

June 1994

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### Recommended Citation

15 Pub. Land L. Rev. 199 (1994)

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# JUDICIAL RECOGNITION OF THE PUBLIC INTEREST IN WATER RECREATION: NEBRASKA AND UNITED STATES SUPREME COURT REALITIES

Peter J. Longo\* and Bruce Elder\*\*

## I. INTRODUCTION

Recreation as part of a balanced life has occupied the concerns of citizens and philosophers since the time of Aristotle.<sup>1</sup> Conventional wisdom suggests water and recreation are mutually inclusive. Nevertheless, in Nebraska, that mutually inclusive link has been suppressed by the dominant link between water and crops. Yet, in Nebraska, "[d]emands for water-based outdoor recreation have grown tremendously during the last decades."<sup>2</sup> Additionally, environmental uses of water have placed new demands on Nebraska's water resources.<sup>3</sup> Even though agriculture and industry have ranked as the top two income producing enterprises in the state since statehood, tourism, of which recreation and the environment play a major part, is "an economic giant only beginning to stir."<sup>4</sup> With the increased demands on water for recreation and its increased importance to the Nebraska economy,<sup>5</sup> the use of Nebraska's surface water for recreational and environmental purposes have only recently been recognized as important components of the public interest in water resources.<sup>6</sup>

In an attempt to settle disputes and develop priorities between domestic, agricultural, and industrial users, Nebraska water law has developed in a piecemeal fashion over the years.<sup>7</sup> With recreational and related environmental uses becoming an important part of the Nebraska

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1. See ARISTOTLE, THE COMPLETE WORKS OF ARISTOTLE (Jonathan Barnes ed., 1984).

2. NEBRASKA GAME AND PARKS COMMISSION, STATE COMPREHENSIVE OUTDOOR RECREATION PLAN 8-23 (1991) [hereinafter SCORP].

3. Steve Gaul, *Politics and Policy, in CONSERVATION AND SURVEY DIV., INST. OF AGRIC. AND NATURAL RESOURCES, UNIV. OF NEBRASKA-LINCOLN, FLAT WATER: A HISTORY OF NEBRASKA AND ITS WATER, RESOURCE REPORT NO. 12 203-30* (Charles A. Flowerday et al. eds, 1993) [hereinafter FLAT WATER].

4. Jon Farrar, *Platte River Instream Flow—Who Needs It?*, NEBRASKALAND, Dec. 1992, at 44.

5. *Id.*

6. *Id.*

7. See Richard S. Harnsberger et al., *Interstate Transfers of Water: State Options After Sporhase*, 70 NEB. L. REV. 754, 767 n.46 (1991).

economy,<sup>8</sup> these uses will have to compete with the traditional uses for the state's water resources.

This article examines Nebraska water law and policy concerning the recreational use and the related environmental benefits of the rivers, streams, and lakes in the state. Nebraska presents an intriguing case for the following two reasons: (1) Nebraska recognizes both prior appropriation and riparian rights water use doctrines,<sup>9</sup> and (2) the legal status for recreational use and environmental concerns are emerging concepts within the state.<sup>10</sup> This article then connects Nebraska's law and policy to the recent policy enunciated by the United States Supreme Court.

This article has five parts. First, it examines Nebraska's water resources and the recreational demands on and environmental value of water. Second, it reviews Nebraska's substantive water law. Third, it analyzes Nebraska water and recreation case law. Fourth, it links recreation and public interest to provide a framework for lawmakers and citizens to protect Nebraska's most precious resource, water. Last, it examines United States Supreme Court cases that recognize recreation as an important part of the water use equation. Examination of Nebraska's policy allows other states to compare and assess their situation in light of the emerging developments in Nebraska. The ultimate goal is a superior water policy that recognizes changing western values.

## II. NEBRASKA'S WATER RESOURCES

### A. Supply

Nebraska is blessed with an abundant supply of water.<sup>11</sup> In fact, many western states experiencing critical water shortages envy Nebraska's supply of water.<sup>12</sup> For example, Nebraska has 23,686 miles of streams and canals, 280,000 acres of artificial and natural lakes, reservoirs, and ponds, and more than 1,500 sandpits.<sup>13</sup> A recent study found that reservoirs in the state have a capacity to store 3.4 million acre-feet<sup>14</sup> of water, that underground reservoirs contain at least 2 billion acre-feet of groundwater (most of which is contained in the Ogallala Aquifer), and that the annual

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8. See Farrar, *supra* note 4, at 44.

9. RICHARD S. HARNESBERGER & NORMAN W. THORSON, *NEBRASKA WATER LAW AND ADMINISTRATION* 19 (1984).

10. For example, "Nebraska was one of the last western states to adopt stream-flow protection legislation and the law it enacted made obtaining an instream appropriation more difficult than did comparable legislation in other Western states." Farrar, *supra* note 4, at 46.

11. See Harnesberger et al., *supra* note 7, at 776.

12. *Id.*

13. See SCORP, *supra* note 2, at 5-8.

14. An acre foot is the amount of water which will cover one acre one foot in depth, and contains 325,850 gallons.

stream flow discharge exceeds seven million acre-feet.<sup>15</sup>

Nebraska's foremost water law experts have stated:

To put these figures into perspective, at current consumption rates, Nebraska groundwater in storage could supply the supplemental water needs of the Metropolitan Water District of Southern California for 2,000 years. Average annual streamflow discharge from Nebraska is approximately equal to the amount of water that the upper basin states on the Colorado River must supply annually to the thirsty states of California, Nevada, and Arizona in the lower basin. Enough water can be stored in Nebraska reservoirs to meet the public water supply needs of Arizona for seven years.<sup>16</sup>

Although Nebraska is currently blessed with an abundant supply of water, water itself is a unique and precious resource.<sup>17</sup> A substantial amount of water leaves the state through normal stream flow.<sup>18</sup> While the water is in the state, it is used and reused for drinking, irrigation, and industrial purposes.<sup>19</sup>

The Platte River Valley, home to the "Oregon Trail," which served as the main road to western expansion from 1840 to 1866, is still the main passageway across the state, as Interstate 80 parallels the Platte from east to west.<sup>20</sup> The Platte River today provides an interesting example of the effect civilization has had on our water resources. What was once a wild river now has a highly regulated flow controlled by releases from numerous water impoundments.<sup>21</sup> Research shows that there are over 250 diversion and storage projects on the Platte River system and that 70 percent of the "estimated historic natural flow in the Platte basin is removed before arriving at the main stream Platte in central Nebraska."<sup>22</sup> Agricultural irrigation, hydroelectric power generation, and flood control have caused this dramatic change.<sup>23</sup> Irrigation from the Platte began in 1860, when a farmer in the North Platte area dug a ditch to divert water to his garden.<sup>24</sup> From that small diversion, irrigation has grown so dramatically that today some 2 million acre-feet of Platte system surface water irrigate 570,000

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15. See Harnsberger et al., *supra* note 7, at 776.

16. *Id.*

17. For a discussion of water's unique qualities, see Vincent H. Dreeszen, *Water Availability and Use*, in *FLAT WATER*, *supra* note 3, at 82-85.

18. An estimated 9 million acre-feet, or 10% of the annual water supply. *Id.* at 83.

19. See Farrar, *supra* note 4, at 40.

20. *Id.* at 38.

21. Don Cunningham, *The Platte*, *NEBRASKA RIVERS*, Jan.-Feb. 1983, at 34.

22. *Id.* at 39.

23. *Id.* at 34.

24. *Id.* at 33, 34.

acres of land.<sup>25</sup>

Estimates of explorers in the early to mid-1800's placed the width of the Platte River from one-third mile to three miles.<sup>26</sup> The river is now only one-tenth to one-fifth as wide.<sup>27</sup> Numerous canals and pumps take water directly from the river, with the largest diverter being the Central Nebraska Public Power and Irrigation District. Through a complex system of dams, reservoirs, canals, and hydroelectric stations, the District diverts eighty-two percent of the river's flow.<sup>28</sup>

The taming of the Platte is just one example of how Nebraska's water resources have been put to use since the early days of westward expansion. Additional examples include the system of reservoirs on the Republican River in southern Nebraska,<sup>29</sup> the North Loup Project which dams the Calamus River and Davis Creek,<sup>30</sup> and the increased irrigation of cropland from 150,000 acres in 1900 to 8 million acres in 1990.<sup>31</sup> Municipal and industrial uses have also increased demands on water resources in the state. Nearly all the large population centers pump their domestic water supplies from the Platte River or its tributaries.<sup>32</sup>

Even with increased domestic use, agriculture has had the greatest impact on the state's water resources. "Agriculture accounts for over ninety percent of the consumptive use in the Western states, a percentage that has remained fairly constant over time."<sup>33</sup> In addition to domestic, agricultural, and industrial uses, environmental and recreational uses, such as boating, canoeing, swimming, fishing, hunting, hiking, camping, picnicking, and sightseeing, require sufficient water flow.<sup>34</sup>

### B. Recreational Demands

Recreation and tourism in Nebraska experienced rapid growth during the 1970's and the first half of the 1980's.<sup>35</sup> This growth can be attributed to "increases in population, leisure time, educational levels, automobile ownership, and disposable personal income."<sup>36</sup> In fact, the recreation and tourism industry has grown to rank as the third largest industry in the state,

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25. *Id.* at 35.

26. *Id.* at 36.

27. *Id.*

28. *Id.* at 35, 36.

29. Steve Gaul, *Politics and Policy*, in *FLAT WATER*, *supra* note 3, at 203-30.

30. *Id.* at 224.

31. Steve Schafer, *Economics and Finance*, in *FLAT WATER*, *supra* note 3, at 113-31.

32. Omaha, Lincoln, Columbus, Fremont, Grand Island, Kearney, Lexington, North Platte, and Scottsbluff all depend on the Platte for their municipal water supplies. Farrar, *supra* note 4, at 43.

33. See Harnsberger et al., *supra* note 7, at 777 n.95.

34. See SCORP, *supra* note 2, at 8-23.

35. *Id.* at 6-10.

36. *Id.*

trailing only agriculture and manufacturing.<sup>37</sup> Tourism expenditures during 1990 exceeded \$1.6 billion and the tourism industry employed an estimated 36,000 people.<sup>38</sup>

Although not all tourism is directly related to Nebraska's water resources, the most popular attractions are outdoor park and recreation areas of the Nebraska Game and Parks Commission.<sup>39</sup> Most of these areas use water resources in some way.<sup>40</sup> As a recent study estimated, thirty-nine percent of Nebraskans participated in beach swimming in 1990, thirty-six percent in pond swimming, nearly nineteen percent in stream and river fishing, and eleven percent in canoeing, sailing, rafting, and other non-power boating activities.<sup>41</sup> Many other outdoor recreation activities are enhanced by or are related to water resources.<sup>42</sup> The Game and Parks Commission expects increased demands to be placed on water-based outdoor recreation in the future.<sup>43</sup>

The Canoe Trails Program provides an excellent illustration of the growth of water-based recreation. Canoe outings nearly doubled in Nebraska from 1980 to 1985.<sup>44</sup> Part of this can be attributed to a Game and Parks Commission land leasing program that began seventeen years ago.<sup>45</sup> The Commission leases canoe sites from private landowners along rivers with good canoeing potential.<sup>46</sup> Nearly all the canoeable streams are located on private property. Thus, prior to implementation of the land leasing program, canoeing was limited to single day trips where public access was available for recreationists to put in and to take out of the water. Multi-day trips could only be made with previous permission from the individual landowners to camp on private property. The Game and Parks Commission leased tracts of land that became campsites for canoeists along the river. These leased campsites are generally spaced along the rivers to allow multi-day trips. The camp facilities are very simple and basic. Signs denote the campsite areas and boundaries so canoeists can locate the proper place to camp. Access to and from the rivers must still be made from state owned or leased riparian land or public road right-of-ways or bridges.

The Canoe Trails Program has opened many miles of canoeable

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 8-23.

41. *Id.* at 6-15.

42. For a complete discussion of Nebraska's outdoor recreation demands, supply, and needs, see *id.* at 6-1 to 8-35.

43. See *id.*

44. These outings have grown from 531,390 to over 886,912. See SCORP, *supra* note 2, at 8-23.

45. *Id.*

46. *Id.*

waters to the public.<sup>47</sup> Its continued success depends upon cooperation with private land owners and the public's respect for the landowners' property.

### C. *Environmental Demands*

In addition to increased recreational use, environmental concerns have also become a major factor in apportioning water resources in the state.<sup>48</sup> Numerous state and federal laws have been enacted to either directly or indirectly protect fish and wildlife, with most designed to maintain minimum stream flows.<sup>49</sup>

The Platte River provides a good example of a river that not only serves the commercial interests of the state but also serves as the home of abundant wildlife.<sup>50</sup> Eighty percent of the world's population of sandhill cranes funnel into the Great Bend region of the Platte River (roughly Sutherland to Grand Island) for use as their spring staging grounds.<sup>51</sup> Inadequate river flows have had a dramatic effect on the sandhill cranes because they require the type of habitat historically provided by the Platte.<sup>52</sup> The sandhill cranes have depended on the Platte's shallow waters and vegetation-free sandbars for thousands of years.<sup>53</sup> In addition to the sandhill cranes, endangered whooping cranes and more than one million ducks and geese use the Great Bend stretch of the Platte River year after year.<sup>54</sup>

Changes in the Platte River have greatly reduced the habitat available to these migratory birds on their journeys.<sup>55</sup> While the entire length of the Platte River in the state once met their habitat needs, now only a 150 mile strip provides habitat appropriate for the sandhill cranes, whooping cranes,

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47. Canoe outings increased from 531,390 in 1980 to 886,912 in 1985. The Nebraska Game and Parks Commission attributes the substantial increase in canoeing activity to increased access. *Id.* at 8-22 to 8-23.

48. Gaul, *supra* note 3, at 229; Farrar, *supra* note 4, at 46.

49. For example, at the state level, Nebraska can deny a water right that is not in the public interest. NEB. REV. STAT. § 46-204 (1988). The Groundwater Management and Protection Act provides for development of groundwater management plans. NEB. REV. STAT. §§ 46-656 to 46-674.20 (1988, Supp. 1992 & Supp. 1993). The Nongame and Endangered Species Conservation Act could protect designated species of wildlife if they would be adversely affected by reduced stream flows. NEB. REV. STAT. §§ 37-430 to 37-438 (1988, Supp. 1992 & Supp. 1993). At the federal level, the National Wild and Scenic Rivers Act protects a portion of the Missouri and Niobrara. The National Environmental Policy Act of 1969, the Fish and Wildlife Coordination Act, the Water Project Recreation Act, and the Small Watershed and Flood Control Act may all have a positive effect on maintaining stream flows and enhancing wildlife habitat and recreational resources.

50. Farrar, *supra* note 4, at 41, 42.

51. *Id.* at 42; Cunningham, *supra* note 21, at 38.

52. Farrar, *supra* note 4, at 42.

53. Cunningham, *supra* note 21, at 38.

54. *Id.*

55. *Id.*

ducks, and geese.<sup>56</sup>

Heightened environmental concerns and increased water-based recreational use have brought additional pressure to maintain sufficient stream flows and other surface water resources.<sup>57</sup> While most traditional water disputes have been between irrigators, the emergence of recreational and environmental uses have significantly changed the players in the water apportionment game. An examination of Nebraska constitutional provisions, state statutes, and court decisions reveals that Nebraska has begun to recognize recreational and environmental uses as beneficial uses of its water.

### III. SUMMARY OF NEBRASKA WATER LAW

The Nebraska courts have played an important role in defining and developing the state's water law policy. This role has come by default because the state legislature has been unable to develop a comprehensive state water management plan.<sup>58</sup> The legislature's failure to act in a comprehensive manner places the development of state water policy in the hands of the state courts and local administrative units, especially the Natural Resource Districts.<sup>59</sup>

#### A. *Surface Water: Prior Appropriation and Riparian Rights*

Two basic legal doctrines are used in this country to determine the rights of individuals using water from rivers and streams. First, the doctrine of riparian rights, which developed under English common law,

56. *Id.*

57. For example, the Nebraska Legislature enacted instream appropriation legislation in 1984. NEB. REV. STAT. §§ 46-2,107 to 2,119 (1988, Supp. 1992 & Supp. 1993). Section 46-2,107 states that: The Legislature finds that the maintenance, conservation, management, storage, and timely release of the waters of the natural streams within the State of Nebraska are in the public interest and are practices essential to the well-being of present and future generations. In furtherance of these practices, the public interest demands the recognition of instream uses for fish, recreation, and wildlife. The Legislature also finds that proposals for future water development should fully consider multiple uses, including instream flows whether from natural flow or from reservoir releases, and recognizes the positive impact of impoundments which can provide significant instream flow benefits.

Also, for over ten years, Central Nebraska Public Power and Irrigation District and Nebraska Public Power District have been in the process of having their facilities relicensed by the Federal Energy Regulatory Commission (FERC). In addition to their disagreements with each other, the districts have been fighting with environmental groups over the best allocation of water resources for recreation and environmental uses (fish and wildlife habitat) and for irrigation and hydroelectric power uses.

58. Peter J. Longo & Robert D. Miewald, *Institutions in Water Policy: The Case of Nebraska*, 29 NAT. RESOURCES J. 751, 752 (1989).

59. *Id.* at 753-54. Natural Resource Districts are local administrative units with broad powers to manage water resources. Districts are divided roughly along river basin hydrologic lines. A locally elected board of directors oversees the districts which are funded largely by local property tax revenues. *Id.* at 756.



permits a landowner whose land borders a river or stream (riparian) to claim use of the water.<sup>60</sup> The water must be put to reasonable use, typically only on the riparian property.<sup>61</sup> Second, the doctrine of prior appropriation, which is statutory in nature, requires a state permit for a user to withdraw a specific quantity of water from a river or stream, regardless of whether the user owns adjoining land. Sufficient water must be available "free from claims of [others with] earlier appropriations," and the water must be put to a beneficial use.<sup>62</sup>

Riparian law developed in England and in the eastern part of the United States where water is abundant. In theory, if all riparians limited their uses to those that were "reasonable," then there would be enough water for everyone.<sup>63</sup> The doctrine "seems to be based on the unspoken premise that if rights to the use of water are restricted to those persons who have access to it through the ownership of the banks, and if those persons will restrict their demands on the water to reasonable uses, there will be enough for all."<sup>64</sup>

Prior appropriation developed in the western United States where water is typically in scarce supply.<sup>65</sup> When there is not enough water for everyone, priority is given to those who obtained their right first, and later users will be required to go without or to purchase rights from a user with priority.<sup>66</sup> Many western states follow the pure doctrine of prior appropriation, or at a minimum, require all new uses to be through appropriation.<sup>67</sup>

Nebraska recognizes both the doctrine of riparian rights and the doctrine of prior appropriation.<sup>68</sup> These two doctrines developed to handle different circumstances—riparian rights to settle occasional disputes where water was typically in abundant supply, and prior appropriation rights in arid climates where water shortages were common.<sup>69</sup> Because the doctrines are adapted to completely divergent conditions, the two doctrines are not completely compatible with each other.

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60. FRANK J. TRELEASE, *WATER LAW, RESOURCE USE AND ENVIRONMENTAL PROTECTION* 10 (1974).

61. *Id.*

62. *Id.* at 11.

63. *Id.*

64. *Id.*

65. *Id.* at 10. For a complete discussion of the development of prior appropriations law in the Western states, see HARNSBERGER & THORSON, *supra* note 9, at 59-62.

66. TRELEASE, *supra* note 60, at 11.

67. *Id.* See also HARNSBERGER & THORSON, *supra* note 9, at 61.

68. Colorado, Arizona, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming all follow pure prior appropriation, while Kansas, North Dakota, Oklahoma, Oregon, South Dakota, Texas, and Washington originally recognized some riparian uses, but use the prior appropriation doctrine today, with all new rights having to be appropriated. Nebraska and California are the only two states where it may be possible to obtain new water rights based on riparianism. *Id.*

69. TRELEASE, *supra* note 60, at 11.

In 1895, the Nebraska legislature adopted the doctrine of prior appropriation.<sup>70</sup> However, subsequent court decisions have held that neither the prior appropriation legislation nor the constitutional provisions abolished riparian rights.<sup>71</sup> Land considered riparian at the time of the enactment of the 1895 statute retained its riparian status — non-use does not destroy the riparian rights.<sup>72</sup> Post-1895 users may lay claim to use of unappropriated water, and their priority status will be based on the date they filed their claim with the Department of Water Resources.<sup>73</sup> The recognition of both doctrines presents the courts with the dilemma of making water policy by harmonizing two incompatible water doctrines.

### B. Groundwater

Although water recreation typically involves only surface water, groundwater levels directly affect surface water. "All water is part of the hydrologic cycle [and] therefore, is interrelated and interdependent."<sup>74</sup> Even though surface and groundwater are hydrologically interrelated,<sup>75</sup> this relationship has not been legally or politically recognized. What functionally constitutes a single resource, the law incorrectly regards as two. Separate statutes govern surface water and groundwater. They each have different governing administrative institutions, and different bodies of case law have developed around each one. Amendments to Nebraska's 1920 Constitution refer only to surface water or "natural streams."<sup>76</sup> Unfortunately, groundwater has gone largely unregulated in Nebraska. With the development of center-pivot irrigation and the consequent proliferation of irrigation wells,<sup>77</sup> some areas of the state have suffered from a significant lowering of the water table, thus ultimately affecting stream flows.<sup>78</sup>

One of Nebraska's foremost legal experts on water law notes the

70. See HARNSEBERGER & THORSON, *supra* note 9, at 69. Act of April 4, 1895, ch. 69, 1895 Neb. Laws Ch. 244 (codified in scattered sections of chapter 46 of Nebraska Revised Statutes) (establishing Nebraska water policy, adopting the prior appropriation doctrine, abrogating riparian rights, declaring unappropriated water public property, and establishing a water rights system).

71. *Wasserburger v. Coffee*, 180 Neb. 149, 156, 141 N.W.2d 738, 744 (1966).

72. *Id.* at 150, 141 N.W.2d at 745.

73. *Id.*

74. See Harnseberger et al., *supra*, note 7, at 777.

75. There is a constant interchange of water between underground aquifers and surface water. Water from underground aquifers feeds rivers and streams and water from rivers and streams recharges underground aquifers.

76. NEB. CONST. art. XV, §§ 5, 6.

77. The number of center pivots in Nebraska increased from 2,725 in 1972 to 27,617 in 1988. Much of the increase in irrigated acres in the past 25 years is due to this dramatic increase in the number of center pivots. Leslie F. Sheffield, *Technology*, in *FLAT WATER*, *supra* note 3, at 87-106.

78. Farrar, *supra* note 4, at 45.

interrelation of surface and groundwater:

In many locations in Nebraska, if groundwater were red, streams would be pink. Similarly, if groundwater were poisoned, the streams would also be poisoned. Groundwater in Nebraska, however, percolates slowly, generally moving only about 300 feet annually. Even in areas of greater groundwater movement, such as the Frenchman's Creek/Enders Reservoir area near Imperial, groundwater moves no more than 1300 feet per year and averages only 900 feet per year. In contrast, stream flow down the Platte River moves approximately 25 miles per day. As a result, when junior headgates are closed at the western border of the state, water reaches senior users west of Kearney in about ten days. The negligible movement of groundwater, however, means that it would seldom be feasible to close junior wells to get water to senior wells, or to a stream, even if Nebraska adopted a prior appropriation system for groundwater. In contrast to surface water management which regulates juniors for the benefit of seniors, effective groundwater reservoir management usually requires that all withdrawals be regulated to minimize well interference. While lawyers may shut down wells completely, hydrologists realize it is rarely optimum to do so.<sup>79</sup>

With little statutory, constitutional, or technical guidance, the Nebraska Supreme Court has been placed in the position of having to develop groundwater policy. In a 1933 case, the court rejected the English rule that provides that land owners own everything under the ground to the center of the earth, including water.<sup>80</sup> The court accepted a modified American rule which provides that the property owner has the right to use captured groundwater under the property for beneficial purposes.<sup>81</sup> The right of beneficial use differs from absolute ownership in that the public interest may be defined such that ownership goes from an individual user to more broad-based public rights. Additionally, the modified portion of the American rule provides that in times of water shortage, all groundwater users withdrawing from groundwater supply must share proportionately with other users.<sup>82</sup> The Nebraska Supreme Court subsequently ruled that the language of the State Constitution covers groundwater.<sup>83</sup> The court stated that the "waters" referred to in the constitution are a "natural want" and that they must be "reasonably used for beneficial purposes

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79. Harnsberger et al., *supra* note 7, at 778 n.98.

80. Olson v. City of Wahoo, 124 Neb. 802, 812, 248 N.W. 304, 308 (1933).

81. *Id.*

82. *Id.* at 811, 248 N.W. at 308.

83. NEB. CONST. art. XV, § 4.

without waste."<sup>84</sup> More recently, Nebraska has attempted to prevent the interstate transfer of the state's groundwater.<sup>85</sup>

Leaving the formulation of state water policy in the hands of the judiciary has its drawbacks. The courts resolve individual disputes, typically between feuding water users, and as a result, a piecemeal framework of rules develops after the fact.<sup>86</sup> The courts typically lack the technical expertise needed to decide some water cases and consequently, their decisions may not conform to the laws of physics, geology, and hydrology.<sup>87</sup> In addition, as more players enter into the water use game, hoping to stake a claim to their share, the courts will become increasingly inadequate to resolve these political confrontations because of their expanding case-loads. Although the situation is less than ideal, it appears that the courts will continue to play a significant role in development of water policy. From this background on Nebraska water law and policy, this article turns to the legal status of recreational use of Nebraska's water.

#### IV. LEGAL FOUNDATIONS FOR RECREATIONAL AND ENVIRONMENTAL USE

##### A. Constitutional Provisions

Sections four, five, six, and seven of article fifteen of the Nebraska Constitution provide the framework through which the court may regulate the state's water resources. These sections were adopted as a result of the 1920 Constitutional Convention and have not been amended.

Section four states that use of water for domestic needs and irrigation purposes is a natural want.<sup>88</sup> Section five dedicates the use of water to the people of the state.<sup>89</sup> Section six provides that unappropriated streamflows may be used for beneficial purposes except in those situations where the

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84. *Metropolitan Utilities Dist. v. Merritt Beach Co.*, 179 Neb. 783, 799-800, 140 N.W.2d 626, 636-637 (1966).

85. For an in-depth discussion on interstate transfers of water, see Harnsberger et al., *supra*, note 7.

86. *Id.* at 767 n.46.

87. For example, water disputes in Colorado are heard before water courts where the decision in water cases are made by referees who "possess the training and experience to enable them to render expert opinions and decisions on water matters." G.E. Radosevich et al., *EVOLUTION AND ADMINISTRATION OF COLORADO WATER LAW* 107 (1985).

88. NEB. CONST. art. XV, § 4 states, "The necessity of water for domestic use and for irrigation purposes in the State of Nebraska is hereby declared to be a natural want."

89. NEB. CONST. art. XV, § 5 states, "The use of the water of every natural stream within the State of Nebraska is hereby dedicated to the people of the State for beneficial purposes, subject to the provisions of the following section." Even though the Constitution itself used the words "every natural stream," the Nebraska Supreme Court has held that "[groundwaters] are as much a part of the hydrologic cycle as the flow of water in a stream or river." See *Metropolitan Utilities Dist.*, 179 Neb. at 799-800, 140 N.W.2d at 636.

public interest dictates denial.<sup>90</sup> In addition, section six addresses prior appropriation, providing that if there are conflicting users, the "first in time, first in right" concept will control.<sup>91</sup> But when the water supply is insufficient for all uses, then domestic use is the first priority, agricultural use is the second, and manufacturing is the third.<sup>92</sup> Section seven designates water use for power purposes as a public use.<sup>93</sup>

The Nebraska Constitution does not mention use of water for recreational purposes. Considering the date of the amendments (1920), it comes as no surprise that domestic, agricultural, manufacturing, and power are the only uses mentioned in the Constitution. At that time, citizens focused on survival. But lifestyles have changed significantly in the past seventy years, recreation has become increasingly popular, and the public has become increasingly aware of environmental issues.<sup>94</sup> Water policy should reflect this change.

Water was so important to early Nebraskans that it is prominently mentioned in the Nebraska Constitution.<sup>95</sup> Yet the constitution provides little guidance to the judiciary in determining priority of uses other than domestic, agricultural, manufacturing, and power. Recreational and environmental uses were not recognized by the early players in Nebraska's water allocation schemes.<sup>96</sup> Early settlers gave little thought to recreation as they were battling "drought, blizzards, grasshoppers, tornados, floods and lord knows what else . . ."<sup>97</sup> However, the political arena exhibits new recreational and environmental concerns. Estimates show that the value given most water used for agricultural purposes does not exceed \$40 per

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90. NEB. CONST. art. XV, § 6 states:

The right to divert unappropriated waters of every natural stream for beneficial use shall never be denied except when such denial is demanded by the public interest. Priority of appropriation shall give the better right as between those using the water for the same purpose, but when the waters of any natural stream are not sufficient for the use of all those desiring to use the same, those using the water for domestic purposes shall have preference over those claiming it for any other purpose, and those using the water for agricultural purposes shall have the preference over those using the same for manufacturing purposes. Provided, no inferior right to the use of the waters of this state shall be acquired by a superior right without just compensation therefor to the inferior user.

91. *Id.*

92. *Id.*

93. NEB. CONST. art. XV, § 7 states, "The use of the waters of the State for power purposes shall be deemed a public use and shall never be alienated, but may be leased or otherwise developed as by law prescribed."

94. See SCORP, *supra* note 2, at 6-9, 8-23.

95. See generally NEB. CONST. art. XV §§ 4-7.

96. No mention was made of either recreational or environmental uses for water when the Nebraska Constitution was enacted or later amended. Art. XV, § 6 mentions only domestic, agricultural, and manufacturing uses.

97. ROBERT D. MIEWALD & PETER J. LONGO, *THE NEBRASKA STATE CONSTITUTION, A REFERENCE GUIDE* 9 (1993).

acre-foot, while water has been valued at \$700 to \$1100 per acre-foot for recreational use in water-scarce regions.<sup>98</sup> Given this disparity, recreational and environmental uses might receive a higher priority than agricultural use in Nebraska.

The Nebraska Constitution does not mention recreational use. This absence, coupled with the continued judicialization of water policy and uncertain direction from the Nebraska Legislature, will inevitably result in recreational use cases. Surprisingly, there are very few cases on this subject in the state, but increasing demands from a variety of users will undoubtedly lead to more litigation in the future. A recent Nebraska Supreme Court case, and earlier, tangential cases may indicate what to expect from the Nebraska Supreme Court in the future.

### B. Court Interpretation

Nebraska's constitutional provisions clearly protect the use of water for irrigation purposes.<sup>99</sup> Creation of extensive irrigation systems in the state show that agricultural use in this regard is a natural want,<sup>100</sup> and thus subject to protection under the constitution. Beyond agricultural, domestic, manufacturing, and power uses, the Nebraska Supreme Court and Nebraska Legislature have begun to recognize recreational, environmental, and scenic uses.<sup>101</sup> To date, the Nebraska Supreme Court has avoided listing specific uses and their priorities, and instead has concentrated on the quality of the use and the purpose for which the water will be used.<sup>102</sup> It has shown concern for water management, and has favored uses that eliminate waste.<sup>103</sup> The fact that maintaining minimum stream flows for recreational use may cause more water to pass through the state and not be put to agricultural or industrial use, poses a hurdle to recreational and environmental uses. It is unclear how the Nebraska Supreme Court would view this concept. Nebraska case law has effected the public's right to use Nebraska's watercourses and provides judicial direction on recreational

98. Harnsberger et al., *supra* note 7, at 777 (citing Ward, *Economics of Water Allocation to Instream Uses in a Fully Appreciated River Basin: Evidence From a New Mexico Wild River*, 23 WATER RESOURCES RES. 381 (1987)).

99. See generally NEB. CONST. art. XV, §§ 4-7.

100. *Spurrier v. Mitchell Irrigation Dist.*, 119 Neb. 401, 410, 229 N.W. 273, 277 (1930), *cert. denied*, 283 U.S. 796 (1931).

101. The legislature passed instream flow legislation in 1984. See NEB. REV. STAT. §§ 46-2, 107 to 2,119 (1988, Supp. 1992 & Supp. 1993). The Nebraska Supreme Court has touched on this issue in *In re Application A-16642*, 236 Neb. 671, 463 N.W.2d 591 (1990).

102. See *Enterprise Irrigation Dist. v. Willis*, 135 Neb. 827, 835-36, 284 N.W. 326, 329; *In re Water Appropriations Nos. 442A, 461, 462 and 485*, 210 Neb. 161, 165-66, 313 N.W.2d 271, 274 (1981).

103. *Willis*, 135 Neb. at 835-36, 284 N.W. at 331; *Appropriations Nos. 442A*, 210 Neb. at 165-66, 313 N.W.2d at 274.

uses.<sup>104</sup>

The law is well settled in Nebraska that property owners with riparian rights on one side of a river own the bed to the thread or center of the stream.<sup>105</sup> An early Nebraska case<sup>106</sup> adopted this principle. A subsequent United States Supreme Court case<sup>107</sup> affirmed this decision and acknowledged that under Nebraska law, the riparian owns the riverbed and if the stream is a property boundary, the riparian owns the bed to the thread or center of the stream.<sup>108</sup> "The State does not hold title to the riverbeds in Nebraska . . . [S]uch riverbeds are as effectively the subject of private ownership as other property, except that, in case of navigable streams, there is an easement for public navigation."<sup>109</sup>

In Nebraska, the Missouri River is the only river to have been declared navigable.<sup>110</sup> Since nearly all the riverbeds in Nebraska are subject to private ownership, the outstanding issue is whether the public can still use the rivers and streams for recreational purposes. As Professor Richard Harnsberger and Professor Norman Thorson observed in their extensive treatise on Nebraska water law,

Early state definitions of navigability were linked to the commercial necessities of the 19th century, but many courts found the linkage unduly restrictive and one that did not lead to a meaningful balancing of the conflicting interests of abutting owners and members of the public. Thus, there developed a philosophy that the navigability of a stream or lake depends upon its public usefulness and value.<sup>111</sup>

The bed and banks of the rivers are privately owned, while the water belongs to the people of the state.<sup>112</sup> Therefore, in Nebraska, river ownership is a divided entity.

Even though the public may float Nebraska's rivers, access must be gained to the rivers and streams without trespassing upon private property. By adopting the principle that riparians own the streambed,<sup>113</sup> the Nebraska court unwittingly created a roadblock to recreational use of the

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104. *In re Application A-16642*, 236 Neb. 671, 463 N.W.2d 591.

105. *Valder v. Wallis*, 196 Neb. 222, 225, 242 N.W.2d 112, 114 (1976).

106. *Kinkhead v. Turgeon*, 74 Neb. 580, 585-86, 109 N.W. 744, 746 (1906) (adopting English law).

107. *Nebraska v. Iowa*, 406 U.S. 117, 123 (1972).

108. *Id.*

109. *Thies v. Platte Valley Public Power and Irrigation Dist.*, 137 Neb. 344, 346, 289 N.W. 386, 387 (1939).

110. HARNBERGER & THORSON, *supra* note 9, at 296.

111. *Id.* at 304.

112. NEB. CONST. art. XV, § 5.

113. *See Kinkhead*, 74 Neb. 580, 109 N.W. 744.

state's rivers and streams. Unlike some states<sup>114</sup> where courts and legislatures have declared the banks and beds to be state property, Nebraska must work around the lack of public ownership of the stream banks and beds. Access to rivers for recreational purposes must be made via public routes or through private land with the permission of the private landowner. Private ownership and lack of access preclude extensive public use of the state's rivers and streams.<sup>115</sup> Public use depends on programs such as the Canoe Trail Program discussed earlier and other cooperative ventures between the state and private landowners. Likewise, the link between recreation and public use has been, and will continue to be, largely determined by case law. Despite a paucity of cases dealing with recreation, public interest, and water, the court has provided some direction for recreational use of water.

In *Brummond v. Vogel*,<sup>116</sup> the Nebraska Supreme Court determined issues of both recreation and water. This case involved a conflict between a downstream, domestic user and an upstream appropriator wanting to dam a stream for agricultural and recreational purposes.<sup>117</sup> The recreational use was in fact a fish pond used for the defendant's recreation.<sup>118</sup> The defendant's argument for the public use of recreation was glaringly absent. The court held:

[T]hat the right of plaintiff to use water from this stream for domestic purposes is superior to the defendant's right to construct a dam to have a reservoir for either agricultural or recreational purposes, and the fact that defendants may also use it for domestic purposes will not justify any unreasonable diminution of water resulting in harm to the plaintiff.<sup>119</sup>

This case would have had more impact if the recreation claim had extended to the public. Indeed, the holding does not apply definite guidelines to recreation cases.

Because a serious recreation argument was not offered, the question of whether recreation becomes a public value remains unsettled. With a

114. For discussion of this area, see Susan B. Biggs, *Recreational Use of Texas Rivers - Recommendation for Adoption of the Texas Public Rivers Act*, 7 ST. MARY'S L.J. 575 (1975); Albert W. Stone, *Legal Background on Recreational Use of Montana Waters*, 32 MONT. L. REV. 1 (1971); Note, *Fishing and Recreational Rights in Iowa Lakes and Streams*, 53 IOWA L. REV. 1322 (1968); Ralph W. Johnson & Russell A. Austin, Jr., *Recreational Rights and Titles to Beds on Western Lakes and Streams*, 7 NAT. RESOURCES. J. 1 (1967); G. Graham Waite, *Public Rights in Navigable Water*, 58 WIS. L. REV. 335, 337-54 (1958); Edward S. Bade, *Title, Points and Lines in Lakes and Streams*, 24 MINN. L. REV. 305, 305-25 (1940).

115. See SCORP, *supra* note 2, at 8-23.

116. 184 Neb. 415, 168 N.W.2d 24 (1969).

117. *Brummond*, 184 Neb. at 416-17, 168 N.W.2d at 25-26.

118. *Id.*

119. *Id.* at 421, 168 N.W.2d at 28.



society that now places a high priority on recreational activities, the Nebraska Supreme Court will likely have to somehow recognize recreational use in the priority scheme. A recent Nebraska Supreme Court case, *In re Application A-16642*,<sup>120</sup> offers the start of recognizing recreation as an important environmental and public interest.

In *In re Application A-16642*, the Nebraska Supreme Court provided guidelines that might clarify the role of recreation and the priority between surface and groundwater.<sup>121</sup> This case was brought to the Supreme Court on direct appeal from an order of the Director of Water Resources.<sup>122</sup> The Director granted the Nebraska Game and Parks Commission an instream flow appropriation on Long Pine Creek.<sup>123</sup> The permit for an instream appropriation was intended to maintain a naturally reproducing rainbow and brown trout fishery in Long Pine Creek, the longest self-sustaining trout stream in Nebraska.<sup>124</sup> The facts of the case show that the recreational stake and environmental impact on trout fishing in the stream were obvious and more importantly, were linked to the legal query of instream appropriation. Specifically, the query was whether the statutory scheme<sup>125</sup> authorizing instream appropriations was unconstitutional under sections four, five, and six of the Nebraska Constitution. Even more importantly, the Nebraska Constitution does not mention or afford protection to the recreational use of water. Even if not constitutional, the possibilities of domestic, agricultural, and industrial users draining a stream dry are distinct legal and physical realities. The court declared the permit constitutional and thereby placed recreation within the constitutional scheme.<sup>126</sup> The language of the court will be of increased importance in the future.

The court first looked to whether "the laws of Nebraska require a diversion when one is not required by the law of physics."<sup>127</sup> Although the constitution uses the word "divert," water does not have to be physically removed from a stream by an appropriator.<sup>128</sup> From a policy standpoint, the court claimed that "the permit system provides a surer method of providing lasting notice of the existence and quantity of valid appropriative rights, requiring a diversion as a prerequisite serves no useful purpose."<sup>129</sup>

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120. 236 Neb. 671, 463 N.W.2d 591.

121. *In re Application A-16642*, 236 Neb. 671, 676, 463 N.W.2d 591, 597 (1990).

122. *Id.* at 674, 463 N.W.2d at 596.

123. *Id.* at 674-75, 463 N.W.2d at 596.

124. *Id.* at 675, 463 N.W.2d at 597.

125. NEBR. REV. STAT. 46-2,107 to 46-2,119.

126. *In re Application A-16642*, 236 Neb. at 675, 463 N.W.2d at 597.

127. *Id.* at 685, 463 N.W.2d at 602.

128. *Id.* at 684-87, 463 N.W.2d at 601-02.

129. *Id.* at 684-85, 463 N.W.2d at 601.

Therefore, with regard to appropriation for recreation, the Department of Water Resources could be a major player and have a profound influence on future generations. The Legislature's inactivity regarding the public interest may have negative consequences as the value of recreation continues to develop.

The second issue the court examined is whether section six provides for a public interest exception to the right to divert water. This issue is important to future recreational and environmental policy. According to the court,

Nebraska's constitutional right to appropriate can and must be limited by the demands of the public interest. The instream flow appropriation statutes can be viewed as a mechanism for determining whether the public interest demands that the statutory scheme include a legislative finding that the right to appropriate water from a given stream should be denied. This view is supported by the fact that "the public interest demands the recognition of instream uses for fish, recreation, and wildlife," and requires the Director of Water Resources to find that the instream flow appropriation is in the public interest.<sup>130</sup>

The "public interest" language clearly elevates recreational and environmental concerns to a high priority in the water use scheme. Indeed, a pro-recreational and pro-environmental interpretation of "public interest" suggests that groundwater could be pumped into an instream flow to meet these demands. Such an interpretation could set off a series of legal battles between recreational and environmental concerns and traditional priorities of domestic, agricultural, and industrial uses.

## V. UNITED STATES SUPREME COURT CASES

The Nebraska situation is not unique. New demands will be placed on water as Americans with more leisure time search for recreation sites. For example, Joe Carvell, a noted scholar, notes that in North Dakota:

Disputes between water recreationists and North Dakota landowners are common. A person may own land on each side of a river. In this situation, some landowners claim ownership of the water. Others, while not asserting ownership, claim exclusive control of the water. Canoeists, fisherman, ice-skaters, and other recreationists are viewed by both landowners as trespassers.<sup>131</sup>

Further, many western states are addressing the need to protect

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130. *Id.* at 689, 463 N.W.2d at 604 (citations omitted).

131. Charles M. Carvell, *North Dakota Waterways: The Public Right of Recreation and Questions of Title*, 64 N.D. L. REV. 7, 8 (1988).

instream flows for recreational purposes.<sup>132</sup> Montana, Oregon, and Washington allow a public entity to acquire a water reservation,<sup>133</sup> thus ensuring water for recreation. John Thorson, Margery Brown, and Brenda Desmond examined Montana's public trust doctrine and concluded that "[t]he 1972 Montana Constitution and the public trust doctrine are the vehicles for the greater recognition of public rights."<sup>134</sup> Undoubtedly, Nebraska policy-makers should follow these states and add recreation to the water formula. Similarly, other western states should look to Nebraska for some new developments, particularly in linking recreation to the environment and public interest. The United States Supreme Court provides some warning as states prepare to protect water for recreational possibilities.

In *Sporhase v. Nebraska ex rel. Douglas*,<sup>135</sup> the United States Supreme Court provided an important message for many jurisdictions.<sup>136</sup> The case primarily dealt with a Nebraska reciprocal demand statute that prevented interstate water transfers.<sup>137</sup> While not specifically dealing with the issue of recreation, the Court provided some interesting possibilities for defining the public interest. Recreation can be part of the public interest equation.<sup>138</sup> Specifically, the Court declared the Nebraska reciprocity portion of the statute unconstitutional for defining public interest for Nebraskans only, violating the Commerce Clause of the United States Constitution.<sup>139</sup> However, the Court's language does allow states the opportunity to define public interest in some instances. The Court concluded that "the existence of unexercised federal regulatory power does not foreclose state regulation of its water resource or the uses of water within the state, or indeed, of interstate commerce in water."<sup>140</sup> The

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132. For an overview of protecting the public interest in western water resource management, see D. Craig Bell & Norman K. Johnson, *State Water Laws and Federal Water Uses: The History of Conflict, The Prospects for Accommodation*, 21 ENVTL. L. 1 (1991).

133. *Id.* at 12-15.

134. John E. Thorson et al., *Forging Public Rights In Montana's Waters*, 6 PUB. LAND L. REV. 1, 47 (1985).

135. 458 U.S. 941 (1982).

136. See Mark P. Gergen, *The Selfish State and the Market*, 66 TEX. L. REV. 1097 (1988); Betsy Vencill, *The Federal Power Act and Western Water Law - Can States Maintain Their Own Water Use Priorities?* 27 NAT. RESOURCES J. 213 (1987); Margaret Z. Ferguson, Note, *Instream Appropriations and the Dormant Commerce Clause: Conserving Water for the Future*, 75 GEO. L.J. 1701 (1987); Robert Currey-Wilson, *Do Oregon's Water Export Regulations Violate the Commerce Clause?* 16 ENVTL. L. 963 (1986); Nancy Nowlin Kerr, *Sporhase, The Commerce Clause and State Power to Conserve Natural Resources - Is the Local Well Running Dry?* 14 ST. MARY'S L.J. 1033 (1983); A. Dan Tarlock, *So It's Not "Ours" - Why Can't We Still Keep It? A First Look at Sporhase v. Nebraska*, 18 LAND & WATER L. REV. 137 (1983).

137. *Sporhase*, 458 U.S. at 953.

138. *Id.*

139. *Id.* at 954-58.

140. *Id.* at 954.

message is clear: recreation can be defined in the public interest as long as the states carefully craft the statute to comply with the commerce clause.<sup>141</sup>

States that want to link water conservation and recreation must legislate in a vigilant manner. *Marsh v. Oregon Natural Resources Council*<sup>142</sup> illustrates the power the federal government possesses when a state has not acted decisively in defining recreational interests. Like *In re Application A-16642*,<sup>143</sup> *Marsh* involved water allocation and the proposed project's effects on fishing. As noted by the Court, "Because the Rogue River is one of the Nation's premier fishing grounds, the [Final Environmental Impact Statement, Supplement No. 1] paid special heed to the effects the dam might have on water quality, fish production and angling."<sup>144</sup> The Oregon Natural Resources Council, the Oregon Guides and Packers Association, Inc., the Rogue River Fly-Fishers, Inc., and the Rogue River Guide Association filed suit claiming that the Army Corps of Engineers did not account for a worst-case scenario.<sup>145</sup> The Court held that "the Corps conducted a reasoned evaluation of the relevant information and reached a decision that, although perhaps disputable, was not 'arbitrary or capricious.'" <sup>146</sup> The Court deferred to the expertise of the Corps and decided the "disputable" claims in favor of the federal government.<sup>147</sup>

The Court sent an important message to the states. Had the Oregon legislature more stringently defined the recreationist's interest as part of the public interest, the Court would have been more concerned with the "disputable" claims. In this case, the Corps of Engineers had no serious challenge from the state policymakers. As Gerschwer notes in reference to this case:

[w]hile the NEPA process is intended to inform and presumably alter agency decision, NEPA does not enable judges to balance competing interests and make ultimate policy decisions. Rather, the judicial role reinforces democratic values by ensuring the proper functioning of a congressionally mandated agency decisionmaking process predicated on public participation and the sharing of information.<sup>148</sup>

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141. Ferguson, *supra* note 136, at 1732.

142. 490 U.S. 360 (1989).

143. *In re Application A-16642*, 236 Neb. 671, 463 N.W.2d 591 (1990).

144. *Marsh*, 490 U.S. at 365.

145. *Id.* at 368.

146. *Id.* at 385.

147. *Id.*

148. Lawrence Gerschwer, Note, *Informational Standing Under NEPA: Justiciability and the Environmental Decisionmaking Process*, 93 COLUM. L. REV. 996, 999 (1993).

*Sporhase* and *Marsh* instruct legislators to carefully tailor water legislation or face the consequence of federal involvement. In light of the Supreme Court's message, if recreation is in the public interest then legislation should be clear and to the point. It is not the role of the courts in Nebraska or other western states to sort through the various claims of public interest, rather, these interests should be clearly defined by the legislatures.

## VI. CONCLUSION

The Nebraska Supreme Court has initiated a policy of placing importance on the public interest in the recreational use of water. However, Nebraska's constitution and statutory directives are less certain. Although the Nebraska Legislature does recognize Nebraska case law and in fact has enacted water laws to reflect a public interest in recreational use, it is time for the legislative branch to legislate in a manner that is more consistent with the public interest. As the Nebraska Supreme Court stated, recreation is an important value in the water debate.<sup>149</sup>

The Nebraska message is important to other jurisdictions. States must decide the value of water's recreational use compared to other competing uses. More importantly, each jurisdiction must determine the appropriate branch to resolve the debate. Nebraska has many unanswered questions for the legislature to clarify. Other jurisdictions might demand more of their legislative branches. Regardless, recreation will continue to be an important variable in future water debates. These public discussions ought to be guided by vigorous citizen participation. For Nebraskans, concerned citizens ought to define water for the benefit of the public and the benefit of future generations. Let participatory democracy, for which Nebraskans are famous, define water in the public interest.

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149. In re Application A-16642, 236 Neb. 671, 676, 463 N.W.2d 591, 597 (1990).