WATER LAW—GROUNDWATER—A FILTER FOR A MUDDY ISSUE?,

INTRODUCTION

The Nebraska law governing a landowner’s right to use underground water has been based on dicta and conjecture by judges and scholars alike.1 In the recent case of Prather v. Eisenmann,2 the Nebraska Supreme Court clarified Nebraska law on ground water use, and also determined the effect of the Preferential Use Statute3 on competing users who are on different preference levels.

This casenote4 will analyze the case law doctrines applied in the area of ground water,5 the effect of Prather on Nebraska case law, and the impact of the Preferential Use Statute on Nebraska ground water law.

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1. See notes 71-76 and accompanying text infra.
3. NEB. REV. STAT. § 46-613 (Reissue 1974). This statute, enacted in 1957, provides:

Preference in the use of underground water shall be given to those using the water for domestic purposes. They shall have preference over those claiming it for any other purpose. Those using water for agricultural purposes shall have the preference over those using the same for manufacturing or industrial purposes.

As used in this section, domestic use of ground water shall mean all uses of ground water required for human needs as it relates to health, fire control, and sanitation and shall include the use of ground water for domestic livestock as related to normal farm and ranch operations.

Id.
4. This casenote does not deal with the issue of surface water problems and their relation to doctrines of appropriative rights and riparian rights. For discussion of this issue, see Robie, Modernizing State Water Rights Laws: Some Suggestions For New Directions, 18 UTAH L. REV. 760 (1974). See also Fischer, Harnsberger & Oeltjen, Rights to Nebraska Streamflows: An Historical Overview with Recommendations, 52 NEB. L. REV. 313 (1973). Nor does this note deal with legislative attempts, with the exception of the Preferential Use Statute, to regulate and manage the extraction of water from wells. For a full discussion of this issue, see Harnsberger, Oeltjen & Fischer, Groundwater: From Windmills to Comprehensive Public Management, 52 NEB. L. REV. 179 (1973). See also Clark, Ground Water Legislation in the Light of Experience in the Western States, 22 MONT. L. REV. 42 (1960). For a discussion of the classification of ground water as either percolating water or underground streams, see Annot., 55 A.L.R. 1383 (1928).
5. Traditionally, these ground water doctrines have applied only to percolating ground waters as opposed to underground streams; however, the Nebraska Legislature has defined ground water as “that water which occurs or moves, seeps, filters, or percolates through the ground under the surface of the land.” NEB. REV. STAT. § 46-635 (Reissue 1974). The court used this definition for its discussion in Prather. 200 Neb. 1, 4, 261 N.W.2d 766, 768 (1978).
FACTS AND HOLDING

The plaintiffs were the owners of three separate tracts of land overlying a common aquifer. Each tract of land was supplied with water from wells draining from the common aquifer. The plaintiffs used the water for domestic purposes.

The defendants owned a ninety-acre tract of land overlying the same aquifer as the plaintiffs' land. A well on the premises, completed in 1976, was used by the defendants for irrigation purposes. The defendants, Eisenmanns, commenced pumping the irrigation well on July 9, 1976. Within three days, plaintiffs lost the use of their wells when the water level dropped below the depth of the wells. Plaintiffs sought damages and an injunction to stop the defendants' pumping of ground water from the irrigation well.

The Madison County District Court found that defendants' well interfered with the plaintiffs' domestic appropriation of water which had a priority over agricultural use under the Preferential Use Statute. The lower court also based its decision on the finding that defendants' appropriation of ground water was in excess of a reasonable and beneficial use on their own land, caused unreasonable harm to plaintiffs by lowering the water table, and was injurious to plaintiffs who had substantial rights in the use of those waters for domestic purposes. The district court concluded that there was sufficient water for all users if defendants did not lower their pump and if plaintiffs lowered their pumps to below the aquifer. The district court therefore permanently enjoined defendants from lowering their pump, and awarded plaintiffs costs of providing an assured alternative method of water supply. In this case, damages were the cost of a new well.

6. The Prathers, the Furleys and the Zessins each owned one of three tracts of land. The Furleys and the Zessins assigned their causes of action to the Prathers who were the plaintiffs in this cause of action. 200 Neb. at 2, 261 N.W.2d at 768.
7. The court defined the term aquifer as "[t]he earth materials with sufficient porosity to contain significant amounts of ground water and sufficient permeability to allow its withdrawal in significant quantities." Id. at 4, 261 N.W.2d at 768.
9. Id. at 3, 261 N.W.2d at 768.
10. Id. at 2, 261 N.W.2d at 767.
11. Id. at 7, 261 N.W.2d at 770.
12. Id. at 7, 10, 11, 261 N.W.2d at 770, 771.
13. Id. at 2, 261 N.W.2d at 767.
14. Id.
15. Id. at 3, 261 N.W.2d at 768.
The Nebraska Supreme Court affirmed the decision of the trial court. However, this decision was based solely on the application of the Preferential Use Statute, and for that reason the court did not determine whether the defendants' use was unreasonable.\textsuperscript{16}

BACKGROUND

Four basic legal theories governing ground water use are 1) the English or absolute ownership rule; 2) the American or reasonable use rule; 3) the California or correlative rights doctrine; and 4) the prior appropriation rule.\textsuperscript{17} These rules are based on different policy considerations regarding the rights of adjacent landowners,\textsuperscript{18} geographical conditions and water supply,\textsuperscript{19} and public interest.\textsuperscript{20} These various policy considerations underlying the four rules can affect the use and allocation of ground water in a given jurisdiction.\textsuperscript{21}

The case of Acton v. Blundell\textsuperscript{22} is the origin of the English, or common law rule governing ground water.\textsuperscript{23} The English rule states that

the owner of the soil owns all that lies beneath the surface and has the absolute right to take the water found beneath land and make any use of it he pleases—regardless of the effect the use may have on an adjoining landowner through whose land the water, in its natural course, would filtrate, percolate or flow.\textsuperscript{24}

Under this rule, any damage to an adjoining landowner is

\textsuperscript{16} Id. at 7, 261 N.W.2d at 770.

\textsuperscript{17} See Clark, Ground Water Legislation in the Light of Experience in the Western States, 22 Mont. L. Rev. 42, 50 (1960) for a state-by-state comparison of the trends in doctrines applicable to percolating waters.


\textsuperscript{19} See Clark, supra note 17, at 42.

\textsuperscript{20} Id. Public interest considerations include community water requirements and economic consequences of greater demand and uses of water. Id.


\textsuperscript{22} 12 M. & W. 324, 152 Eng. Rep. 1223 (Ex. 1843).


"damnum absque injuria," an injury without remedy.\textsuperscript{25}

The English rule was developed in an era when the scientific knowledge regarding ground water was limited, and in a country where water was readily available and the geographical conditions were relatively constant.\textsuperscript{26} Given this lack of knowledge and a ready supply of water, the courts were not forced to abandon the old maxim: "Whose the soil is, his it is from the heavens to the depths of the earth."\textsuperscript{27}

American Courts, for the most part, adjusted this rule to a new era, new conditions and different policy considerations.\textsuperscript{28} Dissatisfaction with the English rule arose\textsuperscript{29} because of the rule's inability to handle the problem of scarcity of water in the West,\textsuperscript{30} the increase of scientific knowledge regarding ground water,\textsuperscript{31} and the possible waste of a vital resource.\textsuperscript{32} Some of the dissatisfaction stemmed from the problem of economic waste. For example,


\textsuperscript{26} The courts were reluctant to hold a man liable for interference with ground water when he had no way of discovering the presence or extent of such water. 37 Mo. L Rev., supra note 24, at 359 n.18. In addition, it was difficult for the prior well-user to prove that a subsequent well which had been sunk had affected the water supply of the first user. Percolating Waters, supra note 18, at 121.

\textsuperscript{27} Percolating Waters, supra note 18, at 133.

\textsuperscript{28} The English rule of absolute ownership, as it is sometimes called, is still followed in some of the states: Connecticut, Maine, Massachusetts, Mississippi, New Jersey, Ohio, Rhode Island, Texas, Vermont, and Wisconsin. F. TRELEASE, WATER LAW 12 (2d ed. 1974). \textit{But cf.} Annot., 55 A.L.R. 1399 (1928) (which places New Jersey in the reasonable use doctrine category); State v. Michels Pipeline Constr., Inc., 63 Wis. 2d 278, —, 217 N.W.2d 339, 351 (1974) (in which Wisconsin recently adopted the position of RESTATEMENT (SECOND) OF TORTS § 858A (Tent. Draft No. 17, 1971)). As recently as 1970, the Supreme Court of Vermont followed the English rule absent pleading and proof that water resources had become scarce. Drinkwine v. Vermont, 129 Vt. 152, —, 274 A.2d 485, 487 (1970). The court spoke in terms of reasonable use and correlative rights interchangeably, so it is unclear exactly what Vermont would have done had there been pleading and proof of scarcity.

\textsuperscript{29} Some of the jurisdictions which found dissatisfaction with the English rule include: Katz v. Walkinshaw, 141 Cal. 116, 122, 70 P. 663, 666 (1902), \textit{aff'd on rehearing}, 74 P. 766 (1903); Erickson v. Crookston Waterworks Power & Light Co., 105 Minn. 182, 192, 117 N.W. 435, 439 (1908); Meeker v. City of East Orange, 77 N.J.L. 623, —, 74 A. 379, 384 (1909).

\textsuperscript{30} Katz v. Walkinshaw, 141 Cal. 116, 122, 70 P. 663, 666 (1902).

\textsuperscript{31} Hydrology studies have proved that ground water changes in an area may possibly have an effect on an adjacent area, thereby proving the English ground-water rule to be unsound. Higday v. Nickolaus, 469 S.W.2d 859, 869 (K.C. Mo. App. 1971). As early as 1850, before there was a body of scientific knowledge which could explain underground water movement, some courts admitted this lack of knowledge and retained the English rule on underground water as a result. Roath v. Driscoll, 20 Conn. 352, 540 (1850).

\textsuperscript{32} Huber v. Merkel, 117 Wis. 355, 358, 94 N.W. 354, 355 (1903). (defendant was allowed to let his water flow away with no apparent use regardless of the effect on his neighbor's wells). The Huber case was overruled by State v. Michels Pipeline Constr., Inc., 63 Wis. 2d 278, —, 217 N.W.2d 339, 347 (1974) which held that there was
under the English rule an owner who invested a great deal of resources developing a ground water extraction system for business purposes on the land would not be protected from an adjacent landowner, who could render this initial development useless by completely draining the subsurface water. This dissatisfaction necessitated a change. Although this change was often couched in terms of an adaptation of the old rule, the English rule was ultimately abandoned, and the doctrines of reasonable use and correlative rights were developed.

The reasonable use doctrine or the American rule, "limits a landowner's use of groundwater to beneficial purposes having some reasonable relationship to the use of his overlying land, without regard to the effect on the supply of water to adjacent landowners." The landowner is exposed to liability only if the use is not beneficial and reasonable to the overlying land.

The American rule focuses on the reasonableness of the water's use on the land without considering the effect on the adjoining landowner's water. If the use of the underground water is reasonable and beneficial to the land, then the adjoining landowner cannot maintain an action even if the entire supply is consumed unimpededly. See Percolating Waters, supra note 18, at 131-32.

The states adopting the reasonable use doctrine or American rule are: Alabama, Arizona, Illinois, Indiana, Iowa, Kentucky, Maryland, Michigan, Missouri, New Hampshire, New York, North Carolina, Pennsylvania, Tennessee, Virginia, and West Virginia. The rule in some of these states is not clear because the adoption of the rule is based on dicta. F. TRELEASE, WATER LAW 12-13 (2d ed. 1974). Some authorities include Oklahoma and Washington as reasonable use states. See 37 Mo. L. Rev., supra note 24, at 360 n.20.

33. See Percolating Waters, supra note 18, at 131-32.
34. Katz v. Walkinshaw, 141 Cal. 116, 125, 70 P. 663, 668 (1902).
35. See note 29 supra.
36. The states adopting the reasonable use doctrine or American rule are: Alabama, Arizona, Illinois, Indiana, Iowa, Kentucky, Maryland, Michigan, Missouri, New Hampshire, New York, North Carolina, Pennsylvania, Tennessee, Virginia, and West Virginia. The rule in some of these states is not clear because the adoption of the rule is based on dicta. F. TRELEASE, WATER LAW 12-13 (2d ed. 1974). Some authorities include Oklahoma and Washington as reasonable use states. See 37 Mo. L. Rev., supra note 24, at 360 n.20.
38. Many of the cases which have imposed liability are those where the defendant is carrying the water away from the overlying land. Forbell v. City of New York, 164 N.Y. 522, 58 N.E. 644, 61 N.Y.S. 1005 (1900). For cases where no liability was imposed because there was reasonable and beneficial use, see Sycamore Coal Co. v. Stanley, 292 Ky. 168, 166 S.W.2d 293 (1942). See also United Fuel Gas Co. v. Sawyers, 259 S.W.2d 466, 468 (Ky. 1953) (adjoining owner's well was contaminated as a result of a gas well being drilled).
39. United Fuel Gas Co. v. Sawyers, 259 S.W.2d 466, 468 (Ky. 1953); Sycamore Coal Co. v. Stanley, 292 Ky. 168, 166 S.W.2d 293, 294 (1942).
This limitation protects the adjacent landowner's use of ground water from other users who would not allocate the ground water for a beneficial use or who would waste it. The American rule recognizes that "when ground later is utilized on overlying land, the purpose generally is domestic use, air conditioning, irrigation, manufacturing, mining and quarrying. Since these uses have high economic or social value and are usually the most efficient ones possible, courts almost always find them reasonable." Unlike the American rule, the English rule provides no such limitation on water use, and therefore these considerations are not recognized.

The rule proposed in the Tentative Draft of the Restatement (Second) of Torts is actually an adaptation of the American rule. The Restatement rule, like the American rule, is phrased in terms of nonliability. Section 858A(a) provides:

A possessor of land or his grantee who withdraws ground water from the land and uses it for a beneficial purpose is not subject to liability for interference with the use of water by another, unless

a) the withdrawal of water causes unreasonable harm through lowering the water table or reducing artesian pressure.

Through its definition of reasonable use, the Restatement rule provides broader protection than the American rule. In the Tentative Draft, reasonable use is analyzed in terms of not only the water use on the land but also the effect of the use on the water level. The first part of this analysis is the same as the American

41. See note 38 supra.
42. See note 32 supra.
45. RESTATEMENT (SECOND) OF TORTS § 858A (Tent. Draft No. 17, 1971). The other exceptions in § 858A are:

A possessor of land or his grantee who withdraws ground water from the land and uses it for a beneficial purpose is not subject to liability for interference with the use of water by another, unless . . .

(b) The ground water forms an underground stream, in which case the rules stated in § 850A to 857 are applicable, or

(c) The withdrawal of water has a direct and substantial effect upon the water of a watercourse or lake, in which case the rules stated in §§ 850A to 857 are applicable.

Id.

47. See RESTATEMENT (SECOND) OF TORTS § 858A(a) (Tent. Draft No. 17, 1971).
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rule. However, under the Restatement approach, even if the use on the land is reasonable, the landowner may be found liable if his use unreasonably affects the water level.\(^{48}\) A use which unreasonably affects water level is defined as a use which lowers the water table to a degree that makes it uneconomical for the injured party to obtain water by deepening his well.\(^{49}\) The Restatement rule therefore protects the small user who does not substantially affect the ground water level, and who cannot economically survive by deepening his well.\(^{50}\)

Only one state, Wisconsin, has officially adopted the Restatement position. The Wisconsin Supreme Court approved the rationale of the Restatement by holding that “[1]ater users with superior economic resources should not be allowed to impose costs upon smaller water users that are beyond their economic capacity.”\(^{51}\)

Although courts often use the terms reasonable use and correlative rights interchangeably,\(^{52}\) the California or correlative rights rule is a distinct doctrine which was a reaction to the defects in the English rule as applied to the particular conditions of California.\(^{53}\) One commentator has stated that

the utter dissimilarity of conditions as compared between California and England is so apparent, that the common law of England could not be safely followed here without deterioration in our development, danger of monopolies, and the obstruction of natural justice for which our American people are noted throughout the world.\(^{54}\)

However, the rule has been criticized because of its “tremendous administrative difficulties” and “enormously expensive adjudications.”\(^{55}\)

\(^{48}\) Id.
\(^{49}\) Id. § 858A, Comment d at 158.
\(^{50}\) For an illustration of this rule’s application, see note 49 supra. Professor Harnsberger supports this rule for Nebraska because of these policy considerations. See Harnsberger, Oeltjen & Fischer, supra note 43, at 209-10.
\(^{52}\) Id. at —, 217 N.W.2d at 349. See, e.g., Evans v. City of Seattle, 182 Wash. 450, 47 P.2d 984 (1935).
\(^{53}\) Katz v. Walkinshaw, 141 Cal. 116, 70 P. 666, 668 (1902).
\(^{54}\) Percolating Waters, supra note 18, at 132.
\(^{55}\) The principle administrative problem which arises in connection with correlative rights doctrine is how to allocate the water supply. Harnsberger, Oeltjen & Fischer, supra note 43, at 207. In addition, courts must retain jurisdiction of each conflicting use case in order to enforce their original decrees allocating groundwater resources. This taxes judicial time. Comment, Groundwater Management in Nebraska without a Legislative Solution: Is There an Alternative?, 57 Neb. L. Rev. 78, 85 (1972). In actuality the court reference proceedings are administered by
The correlative rights doctrine provides that each owner of land has an equal and correlative right to make a beneficial use of the water on his overlying land. Unlike the American rule, this doctrine focuses not only on the water's use on the land, but also on the effect of such use on the adjacent land owner. Even if the use is beneficial and reasonable, the land owner cannot take more than is reasonable in relation to an adjoining land owner's use of the water.

Under the reasonable use rule, an owner may affect his neighbor's water supply provided his own actions are reasonable and beneficial to his own land. The correlative rights doctrine, on the other hand, allows a land owner to make a reasonable and beneficial use of his own land; but that use cannot appropriate more than the landowner's co-equal or correlative share of the water. The English rule does not restrict the nature of the landowner's use or quantity of the water appropriated. This summary of the ground water use rules illustrates the divergent protections afforded landowner's under each rule, and shows the importance of each rule's underlying policy considerations in water allocation.

Many states resolve ground water disputes through the three doctrines discussed above. Several states, however, have turned to another doctrine, the prior appropriation rule, to resolve their ground water disputes. Simply stated, the prior appropriation
doctrine follows the familiar maxim, "first in time, first in right," and grants a priority to the first person to adopt a beneficial use of the water.64 Under this doctrine, the landowner has a right to "continued use of the water so long as the water is diverted and applied to an economically beneficial use, and the use is continuous."65 The prior appropriation doctrine guarantees that once an owner has spent resources to develop a ground water supply, his right to the supply is protected from subsequent users. However, this rule locks water resources into particular uses without the ability to adjust the uses to changing economic and social conditions.66

The prior appropriation doctrine and the English rule are the two extremes of the rules discussed.67 The English rule provides an absolute right to ownership of the water in the land while the prior appropriation doctrine recognizes an absolute right by priority in time to the first beneficial user of the water.68 However, the


Some of the states which have applied it have done so through case law: In Utah, before legislation was enacted, the appropriation doctrine was recognized, probably with respect to most percolating waters, but specifically with respect to artesian waters. Justesen v. Olsen, 86 Utah 158, 40 P.2d 802 (1933); Wrathall v. Johnson, 86 Utah 50, 40 P.2d 755 (1935). In California the doctrine applies only to the surplus percolating waters above the reasonable requirements of overlying lands. Pasadena v. Alhambra, 33 Cal. 2d 908, 207 P.2d 17 (1949). Appropriations of the surplus are made by diversion and use, not under the procedure provided in the Water Code. Cal. Water Code Ann. § 1200 (1954). In Colorado it is well settled that waters which are physically tributary to a stream belong to the stream and are subject to appropriation for beneficial use, whether they are flowing in channels or are simply percolating waters, subject to prior rights on the stream. . . , but the question of the appropriability of non-tributary percolating waters has not yet been decided. Safranek v. Limon, 123 Colo. 330, 228 P.2d 975 (1951). In New Mexico the first statute was declared invalid because of a technical defect, but the supreme court held that the statute, while objectionable in form, was declaratory of existing law, after which the legislature enacted a statute designed to overcome the Supreme Court's objection. N.M. Laws 1927, ch. 182; Yeo v. Tweedy, 34 N.M. 611, 286 P.970 (1929); N.M. Laws 1931, ch. 131.


64. Robie, supra note 4, at 761.

65. 37 Mo. L. Rev., supra note 24, at 361 n.25.


67. See notes 64 and 65 and accompanying text supra.

68. See notes 64 and 65 and accompanying text supra.
other rules limit the landowner's rights to 1) a co-equal share of the water or 2) a beneficial and reasonable use of the water on the land.

ANALYSIS

CASE LAW

Prior to *Prather v. Eisenmann*, scholars disagreed on the status of Nebraska law on ground water. Much of the confusion stemmed from language in the case of *Olson v. City of Wahoo*, which indicated approval of the reasonable use doctrine modified by the correlative rights doctrine in times of shortage. However, the *Olson* language was dicta, and in *Metropolitan Utilities District v. Merritt Beach Co.*, the court cited the reasonable use doctrine as the law in Nebraska without mentioning the correlative rights doctrine in times of shortage. This omission caused some authorities to question the continued validity of the modified reasonable use rule set out in *Olson*.

In *Prather*, the Nebraska Supreme Court clarified the Nebraska case law rule governing ground water by reaffirming *Olson*’s "modified reasonable use rule." The court held that

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

Although the court was unambiguous in its statement of the rule,
this reaffirmation of the Olson rule was dicta. However, this clarification is important because it will aid in defining the rights of landowners on the same priority level under the Preferential Use Statute.

The modified reasonable use rule is unique. In times of plenty, the rule protects water resources for reasonable and beneficial uses on the land. During the shortages, adjacent landowners are protected by allowing each owner a co-equal allocation of the water.

STATUTE

Although Prather discussed the development of ground water law and the Nebraska case law in this area, the decision in Prather was based solely on the Preferential Use Statute.

This statute provides that “preference in the use of underground water shall be given to those using the water for domestic purposes. They shall have preference over those claiming it for any other purpose.” In Prather, the plaintiffs as domestic users were protected by this statute.

The Prather court’s analysis, however, could be viewed as somewhat inconsistent with the legislative intent in enacting this statute. This intent is reflected in the statement of the Committee on Public Works:

The bill is designed and intended to establish preferences in the use of underground water and to remove any uncertainties that may now exist in such use. The order of preference is the same as that provided by the constitution for the use of surface water. At the present time we are not aware of any controversies resulting from a shortage of sub-surface water, but if the use of these waters continues at the present rate, and increases to the extent indicated,
we can reasonably expect that problems of allocation of this water will arise. If this bill is adopted, it will have established some fundamental principles for the [solution] of these problems and, more important, the establishment of preferences in use now may help to avoid future litigation. The sole purpose of this statement is to show the intent of the Legislature in this legislation.87

This statement appears to indicate that the statute was designed to apply in times of shortage.88

This assessment of legislative intent is further supported by a statement in a subsequent legislative debate concerning an amendment to the Preferential Use Statute. During these debates the amendment's principal sponsor, Senator Harold B. Stryker, stated that in case of emergency, the priority among those who need water will be as follows: "For the home and all general purposes of the home, 2) irrigation, and 3) industry."89 This statement also suggests that the statute was intended to apply in times of shortage.

Despite this apparent legislative intent, the language of the statute does not limit its application to times of shortage.90 Therefore, although the Prather court held that there was no water shortage,91 the court applied the statute as written, and found the irrigation user liable to the domestic user under the statute's preference scheme.92

The case law doctrine of Nebraska has not been entirely replaced by the statute. The statute allows for the Nebraska case law rule to be applied when conflicting users are on the same level.93 Also, it can be inferred from the Nebraska Constitution that if an owner wastes the water, regardless of his priority, the

87. Committee Statement on L.B. 598, Comm. on Public Works, 75th Legis., 1st Sess. (1957) (emphasis added). The rationale of a preference system is "to allow water rights to move to more socially desirable uses when supply is insufficient to meet all needs." Oeltjen & Fischer, supra note 66, at 259.
90. The Preferential Use Statute is set out at note 3 supra.
91. 200 Neb. at 4, 161 N.W.2d at 766.
92. Id. at 9-11, 161 N.W.2d at 771-72. Where the language of a statute is clear and unambiguous, legislative history has no control. Such aides are to clear doubt, not to create it. See, e.g., Highland Supply Corp. v. Reynolds Metals Co., 327 F.2d 725, 730 (8th Cir. 1964); American Community Builders, Inc. v. Commissioner, 301 F.2d 7, 13 (7th Cir. 1962); Tampa Elec. Co. v. Nashville Coal Co., 276 F.2d 766, 770 (6th Cir. 1960); Mandel Bros., Inc. v. FTC, 254 F.2d 18, 22 (7th Cir. 1958).
93. 200 Neb. at 10, 161 N.W.2d at 771. See note 81 supra.
The statute provides an order of preference suited to the needs of Nebraska. Undoubtedly, domestic use, because of its importance, warrants overall priority. Irrigation, because of its effect on agriculture, requires a priority second only to domestic use. Because of the importance of these uses, industrial use trails the field.

Despite the advantages of the Preferential Use Statute, it can be criticized on several grounds. First, the statute fails to consider municipal use and its respective position in the scheme. This failure to consider domestic use may permit the statute's preference scheme to be circumvented through condemnation. Although a municipality has the right of eminent domain, it cannot exercise that right unless the condemnation is for a public use. A municipality acts for a public purpose when it condemns agricultural or industrial water to supply domestic needs. However, Professor Trelease has pointed out that “most of the so-called municipal purposes are in fact uses by the inhabitants of the community and the industrial enterprises there located.” Thus, it appears that municipalities may be able to acquire water for industrial use through condemnation despite the Preferential Use Statute's protection of agricultural use.

94. NEB. CONST. art. 15, § 4. Article 15, § 4 provides: “The necessity of water for domestic use and for irrigation purposes in the State of Nebraska is hereby declared to be a natural want.” Id. See Metropolitan Utilities District of Omaha v. Merritt Beach Co., 179 Neb. 783, 140 N.W.2d 626 (1966). “Without any declaration of public policy as to the use of underground waters other than the constitutional declaration that they are a natural want, we adhere to the rule that such waters must be reasonably used for a beneficial purpose without waste.” Id. at 800, 140 N.W.2d at 636-37.

95. Fisher, Harnsberger & Oeltjen, Rights to Nebraska Streamflows: An Historical Overview with Recommendations, 52 Neb. L. Rev. 313, 365-67 (1963). These authors recognized that “[d]omestic uses of water, both from underground and water course sources, are so important to human survival that the legislature should provide injunctive relief for such users against interference by nondomestic users.” Id. at 367.

96. See generally Agricultural Atlas of Nebraska at xv. (J. Williams ed. 1977). Agriculture is the state’s primary source of wealth and its dominant industry with 40% of the land irrigable. Id. at 14. In 1970, 92% of the water use in Nebraska was for irrigation of crop land. Id. at 8.

97. See generally Harnsberger, Oeltjen & Fischer, supra note 43, at 233. This author recognized “[t]he deep-rooted attitude in the state which opposes favoring industry over agriculture in any conceivable situation.” Id.

98. Id. Municipal use has not been defined by the statute because of Nebraska’s “deep-rooted attitude” favoring agriculture. Id.


100. Id. at 223, 147 N.W.2d at 791.

Second, the statute may not be sufficiently comprehensive to protect all normal uses. This problem can be more fully understood by examining the North Dakota permit system which establishes a more extensive preference scheme: (1) domestic use; (2) municipal use; (3) livestock use; (4) irrigation use; (5) industrial use; and (6) fish, wildlife, and other outdoor recreational uses.\(^{102}\)

Third, any preference scheme lacks flexibility. Although an absolute preference for domestic use may be justified, preferences for other uses would freeze water use into potentially uneconomical patterns. Therefore, a preference for agriculture use of water may be less desirable than a preference for other commercial uses.\(^{103}\) One commentator has noted that “in the future, the economic growth of the West will be identified less with irrigation and more with the use of available supplies for municipal, industrial, and recreation purposes.”\(^{104}\)

A final criticism of the Preferential Use Statute is that it is administered by the courts. Professor Cribbet argues that so long as it is administered solely through the courts, it will be difficult, if not impossible, to arrive at a scientifically sound water policy. This is in no way a criticism of the courts, but is a recognition of the fact that they were developed to settle disputed issues, not to plan and execute programs involving large doses of public policy.\(^{105}\)

This same criticism applies with equal force to the Nebraska case law approach to this problem.\(^{106}\)

In summary, it appears that the Preferential Use Statute by favoring agricultural over industrial uses is particularly suited to Nebraska's needs. However, the weaknesses in the statutory scheme suggest that further legislative action may be required before Nebraska's water allocation problems can be solved.


\(^{103}\) Folz, The Economic Dynamics of River Basin Development, 22 LAW & CONTEMP. PROB. 205 (1957). Professor Folz argued that:

Agricultural developments, of themselves, do not generate great economic expansion; the manufacturing facilities that emerge to process agricultural products do not provide large payrolls; development of an area based upon agriculture does not proceed far enough to attract market-oriented industries; and, consequently, economic growth stops short of maturity. If great economic expansion is to occur, therefore, forces other than agriculture must generate it.

\(\text{Id. at 215.}\)


\(^{105}\) J. Cribbet, ILLINOIS WATER RIGHTS LAW 27 (1957), cited in Harnsberger, Oeltjen & Fischer, supra note 43, at 240.

\(^{106}\) Harnsberger, Oeltjen & Fischer, supra note 43, at 240.
CONCLUSION

In Prather, the Nebraska Supreme Court for the first time applied the Preferential Use Statute to a dispute among competing ground water users. The Prather court also clarified the status of Nebraska case law governing ground water use by clearly adopting Olson's modified reasonable use rule.

The Preferential Use Statute provides a priority scheme suited to the agriculturally oriented society of Nebraska. However, the statute's lack of clarity and completeness may be criticized. Because of these weaknesses, the statute may not provide a satisfactory means of protecting Nebraska's ground water resources for future demands.

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