applications.[161] Whatever it was that the Governor had asked the Commission to do never happened. The uncertainty regarding the rights of instream flow holders versus irrigation wells became the largest point of contention among many from the agricultural community. In a series of meetings among agricultural, NRD, public power and irrigation interests, the Nebraska Farm Bureau offered the possible solution of specifically eliminating the holders of instream flow rights from being considered as surface water appropriators under L.B. 108.

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159. *Id.*

160. Paul Hammel, *Farm Groups Take Aim at Water Plan*, Omaha World-Herald, December 1, 1995, at 13, 16.

161. *Water Council Support Idea of Regulations*, Lincoln J. Star, December 21, 1995 at 1B, 7B.

The Farm Bureau's amendment was first presented at the November Water Council meeting and came up for a vote in December. In spite of strong opposition by Council Member Dave Sands, representative of the Audubon Society, the amendment which eliminated the ability of instream flow holders to be considered as surface water appropriators under L.B. 108 was supported by the Council.[162] In addition, after much debate, the Council finally agreed on the following: (1) language allowing existing wells to be treated differently than new wells in an integrated management area; and (2) language allowing state oversight only after approval by an Integrated Water Management Board consisting of five members of the Natural Resources Commission.[163] The Council did not approve any language regarding compensation for affected ground water users but, rather, asked the legislature to examine the issue. Finally, the Council again voted to endorse the concepts of L.B. 108 on a 15-3 vote. Dissenting were Hilger, Hansen, and Senator Janis McKenzie of Harvard.[164] In a rare unanimous vote, the Council then recommended itself out of existence.

VII. THE 1996 LEGISLATIVE SESSION

The draft endorsed by the Water Council was ready for the 1996 session of the Nebraska Legislature. Amended to track the language approved by the Council, the Natural Resources Committee began debating L.B. 108 in earnest at the start of the session. Steadfastly refusing to concede to critics' demands to hold another public hearing on the bill, Senator Beutler's Committee met in executive session three times to discuss L.B. 108.[165] The Chair needed five of its eight members to vote the bill out of Committee. The bill could have been pulled to the floor by a vote of 25 members of the full body. However, with a heady agenda full of hot button topics, such as property taxes and government reorganization, it seemed unlikely the full body would have included another controversial topic, particularly one lacking Committee support.

A. Natural Resources Committee Approval

L.B. 108's passage out of the Committee was tenuous. Senator Beutler could likely count on four votes: his own, Senator Mike Avery of Gretna, Senator Priester of Omaha, and Senator W. Owen Elmer of

162. *Id.*
163. *Id.* Three to be appointed by the Governor and two by the Commission. *Id.*
164. *Water Council Support Idea of Regulations*, Lincoln J. Star, December 21, 1995 at 1B, 7B.
165. Telephone Interview with Nathan Donovan, Legal Counsel, Natural Resources Committee (August 12, 1996).

Indianola in the Republican Valley, a long-time supporter of some manner of integrated management. Of the remaining Committee members, Senator Jim Jones of Eddyville was a staunch opponent and Senator McKenzie had voted against endorsing the draft legislation at the final Water Council meeting. Senator Ardyce Bohlke of Hastings and Senator Bromm were the two possibilities for the elusive fifth vote.[166] In the end, while acknowledging that he might take political heat for it, Senator Bromm provided the fifth vote, and the amended L.B. 108 containing the final Water Council amendments was sent to the full body on March 7, 1996.[167] As Senator Beutler's priority bill, there was still time for the bill to pass in the session, but not much time. With other controversial topics still being debated in an ambitious session, any delay could darken the prospects of passage. A delay loomed on the horizon in the tall, solid form of Senator Merton "Cap" Dierks from Ewing.

B. Senator Dierks' Filibuster Threatens Passage

Senator Dierks' district stretched across north central Nebraska, including Holt County, where the first center pivot in Nebraska and many others that followed, turned that area into a oasis of circles if viewed from the air. During first round debate, Senator Dierks began a filibuster of L.B. 108.[168] A recent rules change allows Senators to close debate after eight hours.[169] Its goal was to end filibusters, but its practical effect may be the opposite. It is much easier to sustain a filibuster for eight hours than it is indefinitely. Senator Dierks began to offer a series of amendments and to talk the bill to death in the first round, citing concerns of opening the door on future restrictions of well water for farm use. He was supported in his effort by a number of farm groups including the Nebraska Farmers Union, the Nebraska Grange, the Nebraska Farmers Organization, the Nebraska League of Rural Voters, the American Corn Growers of Nebraska, and the Ne-

166. The bill was problematic for both of these members who came from districts with large numbers of ground water users, and, Nebraskans First members. One of Senator Bromm's own constituents was Nebraskans First President Bob Hilger.

167. Paul Hammel, *Controversial Water Proposal Sent to Floor*, Omaha World-Herald, March 8, 1996, at 1, 15.

168. Floor Debate on L.B. 108, Neb. Unicameral, 94th Leg., 2d Sess. 12796 (1996) (statement of Sen. Dierks). Senator Dierks stated, "I am willing to take the time to keep it in front of us for eight hours. That's fair notice to you, Senator Beutler, and I will do the same on the select file." *Id.* (statement of Sen. Dierks).

169. Rules of the Nebraska Unicameral Legislature, 94th Leg., 2d Sess., Rule 7, § 10 (1996).

braska Wheat Growers.[170] Nebraskans First maintained their active opposition to L.B. 108 and active support of Senator Dierks' efforts.

L.B. 108 eventually passed the first round after an eight-hour debate spanning almost two weeks.[171] With another eight hours of debate threatened in the waning days of a tough session, the future of the bill in the 1996 session remained in doubt. Debate began again in the second round during an evening session on April 3rd. However, Senators McKenzie and Bohlke in particular, as well as Senators Dierks, Jones, Wickersham, Bromm and Elmer, had been attempting to broker a compromise. The compromise came about during that almost surrealistic evening debate. The three-year old question of the role of state authority was part of the compromise. In order to drop their opposition, Senator Dierks and other opponents agreed to an amendment which restricted the authority of the DWR Director to intervene only in the Republican River Valley until 1999. The amendment also contained a pilot program on integrated management to be conducted for the same river valley with a report due back to the legislature no later than December, 1998. Finally, the compromise included an amendment that, "Neither well registration dates nor appropriation dates shall be a factor in determining whether a management area shall be designated or a joint action plan prepared."[172] Many observers did not quite understand that amendment, Senator Beutler went on record during the debate to make it clear that he did not feel the amendment changed at all what was already the intent of the bill.[173]

With the compromise, Nebraskans First assured that they would drop their opposition to the bill's passage. L.B. 108 moved to final reading on a voice vote, an unprecedented measure for a bill which invoked such controversy.

C. Will it Be Signed?

Although Nebraskans First Executive Director Don Adams, Jr. said his group had "dropped active opposition," the politic winds swirling around L.B. 108 were not completely stilled.[174] The bill quietly passed final reading on the last day of the 1996 session on a vote

170. Leslie Boellstorff, *Move Against Ground Water Bill Fails*, Omaha World-Herald, March 22, 1996, at 15. With regard to the Nebraska Wheat Growers, it is interesting to note that very few wheat operations irrigate with any ground or surface water.

171. *See* Floor Debate on L.B. 108, Neb. Unicameral, 94th Leg., 2d Sess. (1996).

172. Floor Debate on L.B. 108, Neb. Unicameral, 94th Leg., 2d Sess. 15224 (1996); 2 Neb. Leg. J., 94th Leg., 2d Sess. 1868-69 (1996).

173. *Id* at 15195.

174. *Compromise Key in Forwarding Water Bill*, Kearney Hub, April 4, 1996, at 3A.

of 36 ayes, 10 nayes and 3 not present.[175] It was now up to Governor Nelson to sign the bill. However, three days before the bill passed, Nebraska Attorney General Don Stenberg sent a letter to the Governor urging him to veto L.B. 108, citing concerns that the bill would not prevent a Kansas lawsuit and that it would supplant local control.[176] This letter was joined by letters urging a veto from the Nebraska Farmers Union, and, inexplicably, Nebraskans First.[177] Governor Nelson signed the bill the day after passage, citing satisfaction that the bill maintained local control.[178] However, he vetoed the two-year appropriation for funding integrated management staff in the Department of Water Resources.[179] With this inauspicious beginning, integrated management of ground and surface water, at least to the extent found in L.B. 108, became Nebraska law. Now for the question: what form did the most ambitious step to integrating Nebraska's ground and surface water take? For that, we need to analyze the bill in detail.

VIII. ANALYSIS OF L.B. 108

A. THE PROCESS

The first operative part of the bill was a new statement of intent that "Hydrologically connected ground water and surface water may need to be managed differently from unconnected ground water and surface water in order to permit equity among water users and to optimize the beneficial use of interrelated ground water and surface water supplies."[180] Basing the regulatory aspects of the bill on this intent language, the expanded tools of the Natural Resource Districts ("NRDs") are outlined in sections 31 to 34 of the bill; the expanded tools of the Department of Water Resources are outlined in sections 55 to 68. The bill sets out three parallel tracks for the establishment of an integrated management area, dependent on whether an NRD, the Department of Water Resources ("DWR"), or NRD/DWR is to be the

175. Paul Hammel, *Nelson Signs Water Control Bill*, OMAHA WORLD- HERALD, April 13, 1996, at 35.

176. Letter from Don Stenberg, Attorney General of the State of Nebraska, to Governor E. Benjamin Nelson 1-2 (April 8, 1996) (on file at the Governor's Office).

177. Letter from John K. Hansen, President, Nebraska Farmers Union, to Governor E. Benjamin Nelson (April 11, 1996); Letter from Bob Hilger, President, Nebraskans First, to Governor E. Benjamin Nelson (April 11, 1996).

178. Paul Hammel, *Nelson Signs Water-Control Bill*, OMAHA WORLD- HERALD, April 13, 1996, at 35.

179. *Id.* at 43.

180. L.B. 108, § 11(2), 94th Leg., 2d Sess., 1996 Neb. Laws 46, 49 (to be codified as amended at NEB. REV. STAT. § 46-674.20) [hereinafter L.B. 108].

manager.[181] All references to NRD recognize that more than one NRD may be involved in a joint plan in certain areas. As noted above, DWR is given no authority to institute an area except in the Republican River basin until January 1, 1999.[182]

The simple track is if a NRD alone is the manager. A NRD merely prepares a plan and asks the DWR to approve it.[183] If the DWR approves the plan, then the NRD drafts controls to implement the plan and holds a hearing on the plan designation and controls.[184] Finally, a NRD designates an integrated management area and adopts controls.[185]

The two tracks involving the DWR as manager or co-manager set up a labyrinth. Following either track, "the Department of Water Resources makes a preliminary determination that there is a reason to believe that the use of hydrologically connected ground water and surface water resources is contributing to or is in the reasonably foreseeable future likely to contribute to (a) conflicts between ground water users and surface water appropriators, (b) disputes over interstate compacts or decrees, or (c) difficulties fulfilling the provisions of other formal state compacts or agreements. . . ."[186] The bill contains no definition for the term "hydrologically connected ground water and surface water."

In order for the DWR to begin instituting a study to designate an integrated management area, the Director, in addition to the preliminary conflict determination, must find that "the natural resources district or districts in which such use is located have not designated a management area or have not implemented adequate controls to prevent such disputes or difficulties. . . ."[187]

Once a determination of conflict, or potential conflict, has been made from the integrated management area study, and barring no local NRD action, the DWR Director makes a public interest evaluation. In order to decide whether designating a management area or adopting a joint action plan would be in the public interest, the District or the Director shall consider:

> (a) the impacts of the existing or projected diminution or degradation of water resources on (i) surface water appropriators, (ii) ground water users, (iii) public health and safety, (iv)

181. Flow charts showing the three parallel tracts are included in the Appendix. The charts have been prepared by Nebraska Natural Resources Commission Legal Counsel and Water Council Member Jim Cook.

182. L.B. 108, *supra* note 179, at § 55.

183. *Id.* at § 31 (codified as amended at NEB. REV. STAT. § 46-666).

184. *Id.*

185. *Id.*

186. L.B. 108, *supra* note 179, at § 34(2).

187. *Id.* at § 56.

> social, economic, and environmental values in the affected areas or areas, and (v) compliance with state laws, rules, or regulations including, but not limited to, constitutional and statutory preferences in the use of water and interstate compacts or decrees, and (b) whether designation and implementation of a designation of a management area or adoption or implementation of a joint action plan would prevent or alleviate the impact of such diminution or degradation of water resources.[188]

This section also includes the provisions of the compromise regarding well registration dates or appropriation dates, and the exemptions of instream flow appropriations as surface water appropriators in determining whether conflicts exist.[189]

The process is roughly the same under the DWR as manager track. The Director may:

> designate a management area to allow the integrated management . . . or require the district to prepare an action plan, . . . if [it is determined]: (a) That the quantity of surface water resources is being substantially and adversely impacted or is likely to be substantially and adversely impacted in the foreseeable future because of the use of hydrologically connected ground water resources; . . . (c) That designating a management area or requiring preparation of an action plan would mitigate or eliminate the disputes over the interstate compact or decree or the difficulties in fulfilling the provisions of other formal state contracts or agreements; and (d) That designating a management area or requiring preparation of an action plan would be in the public interest.[190]

The public interest criterion are basically the same as under the NRD track.[191]

Under either track involving the DWR directly, the DWR and others conduct a study of the affected area and the DWR prepares a report.[192] Following the report, the DWR then conducts a hearing.[193] Under the NRD track, the NRD then decides whether to proceed, and, if so decides whether to develop a joint action plan with DWR.[194] A hearing is then conducted on the action plan under the NRD track.[195] Finally, the NRD designates a management area, adopts and imple-

188. *Id.* at § 34(9).
189. *Id.* at §§ 34(8), 34(15).
190. *Id.* at § 58(1).
191. L.B. 108, *supra* note 179, at § 58(2).
192. *Id.* at § 56.
193. *Id.* at § 57.
194. *Id.* at § 58.
195. *Id.*

ments an action plan which can be a joint action plan with the surface water portion developed by the DWR.[196]

The process is even more convoluted after the DWR submits its report under the DWR track. First, DWR designates a management area or requires an action plan which is prepared by the DWR, the NRD and surface water project sponsors.[197] A hearing is held by both DWR and the NRD on the action plan, followed by the NRD adopting the ground water action plan and DWR adopting the surface water plan.[198] If the DWR approves the plan, the NRD implements it.[199] If the DWR does not approve an action plan or if the NRD chooses not to prepare one, the decision then goes to the Interrelated Water Review Committee ("IRC") for its review.[200] If the Committee believes an NRD action plan should be adopted, DWR is then allowed to adopt and implement its own action plan.[201] If the Committee does not agree to accept the jurisdiction of the DWR, the NRD can implement its own plan if it prepared one.[202]

B. The Expanded Authorities

The real authorities in this entire process are found in the preparation of the action plan. While it was always maintained during the integrated management debate that surface water use could be regulated under the Act to protect ground water users, most observers realized that this is unlikely to happen. The fact is that the authority given to the NRD to regulate ground water users in order to protect surface water users is much greater than the authority given to the DWR to regulate surface water use. This reality is also imposed by the different legal status of ground and surface water rights in Nebraska, taking into consideration the fact that surface water rights are legally protected property rights.[203] The rights of ground water users reflect the public ownership of ground water as reinforced in the *Bamford* decision.[204]

The authority which an NRD (or the DWR if an NRD fails to act) has to regulate ground water use is as follows:

> (a) [i]t may determine the permissible total withdrawal of ground water for each day, month, or year and allocate such

196. L.B. 108, *supra* note 179, at § 59.
197. *Id.* at § 56.
198. *Id.* at § 57.
199. *Id.* at § 60.
200. *Id.* at § 67. The IRC is made up of the Governor and two members of the Natural Resources Commission who own no real property in the affected area. *Id.*
201. L.B. 108, *supra* note 179, at § 67.
202. *Id.*
203. *See supra* note 27 and accompanying text.
204. *See supra* note 9 and accompanying text.

> withdrawal among the ground water users; (b) [i]t may adopt a system of rotation for use of ground water; (c) [i]t may adopt well-spacing requirements more restrictive than those found in sections 46-609 and 46-651; (d) [i]t may require the installation of devices for measuring ground water withdrawals from water wells; (e) [i]t may adopt a system which requires reduction of irrigated acres pursuant to subsection (2) of section 32 of this act; (f) [i]t may require the use of best management practices; (g) [i]t may require the analysis of water or deep soils for fertilizer and chemical content; (h) [i]t may provide [certain] educational requirements . . .; (i) [i]t may require water quality monitoring and reporting . . .; and (j) [i]t may may adopt and promulgate such other reasonable rules and regulations as are necessary to carry out the purpose for which a management area was designated.[205]

The authorities, or tools, are the same whether an NRD is regulating just for ground water or for integrated management of ground and surface. The recent Nebraska Supreme Court decision in *Wagoner v. Central Platte Natural Resources District*,[206] however, makes it clear that an NRD can only use the tools explicitly provided to it in the Act.[207]

The only additional surface water authority given to the DWR is as follows:

> [DWR may require]: (1) increased monitoring and enforcement of surface water diversion rates and amounts diverted annually; (2) the prohibition or limitation of additional surface water appropriations; (3) requirements for surface water appropriators to apply or utilize reasonable conservation measures or best management practices consistent with the good husbandry and other requirements of section 46-231; or (4) other reasonable restrictions on surface water use that are consistent with the intent of section 11 of this Act and the requirements of section 46-231.[208]

Although the Act does not mention compensation, compensation may be required if any "reasonable restrictions" include the reduction in a surface water appropriation.[209]

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205. L.B. 108, *supra* note 180, at § 31(1) (codified as amended at NEB. REV. STAT. § 46-666).

206. 247 Neb. 233, 526 N.W.2d 422 (1995).

207. Wagoner v. Central Platte Natural Resources Dist., 247 Neb. 233, 241, 526 N.W.2d 422, 428 (1995).

208. L.B. 108, *supra* note 179, at § 60.

209. *Id.*

C. Funding Concerns

In response to funding concerns, the Act also created the Interrelated Water Management Fund for the purpose of funding studies to determine potential conflicts or difficulties fulfilling state compacts or decrees.[210] Prior to L.B. 108's passage, Senator Beutler approached the Nebraska Environmental Trust Fund Chairman inquiring whether the studies under L.B. 108 would be an appropriate recipient of trust funds.[211] With a positive response, the Interrelated Water Management Fund was designed to accept these funds as well as appropriations requested by DWR.[212] However, questions concerning whether Environmental Trust Fund dollars can be used for interrelated hydrologic studies continue to be raised. Studies of this type do not logically appear fundable from the fund's legislative priorities.[213] Recently, however, the Environmental Trust Fund clarified its five year funding priorities to allow funding for activities which are undertaken to understand: (a) The relationship between ground water and surface water; or (b) The management of hydrologically connected sources. [214]

IX. CONCLUSION

Following adoption of the action plan with its tools for integrating the management of ground and surface water, the management of these integrated supplies of water in Nebraska may finally be a reality. Of course, given the somewhat cumbersome and time-consuming procedure found in L.B. 108, any integrated management will be in the distant future. Particularly, if the district or DWR decisions are appealed to the Nebraska Court of Appeals and Nebraska Supreme Court following each stage of the process. Given this time lag, Kansas is uncertain whether it could get relief faster for alleged violations of the Republican River Compact by filing an original action in the United States Supreme Court than by Nebraska using the tools available in L.B. 108. In Kansas' eyes, the answer depends on whether they see a "good faith" effort on the part of the four Nebraska NRDs in the Republican watershed to implement the law to fulfill either an additional agreement or the Compact terms with Kansas.[215] If the De-

210. *Id.* at § 73.
211. Floor Debate on L.B. 108, Neb. Unicameral, 94th Leg., 2d Sess. 15219 (1996).
212. L.B. 108, *supra* note 179, § 73.
213. *See* Nebraska Environmental Trust Fund Act, Neb. Rev. Stat. §§ 81-15,167 to -15,176 (Reissue 1994).
214. *Nebraska Environmental Trust News*, Vol. 17 (Nov. 1996), Page 1: "Trust Board approves grants, clarifies priorities at October 22nd Board meeting."
215. Telephone Interview with DeAnn Hupe Seib, Assistant Legal Counsel to Kansas State Engineer David Pope, August 28, 1996.

partment is required to step in and be the manager under L.B. 108 in the Republican basin, it is likely that Kansas would view Supreme Court relief as the more attractive option.

Surface water rights in Nebraska are still administered under the prior appropriation doctrine. Ground water rights in Nebraska are still regulated by the correlative rights doctrine and increasingly, the Groundwater Management and Protection Act. However, L.B. 108, may now be a vehicle towards partial integration of these two disparate systems. To that end, the passage of L.B. 108 may be viewed as a success. While it is true that the integration of ground and surface water schemes followed a much different path in Nebraska than in other Western states, Nebraska took this step much later and after its ground water irrigators put into production a larger percentage of acres irrigated by ground water than most other states. The debate also did not begin in earnest until after the qualified success of Nebraska's natural resources districts, which are still held up nationwide as a model for maintaining local control of natural resources decisions. With the maintenance of local control being paramount, and the protection of Nebraska's ground water based agricultural economy being the second highest consideration, L.B. 108, as amended by the Water Council at its final meeting, should work to protect both interests.

There are still many unanswered questions regarding integrated management under L.B. 108. Questions still exist concerning the source of funding for hydrologic studies, compensation for affected users, the impact of L.B. 108 on the correlative rights doctrine, as well as endless other topics. However, there were many unanswered questions when the Groundwater Management and Protection Act was passed. These questions will eventually be worked out by the districts, the DWR and the courts. Senator Bromm, possibly the second most influential member of the Natural Resources Committee, has stated that he does not anticipate L.B. 108 being re-examined until these questions begin to be resolved.[216]

Although the DWR could act in this area, the four NRDs and four surface irrigation districts in the Republican River are already looking into using L.B. 108. A coalition of these groups has recommended to the four NRD boards that each of the NRD's seek to form an integrated management area. Wayne Heathers, Manager of the Middle Republican NRD and chair of the Coalition, has stated that a basinwide response to Kansas' allegations under the Republican River Compact "will entail some management of ground water

216. Senator Curt Bromm, "L.B. 108: What Now?", Remarks at Natural Water Resources/Nebraska Association of Natural Resources Districts Workshop, in Kearney, Nebraska (June 4, 1996).

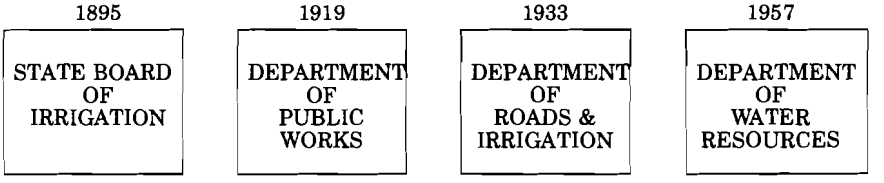
basinwide."[217] With this aggressive response to L.B. 108 from the area of the state with the most to lose, the unanswered questions about L.B. 108 may be answered, sooner, rather than later. With these answers, the State of Nebraska may be able to join its fellow Western states in integrating management of its interrelated ground and surface water supplies.

The long-term debate, not about the term "conjunctive use" but about integrated management, did not end with the passage of L.B. 108. However, L.B. 108 was the greatest step to date. By building upon the Groundwater Management and Protection Act and maintaining local control, L.B. 108 will hopefully be successful in bringing about equity among Nebraska's water users and protecting Nebraska's irrigated agriculture economy.

217. *Republican River NRD May Move Quickly on New Water Law*, NEBRASKA FARMER, at 24, 26 (July 1996). This Coalition also announced plans to file an application in November, 1996, with the Nebraska Environmental Trust Fund for a $3,000,000.00/three year grant under the clarified funding priorities discussed above. *See supra* note 214.

APPENDIX

STATE OF NEBRASKA
HISTORY OF DEPARTMENT OF WATER RESOURCES



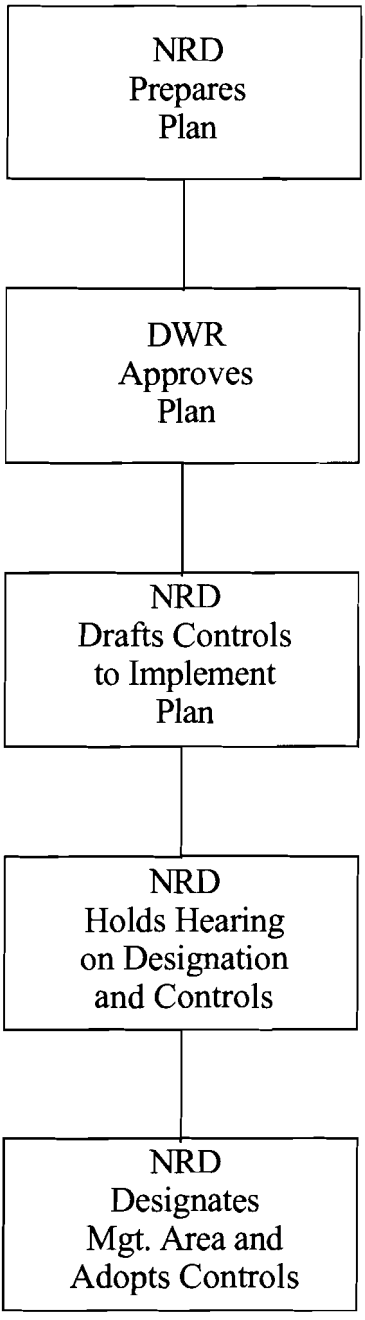
Organized April 24, 1895

Thirty-seventh session of Nebraska Legislature enacted the Civil Administrative Code Bill which put the State Board of Irrigation into the Department of Public Works.

Administered by the Chief of the Bureau of Irrigation, Water Power and Drainage.

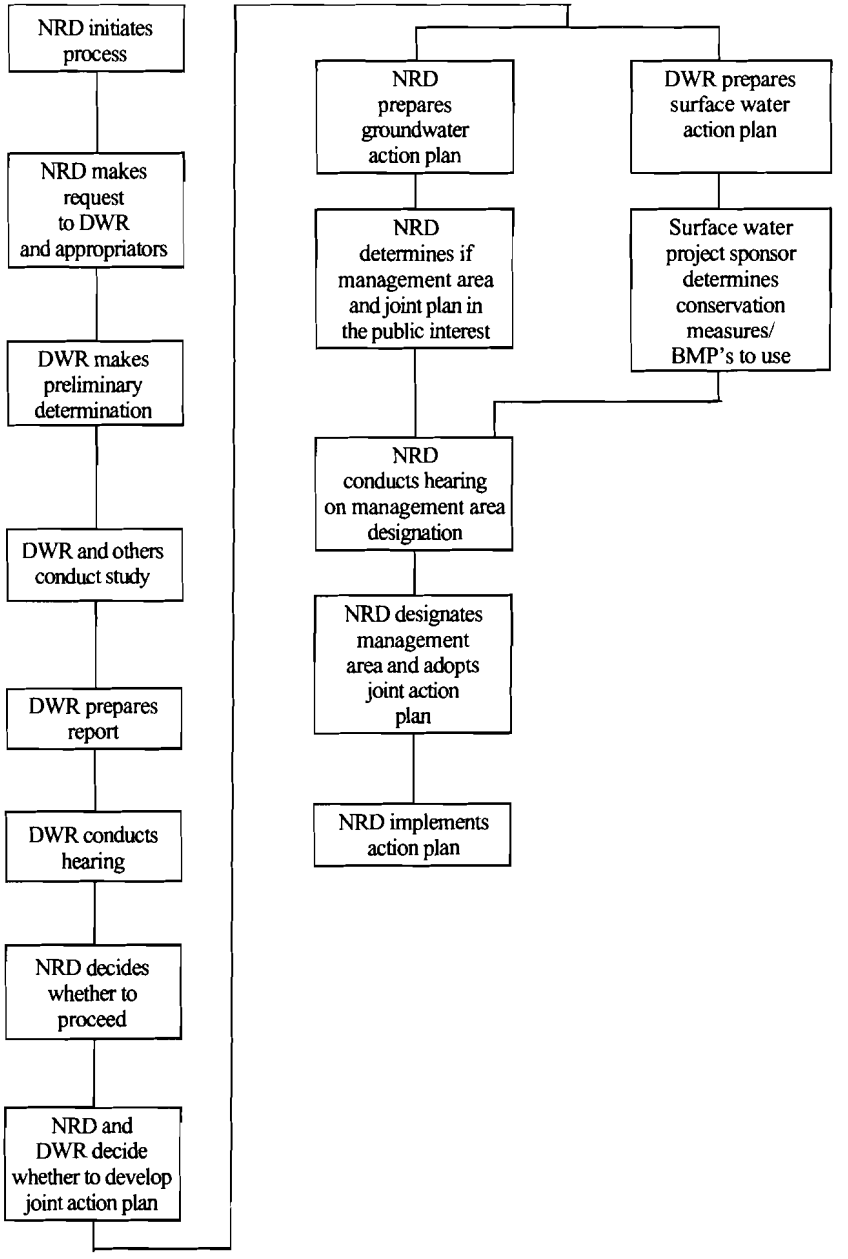
Under an act of the 1957 Legislature, became a separate department on September 20, 1957.

WATER MANAGEMENT AREA DESIGNATION
CURRENT LAW AND EASY WAY UNDER LB 108



NRD DESIGNATION OF MANAGEMENT AREA FOR INTEGRATED MANAGEMENT JOINT NRD AND DWR ACTION PLAN

(Section 46-656.28)



DWR DESIGNATION OF MANAGEMENT AREA FOR INTEGRATED MANAGEMENT
(Sections 46-656.49 to 46-656.60)
(Authority Limited to Disputes Over Interstate Compacts and Decrees and Other Formal State Contracts or Agreements and to Republican River Basin Until January, 1999)