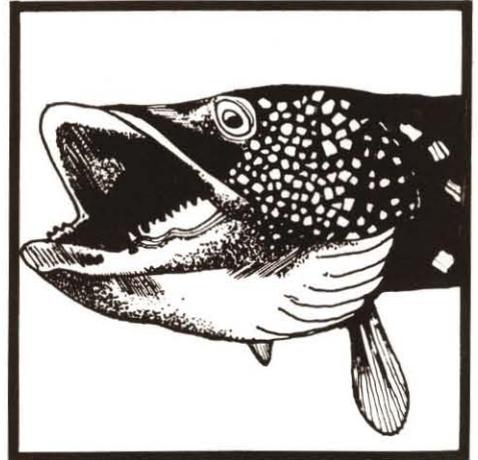


Report# Five  
POLICY ISSUE STUDY  
ON SELECTED  
WATER RIGHTS ISSUES



# RIPARIAN RIGHTS

State Water Planning and Review Process  
Nebraska Natural Resources Commission

**MARCH 1983**



# Public Advisory Board

## State Water Planning and Review Process

NEBRASKA NATURAL RESOURCES COMMISSION · 301 CENTENNIAL MALL SOUTH · P.O. BOX 84876 · LINCOLN, NEBRASKA 68509

The Honorable Robert Kerrey  
Governor, State of Nebraska  
State Capitol, 2nd Floor  
Lincoln, Nebraska 68509

Members of the Nebraska Legislature  
Eighty-Eighth Legislature  
First Session  
State Capitol  
Lincoln, Nebraska 68509

Governor Kerrey and Members of the Legislature:

In accordance with its statutory responsibility under Section 2-3287 R.S. Supp. 1982, the Public Advisory Board has reviewed the report of the Natural Resources Commission entitled "Riparian Rights" and the Commission's recommendations on the alternatives contained in that report. The members of the Public Advisory Board understand the Commission's concerns about registration of riparian rights. However, we disagree with the Commission's conclusion that registration would create more problems than benefits. To the contrary, the Public Advisory Board believes that our water resources cannot be properly planned or administered unless the extent of all claims to those resources is known. At present the extent of riparian claims is not known. We recommend, therefore, that the Legislature adopt and implement Alternative #2: "Legislatively require registration of riparian water right claims with the Nebraska Department of Water Resources, establishing that any other riparian water uses are not legally sanctioned, and making failure to register a forfeiture of any water right claim."

We are not at this time recommending that action on riparian rights go beyond registration of those rights. The registration process, once completed, will provide the state's policy makers with a good information base upon which to decide if adjudication and integration of the riparian claims into the appropriate system should also be accomplished. We do not believe that decision can be properly made unless registration first occurs.

The "Riparian Rights" report identifies and describes a number of subalternatives for Alternative #2. These subalternatives provide the Legislature with different ways of implementing Alternative #2. They relate to: (1) what land qualifies as riparian land; (2) what are valid water uses for purposes of a riparian claim; (3) whether the water must have actually been used at some time in the past; (4) whether such use must have involved a physical diversion of water from the stream; (5) and whether riparian claims for stockwatering purposes ought to be exempted from registration requirements. The Public Advisory Board makes the following recommendations regarding those subalternatives.

**MUNICIPAL**  
Richard Hawes  
Omaha

**DOMESTIC**  
Alfred Gigstad  
Nebraska City

**GROUND WATER IRRIGATION**  
Robert Lowry  
Cairo

**SURFACE WATER IRRIGATION**  
Don Steen, Chairman  
Morrill

**LIVESTOCK PRODUCTION**  
Jack Maddux  
Wauneta

**ENVIRONMENTAL**  
Clayton Lukow  
Holstein

**INDUSTRIAL & COMMERCIAL**  
Vance Anderson  
Hastings

**WILDLIFE, FISH & RECREATION**  
Richard Nisley  
Roca

**1st CONGRESSIONAL DISTRICT**  
William Schlaphoff  
Waverly

**2nd CONGRESSIONAL DISTRICT**  
William Emrich  
Bellevue

**3rd CONGRESSIONAL DISTRICT**  
Roy Stewart  
Newport

Defining Riparian Land. The Public Advisory Board recommends subalternative 2a: "Authorize registration of riparian claims related to land which is legally riparian, i.e., the land borders the natural stream, was severed from the public domain before April 4, 1895, and has not lost riparian status due to subdivision". This subalternative recognizes previously imposed restrictions on what constitutes legally riparian land. To expand the lands eligible for making riparian claims to all those which are physically riparian, as suggested by subalternative 2b, would create claims which do not presently exist and significantly increase the number of claimants in any registration process.

Purpose of use. Although there may be constitutional limits to the extent to which the Legislature can specify valid purposes of use for riparian claims, the Public Advisory Board believes that a narrow definition should be imposed if possible. We recommend, therefore, that subalternative 2d be incorporated in the registration process. That subalternative would authorize registration of riparian claims for domestic, agricultural, and manufacturing purposes only. Those uses are the only ones specifically recognized in the Nebraska Constitution. To allow registration of uses which are not presently eligible for appropriative rights could cause problems in any future integration of those uses into the appropriative rights system.

Actual use requirement. Unlike appropriative rights, riparian rights are not lost by nonuse. However, the Legislature probably could prevent recognition of riparian claims which have not been utilized within some reasonable period of time. The Public Advisory Board does not feel that such action is necessary and recommends therefore the enactment of subalternative 2e: "Authorize registration of riparian claims whether or not water has actually been used in the past".

Physical diversion requirement. Since the Public Advisory Board is recommending subalternative 2d (note explanation above) we do not believe that a physical diversion requirement is necessary. Claims for domestic, agricultural, or manufacturing purposes should be recognized whether they involve a diversion or not.

Stockwatering. Subalternatives 2h and 2i relate to whether stockwatering users ought to be exempted from the registration requirements or be given the option of not registering. The Public Advisory Board recognizes that stockwatering uses may constitute the majority of riparian claims and that requiring their registration will substantially increase the number of claims which are filed. However, if the purposes of registration, i.e. to determine the number and quantity of claims to the resource, are to be implemented, the greatest number of claims should not be excluded from the registration requirements. We recommend, therefore, that neither subalternative 2h or 2i be implemented and that stockwatering users be subject to the same requirements as other riparian claimants.

We hope our recommendations will be helpful to you in your deliberations on this important water policy issue.

Sincerely,



Don Steen  
Chairman

DS:JRC:11

cc: Members of Natural Resources Commission  
Members of Public Advisory Board

**POLICY ISSUE STUDY  
ON  
SELECTED WATER RIGHTS ISSUES**

**STATE WATER PLANNING AND REVIEW PROCESS**

**REPORT #5 RIPARIAN RIGHTS**

**REPORT  
OF THE  
NATURAL RESOURCES COMMISSION  
TO  
GOVERNOR ROBERT KERREY  
AND  
THE MEMBERS OF THE NEBRASKA LEGISLATURE**

**MARCH 1983**

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**PROGRAMS:**

SOIL & WATER CONSERVATION  
WATERSHED PROTECTION  
COMPREHENSIVE PLANNING  
FLOOD PLAIN MANAGEMENT  
DATA BANK  
WATER CONSERVATION FUND  
DEVELOPMENT FUND



**STATE OF NEBRASKA  
NATURAL RESOURCES COMMISSION**

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The Honorable Robert Kerrey  
Governor, State of Nebraska  
State Capitol, 2nd Floor  
Lincoln, Nebraska 68509

Members of the Nebraska Legislature  
Eighty-eighth Nebraska Legislature, First Session  
State Capitol  
Lincoln, Nebraska 68509

Governor Kerrey and Members of the Legislature:

This report entitled "Riparian Rights" has been reviewed and approved by the Natural Resources Commission. It is the fifth report of the Selected Water Rights Issues policy study.

Four policy alternatives related to how riparian rights could be addressed are analyzed in this report. The Commission's recommended course of action is also provided and can be found on the blue pages immediately following the Table of Contents.

It is the hope of the Natural Resources Commission that this report will be helpful in making policy decisions, and, if necessary, statutory changes. The Natural Resources Commission is prepared to answer any further questions you may have.

Sincerely,

A handwritten signature in cursive script that reads "Clinton VonLoggen".

Chairman  
Natural Resources Commission

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# Foreword

This is report number five of the Selected Water Rights Issues Policy Study. Several water policy issue studies are being conducted by the Natural Resources Commission under the State Water Planning and Review Process. This report addresses riparian rights to use surface water and how those rights relate to appropriative rights.

The base document for this report was prepared primarily by J. David Aiken, Water Law Specialist, University of Nebraska, with the assistance of an interagency task force. Members of the task force and the agencies represented are as follows:

James R. Cook ..... Natural Resources Commission (*Leader*)  
Richard Hansen ..... Department of Environmental Control  
J. Michael Jess ..... Department of Water Resources  
William Lee ..... Department of Health  
Darryll Pederson ..... Conservation & Survey Division, UNL  
J. David Aiken ..... Water Resources Center, UNL  
Karen E. Langland ..... Policy Research Office  
Gerald Chaffin ..... Game & Parks Commission  
John Alloway ..... Department of Agriculture

Others who contributed to preparation of this report are: Norman Thorson, University of Nebraska College of Law and Bob Kuzelka, Dennis Lawton, and Ray Bentall, all with the Conservation and Survey Division, University of Nebraska, IANR.

Three members of the Commission were assigned the responsibility for considering comments on the report received at public hearings, in writing, and from the Public Advisory Board and for suggesting changes in and recommendations on the report. The committee members are:

Henry P. Reifschneider, Chairman  
Robert W. Bell  
Rudolf C. Kokes

Other reports prepared as part of the Selected Water Rights Issues Policy Study include:

Preferences in the Use of Water (completed)  
Drainage of Diffused Surface Water (completed)  
Water Rights Adjudication (completed)  
Property Rights in Groundwater (completed)  
Interstate Water Uses and Conflicts  
Transferability of Surface Water Rights

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# Comments and Recommendations of the Natural Resources Commission

## INTRODUCTION AND PURPOSE

The responsibility of the Natural Resources Commission in preparing policy issue study reports is twofold. First, the Commission is responsible for presenting policy alternatives which are both representative in scope and objective in substance. It is hoped that this report accomplishes that purpose. Second, the Commission is responsible for providing its opinion and recommendations on the various alternatives presented in each report to the general public, the Legislature, and the Governor.

The Commission arrived at the following recommendations after a review of the report and consideration of comments generated from public hearings and from the Public Advisory Board.

## RECOMMENDATIONS

At the present time, the Commission recommends that neither *Alternative #2* (register riparian rights) or *Alternative #3* (register and adjudicate riparian rights) be adopted. Following the 1966 case entitled *Wasserburger v. Coffee*, there was much concern that conflicts between riparians and appropriators would occur at an ever increasing rate and would soon constitute a major problem in Nebraska water law. That concern has not materialized and the Commission believes that attempts now to register riparian rights or to integrate them into the appropriation system could well cause more problems that it would solve. What are potentially thousands of now dormant riparian rights could suddenly become active claims to use water in conflict with presently recognized appropriative rights. Such a reaction would be counterproductive to the overall objective of promoting harmony between water users.

The Commission recommendation that neither

*Alternative #2* or *Alternative #3* be implemented **is not without qualification**. In previous policy issue study reports, the Commission has recommended that the water use preferences be modified and that instream flow values be recognized in the state's water allocation system. Depending upon how those earlier recommendations would be implemented by the Legislature, such implementation could increase the likelihood of conflicts between appropriative rights and riparian rights.

For example, in implementing a policy in favor of protecting instream uses the Legislature might not restrict the right to protect those uses to public entities. Consequently, an individual riparian landowner's chances of successfully using his riparian right to maintain instream flows would be significantly increased.

Because of this and similar possibilities, the Commission recommends that a decision now not to register or to integrate riparian rights be reassessed each time other policy decisions are made which could affect the type and frequency of riparian rights claims. Given certain combinations of policy decisions, registration or adjudication of riparian rights may prove to be more attractive than they are at present.

While the Commission does not presently favor either *Alternative #2* or *#3*, we do recommend that positive legislative action be taken towards implementation of *Alternative #4* (define and protect domestic uses of surface water). In the report entitled "*Preferences in the Use of Water*", issued in October of 1981, the Commission recommended that domestic use of water be defined and that it be given an absolute preference for both surface water and groundwater. *Alternative #4* in this report is consistent with that recommendation and may in fact go a necessary step beyond. Although there is some case law to the contrary, preferences are generally thought to be available only to appropriators. Since instream domestic uses of water customarily do not obtain appropriative rights, the

preference given domestic use of surface water in current preferences statutes may be of little value. Domestic use of water ought to be protected, whether the individual land owner is relying upon an appropriative right, a riparian right, or neither. The quantity used for these purposes is very small in comparison to the value received. Interference with other water uses because of implementation of this alternative would not be so great as to offset the benefits received.

*Alternative #4* should, however, be applied differently to existing non-domestic appropriations than to those appropriations to be granted in the future. For future uses, our recommendation is essentially the same as that made in the *Preferences Report*, which is that the Depart-

ment of Water Resources administer those **future** non-domestic appropriations for the benefit of domestic surface water users even if there is another reliable source of domestic water available (sub-alternative 4b). **Future** non-domestic appropriations could, at the time of their issuance, be made subject to adequate water being available for present and future domestic uses. However, because of possible constitutional difficulties and the additional disruptive effect *Alternative 4b* could have on **present** non-domestic appropriations, we recommend that those appropriations be administered for the benefit of domestic surface water users **only** if there is no other reliable source of water available (sub-alternative 4a). This condition will greatly reduce any disruptive effect which may otherwise occur.

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# Introduction

This report discusses the two kinds of rights to use surface water currently authorized in Nebraska, riparian and appropriative: how they conflict, how they have been judicially inter-related, and how they might be integrated to avoid future conflicts. Nebraska is one of several western states having two inconsistent legal bases for allocating surface water rights. Riparian rights are based exclusively on owning land bordering a stream. Appropriative rights are acquired by obtaining a state permit and using streamflow for a beneficial purpose. The riparian doctrine was adopted in Nebraska by Nebraska Supreme Court decision, while prior appropriation was later established by legislation. The existence of two inconsistent legal bases for allocating surface water rights has resulted in conflicts among riparians and appropriators, which in turn have led to recommendations that riparian rights be integrated into the appropriative system.

This report discusses the conflict between riparian and appropriative rights in Nebraska and how they might be integrated to avoid future conflicts. **Chapter One** describes the riparian-appropriative conflict in Nebraska, and summarizes the judicial rules that have developed for resolving these conflicts. **Chapter Two** discusses the practical effects of riparian rights on surface water allocation in Nebraska: what riparian-appropriative conflicts may arise in the future, the likelihood of future riparian-appropriative conflicts actually leading to litigation, and how courts are likely to deal with those conflicts. **Chapter Three** surveys how other western states have addressed the riparian right issue.

**Chapter Four** presents legislative alternatives for dealing with riparian rights. The four principal alternatives are (1) do nothing, (2) register riparian claims, (3) register and adjudicate riparian claims, bringing riparian rights into the appropriative system, and (4) administer appropriations for the benefit of individual domestic and live-

stock watering users. The major policy issues presented in these alternatives (and their associated sub-alternatives) are (1) whether or not riparian claims should be integrated into the appropriative system, (2) what land should be defined as riparian land, (3) for what purposes of use should riparian claims be recognized, (4) how should riparian right priority dates be established, (5) whether dormant riparian claims should be recognized, and (6) whether livestock watering claims should be treated differently from other riparian claims. Each policy alternative is described in detail, along with suggestions of how the alternative could be implemented.

The external impacts of adopting each alternative also are addressed in **Chapter Four**. Discussed are the probable water use pattern changes, if any, resulting from implementing each alternative and the related physical/hydrologic/environmental impacts and socio-economic impacts.

The final chapter, **Chapter Five**, is devoted to explaining the relationship between this report and other policy issue reports produced or to be produced as part of the State Water Planning and Review Process. Relationships are developed for many of the studies being conducted. The value of **Chapter Five** to decision makers is to alert them to how other water policy issues can be affected by decisions regarding riparian rights.

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# Summary

## CURRENT SITUATION

### Source of Conflict

Nebraska is one of several western states having two inconsistent legal bases for allocating surface water rights: riparian and appropriative. Riparian rights to use surface water are based exclusively on owning land bordering a stream. Appropriative rights to use surface water are acquired by obtaining a state permit and using streamflow for a beneficial purpose. The riparian doctrine was adopted in Nebraska by Nebraska Supreme Court decision, while prior appropriation was later established by legislation.

The existence of two inconsistent legal bases for allocating surface water rights has resulted in conflicts among riparians and appropriators. Early Nebraska Supreme Court decisions resolving these conflicts limited a riparian's legal remedy to money damages when the exercise of an appropriation by a public entity conflicted with enjoyment of a private riparian right. These court decisions led to the widely accepted conclusion that the conflict among riparians and appropriators had been definitively resolved judicially in favor of the appropriators. Two recent Nebraska Supreme Court decisions involving irrigation-stockwatering disputes, however, suggest that rights of private appropriators and private riparians would be balanced on an equal basis, and that in some circumstances a riparian would be able to enjoin through court order the exercise of an appropriation. This judicial reevaluation of the relative rights of riparians and appropriators has led to recommendations that riparian rights be integrated into the appropriative system.

### Nebraska Law

The following propositions summarize the current law in Nebraska for resolving riparian-appropriative conflicts.

1. Riparians are entitled to only nominal damages for appropriative interference with vested dormant riparian rights.

2. Riparians are only entitled to damages when a "public" appropriator interferes with a non-domestic riparian use if the riparian use was initiated first.

3. "Public" appropriators are entitled to enjoin non-domestic riparian interference with appropriative uses if the appropriative use was initiated first.

4. Conflicts between private appropriators and riparians will be resolved by balancing the equities. The major factors to be considered are (1) the local water supply conditions, (2) the relative priority dates of the parties (where the riparian priority date is the date of initial use), and (3) the relative social utility of the appropriative and riparian water uses.

5. Private individual domestic uses may be entitled to injunctive relief where appropriators interfere with domestic uses even in the absence of legal riparian status.

### Need to Examine Policy Alternatives

Future riparian-appropriative conflicts are most likely to arise in two situations: irrigation-stockwatering conflicts and conflicts involving "extra-preference" uses (i.e. surface water uses not enumerated in the water preferences provisions, such as induced groundwater recharge, municipal, fish and wildlife maintenance and recreation). The practical effects of riparian rights in Nebraska has been limited in the past to the livestock-irrigation conflicts on Hat Creek. The probability of such litigation in the future seems limited. If it does occur, such litigation is likely to have only a limited local impact. Litigation involving extra-preference water uses is probable, however. The presence of riparian rights may not be a significant factor in such litigation because such litigation has occurred in the past without invoking riparian rights. The greatest practical significance of riparian rights

is that they are a possible basis for asserting rights for water uses popularly perceived as being outside the appropriative system: livestock watering and extra-preference water uses.

## **ALTERNATIVE LEGISLATIVE POLICY ACTIONS**

Four alternatives, three of which have sub-alternatives, are discussed in the report. They are summarized below:

### **Alternative #1: Take no legislative action.**

Implementing this alternative would preserve the status quo. Existing appropriators would be subject to the possibility that courts would issue injunctions to protect riparian domestic and livestock watering uses. Appropriators would also be subject to the somewhat smaller possibility that courts would issue injunctions to protect other riparian uses; e.g., riparian uses not involving a direct physical diversion of water (groundwater recharge, fish, wildlife, and recreation, etc.) or for extra-preference riparian uses (municipal, fish, wildlife, recreation).

### **Alternative #2: Legislatively require registration of riparian water right claims with the Nebraska Department of Water Resources, establishing that any other riparian water uses are not legally sanctioned, and making failure to register a forfeiture of any water right claim.**

Sub-alternative 2a: Authorize registration of riparian claims related to land which is legally riparian (i.e., the land borders a natural stream, was severed from the public domain before April 4, 1895, and has not lost riparian status due to subdivision).

Sub-alternative 2b: Authorize registration of riparian claims related to land which is physically riparian.

Sub-alternative 2c: Authorize registration of riparian claims for any beneficial purpose.

Sub-alternative 2d: Authorize registration of riparian claims for domestic, agricultural and manufacturing purposes only.

Sub-alternative 2e: Authorize registration of riparian claims whether or not water has actually been used in the past.

Sub-alternative 2f: Authorize registration of riparian claims only where water use has been made within the last 5 years or where works are under construction.

Sub-alternative 2g: Authorize registration of riparian claims only where water has been diverted and used within the last 5 years or where works are under construction.

Sub-alternative 2h: Legislatively exempt individual domestic and stockwatering uses up to the normal dryland grazing capacity of the land from riparian right registration requirements.

Sub-alternative 2i: Legislatively give riparians using water for individual domestic and stockwatering purposes up to the normal dryland grazing capacity of the land the option to register their riparian claims.

Implementing *Alternative #2* would require riparian claims to be registered with (but not adjudicated by) the Nebraska Department of Water Resources (DWR). Two advantages of the registration approach are: (1) unregistered riparian claims would be forfeited and (2) registered riparian claims could be evaluated to determine if they should be adjudicated, and whether and how they should be integrated into the appropriative system. The forfeiture of unregistered claims would remove the legal possibility of dormant riparian claims being legally asserted to frustrate appropriations. A disadvantage of riparian right registration is that filing riparian claims may lead claimants to believe they have a secure water right and are therefore entitled to use streamflow.

The nine sub-alternatives for *Alternative #2* deal with: (1) whether riparian claims would be allowed for land that is physically riparian but not legally riparian, (2) whether extra-preference water uses (groundwater recharge, fish, wildlife and recreation, etc.) would qualify for riparian right registration, (3) whether riparian water uses not involving a physical diversion of water (such as fish, wildlife and recreation) could be eligible for riparian right registration, (4) whether dormant riparian claims could be eligible for riparian right registration, and (5) whether stockwatering claims should be exempted from riparian claim registration requirements.

### **Alternative #3: Legislatively require registration and adjudication of riparian water right claims with the Nebraska Department of Water Resources, establishing that any other riparian water uses are not legally sanctioned.**

**ed, and making failure to register a forfeiture of any water right claim.**

Sub-alternative 3a: Authorize registration and adjudication of riparian claims related to land which is legally riparian.

Sub-alternative 3b: Authorize registration and adjudication of riparian claims related to land which is physically riparian.

Sub-alternative 3c: Authorize registration and adjudication of riparian claims for any beneficial purpose.

Sub-alternative 3d: Authorize registration and adjudication of riparian claims for domestic, agricultural and manufacturing purposes only.

Sub-alternative 3e: Authorize registration and adjudication of riparian claims whether or not water has actually been used in the past.

Sub-alternative 3f: Authorize registration and adjudication of riparian claims only where water use has been made within the last 5 years or where works are under construction.

Sub-alternative 3g: Authorize registration and adjudication of riparian claims only where water has been diverted and used within the last 5 years or where works are under construction.

Sub-alternative 3h: In adjudicating riparian claims, legislatively establish that the priority date of the riparian claim is the earlier of the date of initial beneficial use or the date the riparian claim was filed with the Nebraska Department of Water Resources.

Sub-alternative 3i: In adjudicating riparian claims, legislatively establish that the priority date of the riparian claim is the date the riparian land was severed from the public domain.

Sub-alternative 3j: Legislatively exempt individual domestic and stock-watering uses up to the normal dryland grazing capacity of the land from riparian right registration and adjudication requirements.

Sub-alternative 3k: Legislatively give riparians using water for individual domestic and stockwatering purposes up to the normal dryland grazing capacity of the land the

option to register and adjudicate their riparian claims.

Sub-alternative 3l: Legislatively require registration and adjudication only of riparian claims.

Sub-alternative 3m: Legislatively require registration, adjudication, and integration of riparian claims into the appropriate system.

Implementing *Alternative #3* would require riparian claims to be registered with and adjudicated by the DWR. Adjudicating riparian claims would require the DWR to hold hearings in the river basins throughout the state wherever riparian claims were filed to determine whether appropriations should be issued based on the riparian claim.

Riparian right adjudication procedures could last several years. If adjudicated riparian claims are given new appropriations (sub-alternative 3m), adjudication procedures could create considerable uncertainty regarding the status of riparian claims, current and pending appropriations, and future appropriations. If extra-preference uses qualify for riparian right adjudication (sub-alternative 3c) or if riparian priority dates are based either on severance of riparian land from the public domain (sub-alternative 3i) or the date of initial use (sub-alternative 3h), current appropriators could be forced to participate in riparian right adjudication proceedings to protect their own interests, at considerable private and public expense.

The thirteen sub-alternatives for alternative 3 deal with: (1) whether riparian rights adjudication would be allowed for land that is physically riparian but not legally riparian, (2) whether extra-preference water uses (ground water recharge, fish, wildlife and recreation, etc.) would qualify for riparian right adjudication, (3) whether riparian water uses not involving a physical diversion of water (such as fish, wildlife and recreation) could be eligible for riparian right adjudication, (4) whether dormant riparian claims could be eligible for riparian right adjudication, (5) whether riparian priority dates will be based on severance of riparian land from the public domain or the initial date of water use, (6) whether stockwatering claims should be exempted from riparian claim adjudication requirements, and (7) whether riparian claims should simply be adjudicated, or whether the riparian claims should be adjudicated and integrated into the appropriation system.

**Alternative #4: Define domestic use of surface water to include the watering of domestic, farm and ranch animals in normal farm and ranch operations up to the normal dryland grazing capacity of the land; and require the Nebraska Department of Water Resources to administer non-domestic appropriations for the benefit of domestic surface water users.**

Sub-alternative 4a: Require the Department of Water Resources to administer non-domestic appropriations for the benefit of domestic surface water users only if there is no other reliable source of domestic water available.

Sub-alternative 4b: Require the Department of Water Resources to administer non-domestic appropriations for the benefit of domestic surface water users even if there is another reliable source of domestic water available.

Defining domestic use to include the watering of farm and ranch animals up to the normal dryland grazing capacity of the land would clarify that such livestock watering was a domestic rather than an agricultural use, and would conform to the reasonable expectation of riparian landowners that their ownership includes the right to water livestock in the stream. (Livestock watering would not include watering of livestock in a feedlot.)

The major distinction between sub-alternatives 4a and 4b is the extent to which administrative protection for stockmen would be allowed. Implementing sub-alternative 4a would limit administrative protection to situations where no suitable alternative source of livestock water is available. If groundwater supplies were adequate for livestock water supply purposes, or if a rural water system provided a dependable livestock water supply, the DWR would not administer non-domestic appropriations for the benefit of stockmen. If groundwater supplies or rural water supplies were inadequate for livestock watering, however, sub-alternative 4a would require the DWR to administer non-domestic appropriations for the benefit of stockmen. Sub-alternative 4b would require the DWR to administer non-domestic appropriations for the benefit of stockmen, even if dependable alternative livestock water supplies were available.

## **RELATIONSHIP TO OTHER STUDIES**

Water policy issues are complex and often extremely interrelated. Riparian rights are no

exception. Particularly significant relationships exist between this report and the other policy issue study reports entitled "*Instream Flows*", "*Preferences in the Use of Water*", and "*Water Rights Adjudications*". Policy makers will be well advised to consider the subjects addressed by those three studies when considering decisions related to the integration of riparian rights into the appropriation system. Less significant relationships can also be found with many of the other studies being conducted, including those entitled "*Water Quality*", "*Groundwater Reservoir Management*", "*Water Use Efficiency*", "*Interstate Water Uses and Conflicts*", "*Transferability of Water Rights*", "*Beneficial Use*", "*Municipal Water Needs*", and "*Supplemental Water Supplies*". At least a general understanding of the issues addressed by these other studies will be helpful during an analysis of riparian rights.

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# CHAPTER 1

## RIPARIAN RIGHTS IN NEBRASKA: BACKGROUND AND PRESENT STATUS

This report discusses the two kinds of rights to use surface water currently authorized in Nebraska, riparian and appropriative: how they conflict, how they have been legally interrelated, and how they might be integrated to avoid future conflicts. Nebraska is one of several western states recognizing both riparian and appropriative rights. Riparian rights, under which rights to use surface water are based exclusively on owning land bordering a stream, were first recognized in Nebraska by decisions of the Nebraska Supreme Court. Appropriative rights, which are acquired by obtaining a state permit and using streamflow for a beneficial purpose, were later established by legislation.

The existence of two inconsistent legal bases for allocating surface water rights has resulted in conflicts among riparians and appropriators. Early Nebraska Supreme Court decisions resolving these conflicts limited a riparian only to money damages: The appropriator got the water. These decisions led to the widely accepted conclusion that the conflict among riparians and appropriators had been definitively resolved judicially in favor of the appropriators. Two recent Nebraska Supreme Court decisions, however, suggest that under some circumstances the riparian would get the water, not the appropriator. This reevaluation of the relative rights of riparians and appropriators has led to recommendations that riparian rights be integrated into the appropriative system.

### THEORIES OF SURFACE WATER RIGHTS

To understand the significance of riparian rights in Nebraska, a brief review of the riparian and appropriative doctrines and their development in Nebraska is necessary. Rights to use surface water in the United States are governed by two legal doctrines: Riparian rights and prior appropriation. Although both riparian and appropriative rights are created or acquired under

state law, the characteristics of each right are quite different. The riparian theory is generally followed in the east. Appropriative water rights are recognized in the west, although some western states (including Nebraska) recognize both riparian and appropriative rights.

### Riparian Rights

Riparian rights developed at common law (i.e. through litigation) in pre-industrial England. Under the modern version of the riparian rights doctrine, each owner of land bordering a natural stream or lake ("riparian land") has the right to make a "reasonable" use of the surface water flowing past his land. An upper riparian is liable if his use unreasonably interferes with a downstream riparian use. Whether the upstream use is unreasonable is determined in court and depends on the facts and circumstances of each case, including the other riparian uses on the stream. The riparian rights exist even if the water has not been used previously, and a new use can be initiated at any time. The water must be used on riparian land (i.e. part of a tract of land which fronts on the stream) within the watershed of the stream. In those states where there is no appropriation system, a non-riparian who uses water generally is liable to any riparian he injures, but a riparian generally is not liable for any use which interferes with the previously initiated use of a non-riparian.

Riparian law, which developed in the more humid environs of England and the eastern United States, is based on the premise that if rights to use water are restricted to riparians, and if each riparian will use the water reasonably, there will be enough for all. The riparian doctrine attempts to adjust uses so that all reasonable riparian uses can be accommodated. Riparian law does not allocate rights to use water so much as it provides the basis for resolving the infrequent disputes arising among users of generally abundant supplies.

## Appropriative Rights

Appropriative rights originated in western state court decisions giving legal sanction to mining camp customs regarding land and water use claims. Modern appropriative rights are not based on land ownership but are governed primarily by statute. An appropriation is a state administrative grant which allows the holder to use a specific quantity of surface water for a specified purpose on a specified tract of land if water is available after the claims of earlier appropriators have been satisfied. Acquiring the right is initiated by application for a state permit, and is completed (“perfected”) by using the water for the specified purpose. The place of use is not restricted to riparian land.

The appropriative doctrine is based on the assumption that water supplies will be inadequate for all appropriators to be supplied. When shortages occur those “senior” appropriators who acquire appropriations first will be entitled to the available water at the expense of subsequent “junior” appropriators.

## DEVELOPMENT OF RIPARIAN AND APPROPRIATIVE RIGHTS IN NEBRASKA

### Riparian Rights

**Judicial recognition.** Prior to comprehensive legislation on water rights the Nebraska Supreme Court adopted the riparian doctrine.<sup>1</sup> The court subsequently ruled that riparian rights included the right to use water.<sup>2</sup> In 1966 the Nebraska Supreme Court ruled that enactment of an appropriation statute in 1895 prevented landowners subsequently acquiring riparian land from the public domain from acquiring riparian rights.<sup>3</sup> Riparian land acquired before the effective date of the 1895 appropriation statute retained its riparian rights, however.

**Basis of the riparian right.** Persons who own or possess riparian land have, with no further requirement, a riparian right to use water. For land to be considered legally “riparian” the major requirements are that the land (1) must border a natural lake or stream, (2) must have come into private ownership before April 4, 1895, and (3) must have been part of a tract of land having direct access to the stream continuously since April 4, 1895.<sup>4</sup> Land not meeting all of these requirements does not have riparian status, even if it is physically contiguous to a stream or lake.

**Nature of the riparian right.** At common law, every riparian landowner had the right to use

water as it flowed past his land. Riparians could use as much water as they needed for domestic purposes, but uses of water for other purposes had to be reasonable in light of the uses of other riparians on the stream. Where a riparian complains that an upstream riparian use is interfering with his reasonable use of water, the court will consider the reasonableness of both uses.

### Appropriative Rights

**Legislative recognition.** The Nebraska Legislature first recognized the appropriative doctrine in 1877 and in 1889, but did not adopt a comprehensive appropriative system until 1895.<sup>5</sup> The 1895 act created an administrative system for adjudicating existing rights, acquiring new appropriations, and administering appropriations during periods of water shortage. Regarding riparian rights, the 1895 act protected existing rights to water “appropriated and acquired” prior to April 4, 1895.<sup>6</sup> The constitutionality of the act was upheld by the Nebraska Supreme Court in 1903.<sup>7</sup>

**Nature of appropriative rights.** An appropriation is an administrative grant to use a specified quantity of water on a specified tract of land for a specified purpose. Disputes among appropriators are resolved on the basis of priority: First in time is first in right. The priority date is the earlier of the date the appropriator applied to the Nebraska Department of Water Resources (DWR) for his appropriation, or (in the case of appropriations adjudicated by the DWR between 1895-1900) the date water use was initiated. If streamflow is insufficient to satisfy a senior appropriator, the DWR will reduce or stop the withdrawals of upstream junior appropriators.

## JUDICIAL RESOLUTION OF RIPARIAN-APPROPRIATIVE CONFLICTS

The 1895 appropriation act did not explicitly provide a mechanism for resolving disputes among riparians and appropriators. Riparian-appropriative conflicts have been resolved through litigation. Early Nebraska Supreme Court decisions did not involve domestic uses, and favored appropriators. In two more recent decisions, however, the court ruled that appropriators could be required to stop their withdrawals if they interfered with domestic riparian uses. These decisions have led to recommendations that riparian rights be integrated into the appropriative system to minimize future riparian-appropriative conflicts.

## Early Riparian-Appropriative Cases

*Clark v. Cambridge & Arapahoe Irr. & Imp. Co.*<sup>8</sup> In the 1895 *Clark* decision the plaintiff was a downstream riparian who had erected a grist mill on the Republican River in 1879. Defendant-irrigation company in 1891 constructed an irrigation canal above plaintiff's mill, interfering with the mill operation. The court ruled that the riparian normally would have been entitled to compensation from the appropriator because the appropriator was interfering with the riparian's water use. However, the court further ruled that the riparian had waited too long to press his claim. The riparian knew of the appropriator's plans to irrigate, but did not contest the appropriator's right to do so until after the irrigation canal had been constructed. The opinion suggests that if the riparian's objections had been made in a more timely fashion, the riparian would have been entitled to money damages. The appropriator would have been able to continue water use upon paying compensation to the riparian.

*Crawford Co. v. Hathaway.*<sup>9</sup> The 1903 *Crawford* decision involved a conflict between a downstream riparian mill operation and a subsequently established upstream appropriation for irrigation and municipal purposes on the White River. The court suggested that riparian-appropriative disputes would be resolved on the basis of priority by comparing the dates the riparian and appropriative rights vested. For the appropriator this would be the priority date assigned to the appropriation. For the riparian this would be the date the riparian land was severed from the public domain. The earlier date would give the prior right. However, if the riparian had the prior right, the court suggested that the riparian would be entitled only to money damages. If the appropriator were the junior water user, the appropriator would still be entitled to use the water upon payment of compensation to the senior riparian.

*McCook Irr. & Water Power Co. v. Crews.*<sup>10</sup> The 1905 *McCook* case involved a conflict between a downstream prior irrigation appropriator and a subsequently initiated upstream riparian irrigator on the Frenchman River. The subsequently initiated riparian irrigation withdrawals interfered with the previously established irrigation withdrawals of the appropriator. In its decision the Nebraska Supreme Court noted that riparians were generally entitled to damages when appropriative withdrawals interfered with the riparian water uses. However, the court ruled that a riparian could not

increase the amount of damages that he was entitled to by increasing his water use. That is, while the appropriator might be liable for damages for interfering with a riparian domestic water use, the appropriator in that case was not liable for interfering with a riparian use for irrigation when the riparian's irrigation occurred after the appropriator's irrigation. The court further said that where a riparian had not used water in the past and was denied the use of water in the future because of appropriative water uses, the dormant riparian right "may prove to be so infinitesimal that the law would not take note of it. The damages may be nominal only."<sup>11</sup> Finally, the court ruled that appropriators were entitled to enjoin by court order "junior" riparian withdrawals that interfered with their "senior" appropriations.

*Cline v. Stock.*<sup>12</sup> The 1905 *Cline* decision dealt with the conflict between a riparian mill owner on the Republican River at Concordia, Kansas established in 1873, and Nebraska irrigators 200 miles upstream with 1894 priority dates. In a brief opinion the Nebraska Supreme Court ruled that the riparian could not enjoin the appropriator's diversions through court order, but could sue the appropriators for money damages.

**Summary.** The early cases established that a riparian was entitled to damages when his riparian water use was interfered with by an appropriator. *Crawford* (1903) suggested that the riparian would be entitled to damages if the riparian right vested prior to the appropriation. *McCook* (1905) established, however: (1) that a riparian's damages could not be increased by increasing the riparian use after the appropriation was initiated, and (2) that an appropriator could enjoin a subsequently initiated riparian use. Thus, *McCook* substantially modifies the suggestion in *Crawford* that the date the riparian and appropriation rights vested determined whether damages are owed. *McCook* makes the date of initial riparian water use the governing date for damages as a practical matter.

## Recent Cases

In the early riparian-appropriative cases the appropriator was a collective irrigation enterprise, while the riparian was a private non-domestic water user. The two more recent cases dealt with private appropriators and private riparian domestic water uses. In an effort to protect domestic uses, the Nebraska Supreme Court adopted a new test for cases involving riparian domestic uses where riparian-appropri-

ative conflicts were resolved not on the basis of priority (however defined) but on a more complicated "balancing of the equities", i.e. a more detailed consideration of the facts and circumstances of each case.

*Wasserburger v. Coffee*.<sup>13</sup> The 1966 *Wasserburger I* decision involved a conflict between riparian livestock watering and appropriative irrigation on Hat Creek. The Nebraska Supreme Court ruled that an appropriative water use could be enjoined by court order if the appropriative use was unreasonable in comparison to the riparian uses it interfered with. The factors to be considered in determining whether the appropriative use was unreasonable include: (1) the social value legally attached to the riparian and appropriative uses, (2) the priority date of the appropriation and the date the riparian use was initiated, (3) the appropriateness of the riparian use to the watercourse, (4) the extent of the harm, and (5) the difficulty of avoiding the harm.

In *Wasserburger I* the court departed from looking simply at the relative priorities of the parties. However, the court recognized that it was departing from the rules established in earlier riparian-appropriative cases, and limited the new rules it enunciated to similar situations where private appropriations interfered with private riparian uses. In so doing, the court retained the rules governing riparian-appropriative conflicts established in *Crawford* (1903) and *McCook* (1905) for resolving similar riparian-appropriative conflicts.

*Brummond v. Vogel*.<sup>14</sup> The 1969 *Brummond* case dealt with a conflict between an appropriator and livestock watering. In *Brummond*, however, the stockman did not prove that he legally was a riparian. In *Brummond* the Nebraska Supreme Court concluded that the stockman's domestic use of water was legally superior to the appropriator's use for agricultural and recreational purposes. The court did not indicate what was the legal basis for its opinion. A close reading of the opinion suggests that the stockman's water rights were not based on Nebraska riparian or appropriative law, but were rather based on actually using the water for livestock watering purposes. Further, the livestock watering seems to have occurred prior to the appropriative priority date. However, the court did not clarify whether the livestock watering was protected because of its prior use, or because it was a preferred domestic use. The court clearly intended to protect domestic uses of surface water, but its legal rationale for doing so was unclear.

## Summary.

The following propositions summarize the current law in Nebraska for resolving riparian-appropriative conflicts.

1. Riparians are entitled to only nominal damages for appropriative interference with vested dormant riparian rights.

2. Riparians are only entitled to damages when a "public" appropriator interferes with a non-domestic riparian use if the riparian use was initiated first.

3. "Public" appropriators are entitled to enjoin non-domestic riparian interference with appropriative uses if the appropriative use was initiated first.

4. Conflicts between private appropriators and riparians will be resolved by balancing the equities. The major factors to be considered are (1) the local water supply conditions, (2) the relative priority dates of the parties (where the riparian priority date is the date of initial use), and (3) the relative social utility of the appropriative and riparian water uses.

5. Private individual domestic uses may be entitled to injunctive relief where appropriators interfere with domestic uses even in the absence of legal riparian status.

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## FOOTNOTES

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1. *Gill v. Lydick*, 40 Neb. 508, 59 N.W. 104 (1894) (water power for mill); *Eidenmiller Ice Co. v. Guthrie*, 42 Neb. 238, 60 N.W. 717 (1894) (ice harvesting).
  2. *Clark v. Cambridge & Arapahoe Irr. & Imp. Co.*, 45 Neb. 798, 64 N.W. 239 (1895); *Meng v. Coffee*, 67 Neb. 500, 93 N.W. 713 (1903).
  3. *Wasserburger v. Coffee*, 180 Neb. 149, 141 N.W.2d 738 (1966).
  4. See Fischer, Harnsberger & Oeltjen, "Rights to Nebraska Streamflows: An Historical Overview with Recommendations," 52 *Neb. L. Rev.* 313, 318 (1973).
  5. See Fischer et al. at 333-48.
  6. Neb. Laws C. 69, §49 (1895).
  7. *Crawford v. Hathaway*, 67 Neb. 325, 93 N.W. 781 (1903).
  8. 45 Neb. 798, 64 N.W. 239 (1895).
  9. 67 Neb. 325, 93 N.W. 781 (1903).
  10. 70 Neb. 115, 102 N.W. 249 (1905).
  11. 102 N.W. at 252.
  12. 71 Neb. 79, 102 N.W. 265 (1905).
  13. 180 Neb. 149, 141 N.W.2d 738 (1966).
  14. 184 Neb. 415, 168 N.W.2d 24 (1969).
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## CHAPTER 2

# EFFECT OF RIPARIAN RIGHTS ON SURFACE WATER ALLOCATION IN NEBRASKA

This chapter discusses the practical effects of riparian rights on surface water allocation in Nebraska: what riparian-appropriative conflicts may arise in the future, the likelihood of riparian-appropriative conflicts actually leading to litigation, and how courts are likely to deal with those conflicts.

### PRACTICAL EFFECTS OF RIPARIAN RIGHTS

#### Role of Riparian Rights in Water User Expectations

Before discussing potential riparian-appropriative conflicts, the role of riparian rights in forming water user expectations deserves brief consideration. When Nebraska was first settled, the settlers probably did not seek and did not have formal legal opinions regarding water rights. Those settling riparian lands assumed they were entitled to use streamflow as it flowed through their lands for domestic and other purposes (including irrigation and water power). This reasonable expectation was a primary reason for the adoption of the riparian doctrine by the Nebraska Supreme Court.<sup>1</sup> When the Nebraska Legislature enacted the 1895 appropriation act, the reasonableness of the expectation that riparian proprietors were free to use water for any purpose was fundamentally changed, at least regarding high-volume water uses. The legislation established an administrative system for allocating surface water rights. While this system appeared comprehensive, it left some gaps (at least as popularly perceived) regarding livestock watering and “extra-preference” uses (i.e. uses outside the preferences provisions, such as fish, wildlife, and recreation, and induced groundwater recharge). Therefore this change in water law doctrine probably did not significantly affect landowner expectations regarding livestock watering uses. Riparian landowners historically

have not relied on riparian rights to any significant degree except for livestock watering. The legal existence of riparian rights does not significantly influence the ownership and management decisions of riparian landowners. Rather, riparian rights are a legal alternative attorneys might discover in counselling riparian clients regarding surface water supply shortages.

This last point is worth emphasizing. In other western states (notably California) riparian rights are similar to appropriative rights in Nebraska. In California, for example, riparian rights can represent a secure legal claim for a dependable water supply for high-volume uses. Because of this riparian rights in California are the basis for significant land investment and management decisions. This is not the case for riparian rights in Nebraska except perhaps for livestock watering (as discussed later). Riparian rights in Nebraska represent a possible claim for livestock watering and a potential legal basis for claiming rights for extra-preference water users. The practical significance of riparian rights, beyond livestock watering, is not the water supply security they afford, but the possible legal claim they may represent for extra-preference surface water uses. If riparian rights in fact represented secure water rights for high-volume water uses, the practical significance of riparian rights would be much greater than presently is the case.

#### Basis of Riparian Rights

*Wasserburger I*<sup>2</sup> (1966) established that for a tract of land to legally have riparian status it generally must have been in private ownership before April 4, 1895 (the effective date of the 1895 appropriation act), and must have fronted on a stream continuously since April 4, 1895.<sup>3</sup> Land meeting these requirements is legally riparian even if ownership has changed. Riparian rights are not evidenced by a permit or a notation on the land title or deed, but are an unwritten

aspect of owning land meeting the two requirements described above.

The amount of land in Nebraska which qualifies as legally riparian land is unknown. Much of the land in eastern and central Nebraska probably was settled by 1895. Whether this is true for the sandhills region and western Nebraska is unclear. If much physically riparian land is not legally riparian, however, one issue to consider in evaluating riparian right policy alternatives is how physically riparian land should be treated. For example, if a policy alternative deals with livestock watering disputes, it may be applicable to such disputes generally whether or not legally riparian land is involved, as in *Brummond*<sup>4</sup> (1969). Similarly, alternatives dealing with extra-preference uses may be relevant to any surface water conflict involving these uses even if legally riparian land is not involved. Addressing the riparian rights issue may require addressing the related policy issues of how conflicts involving livestock watering and extra-preference uses should be addressed.

### **Potential Riparian-Appropriative Conflicts.**

The potential for riparian-appropriative conflicts is the basis for recommendations that riparian rights be integrated into the appropriative system.<sup>5</sup> If riparian rights had been judicially defined such that they did not threaten appropriations, as was thought to be the case prior to *Wasserburger I* (1966), the need to integrate riparian and appropriative rights probably would not have been perceived.

Future riparian-appropriative conflicts are most likely to arise in two situations: irrigation-stockwatering conflicts and conflicts involving extra-preference uses. These two conflict situations represent the two major water use categories popularly perceived as falling outside the appropriation system. Appropriations have not been acquired for livestock watering because of the popular perceptions (1) that the 1895 appropriation act applied only to high-volume diversions of water and (2) that the domestic preference protected livestock watering rights. Appropriations for extra-preference uses have not been acquired because of popular and official perceptions that such uses were outside the appropriation system.

**High-volume riparian uses.** A third potential conflict involving riparian rights should be dispensed with. High-volume riparian uses could be initiated that could interfere with existing appropriations. However, it is unlikely that any significant high-volume riparian uses are

currently being made. The Nebraska Department of Water Resources (DWR) administers appropriations on virtually all streams in Nebraska during these periods of water shortage. Any high-volume riparian use should have been identified by the DWR during these periods of water right administration. If new high-volume riparian uses were initiated in the future which interfered with an appropriation, however, the appropriator would be entitled to enjoin by court order the riparian use under the authority of *McCook*<sup>6</sup> (1905). Thus, these kinds of potential riparian water uses merit little further consideration at least on those streams administered in the past.

### **Livestock Watering Riparian Conflicts.**

**Likelihood of litigation.** Basically, litigation is a last resort in conflict resolution. Riparian stockwatering litigation is likely to occur (1) only when water supplies are inadequate to meet all needs and the parties are unable to find a compromise, or (2) when one party dislikes the other and uses water as a pretext for spite litigation. Litigation will not occur when surface water supplies are adequate because there is no conflict. When surface water supplies are inadequate but groundwater is readily available litigation is likely to occur (1) if the party forced to develop groundwater believes it has a legal basis for recovering part of the costs incurred (e.g. if the insurance companies litigate the liability issue) or (2) for spite. If surface and groundwater supplies are both inadequate[as was the case in *Wasserburger I* (1966)] litigation may occur if the parties cannot find a compromise because there is a genuine conflict. Because groundwater supplies generally are available throughout most of Nebraska at a reasonable cost, riparian stockwatering litigation has been less frequent than if water supplies were more limited. Riparian stockwatering litigation is most likely to occur where the water conflict is genuine (and the risks of litigation therefore are worth taking) or where spite is involved.

For purposes of this discussion, livestock watering includes the watering of domestic livestock and livestock on pasture (up to the normal dryland capacity of the land) but excludes the watering of livestock in a feedlot. Stockwatering conflicts are unlikely to arise frequently because groundwater is the major source of livestock water in Nebraska. However, groundwater is inadequate for livestock watering in several parts of Nebraska, including: (1) the White River-Hat Creek basin--northern part of Dawes, Sioux, and Sheridan counties, (2) the Niobrara River basin--parts of Boyd and Knox counties, (3) the Republican River basin--scattered areas along the

Kansas border, mostly south of the Republican River, (4) the Nemaha River basin--localized areas scattered throughout the basin, and (5) localized areas in other river basins where bed-rock lies near the surface.<sup>7</sup>

Irrigation-livestock watering disputes may be less frequent in these areas if rural water systems provide more reliable supplies for stockwatering purposes. Irrigation-livestock watering disputes on Hat Creek have led to two major Nebraska Supreme Court decisions: *Meng*<sup>8</sup> (1903) and *Wasserburger I*<sup>9</sup> (1966). Future litigation may be less likely if rural water systems are developed. This has occurred in Hat Creek: a rural water system had been developed subsequent to *Wasserburger I* which made livestock water available to the riparian. The riparian, however, has persuaded the Nebraska Supreme Court that the rural water system was not a reliable source of livestock water, particularly during the winter. This was the basis for the court's subsequent ruling that the irrigator could not store streamflow without regard to the riparian's stockwatering needs.<sup>10</sup>

## Judicial Resolution of Potential Stockwatering Disputes.

Riparian-appropriative conflicts involving livestock watering are likely to be judicially resolved on the basis of (1) an "actual use" priority, (2) the domestic preference, or (3) balancing the equities.

**(1) Priority.** Where the appropriator is a "public" appropriator (and perhaps where the appropriator is a private appropriator), riparians may prevail in appropriative stockwatering disputes based on a legal theory of an "actual use" priority. *McCook* (1905) suggested that as a practical matter a riparian's priority date is the date the riparian use was initiated. *Wasserburger I* (1966) and *Brummond* (1969) contain similar suggestions. In *Brummond* the stockman was a "senior appropriator" because he had acquired an "appropriation" prior in time to the irrigator's appropriation. The stockman's "appropriation" was acquired not by conforming to the Nebraska water appropriation statutes, however, but by actually using the water for livestock watering purposes. If this legal theory were followed in subsequent decisions, a stockman would be entitled to water even if his land were not legally riparian if he could prove that he had acquired an appropriation "by use" which gave him a senior priority. Stockmen would probably fare well under this approach (whether

their land was legally riparian or not) because livestock watering would predate irrigation or other appropriations in most circumstances.

**(2) Domestic preference.** *Brummond* (1969) may be read as giving domestic users an absolute preference in that compensation is not required if a preferred user interferes with the rights of senior appropriators. The Court in *Brummond* did not, however, reach the issue of whether the domestic user would be required to pay compensation for exercising a domestic preference (as required by Nebraska constitution art. XV, §6) because the Court ruled the stockman had not proven that the proposed appropriation would necessarily interfere with his livestock watering. If stockwatering-appropriation disputes were resolved on the basis of preference, the appropriator could argue that his appropriation can be restricted for the benefit of the stockman only if the stockman acquires the right to interfere with the appropriation through condemnation. If compensation were required, the legal value of a stockwatering claim would be significantly reduced.

**(3) Balancing the equities.** *Wasserburger I* (1966) establishes a balancing test for resolving riparian-appropriative conflicts involving individual riparians and appropriators. *Wasserburger I* adds two additional criteria to the *McCook* actual use priority criterion: (1) the social utility of the respective uses and (2) water supply availability. In livestock watering disputes the stockman is likely to prevail over the appropriator as in *Wasserburger I* if a real shortage of livestock water exists. If ample ground water were available for livestock watering purposes, however, the courts are likely to require the riparian to develop livestock wells rather than to enjoin an appropriator's surface water use.

## Disputes Involving Extra-Preference Uses.

**Likelihood of litigation.** Extra-preference uses most likely to be involved in riparian-appropriative litigation include fish, wildlife and recreation, and induced ground water recharge. Litigation involving fish and wildlife water uses has occurred relative to the Grayrocks reservoir on the North Platte River in Wyoming<sup>11</sup>, the Norden reservoir on the Niobrara River in Nebraska<sup>12</sup>, and the proposed Catherland reclamation project in the Little Blue River basin,<sup>13</sup> although the riparian rights issue was not raised in any of these cases. While the legal status of riparians to claim water for fish, wildlife



and recreational purposes has not yet been defined, there is some possibility that they could be, especially in the Niobrara and Platte River basins (which contain important fish, wildlife, and recreational resources).<sup>14</sup> Riparian-appropriative litigation in these river basins is likely to occur if additional surface water projects are developed, particularly because groundwater cannot easily be used as a supplemental source of supply for fish, wildlife and recreation water uses.

Potential riparian-appropriative conflicts stemming from surface water development interfering with municipal induced groundwater recharge is also possible, although such litigation has not occurred in the past. Platte valley municipalities are involved in the Little Blue NRD trans-basin diversion litigation, however, because of perceived adverse impacts of streamflow diversions on downstream municipal wellfields.<sup>15</sup> Such litigation may be less likely to occur than litigation involving fish, wildlife and recreation, however, because municipal water supplies typically can be maintained by expanding the municipal wellfield.

### **Judicial Resolution of Conflicts Involving Extra-Preference Water Uses.**

Riparian-appropriative conflicts involving extra-preference uses are likely to be resolved either by priority or by balancing the equities.

**(1) Priority.** As discussed above, *McCook* (1905) suggests that riparian-appropriative con-

flicts will be resolved on the basis of priority, with the riparian's effective priority date being the date of initial use. If conflicts involving extra-preference riparians occur, the riparian use could be senior to some appropriations and junior to others. Early priority dates could be claimed for fish and wildlife use, however, as such use often predated settlement.

**(2) Balancing the equities.** As discussed above, *Wasserburger I* (1966) establishes a balancing test for resolving riparian-appropriative conflicts involving individual riparians and appropriators. *Wasserburger I* adds two additional criteria to the *McCook* actual use priority criterion: (1) the social utility of the respective uses and (2) water supply availability. How the social utility criterion will be evaluated by the Nebraska Supreme Court relative to extra-preference uses is difficult to predict. The constitutional declaration that irrigation water use is a natural want may give irrigation a favored status.<sup>16</sup> Fish, wildlife and recreation may be favored if the court determines the state has a public trust obligation to protect such uses.<sup>17</sup> Induced groundwater recharge for municipal purposes may benefit from the domestic water preference to the extent of domestic water use.

How the water supply availability criterion will be evaluated is also difficult to predict. To the extent that extra-preference uses are low-volume uses with no practical alternative water supply (such as fish and wildlife) they may be protected as in *Wasserburger I* (1966). Where dependable alternative sources of supply are available (e.g. for induced groundwater recharge), however, extra-preference water users may enjoy no particular legal advantage relative to appropriators.

### **Summary**

The practical effects of the existence of riparian rights in Nebraska has been limited in the past to the livestock-irrigation conflicts on Hat Creek. The probability of such litigation in the future seems limited. If it does occur, such litigation is likely to have only a limited local impact. Litigation involving extra-preference water uses is probable, however. The presence of riparian rights may not be a significant factor in such litigation because such litigation has already occurred without invoking riparian rights. The greatest practical significance of riparian rights is that they are a possible legal basis for asserting rights for water uses popularly perceived as being outside the appropriative system: livestock watering and extra-preference water uses.

The needs and problems associated with ripar-

ian rights are not concerned with the possibility that the assertion of riparian rights will disrupt the appropriation system in Nebraska. The widespread reliance on riparian rights as an alternative to appropriative rights for irrigation (the major use of surface water use in Nebraska) seems foreclosed by *McCook* (1905). The greatest opportunity offered by the riparian rights issue is the focusing of attention on the need to address water policy issues related to livestock watering and extra-preference water uses.

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## FOOTNOTES

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1. *Meng v. Coffey*, 67 Neb. 500, 93 N.W. 713 (1903).
2. *Wasserburger v. Coffee*, 180 Neb. 149, 141 N.W.2d 738 (1966) (“*Wasserburger I*”).
3. See Fischer, Harnsberger & Oeltjen, “Rights to Nebraska Streamflows: An Historical Overview with Recommendations,” 52 **Neb. L. Rev.** 313, 318 (1973).
4. *Brummond v. Vogel*, 184 Neb. 415, 168 N.W.2d 24 (1969).
5. See Fischer et al. at 364-66; Missouri River Basin Comm’n, **Report on the Platte River Basin, Nebraska, Level B Study** at 245 (1976).
6. *McCook Irr. & Water Power Co. v. Crews*, 70 Neb. 115, 102 N.W. 249 (1905).
7. Neb. Soil & Water Comm’n, **Report on the Framework Study, Appendix C: Land and Water Resources Problems and Needs** at 32 (1971).
8. *Meng v. Coffey*, 67 Neb. 500, 93 N.W. 713 (1903).
9. *Wasserburger v. Coffee*, 180 Neb. 149, 141 N.W.2d 738 (1966) (“*Wasserburger I*”).
10. *Wasserburger v. Coffee*, 201 Neb. 416, 267 N.W.2d 760 (1978) (“*Wasserburger II*”).
11. *Nebraska v. Rural Elec. Adm’n*, 12 E.R.C. 1157 (D. Neb. 1978).
12. *Save the Niobrara River Assn. v. Andrus*, 10 E.R.C.1665 (1977).
13. *Little Blue NRD v. Lower Platte North NRD*, 206 Neb. 535, 294 N.W.2d 598 (1980); *Little Blue NRD v. Lower Platte North NRD*, 210 Neb. 862, 317 N.W.2d 726 (1982).
14. See **Framework Study Appendix C** at 92-118.
15. See also *Metropolitan Utilities Dist. v. Merritt Beach Co.*, 179 Neb. 783, 140 N.W.2d 626 (1966).
16. Neb. Const. art. XV, §4.
17. See Rogers, **Environmental Law** at 181-82 (1977).

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## CHAPTER 3

# RESOLUTION OF RIPARIAN-APPROPRIATIVE CONFLICTS IN OTHER WESTERN STATES

### RECOGNITION OF THE RIPARIAN DOCTRINE

Of the seventeen contiguous western states, nine have recognized both riparian and appropriative surface water rights. These “dual-doctrine” states include the coastal states of California, Oregon and Washington, and the states lying on the 100th meridian: North and South Dakota, Nebraska, Kansas, Oklahoma and Texas. These states are generally more humid than the arid mountain and southwestern states where the riparian doctrine has never been recognized as a general basis for surface water allocation.<sup>1</sup> The dual doctrine states have encountered some of the problems Nebraska has in attempting to judicially and legislatively interrelate appropriative and riparian surface water rights.

The facets of the riparian doctrine as implemented in the dual-doctrine states are varied and contain many aspects not relevant to decision makers attempting to determine whether riparian and appropriative water rights in Nebraska should be integrated. Rather than review all elements of the riparian doctrine in other western states, the issues relating to legislative and judicial integration of riparian and appropriative water rights in Nebraska will be evaluated in this chapter. These issues include:

- (1) what purposes of use have been recognized or should be authorized under a riparian right;
- (2) whether and the extent to which dormant riparian claims should be recognized;
- (3) how riparian livestock watering uses should be addressed; and
- (4) if riparian rights are transformed into appropriative rights, what priority date the new appropriation should be given.

What administrative procedures the dual-doctrine states used to integrate riparian rights into the appropriative system is a fifth possible

issue, which is not discussed because these states did not establish special procedures for riparian rights adjudication. The first four issues are all based on the premise that riparian right claims should be integrated into the appropriative system by registration and adjudication of riparian claims and the issuance of new appropriative rights in lieu of the common law riparian rights.

### PURPOSES OF USE

A major policy issue related to riparian rights is whether a legislative definition of riparian rights should recognize “any beneficial use” of water, or whether recognition should be limited to domestic, agricultural and manufacturing purposes. In other words, the issue is whether extra-preference uses of surface water, such as mining, municipal use, commercial use, industrial use, groundwater recharge, recreation, aesthetics, fish and wildlife, and other “instream” water uses should be established as legitimate riparian water uses. This issue has not been addressed directly by the Nebraska Supreme Court. In an early decision, however, the court in *dicta* suggested that a riparian could use streamflow for “any” purpose.<sup>2</sup> The court did not discuss the difference between what may be referred to as “utilitarian” (i.e., domestic and profit seeking uses) and other water uses, such as aesthetics or recreation.

Courts in California and Oklahoma have also stated that the riparian right extends to “any beneficial use.”<sup>3</sup> Other recognized beneficial uses include: domestic, stockwatering, irrigation, water power, municipal, mining, and industrial.<sup>4</sup> Courts in some western states have ruled that a riparian landowner could not claim a riparian right for aesthetic purposes if such uses would prevent upstream uses for “strictly utilitarian purposes.”<sup>5</sup> However, courts in California, Texas and Washington have recognized riparian

rights to have lake levels maintained to protect the value of private residential and commercial recreational developments.<sup>6</sup> Recreational uses have been recognized under riparian rights in California, Oklahoma, South Dakota, Texas and Washington.<sup>7</sup> Fishing and fish propagation have been recognized by courts in Texas, Oklahoma and Washington.<sup>8</sup>

Other western states which have legislatively integrated riparian and appropriative rights seemed to have acted on the assumption that competing riparian and appropriative water users were seeking to use the available water for basically the same purposes. Categories of "legitimate" riparian uses of water were not identified. The only categories of water use receiving special treatment were domestic and livestock watering uses, which were generally exempted from any riparian or appropriative rights registration or regulation.<sup>9</sup>

## **Dormant Riparian Rights**

The second major issue is whether dormant riparian rights should be recognized. Owners of riparian land meeting the *Wasserburger*<sup>10</sup> tests have a riparian right to use streamflow, even if they have never used streamflow for any purpose. Under the general riparian doctrine, a riparian proprietor may initiate a new water use at any time, so long as it is reasonable in relation to the needs and uses of other riparian proprietors. The policy issue is whether dormant riparian rights can be legislatively cancelled. In other words, if a riparian landowner is not actually using water, can legislation prevent him from using water in the future without first obtaining an appropriation? The reason for doing so is to end the uncertainty associated with outstanding riparian claims that may interfere with currently authorized appropriative water rights.

Other western states have integrated riparian and appropriative rights by legally recognizing riparian water rights only where (1) water was being currently used, or (2) where the riparian was in the process of developing a water use.<sup>11</sup> (In these cases, however, the state was enacting its first appropriation statute. Any water claim would be adjudicated, whether it was a riparian claim or a claim based on actual water use. In contrast, this study is dealing with integrating riparian and appropriative rights after the fact, i.e. 87 years after an appropriation statute was enacted.) By limiting legal protection to current or developing riparian water uses the appropriation statutes of other dual-doctrine statutes constituted in effect a legislative declaration that dormant riparian uses were null and void. In addition, active riparian claims have been re-

quired to be filed and adjudicated by the state water rights agency. This adjudication procedure is the same process that occurred when water claims were adjudicated in Nebraska from 1895 to 1900. Dormant riparian claims have been protected, if at all, for domestic and livestock watering purposes only. While the nullification of dormant riparian rights has been challenged as an unconstitutional taking of property, these challenges have not been successful.<sup>12</sup>

The major exception to this approach for integrating riparian rights into the appropriative system is California. Similar to Nebraska, the California legislature has not attempted to integrate riparian and appropriative rights. What integration has occurred has been through litigation. Dormant riparian rights, therefore, represent substantial water right claims in California, particularly because the "priority date" of a riparian right in California is the date the land was severed, regardless of when the use was actually initiated.<sup>13</sup>

## **Riparian Livestock Watering**

The largest probable riparian water use in Nebraska is livestock watering. The question is whether domestic and livestock watering uses should be treated differently from other riparian claims.

In other western states where riparian and appropriative rights have been legislatively integrated, domestic and livestock watering riparian uses typically have been exempted from any riparian rights registration and appropriation procedural requirements.<sup>14</sup> In Oregon domestic riparian rights are protected in that irrigators are administratively required to pass water down to downstream riparians for domestic and livestock watering purposes.<sup>15</sup> These states have elected to allow riparian landowners to make limited use of surface water without having to comply with the formalities of surface water law. It is unclear whether this decision was made because of political considerations, with the number of domestic and stockwatering users overwhelming the administrative system for adjudicating and administering water rights, or because the quantities of water involved in domestic and stockwatering uses were so small as not to warrant adjudication and administration.

## **Riparian Priority Dates**

If riparian water rights are brought into the appropriation system through registration and adjudication, a major issue is whether the priority dates for the "new" appropriative rights will be (1) the date the riparian land was severed from the

public domain, or (2) the date beneficial use of water was (or will be) initiated by the riparian. This issue is of major importance as it defines how conflicts between former riparians and existing appropriators will be resolved.

In California, riparian-appropriative conflicts are resolved on the basis of priority. The appropriator's priority depends on the date of beneficial use, whereas the riparian's priority is the date the land was severed from the public domain, even if beneficial use was not initiated until much later. Thus, a riparian could have initiated the beneficial use of water after an appropriator but have an earlier priority date if the riparian land was severed prior to the appropriator's initiation of beneficial use. Legislation integrating riparian rights into the appropriative system in other western states, however, does not spell out how a riparian's priority date should be determined.

Presumably the priority date would have been assigned for riparian claims on the same basis as for other water claims, which in most cases would be the date of initial beneficial use.

## SUMMARY

The experience of other western dual doctrine states provides little guidance in legislatively integrating riparian rights into the appropriative system in Nebraska, primarily because most dual doctrine states completely integrated riparian rights into the appropriative system when they initially enacted appropriation legislation. Exempting riparian stockwatering claims from water right adjudication procedures, however, is a feature of riparian rights integration in other dual doctrine states which Nebraska policy makers may wish to consider.

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## FOOTNOTES

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1. But see I Hutchins, **Water Rights Laws in the Nineteen Western States**- (U.S. Dep't of Agric. Misc. Pub. No. 1206, 1971) at 192 (Courts in some pure appropriation states have ruled or suggested that a riparian landowner may use surface water so long as appropriators are not interfered with); 192-93 (courts have used riparian doctrine as source of law in defining the rights of riparian proprietors not addressed by appropriation).
2. *Eidemiller Ice Co. v. Guthrie*, 42 Neb. 238, 60 N.W. 717 (1894) (court ruled that riparian had right to harvest ice).
3. *Lux v. Hagen*, 69 Cal. 391, 10 P. 674 (1886); *Smith v. Stanolind Oil & Gas Co.* 197 Okla. 499, 172 P.2d 1002 (1946).
4. 2 Hutchins at 106-20.
5. 2 Hutchins at 120nn625-29.
6. *Los Angeles v. Aitken*, 10 Cal. App. 2d 460, 52 P.2d 585 (1935), hearing den. 36 Cal. App. 2d 116, 97 P.2d 274 (1939); *Lakeside Irr. Co. v. Kirby*, 166 S.W. 715 (Tex. Civ. App. 1914); **In re Martha Lake Water Co.**, 152 Wash. 53, 277 P. 382 (1929); **Petition of Clinton Water Dist.**, 36 Wash. 2d 284, 218 P. 309 (1950).
7. *Elsinore v. Temescal Water Co.*, 36 Cal. App. 2d 116, 97 P. 274 (1939); *Prather v. Hoberg*, 24 Cal.2d 549, 150 P.2d 405 (1944); *Martin v. British Am. Oil Co.*, 187 Okla. 193, 102 P.2d 124 (1940); *Sayles v. Mitchell*, 60 S.D. 592, 245 N.W. 390 (1932); *Great Am. Dev. Co. v. Smith*, 303 S.W.2d 861 (Tex. Civ. App. 1957), *Snively v. Jaber*, 48 Wash. 2d 815, 296 P.2d 1015 (1956); *Bach v. Sarich*, 74 Wash. 2d 575, 445 P.2d 648 (1968).
8. *Diversion Lake Club v. Health*, 127 Tex. 129, 86 S.W.2d 441 (1935); *Curry v. Hill*, 460 P.2d 933 (Okla. 1969); *Snively v. Jaber*, 48 Wash. 2d 815, 296 P.2d 1015 (1956).
9. See generally I Hutchins at 210-25.
10. *Wasserburger v. Coffee*, 180 Neb. 149, 141 N.W.2d 738 (1966).
11. Kan. Stat. Anno. §82a-704a (Supp. 1979); Okla. Stat. Ann. tit. 82, §1-A; Oreg. Rev. Stat. §539.010; Vernon's Texas Code Ann., Water Code §5.303; Rev. Code Wash. Ann. §90.14.010 to 90.14.121.
12. *State ex rel. Emery v. Knapp*, 167 Kan. 546, 207 P.2d 440 (1949); *In re Willow Creek*, 74 Oreg. 592, 144 P. 505 (1914); *In re Hood River*, 114 Oreg. 112, 227 P. 1065 (1924); *California Oregon Power Co. v. Beaver Portland Cement Co.*, 73 Fed. 2d 555 (9th Cir., 1934).
13. See generally, Anderson, **Riparian Rights in California** (Governor's Comm'n to Review Cal. Water Rights Law Staff Paper No. 4, Nov. 1977).
14. Kan. Stat. Anno. §82a-709 (1977); Okla. Stat. Ann. tit. 60, §60; Oreg. Rev. Stat. §539.010; Vernon's Texas Code Ann., Water Code §5.303.
15. See Hutchins, **The Common-Law Riparian Doctrine in Oregon: Legislative and Judicial Modification**, 36 Oreg. L. Rev. 193, 218-29 (1957).

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# CHAPTER 4

## ALTERNATIVE LEGISLATIVE POLICY ACTIONS

### INTRODUCTION

The preceding chapters present background information about the riparian doctrine and its legal status in Nebraska and other western states. This chapter deals with how the riparian rights doctrine could be integrated into the appropriative water rights system in Nebraska. Four legislative alternatives (with several sub-alternatives) are presented for consideration. The probable water use pattern changes, if any, resulting from implementing each alternative are identified, as well as the related physical/hydrologic/environmental impacts and socio-economic impacts.

The riparian rights alternatives contained in this chapter are not the only ones possible in Nebraska. However, those listed are a representative range of alternatives. Most additional options, if listed, would be variations of those already identified. No alternative was included or excluded because of political considerations.

While enactment of some alternatives would exclude the enactment of others, not all are mutually exclusive. Some alternatives are intended to be used in combination with others. The alternatives presented may be modified. In addition, modifying riparian rights policies may not be the only way to achieve a particular water policy objective. Some of the alternatives from other water policy studies, particularly the water preferences, instream flows, and beneficial use water policy studies, deal with some of the issues raised in this study.

### IDENTIFICATION OF ALTERNATIVES

*Alternative #1:* Take no legislative action.

*Alternative #2:* Legislatively require registration of riparian water right claims with the Nebraska Department of Water Resources, establishing that any other riparian water

uses are not legally sanctioned, and making failure to register a forfeiture of any water right claim.

The sub-alternatives for *Alternative #2* deal with: (1) whether riparian claims would be allowed for land that is physically riparian but not legally riparian, (2) whether extra-preferred water uses (groundwater recharge, fish, wildlife and recreation, etc.) would qualify for riparian right registration, (3) whether riparian water uses not involving a physical diversion of water (such as fish, wildlife and recreation) could be eligible for riparian right registration, (4) whether dormant riparian claims could be eligible for riparian right registration, and (5) whether stockwatering claims should be exempted from riparian claim registration requirements.

*Alternative #3:* Legislatively require registration and adjudication of riparian water right claims with the Nebraska Department of Water Resources, establishing that any other riparian water uses are not legally sanctioned, and making failure to register a forfeiture of any water right claim.

In addition to the issues already described above relative to *Alternative #2*, the sub-alternatives for *Alternative #3* also deal with: whether riparian priority dates will be based on severance of riparian land from the public domain or the initial date of water use, whether stockwatering claims should be exempted from riparian claim adjudication requirements, and whether adjudicated riparian claims should be integrated into the appropriative system.

*Alternative #4:* Define domestic use of surface water to include the watering of domestic, farm and ranch animals in normal farm and ranch operations up to the normal dryland grazing capacity of the land; and require the Nebraska Department of Water Resources

to administer non-domestic appropriations for the benefit of domestic surface water users.

The two sub-alternatives for *Alternative #4* deal with whether non-domestic appropriations should be administered for the benefit of stockmen even if alternative stockwatering supplies are available.

## INFORMATION PRESENTED FOR EACH ALTERNATIVE

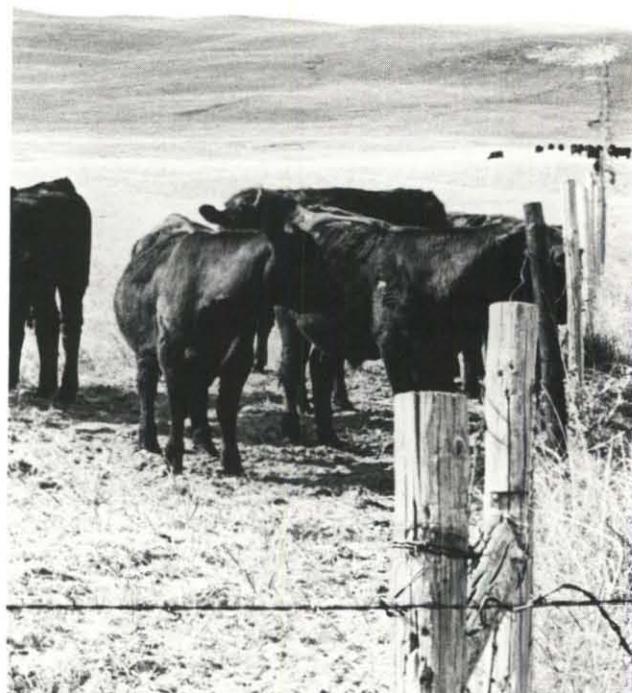
More detailed discussion of the alternatives begins below. For each alternative, information is presented under the following headings: **Description; Methods of Implementation; Changes in Water Use Patterns; Physical/Hydrologic/Environmental Impacts; and Socio-economic Impacts.** The information presented under the headings **Description** and **Methods of Implementation** describe the alternative, how it could be implemented, and discuss direct implementation costs. How water uses would change if an alternative were implemented is discussed under **Changes in Water Use Patterns.** Brief discussions of physical, hydrologic and environmental impacts of implementing an alternative are included under **Physical/Hydrologic/Environmental Impacts.** The economic efficiency and equity effects of implementing each policy alternative are discussed under **Socio-economic Impacts.**

### **Alternative #1: Take no legislative action.**

#### **Description.**

Implementing this alternative would preserve the status quo. Existing appropriators would be subject to the possibility that courts would issue injunctions to protect riparian domestic and livestock watering uses. Appropriators would also be subject to the somewhat smaller possibility that courts would issue injunctions to protect other riparian uses; e.g., riparian uses not involving a direct physical diversion of water groundwater recharge, fish, wildlife, and recreation, etc.) or riparian uses for purposes not included in the surface water preferences provisions (municipal, fish, wildlife, recreation).

One implication of implementing this alternative is that conflicts involving irrigators and ranchers watering their livestock would not be resolved on the inflexible basis of priority or preference. Instead, these disputes would be resolved under the guidelines established in *Wasserburger v. Coffee*<sup>1</sup>, which would involve a more complete consideration of the facts of each



case, including the availability of alternative sources of livestock water. While this makes conflict resolution more expensive to the parties involved, it does allow a considerable amount of flexibility in making water allocation decisions with a minimum cost of administration.

A second implication of maintaining the status quo is that integrating riparian and appropriative rights can be deferred until water uses that have been popularly perceived as being outside the appropriative system have otherwise been brought into the appropriative system. Two kinds of surface water use have been popularly perceived as being outside the appropriative system: (1) uses not involving a physical diversion of water (such as groundwater recharge<sup>2</sup>, stockwatering fish and wildlife maintenance, recreation, water quality maintenance, etc.) and (2) uses not enumerated in the surface water preferences provisions (such as municipal [although one could argue that some municipal uses were domestic or a combination of domestic and industrial uses], commercial [although one could argue that some commercial uses were domestic], fish and wildlife maintenance, recreation, water quality maintenance, etc.). If the status quo is maintained, these water users have the option of attempting to have their water uses recognized by asserting riparian claims.

#### **Methods of Implementation.**

*Alternative #1* could be implemented by enacting no legislation dealing with riparian rights. The

major costs associated with maintaining the status quo would be the potential of private litigation costs associated with riparian-appropriative law suits, as well as continued uncertainty regarding whether appropriative water rights will be restricted through litigation for the benefit of riparians.

### **Changes in Water Use Patterns.**

Implementing this policy would not significantly affect existing water use patterns. There is no indication that the threat of riparian claims has inhibited surface water users from making investments in current and prospective appropriations.

### **Physical/Hydrologic/Environmental Impacts.**

Implementing this alternative would result in no changes in the physical/hydrologic/environmental impacts from those currently experienced. The current system of appropriating surface water would continue with the potential for limited or no instream flows and the associated environmental and hydrologic impacts.

### **Socio-Economic Impacts.**

The dominant feature of current law is uncertainty. To the extent that existing appropriators can be enjoined at the insistence of a riparian landowner, the appropriation right is not secure. An appropriator can evaluate his position relative to other appropriators but he has no way of evaluating his position relative to riparians since no record of riparian uses or claims has been made. Consequently, appropriators may be discouraged from making economically sound capital investments by the possibility that their water right could be defeated by an unknown riparian. The problem may be particularly severe with respect to dormant riparian claims. Even if investment is not directly inhibited, however, the loss of income from having an appropriative water right interrupted by exercise of an undisclosed riparian right likely will not be perceived fair by most observers.

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**Alternative #2: Legislatively require registration of riparian water right claims with the Nebraska Department of Water Resources, establishing that any other riparian water uses are not legally sanctioned, and making failure to register a forfeiture of any water right claim.**

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**Sub-alternative 2a:** Authorize registration of riparian claims related to land which is legally riparian (i.e., the land borders a natural stream, was severed from the public domain before April 4, 1895, and has not lost riparian status quo due to subdivision.

**Sub-alternative 2b:** Authorize registration of riparian claims related to land which is physically riparian.

**Sub-alternative 2c:** Authorize registration of riparian claims for any beneficial purpose.

**Sub-alternative 2d:** Authorize registration of riparian claims for domestic, agricultural and manufacturing purposes only.

**Sub-alternative 2e:** Authorize registration of riparian claims whether or not water has actually been used in the past.

**Sub-alternative 2f:** Authorize registration of riparian claims only where water use has been made within the last 5 years or where works are under construction.

**Sub-alternative 2g:** Authorize registration of riparian claims only where water has been diverted and used within the last 5 years or where works are under construction.

**Sub-alternative 2h:** Legislatively exempt individual domestic and stockwatering uses up to the normal dryland grazing capacity of the land from riparian right registration requirements.

**Sub-alternative 2i:** Legislatively give riparians using water for individual domestic and stockwatering purposes up to the normal dryland grazing capacity of the land the option to register their riparian claims.

### **Description.**

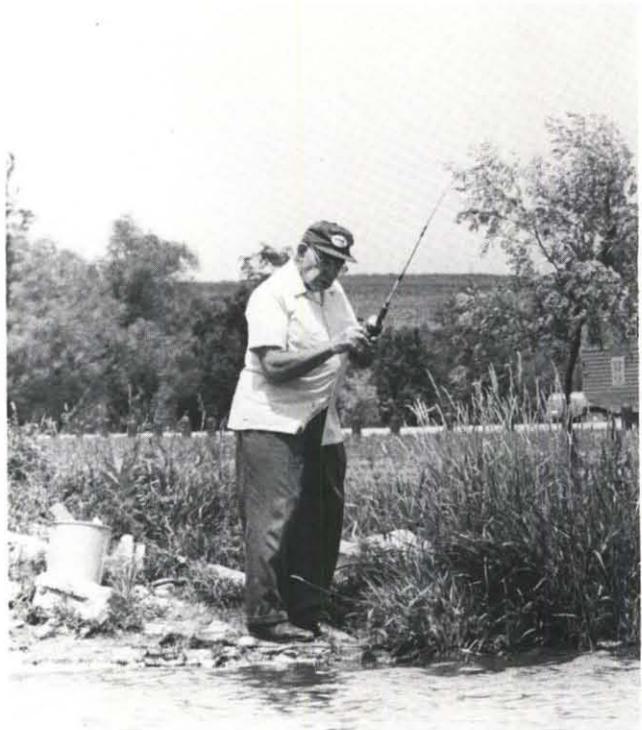
Implementation of *Alternative #2* would require riparian claims to be registered with (but not adjudicated by) the Nebraska Department of Water Resources (DWR). Two advantages of the registration approach are: (1) unregistered riparian claims would be forfeited and (2) registered riparian claims could be evaluated to determine whether and how they should be integrated into the appropriative system. The forfeiture of unregistered claims would remove the legal possibility of dormant riparian claims being asserted to frustrate

appropriations. A disadvantage of riparian right registration is that filing riparian claims may lead claimants to believe they have a secure water right and are therefore entitled to use streamflow.

The riparian claims would not be adjudicated by the DWR, but would be inventoried and evaluated regarding the types and quantities of use, the potential water quantities that might be established, and potential priority dates for the riparian rights if they were adjudicated. A determination regarding whether the riparian claims should be adjudicated, and how those claims should be legally integrated into the appropriative system, could be deferred until after registered claims had been inventoried and evaluated. Future legislation would be required to give the DWR authority to adjudicate registered claims, if this were determined to be necessary or desirable.

**Defining riparian land.** Sub-alternatives 2a and 2b deal with the land physically bordering a stream for which riparian claims can be registered and adjudicated. Implementing sub-alternative 2a would limit riparian claim registration to claims associated with legally riparian land, i.e. land meeting the *Wasserburger I* (1966) tests of being riparian. Implementing sub-alternative 2b would authorize owners of land bordering a stream to register and have their water use claims adjudicated even though their lands did not meet the *Wasserburger I* tests of being legally riparian. Implementing sub-alternative 2b would create more potential riparian claimants.

**Purpose of use.** Sub-alternatives 2c and 2d deal with the purposes of use for which a riparian claim could be registered. Sub-alternative 2c would allow riparian claims for any beneficial use to be filed, including fish, wildlife, recreation, water quality maintenance, groundwater recharge, etc. Sub-alternative 2d would allow riparian claims to be filed for the purposes enumerated in the water preferences provisions only: domestic, agricultural and manufacturing. If riparian claims are allowed for any beneficial purpose, those using or wishing to use water for purposes other than those enumerated in the preferences provisions (such as groundwater recharge, municipal, fish and wildlife maintenance, recreation, etc.) are very likely to file riparian claims in hopes that they for the first time will be able to obtain an appropriation for their extra-preference use. Limiting riparian claims to preferred uses only (sub-alternative 2d) would be unconstitutional if actual extra-preference riparian uses were precluded by a riparian registration requirement, and could be unconstitutional if dormant extra-preference riparian uses were precluded.



The purposes of water use for which riparian claim registration would be allowed is a significant policy issue. Registration of a riparian claim carries with it the implication that if claims are adjudicated, all claims will be adjudicated and appropriations issued on the same basis. Thus, if riparian claims for fish and wildlife, for example, are allowed and if registered riparian claims are subsequently adjudicated and appropriations issued, appropriations would be issued for adjudicated riparian fish and wildlife claims on the same basis as for any other adjudicated riparian claim.

**Actual use requirement.** Sub-alternatives 2e, 2f and 2g deal with whether dormant riparian claims (i.e., claims made for riparian water rights even though water is not being used pursuant to a riparian right) would be authorized. Sub-alternative 2e would authorize dormant riparian claims as well as active riparian claims (i.e., claims for riparian water rights for which water is actually being used) to be filed. If dormant riparian claims were later adjudicated and appropriations issued, the adjudicated dormant riparian claims for high volume uses (irrigation, etc.) could interfere with existing appropriations if the priority date was based on the date the riparian land was severed from the public domain (sub-alternative 3i). Sub-alternatives 2f and 2g require either (1) that water has been used within the last five years or (2) that water use facilities are under construction. Implementing either of these sub-alternatives would preclude the possibility that appropriations could be adjudicated and issued in the future for dormant riparian claims.

**Physical diversion requirement.** Sub-alternatives 2f and 2g deal with whether a diversion of streamflow would be necessary for a riparian claim to be registered. Sub-alternative 2f would not require a diversion of water whereas sub-alternative 2g would. Implementing sub-alternative 2f would allow instream water uses while implementing sub-alternative 2g would preclude most, if not all, instream water uses. If riparian claims are allowed for uses not involving a direct physical diversion of water, those using or wishing to use water such that a direct physical diversion of water is not involved are very likely to file riparian claims in hopes that they, for the first time, will be able to obtain an appropriation for their "non-diverting" use.

**Stockwatering.** Sub-alternatives 2h and 2i deal with riparian livestock watering. Sub-alternative 2h would exempt stockmen from riparian right registration requirements, while sub-alternative 2i would give stockmen the option to register any riparian claims. Stockwatering in a feedlot would not qualify for this exemption. Implementing either of these sub-alternatives would probably greatly reduce the number of riparian claims filed.

Exempting individual domestic and livestock watering uses from any riparian rights registration requirements would follow the policy of many western states of recognizing and protecting domestic uses without requiring the strict appropriative procedural formalities. This allows administrators to deal primarily with the high-volume uses of other appropriators and to avoid the immense bookkeeping and related administrative tasks that would be required if domestic water users were required to follow the usual appropriative procedural formalities.

### **Methods of Implementation.**

Implementing this alternative would require enacting legislation: (1) requiring all riparian water right claims to be registered with the DWR within a stated period, (2) establishing that any other riparian water uses are not legally sanctioned, and (3) establishing that failure to register a claim would constitute a forfeiture of any riparian right. The legislation should also: (1) specify what land would qualify as riparian, (2) specify the purposes of water use for which riparian claims could be registered, (3) specify whether dormant riparian claims could be registered, (4) specify whether uses not involving a direct physical diversion of streamflow could be registered, and (5) specify how livestock watering claims would be treated.

The DWR would be required to notify potential claimants of the registration requirement. While

some commentators have suggested that this could require actual notice to each owner of a legally riparian parcel, the water right adjudication procedures of other western states have required only general public notice (through newspaper, TV and radio announcements). If actual notice were required to each riparian proprietor, the costs of such notice would be an estimated \$70,000 to \$100,000 if, for example, a notice were included in each county tax assessment statement. An advantage of actual notice is that it avoids any constitutional question regarding whether adequate notice of the riparian right registration requirement was given. If only a general public notice were required, however, the notice costs would be substantially less. A disadvantage of this approach, however, is that such notice might not be adequate to warn landowners that failure to register a riparian claim would lead to forfeiture.

Other administrative costs are difficult to estimate, but could be substantial, depending on the number of claims filed. The primary costs would be the costs of processing and filing the riparian right claims.

### **Changes in Water Use Patterns.**

The only possible change in water use patterns related to registering riparian claims would be if riparians began using water for the first time in the belief that such use was necessary to prevent riparian water rights from being forfeited, or that the registration of a riparian claim entitled one to use streamflow.

### **Physical/Hydrologic/Environmental Impacts.**

Because this alternative would require registration only, implementing this alternative would create no significant change in the physical/hydrologic/environmental impacts from the current system. If however, riparians began using water for the first time in the belief that such use was necessary to prevent riparian water rights from being forfeited, or that the registration of a riparian claim entitled one to therefore use streamflow, surface water withdrawals might increase. This could result in reduced instream flows with the associated environmental and hydrologic impacts.

### **Socio-Economic Impacts.**

Registration of riparian rights would promote economic efficiency by putting all present and potential water users on notice of riparian claims. Registration would facilitate consideration of the magnitude of the riparian "problem". To maxi-

mize the economic value of the registration process, however, a comprehensive registration system should be used so that no dormant, non-forfeited claims would remain. Only rights subject to registration, however, could be constitutionally forfeited by non-registration. Therefore, if instream claims or dormant rights are not subject to a registration requirement, they will not be cut off. Consequently, alternatives 2c and 2e clearly are superior to alternatives 2d, 2f, and 2g from an economic perspective since they would result in a comprehensive system of registration. Similarly, alternatives 2h and 2i should be rejected unless it is determined that the value of the information collected is less than cost of obtaining the information. Registration of stockwatering claims in particular, however, appears economically desirable since such claims can have large impacts on other water users. Finally, with respect to riparian land, little reason exists to expand the registration process to include land not legally riparian. The legal definition of riparian land in Nebraska is well settled and the definition poses no constitutional problems. Consequently, alternative 2a is favored over alternative 2b.

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**Alternative #3: Legislatively require registration and adjudication of riparian water right claims with the Nebraska Department of Water Resources, establishing that any other riparian water uses are not legally sanctioned, and making failure to register a forfeiture of any water right claim.**

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**Sub-alternative 3a:** Authorize registration and adjudication of riparian claims related to land which is legally riparian.

**Sub-alternative 3b:** Authorize registration and adjudication of riparian claims related to land which is physically riparian.

**Sub-alternative 3c:** Authorize registration and adjudication of riparian claims for any beneficial purpose.

**Sub-alternative 3d:** Authorize registration and adjudication of riparian claims for domestic, agricultural and manufacturing purposes only.

**Sub-alternative 3e:** Authorize registration and adjudication of riparian claims whether or not water has actually been used in the past.

**Sub-alternative 3f:** Authorize registration and adjudication of riparian claims only where water use has been made within the last 5 years or where works are under construction.

**Sub-alternative 3g:** Authorize registration and adjudication of riparian claims only where water has been diverted and used within the last 5 years or where works are under construction.

**Sub-alternative 3h:** In adjudicating riparian claims, legislatively establish that the priority date of the riparian claim is the earlier of the date of initial beneficial use or the date the riparian claim was filed with the Nebraska Department of Water Resources.

**Sub-alternative 3i:** In adjudicating riparian claims, legislatively establish that the priority date of the riparian claim is the date the riparian land was severed from the public domain.

**Sub-alternative 3j:** Legislatively exempt individual domestic and stockwatering uses up to the normal dryland grazing capacity of the land from riparian right registration and adjudication requirements.

**Sub-alternative 3k:** Legislatively give riparians using water for individual domestic and stockwatering purposes up to the normal dryland grazing capacity of the land the option to register and adjudicate their riparian claim.

**Sub-alternative 3l:** Legislatively require registration and adjudication only of riparian claims.

**Sub-alternative 3m:** Legislatively require registration, adjudication, and integration of riparian claims into the appropriative system.

**Description.**

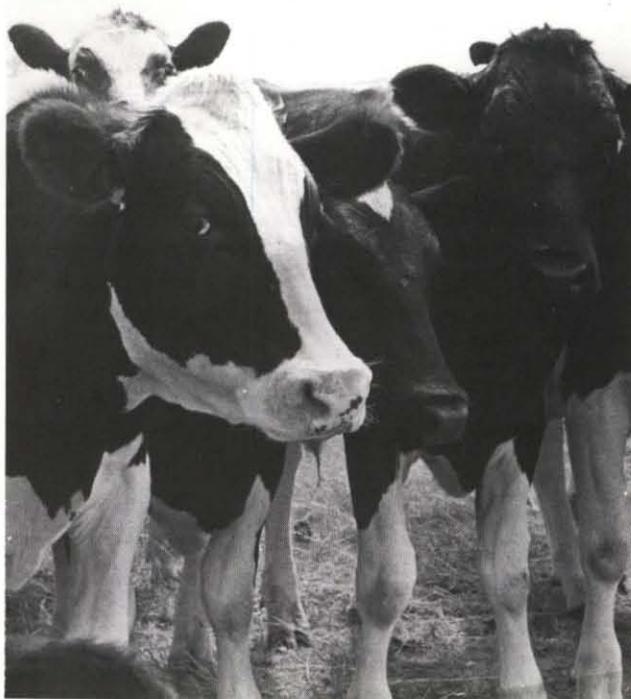
Implementing *Alternative #3* would require riparian claims to be registered with and adjudicated by the DWR. The implications of registering riparian claims have been discussed relative to *Alternative #2*. Adjudicating riparian claims would mean that the DWR would be required to hold hearings in the river basins in which riparian claims were filed. At these hearings the DWR would receive testimony regarding the claim and then determine whether a valid riparian claim existed. The DWR could determine the purpose

of authorized water use, the quantity and method of water use, and the priority date for the riparian claim. Once this was accomplished, the Legislature could then consider whether the riparian claims should be integrated into the appropriative system. Alternatively, riparian claims could be integrated into the appropriative system as part of the riparian claim adjudication process.

When Nebraska's prior appropriation system was first established, administrative adjudication of appropriations lasted five years, from 1895 to 1900. Adjudicating riparian rights could take as long or longer, depending on what purposes of use qualify for adjudication, and on how priority dates are determined. The more riparian uses that are recognized, and the earlier that riparian priority dates can be assigned, the greater the number of riparian claims that would be filed and the greater likelihood of conflicts with existing and future appropriators. This would lead to more existing appropriators participating in riparian rights adjudication proceedings to protect the legal status of their appropriations, which would lengthen those proceedings. In addition, if extra-preference riparian claims are allowed and if priority dates could be assigned which would displace existing appropriators, the value of existing and future appropriations would be unclear, pending the outcome of the riparian rights adjudication proceedings. Finally, adjudicating riparian claims could lead to adjudicating federal and Indian reserved water rights claims. The implications of adjudicating federal and Indian reserved water right claims are evaluated in the state water planning report *Water Right Adjudications*.

**Defining riparian land.** Implementing sub-alternative 3a (defining riparian land to include only the land meeting the *Wasserburger I* (1966) tests of being legally riparian land) would result in fewer riparian claimants, and would restrict the benefits of riparian right adjudication to those landowners whose land happens to be legally riparian (which arguably is only a historical accident). Implementing sub-alternative 3b (defining riparian land as all land bordering a stream) would lead to more riparian claims being filed, and would also provide a uniform opportunity for landowners bordering a stream to obtain the benefits of riparian right adjudication. Allowing adjudication of riparian rights for land not meeting the *Wasserburger I* tests arguably may somehow interfere with the rights of existing appropriators. This approach may be permissible, however, if the Legislature establishes that the reason for the adjudication is to bring uses popularly perceived as being outside the appropriative system (stockwatering, fish and wildlife, etc.) into the appropriation system for the first time.

**Purpose of use.** The difference between sub-alternatives 3c (claims for any beneficial use could be adjudicated) and 3d (claims for domestic, agricultural and industrial purposes only could be adjudicated) have been discussed already relative to *Alternative #2* under the heading **purpose of use**. Implementing sub-alternative 3c further implies, however, that appropriations could be obtained for purposes other than those enumerated in the surface water preferences provisions through the riparian right adjudication process. Implementing sub-alternative 3d would require all domestic, agricultural and manufacturing riparian claims to be registered and adjudicated by the DWR. Claims for these preferred purposes would be authorized, although clarification regarding what constituted a domestic use would be helpful. For example, induced recharge of a municipal well located near a stream could constitute a domestic use (or a combined domestic and industrial use). Watering of domestic and farm livestock up to the normal dryland grazing capacity of the land in a normal farm or ranch operation could also constitute a domestic use.



**Actual use requirement.** The difference between sub-alternatives 3e (dormant riparian claims could be registered and adjudicated) and 3f and 3g (only active riparian claims could be registered and adjudicated) have been discussed relative to *Alternative #2* under the heading **actual use requirement**. Implementing sub-alternative 3e further implies, however, that appropriations would be issued for dormant riparian claims through the riparian right registra-

tion and adjudication process. If this occurred, these appropriations would be subject to appropriation cancellation provisions (i.e., the "riparian appropriations" would be subject to loss due to more than three consecutive years nonuse, whereas at common law a riparian right is not lost due to nonuse).

**Physical diversion requirement.** The significance of sub-alternatives 3f (a physical diversion of water is not required to constitute an active riparian water use) and 3g (a physical diversion of water is required to constitute an active riparian water use) have been described relative to *Alternative #2* under the heading **physical diversion requirement**. Implementing sub-alternative 3f further suggests, however, that appropriations could be acquired for water uses not involving a direct diversion of water through the riparian right adjudication process.

Legislative clarification of what constitutes a diversion would no doubt be helpful to the DWR in adjudicating riparian claims. The conventional definition of what constitutes a diversion of water could be expanded to include, for example induced recharge of a well located near a stream, or livestock and wildlife watering in the stream.

**Priority date.** Sub-alternatives 3h and 3i deal with how the priority date for adjudicated riparian claims would be assigned. This may be the single most important issue regarding adjudication of riparian claims. Sub-alternative 3h would establish the priority date for the adjudicated riparian claim as the earlier of the date water was initially used (if the claim were for an active riparian right), or the date the riparian claim was filed with the DWR (if the claim were for a dormant riparian right). Sub-alternative 3i would establish the priority date as the date the riparian land was severed from the public domain, whether or not water had ever been actually used. The earlier the priority date is, the more valuable the adjudicated riparian claim becomes. The later the priority date is, the less valuable the adjudicated riparian claim becomes. As noted above, the greater the possibility that riparian claimants could obtain early priority dates, the more controversial riparian right adjudication would be.

One issue associated with implementing sub-alternative 3i (priority date is the date of severance) relates to riparian claims for high-volume uses (principally irrigation). Because many streams in Nebraska are subject to DWR administration of priorities during the irrigation season, anyone attempting to irrigate (or make other high-volume surface water uses) from these streams without an appropriation would very likely have been identified and ordered by the DWR to stop withdrawals during periods of water shortages. The absence of such high-volume

riparian water use conflicts strongly suggests that there are few if any active high-volume riparian water users without an appropriation. If a substantial number of high-volume claims were filed, however, (because dormant riparian claims were allowed pursuant to sub-alternative 3e) holders of adjudicated riparian rights could displace existing senior appropriators on the stream if priority dates were assigned on the basis of severance of riparian land from the public domain. For example, junior appropriators could use riparian right adjudication as a means of improving their priority if they could obtain a priority date based on the date of severance (sub-alternative 3i). If, however, the priority date of an adjudicated riparian right were the earlier of the date water was first applied to beneficial use or the date the riparian claim was filed with the DWR (sub-alternative 3h), the effect of adjudicating a riparian claim would be almost the same as obtaining a new appropriation from the DWR (if the riparian claim were a dormant one).

The effect of implementing sub-alternative 3i (priority date based on date of severance) would have similar implications if riparian claims were allowed for extra-preferred uses (sub-alternative 3c) or for uses not involving a direct diversion of streamflow (sub-alternative 3f). If appropriations were issued for these categories of riparian claims with a priority date based on the date of severance, these appropriations could pre-date most appropriations on most streams. Because livestock watering uses are likely to have been initiated on or near the date of severance, how priority dates are assigned to adjudicated riparian claims for livestock watering is less significant than regarding other riparian claims.

**Stockwatering.** The significance of sub-alternatives 3j (exempting individual domestic and livestock watering riparian uses from riparian right registration and adjudication requirements) and 3k (giving riparian water users for individual domestic and stockwatering purposes the option to register and adjudicate their riparian rights) have been described relative to *Alternative #2* under the heading **stockwatering**. Implementation of sub-alternative 3k or failure to implement option 3j further suggest, however, that appropriations could be acquired for individual domestic and livestock watering purposes and that the DWR would be required to administer appropriations accordingly. If many livestock watering appropriations were acquired, and if they were given fairly senior priority dates (as is likely at least for active riparian livestock watering claims), this could greatly increase DWR water administration responsibilities during periods of water shortages.

**Registration v. integration.** Sub-alternative

3l would require the DWR to adjudicate riparian claims but not to issue new appropriations. Sub-alternative 3m would require adjudication of riparian claims and issuance of new appropriations. If alternative 3l were implemented, the decision regarding whether adjudicated riparian claims should be integrated into the appropriative system could be deferred. However, riparians and appropriators would know the extent of outstanding riparian claims. Riparian-appropriative conflicts would still be resolved by litigation, but the issues of the existence of riparian rights, the extent of riparian land, etc. would not need to be judicially resolved, because these issues would have been established in the riparian claim adjudication proceedings. The court would need to decide only how each riparian-appropriative conflict ought to be resolved. If alternative 3m were implemented the new adjudicated appropriations would be subject to DWR administrative protection and regulation, depending on whether the riparian claim represented a senior or a junior appropriation.

### **Methods of Implementation.**

Implementing *Alternative #3* would require enacting legislation (1) requiring all riparian water right claims to be registered with the DWR within a stated period (e.g., three years), (2) requiring DWR adjudication of riparian claims, and (3) establishing that failure to register a claim would constitute a forfeiture of any riparian right. The legislation should also: (1) define what constitutes riparian land, (2) specify the purposes of water use for which riparian claims could be registered and adjudicated, (3) specify whether dormant riparian claims could be registered and adjudicated, (4) specify whether uses not involving a direct physical diversion of streamflow could be registered and adjudicated, (5) specify how priority dates would be assigned to riparian claims, (6) specify how livestock watering claims would be treated, and (7) specify whether claims are to be adjudicated only or whether new appropriations would be issued for adjudicated riparian claims.

Administrative costs could be substantial, depending on the number of claims filed. The primary costs would be the notice requirements (described relative to *Alternative #2* under the heading of **methods of implementation**), the administrative costs of processing and filing the riparian right claims, and the expense of holding adjudication hearings in every river basin where riparian rights were filed. As noted above, adjudicating riparian claims statewide could take five years or more, depending on what claims can be adjudicated and how they are adjudicated. The

DWR has estimated that appropriation cancellation hearings cost approximately \$200 per appropriation. If 5,000 riparian claims were filed, the administrative costs could reach \$1 million. If riparian adjudication hearings were controversial, the administrative cost per hearing would be higher. In addition, any appropriations issued for adjudicated claims would constitute additional appropriations which the DWR would be required to administer during periods of water shortage.

### **Changes in Water Use Patterns.**

Implementing *Alternative #3* (adjudicating riparian claims) could have significant impacts on surface water use patterns, although the likely nature of those impacts depends on which set of registration and adjudication sub-alternatives are selected. The major factors are what purposes of riparian use are authorized and how the priority date for adjudicated riparian claims would be assigned. If priority dates are based on severance (sub-alternative 3i), the potential exists for a substantial change in water use patterns, as many appropriators would become junior to adjudicated riparian claims. This change in water use patterns would be even greater if dormant claims (sub-alternative 3e), uses not enumerated in the preference statutes (sub-alternative 3c) or uses not involving a direct diversion of streamflow (sub-alternative 3f) are allowed. These changes would also reduce the amount of water available for future appropriation. At the same time, dormant, extra-preference and "non-diverting" uses for which riparian claims had been adjudicated would be protected with regard to future appropriations.

If priority dates are based on the earlier of the date of initial use or the date of DWR filing (sub-alternative 3h), the changes in water use patterns would be less than if the priority date were based on severance. Changes in water use patterns could still be substantial, however. If extra-preference uses (sub-alternative 3c) or "non-diverting" uses (sub-alternative 3f) were authorized, current appropriative uses could be displaced to the extent the riparian claimants could establish a relatively early priority date. If the priority date were limited to the date the riparian claim was filed with the DWR, however, the primary water use impact would be that less water would be available for future appropriations. The adjudication of dormant riparian rights would change existing water use patterns only if they represented extra-preference or non-diverting uses. Otherwise they would have the same effect as if a new appropriation had been issued.

If riparian claims for extra-preferred or non-diverting uses are not adjudicated (i.e., if sub-

alternatives 3c or 3f are not implemented), current uses of these types could be displaced by appropriations authorized in the future.

Water use impacts associated with adjudicating riparian stockwatering claims are insignificant, although they could be locally significant in water short areas where appropriators were required to curtail withdrawals for the benefit of stockmen.

If adjudicated riparian claims can displace existing or unperfected (pending) appropriations, and if riparian right adjudication proceedings therefore are controversial, the adjudication proceedings could take several years to complete. This would make the status of existing and pending appropriations more uncertain, and could discourage new appropriations.

Other possible water use changes associated with adjudicating dormant riparian claims are discussed relative to *Alternative #2* under the heading **changes in water use patterns**.

### **Physical/Hydrological/Environmental Impacts**

Implementing the sub-alternatives dealing with preferred purposes of use, (sub-alternatives 3d, 3h and 3i) would result in no change in physical/hydrologic/environmental impacts from the existing system. Implementing the sub-alternatives dealing with extra-preference uses (sub-alternatives 3c, 3e and 3f) has the potential for creating dramatic changes in water use patterns such that impacts cannot be predicted. This would be particularly true if priority dates were assigned on the basis of severance (sub-alternative 3i). Implementing the sub-alternatives that could lead to controversy in riparian right adjudication between riparians and appropriators (sub-alternatives 3a, 3c, 3e and 3f) could lead to increased ground water use due to the uncertain legal status of existing and future appropriations. This in turn could lead to reductions in ground water storage, and in increases in streamflow.

### **Socio-Economic Impacts.**

For the most part the economic impacts described for the previous alternative apply with equal force to this alternative. Adjudication, however, would undoubtedly reduce claims below the level claimed by registration since not all registered claims would be found legally sufficient in an adjudication procedure. Sub-alternative 3m seems to contemplate issuance of an appropriation permit for adjudicated claims. Adjudication, rather (sub-alternative 3l), might be used to quantify riparian claims only, reserving the issue of whether or how the claims ought to

be incorporated into the appropriation system. Economically, the process should be broken into discrete steps with a decision made to continue the process only if expected benefits exceed expected costs. Thus, the first step should be registration (*Alternative #2*). If relatively few claims are registered a riparian rights "problem" might not exist and further action might not be required. If further action was deemed necessary, the riparian rights themselves might be adjudicated. The magnitude of adjudicated claims might obviate the need for further action. Only if adjudication indicated a problem would further action to integrate riparian rights into the economic system be justified economically.

As to specific sub-alternatives, alternatives 3a, 3c, and 3e are economically superior to alternatives 3b, 3d, 3f, and 3g for the reasons given in *Alternative 2*. Similarly, alternatives 3j and 3k should be rejected, at least with respect to livestock watering claims. As to alternatives 3h and 3i, it is doubtful that any priority date other than the date of severance from the public domain could be sustained constitutionally. Consequently, to avoid the considerable costs of constitutional litigation, alternative 3i would be favored economically over alternative 3h.

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**Alternative #4: Define domestic use of surface water to include the watering of domestic, farm and ranch animals in normal farm and ranch operations up to the normal dryland grazing capacity of the land; and require the Nebraska Department of Water Resources to administer non-domestic appropriations for the benefit of domestic surface water users.**

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**Sub-alternative 4a:** Require the Department of Water Resources to administer non-domestic appropriations for the benefit of domestic surface water users only if there is no other reliable source of domestic water available.

**Sub-alternative 4b:** Require the Department of Water Resources to administer non-domestic appropriations for the benefit of domestic surface water users even if there is another reliable source of domestic water available.

### **Description.**

*Alternative #4* recognizes that the primary reason riparian rights have any current legal

vitality in Nebraska is the ambiguity of existing law regarding the preference status of livestock watering and the exercise of preferences. *Wasserburger I* (1966) and *Brummond* (1969)<sup>3</sup> both dealt with irrigation-livestock watering disputes, and demonstrate the failure of existing appropriation law to clearly deal with stockwatering uses. Implementing this alternative would go as far as may be legally possible to implement the absolute domestic preference for livestock watering which arguably is contained in both the appropriation statutes and the Nebraska constitution, and which was inferred in *Brummond*.

Defining domestic use to include the watering of farm and ranch animals up to the normal dryland grazing capacity of the land would clarify that such livestock watering was a domestic rather than an agricultural use, and would conform to the reasonable expectation of riparian landowners that their ownership includes the right to water livestock in the stream. (Livestock watering would not include watering of livestock in a feedlot). This definition would implement an important principle consistently expressed in water rights law that small-volume users should be legally protected from the disproportionately larger uses of others. Finally, this definition would implement what appears to be the legislative intent in establishing the domestic preference in Nebraska's appropriative statutes, as corroborated by contemporary *dicta* in *Crawford* (1903)<sup>4</sup>.

Most commentators have suggested that the Nebraska constitution imposes a compensation requirement for the exercise of a preference. Another interpretation is possible, however. Compensation might not be required for the exercise of a domestic preference by an individual water user. This interpretation is suggested by, although not established in, *Brummond* (1969).

#### Method of Implementation.

*Alternative #4* could be implemented by enacting legislation defining domestic use of surface water to include the watering of domestic, farm, and ranch animals in normal farm and ranch operations up to the normal dryland grazing capacity of the land, and requiring the DWR to administer non-domestic appropriations for the benefit of domestic surface water users. Implementing sub-alternative 4a would require further legislation limiting DWR administration for the benefit of stockmen to situations where there was no alternative source of livestock water. Implementing sub-alternative 4b would require legislation specifying that DWR administration for the benefit of stockmen was not so limited.

Implementing *Alternative #4* would increase the DWR's responsibilities for administering appropriations during water shortages. In river basins where surface water was a significant source of livestock water, this increase in administrative duties could be significant. Where groundwater is the principal source of livestock water, however, DWR administrative duties probably would not increase even if sub-alternative 4b were implemented unless stockmen requested DWR administration on other than a "good faith" basis.

#### Changes in Water Use Patterns.

Implementing *Alternative #4* could give ranchers a more secure surface water supply through DWR regulation of irrigators for the benefit of ranchers. Implementation of sub-



alternative 4b, effective DWR administration protecting stockmen, could reduce the efforts of ranchers to develop alternative livestock watering supplies (e.g. through the development of rural water systems).

#### Physical/Hydrologic/Environmental Impacts.

Implementing this alternative could result in limited and localized physical/hydrologic/environmental impacts. These impacts would stem from the potential for streamflow and also from surface water quality deterioration resulting from increased livestock wastes in streams.

## Socio-Economic Impacts.

Absolute preferences are economically inefficient and constitutionally suspect, particularly when applied to surface water. Consequently, of the two sub-alternatives, alternative 4a is clearly superior economically to alternative 4b. From an economic perspective, neither alternative is particularly desirable at the present time. Both alternatives could operate to defeat the reasonable expectations of appropriators under present law.

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### FOOTNOTES

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1. 180 Neb. 149, 141 N.W.2d 738 (1966).
  2. Two kinds of groundwater recharge exist: when a well induces recharge from a stream, and when a losing stream generally recharges the groundwater aquifer. One can argue that induced groundwater recharge constitutes a physical diversion of water, because the well was diverting the water from the stream by inducing the recharge.
  3. *Brummond v. Vogel*, 184 Neb. 415, 168 N.W.2d 24 (1969).
  4. *Crawford Co. v. Hathaway*, 67 Neb. 325, 93 N.W. 781 (1903).
  5. *Wasserburger v. Coffee*, 201 Neb. 416, 267 N.W.2d 760 (1978). ("*Wasserburger II*").
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## CHAPTER 5

### RELATIONSHIP OF THIS STUDY TO OTHERS

Each of the policy issue studies being conducted demonstrates the interrelationship between water policy issues. Water policy is complex, and no method of distinguishing issues can successfully eliminate overlaps. The purpose of this chapter is to identify the most significant relationships between this study and the other policy issues studies being conducted as part of the State Water Planning and Review Process.

As this report is being prepared, the original policy issue studies are nearing completion. While reports have not yet been prepared on several of the studies, work is well underway on all of those original studies still scheduled. The scope of all of these studies is therefore quite well defined. As a result, it is now much easier to identify the relationships between each of the studies than it was when the process began.

Identifying those relationships is important in each case. Such identification promotes awareness of the fact that any particular water policy action will have greater impact upon overall water policy than just the resolution of the immediate issue at hand. The result of this awareness should not be to delay automatically what may otherwise appear to be a favorable action, although that may be appropriate in some cases. However, such awareness should at a minimum discourage actions that will prevent consideration of new information at a later date.

Significant relationships can be identified between the subject of this report, riparian rights, and several of the other policy issue studies being conducted. The extent of that relationship, if any, is addressed in the material which follows.

#### STUDY #1 INSTREAM FLOWS

Since the exercise of riparian rights is one potential way to achieve recognition of uses which are dependent upon the maintenance of instream flows, there can be considerable re-

lationship between this study and the study on *Instream Flows*. Alternatives 2c and 3c in this report would specifically grant recognition of instream uses by riparian landowners. If integrated into the appropriative system, valid claims for such uses would be converted to appropriative rights. On the other hand, other alternatives, such as 2d, 2g, 3c, and 3g, would deny recognition of instream riparian uses. They would therefore prevent use of the riparian rights system to achieve instream flow objectives.

One particular instream use, stockwatering, is the subject of alternatives 2h, 2i, 3j, 3k, 4a, and 4b. By exempting this use from registration or adjudication, alternatives 2h and 3j would leave resolution of conflicts involving stockwatering to the courts. Alternatives 2i and 3k would allow the landowner to make a one-time decision whether he or she wanted to rely on an administrative or judicial procedure for protection of his or her right to water livestock. Finally, *Alternative #4*, especially subalternative 4b, would resolve the stockwatering/instream flow issue to the benefit of the stockwater user. It is important to note that the protection granted such uses by *Alternative #4* would extend to all users, not just those with riparian rights.

#### STUDY #2 WATER QUALITY

This study and the *Study on Water Quality* appear to have little relationship to each other. Unless waste assimilation was recognized as a use entitled to a riparian claim under alternative 2c or 3c the only relationships between the two studies would depend upon the extent to which implementation of any of the riparian rights alternatives increased or decreased flow in a given stream. Those alternatives that favor greater recognition of riparian rights for consumptive uses would tend to decrease flow, which in turn would tend to degrade water quality.

### **STUDY #3 GROUNDWATER RESERVOIR MANAGEMENT**

The only apparent relationship between this study and the *Groundwater Reservoir Management Study* relates to the question of whether natural or induced groundwater recharge from streamflow should be recognized as a valid riparian claim. An affirmative decision would provide protection to groundwater reservoirs dependent upon such recharge.

### **STUDY #4 WATER USE EFFICIENCY**

The relationship between this study and the *Water Use Efficiency Study* is not significant. None of the alternatives in this report address water use efficiency directly and efficiency in use would probably not be a criterion for whether or not a particular riparian right ought to be integrated into the appropriations system.

### **STUDY #5 SELECTED WATER RIGHT ISSUES**

*Drainage of Diffused Surface Water.* No significant relationships with this study have been identified.

*Preferences in the Use of Water.* This study and the study on *Preferences in the Use of Water* are related in at least two ways. First, two of the alternatives in this study (2d and 3d) would restrict registration and/or adjudication of riparian rights to uses listed within the preferences system. Preferences therefore become critical to whether or not particular uses will be recognized in any action modifying the nature of riparian rights.

The second way in which the preferences report and this report are related is in regard to administration of riparian rights once they have been integrated into the appropriative system. It is generally believed that riparian rights neither benefit from nor are subject to preferences. At least one Nebraska case would indicate that an exception to this rule may be made for domestic uses (*Brummond v. Vogel*, 184 Neb. 415, 168 N.W.2d 24 (1969)). At any rate, once integrated into the appropriative rights system, a previous riparian right would be able to exercise a preference against inferior uses and would also be subject to exercise of a preference by superior uses.

*Water Rights Adjudication.* This study is closely related to both Parts I and II of the *Water Rights Adjudication Study*. Part I of the report for that

study deals with the cancellation of water rights for non-use. Riparian rights are not subject to forfeiture for lack of use and can lie dormant for many years. If integrated into the appropriative system (*Alternative #3*), riparian rights would thereafter be subject to cancellation the same as any other unused appropriative right.

*Alternative #3* of this report calls for the adjudication of riparian rights claims. Part II of the *Water Rights Adjudication Report* deals specifically with adjudication of previously unquantified rights like riparian rights, federal reserved rights and Indian water rights. If *Alternative #3* in this report were implemented, adjudication of all riparian claims would be required and new procedures might need to be established for this purpose.

*Property Rights in Groundwater.* No significant relationships with this study have been identified.

*Interstate Water Uses and Conflicts.* *Alternative #3* and particularly *Alternative #4* would result in an increase in the number of established claims to water in Nebraska. Even if this increase did not result in an increase in the actual amount of water used, the recognition of these additional claims could enhance Nebraska's rights to allocation of interstate waters.

*Transferability of Water Rights.* Implementation of *Alternative #3* would increase the number of appropriations in the State of Nebraska. If surface water rights were also made transferable, as will be addressed by the study on that subject, more water rights would be available for transfer to other locations or other uses. It would also be true, however, that a greater number of water rights would have to be taken into account when a proposed transfer was being considered for approval.

*Beneficial Use.* While these two studies do not appear to be directly related to each other, they do address many of the same issues. For example, both require a decision on what types of uses constitute beneficial uses of water. Both also address a question of actual use of water and its effect on the validity of any claims to that use.

### **STUDY #6 MUNICIPAL WATER NEEDS**

There is a limited relationship between this study and the one on *Municipal Water Needs*. Depending upon which of the subalternatives would be selected, *Alternative #3* could increase the demand on surface water supplies, and consequently reduce the amount of recharge to municipal well fields relying on instream flows. However, municipal water supplies could benefit

from implementation of *Alternative #3* if other subalternatives were accepted. If groundwater recharge were recognized as a valid riparian claim (3c), and if claims for such purposes were eventually integrated into the appropriate rights system, a few municipalities might realize a greater level of protection for municipal well fields.

## **STUDY #7 SUPPLEMENTAL WATER SUPPLIES**

Implementation of *Alternative #3* or *#4* of this report could decrease the amount of surface water available for storage or delivery to areas with inadequate supplies. This effect would occur through the recognition and administration of additional claims to the surface water supplies.

## **STUDY #8 INTERBASIN TRANSFERS**

## **STUDY #9 WEATHER MODIFICATION**

These two studies are no longer scheduled for completion as a part of the State Water Planning and Review Process. Therefore, no attempt has been made to identify possible relationships with this study.

## **STUDY #10 WATER - ENERGY**

## **STUDY #11 SURFACE - GROUNDWATER INTEGRATION**

These two studies are identified and discussed in the September 15, 1982 Annual Report and Plan of Work. The scope of these studies, however, has not been well defined at the time this report is being prepared and no attempt has been made to identify possible relationships with this study.

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## Appendix A

# SUMMARY OF HEARING REPORT #5. RIPARIAN RIGHTS

2:00 p.m., 7:00 p.m.  
SEPTEMBER 8, 1982  
Lincoln, Nebraska  
Nebraska State Office Building

### PUBLIC NOTICE

Legal notice of this hearing was published in eight newspapers across the State of Nebraska. Press releases were sent to every newspaper and radio station in the state.

### HEARING PROCEDURE

This hearing was held simultaneously with hearings on two other *Selected Water Rights Issues Policy Study* reports and on the *Municipal Water Needs Policy Issue Study*. Robert W. Bell and Henry P. Reifschneider presided jointly over

the hearing and James R. Cook conducted the hearing. A brief summary of each report was presented prior to the receipt of testimony. Those present were given an opportunity to testify on all of the reports. An informal question and answer period was then conducted, and an opportunity for additional testimony was offered prior to the conclusion of the hearing.

### TESTIMONY OFFERED

No testimony was presented on Report #5 on *Riparian Rights*.

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## Appendix B

# SUMMARY OF HEARING

## REPORT #5, RIPARIAN RIGHTS

2:00 p.m., 7:00 p.m.  
SEPTEMBER 29, 1982  
Ogallala, Nebraska  
Holiday Inn

### PUBLIC NOTICE

Legal notice of this hearing was published in nine newspapers across the State of Nebraska. Press releases were sent to every newspaper and radio station in the state.

### HEARING PROCEDURE

This hearing was held simultaneously with hearings on two other *Selected Water Rights Issues Policy Study* reports and on the *Municipal Water Needs Policy Issue Study*. Commission members Wayne Johnson, Maureen Monen, and Henry Reifschneider presided jointly over the hearing and James R. Cook conducted the hearing. A brief summary of each report was presented prior to the receipt of testimony. Those present were given an opportunity to testify on all the reports. An informal question and answer period was then conducted and an opportunity for additional testimony was given again prior to the conclusion of the hearing.

### TESTIMONY OFFERED

Informal comments on the report brought out the points that (1) there is currently no record of riparian rights in the state and each parcel of

riparian land would have to be looked at individually, (2) many riparian rights have now been appropriated, and (3) riparian rights have perpetual existence.

Specific testimony was offered as follows:

1. **Bruce Snyder, North Platte.** In Mr. Snyder's opinion, the purpose of this report is to reduce uncertainty. He mentioned two instances where conflicts could occur: livestock watering and instream uses. He suggested that the farmer was not really a big problem and that recognition of riparian rights in instream uses for fish and wildlife and groundwater recharge was not worth the "battle" it would inevitably cause. He concluded by stating that lawsuits can settle it now anyway.

2. **Clayton Lukow, Holstein.** Mr. Lukow testified that although there probably aren't a lot of riparian rights in Nebraska and that it would cost a lot to bring them out into the open, if we don't identify them, we will continue to face uncertainty in the total amount of water actually allocated in the state.