CONSTITUTIONAL RESTRAINTS ON WATER DIVERSSIONS IN NEBRASKA: THE LITTLE BLUE CONTROVERSY

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INTRODUCTION

On November 28, 1977, the Little Blue Natural Resources District1 (Little Blue NRD) filed an application with the Nebraska Department of Water Resources (DWR) requesting permission to take water from the Platte River for irrigation purposes.2 In its application, Little Blue NRD proposed a water diversion and retention project which would divert water from the Platte River to a storage reservoir on the Little Blue River. The proposed diversion would take 125,000 acre-feet of water from the Platte3 from September to January of each year at a rate of 450 cubic feet per second.4 The Little Blue NRD considered the diversion to be necessary because of a perceived lack of adequate long-term groundwater supplies in the aquifer underlying the area.5 Stress on groundwater

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1. Natural Resource Districts in Nebraska are special purpose governmental entities established to “conserve, protect, develop, and manage the natural resources” of the state. NEB. REV. STAT. § 2-3201 (Reissue 1977). They are responsible for developing:
   plans, facilities, works and programs relating to (1) erosion prevention and control, (2) prevention of damages from flood water and sediment, (3) flood prevention and control, (4) soil conservation, (5) water supply for any beneficial uses, (6) development, management, utilization and conservation of ground water and surface water, (7) pollution control, (8) solid waste disposal and sanitary drainage, (9) drainage improvement and channel rectification, (10) development and management of fish and wildlife habitat, (11) development and management of recreational and park facilities, and (12) forestry and range management. NEB. REV. STAT. § 2-3229 (Reissue 1977). There are 24 NRD’s in Nebraska, each managing a single contiguous area. NEB. REV. STAT. § 2-3203 (Reissue 1977).
   The Little Blue NRD is located in southcentral Nebraska and encompasses parts of Adams, Webster, Clay, Nuckolls, Fillmore, Thayer and Jefferson Counties. Little Blue Natural Resources Dist. v. Lower Platte N. Natural Resources Dist., 206 Neb. 535, 538, 294 N.W.2d 598, 600 (1980) [hereinafter cited as Little Blue I].

2. Id.


4. Little Blue I, 206 Neb. at 538, 294 N.W.2d at 600. The project would use water only at these intervals because another project already in place and using the same delivery canal would take water from April through August. Id.

5. *Much of the farmland within the district is suitable to irrigation but is
supplies has created shortages within regions of the state and has prompted state and local action to conserve the resource.

Although the director of DWR found that there was sufficient unappropriated water in the Platte River for the proposed project, he denied the application because the contemplated water transfer was interbasin in nature, i.e., flows diverted by the project, including post-irrigation return flows, would be permanently lost to the basin of origin. Nebraska water law had long been interpreted as farmed as dryland because of the lack of a groundwater aquifer. An irrigation project was conceived and developed by the district to provide supplemental water to this area. Id. at 539, 294 N.W.2d at 600. An aquifer is “[a] geological formation or layer of material that is porous or permeable to water, thus capable of containing or carrying groundwater.” 7 R. CLARD, WATERS AND WATER RIGHTS 273 (1976).

6. The amount of land under irrigation in Nebraska has increased from about 5,400,000 acres in 1975 to about 7,200,000 acres in 1980. Nebraska Natural Resources Commission, Summary of the Nebraska Research for the Six-State High Plains Ogallala Aquifer Study 15 (1981) [hereinafter cited as SUMMARY]. This substantial increase in irrigation was accomplished largely through additional groundwater use. Groundwater irrigation in Nebraska has been made possible by the water-rich Ogallala Aquifer, which underlies almost the whole of the state as well as parts of Colorado, Kansas, Oklahoma, New Mexico, and Texas. Id. at 1. Groundwater use has also been encouraged by the State’s longstanding legal prohibition on interbasin transfers of surface water. Osterman v. Central Neb. Pub. Power & Irrigation Dist., 131 Neb. 356, 361-62, 268 N.W. 334, 339 (1936). See notes 10-11 and accompanying text, infra.

Perhaps most adversely affected by lack of sufficient groundwater supplies is the Little Blue NRD. Whereas some areas of the state continue to enjoy abundant groundwater supply, SUMMARY, supra note 6, at 19, the water table in portions of the Little Blue NRD had declined in 1980 by as much as 25 feet from previous levels, id., largely due to groundwater use more intensive than in other parts of the state. Id. at 18.

7. Under recent amendments to the Nebraska Groundwater Management Act, NEB. REV. STAT. § 46-656 (Supp. 1982), areas within NRD’s most adversely affected by declines in groundwater levels may be designated as “control areas.” NRD’s have substantially more authority to control groundwater withdrawals in control areas than in other areas of jurisdiction. NEB. REV. STAT. § 46-666 (Supp. 1982).

Approximately 1/3 of the Little Blue NRD, the geographic area containing about 60% of the irrigation wells in the NRD, has been designated a control area. On June 21, 1980, the NRD adopted rules and regulations containing both mandatory and voluntary measures to allocate groundwater, although the only measure immediately required was the installation of water flow meters. The DWR approved those regulations a month later, and they have been effective since that time. Recently, residents within the NRD requested a two-year delay in applicability of mandatory provisions. The NRD and the DWR have agreed to the proposed delay, although at this writing no formal action by the NRD board has taken place. Such action is expected by September, 1982; if that schedule persists, the period of delay would extend until the Spring of 1985. Conversation with Craig Pope, Manager of Groundwater Section, Little Blue NRD, July 23, 1982.

8. Little Blue 1, 206 Neb. at 540, 294 N.W.2d at 601. An appropriation is a vested water right secured by actual diversion of flow and application of that flow to a beneficial use within a reasonable time. Nebraska v. Wyoming, 325 U.S. 589, 614 (1945). Unappropriated waters are those waters not subject to an appropriation right. Id.

9. Little Blue 1, 206 Neb. at 540, 294 N.W.2d at 601. A basin is generally defined as an area drained by a stream and its tributaries. 7 R. CLARK, WATERS AND RIGHTS
favoring use of water within the basin from which it was diverted, thereby assuring that any flows not consumed by the use would remain available for reuse by others within the basin.\textsuperscript{10}

In confirming that Nebraska law prohibited interbasin transfers, the director relied on a longstanding Nebraska Supreme Court decision, \textit{Osterman v. Central Nebraska Public Power District},\textsuperscript{11} which held that there exists "no right to transport waters beyond or over the divide or watershed that enclosed the source from which obtained."\textsuperscript{12}

The \textit{Osterman} ban on interbasin diversions has long generated debate among legal scholars as well as among irrigators desirous of obtaining surface waters lying beyond their basins.\textsuperscript{13} In the view of some, interbasin transfers should be prohibited so that those residing nearest a stream need not want for water while others beyond the basin of origin enjoy its benefits.\textsuperscript{14} Proponents of interbasin transfers, however, maintain that prohibitions, by keeping water within a basin of origin, condemn large segments of Nebraska's arable land to less productive dryland farming while allowing unused water to course its way through the state.\textsuperscript{15} Given this backdrop, and the split among states on the issue,\textsuperscript{16} the Ne-

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  \item \textsuperscript{10} See notes 12-15 and accompanying discussion, infra.
  \item \textsuperscript{11} 131 Neb. 356, 268 N.W. 334 (1936).
  \item \textsuperscript{12} \textit{id}. at 366, 268 N.W. at 339. The case involved proposed diversions of water from the Platte and North Platte Rivers for transport, 60\% of which would be taken out of the Platte River basin and put into the Blue and Republican River basins for use in irrigation and power generation. \textit{id}. at 357-58, 268 N.W. at 335-36. The Central Nebraska Public Power and Irrigation District was able to secure these water rights. It was, however, unable to secure other rights and the project, although reduced in size by \textsuperscript{14}, was finally developed. J. Aiken, An Introduction to Nebraska Water Rights Law § 3.4 (Department of Agricultural Economics Staff Paper, University of Nebraska-Lincoln (1979-No. 2)). Land in the Republican and Blue River basins is now largely irrigated by groundwater. \textit{id}. at § 3.5.
  \item \textsuperscript{13} See Doyle, \textit{Water Rights in Nebraska}, 29 Neb. L. Rev. 385 (1950); see also Yeutter, \textit{A Legal-Economic Critique of Nebraska Watercourse Law}, 44 Neb. L. Rev. 11 (1965).
  \item \textsuperscript{14} Osterman spoke to this point: "It would be a sad commentary on our political organization, upon the department of roads and irrigation, and upon this reviewing court, if in rationing this necessity of life this beautiful valley should be left with a dry river bed and ruined farms, because of any mistaken theory that the protection of its natural fertility did not constitute a public interest within the policy of our laws." 131 Neb. 356, 362, 268 N.W. 334, 337 (1936).
  \item \textsuperscript{15} One expert estimates that where irrigated acreage will yield 100 bushels of corn per acre, dryland acreage will produce only 47. Comments of Dr. Martin Massengale, before the 1981 Nebraska Water Conference, Lincoln, Nebraska, Mar. 10, 1981.
  \item \textsuperscript{16} California, Colorado, Oklahoma, and Texas have enacted statutes designed to provide protection for areas of origin. California: \textsc{Cal. Water Code} § 10505
The Nebraska Supreme Court's recent reconsideration of the matter provoked substantial interest in the agricultural community.

In *Little Blue N.R.D. v. Lower Platte North N.R.D.* (Little Blue *I*), the court reversed *Osterman*, thereby lifting the ban against interbasin diversions. This decision has triggered a major controversy in Nebraska water law, which this paper will discuss. The paper is composed of three parts: Part I will offer a more detailed explanation of *Osterman*, Little Blue *I* and its follow-up proceeding, *Little Blue II*; Part II will isolate the constitutional issue raised by these proceedings as well as its potential impact on water management in Nebraska; and Part III will propose a fast retreat from the court's apparent constitutional interpretation.

I. *Osterman* and *Little Blue I & II*

In holding that Nebraska law prohibited interbasin diversions, the *Osterman* court relied on an 1859 statute, which provided in relevant part:

§ 59. The owner or owners of any irrigation ditch shall carefully maintain the embankments thereof so as to prevent waste therefrom, and shall return the unused water from such ditch or canal with as little waste thereof as possible to the stream from which such water was taken or to the Missouri River.\(^{19}\)

The court, considering the emphasized portion of the statute, concluded swiftly that interbasin transfers were prohibited.\(^{20}\) After so

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\(^{17}\) 206 Neb. 535, 294 N.W.2d 598 (1980).

\(^{18}\) *Little Blue Natural Resources Dist. v. Lower Platte N. Natural Resources Dist.*, 210 Neb. 862, 317 N.W.2d 726 (1982) [hereinafter cited as *Little Blue II*].


\(^{20}\) 131 Neb. at 368-69, 268 N.W. at 340.
concluding, the court looked at the potentially nettlesome final phrase of the provision, “or to the Missouri River,” a phrase which, if read literally, would condone all water transfers so long as the location of ultimate use was within the extensive and subsuming Missouri River basin.

The court resolved the discrepancy without pause or difficulty. It rejected any literal reading and declared without elaboration that the concluding phrase of the statute was “not applicable.”

Thus, it concluded that “the divide or watershed must therefore not be crossed by an irrigation ditch or canal and the waters applied to lands whose situation is such that prevents the unused waters from being returned to the source from which they were taken.”

The Nebraska Supreme Court in Little Blue I set aside this narrow analysis, holding that “the unappropriated waters of every natural stream within the State of Nebraska may be diverted from one basin to another, except when such diversion is contrary to the public interest in which case it shall be denied.” In rejecting Osterman’s reading of the last phrase of section 59, the court stated:

There is no basis . . . to conclude that the phrase ‘or to the Missouri River’ has no meaning. All of the water of the State of Nebraska empties into the Missouri River and, therefore, it must be concluded that diversion may occur so long as the unused portion of the water is not in some manner unnecessarily impounded or wasted and is returned to its natural stream or to the Missouri River.

The court then went on to identify an independent, additional basis for its reversal. That basis, unconsidered in Osterman, is article XV, sections 4-6, of the Nebraska Constitution, which were added to the Constitution sixteen years before Osterman was decided:

Article XV, § 4: Water is a public necessity. The necessity of water for domestic use and for irrigation purposes in the State of Nebraska is hereby declared to be a natural want.

Article XV, § 5: Use of water dedicated to people. The use

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21. Id. at 368, 268 N.W.2d at 340.
22. Id. at 369, 268 N.W.2d at 340. The court also commented on § 43 of the statute, which provided that “The right to divert unappropriated waters of every natural stream for beneficial use shall never be denied . . . .” Neb. Rev. Stat. § 46-504 (enacted 1929), amended § 46-204 (Supp. 1982). It held this provision to be inapplicable as it was enacted prior in time to § 59. Osterman at 368, 268 N.W. at 340. For further discussion of Osterman, see Yeutter, A Legal-Economic Critique of Nebraska Watercourse Law, 44 Neb. L. Rev. 11, 53-57 (1965).
24. Id. at 544, 294 N.W.2d at 603.
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.

Article XV, § 6: Right to divert unappropriated waters. 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.

These provisions, said the court, contradicted the Osterman decision. Specifically, the court held that section 5 dedicated streams of the state to all Nebraskans, not just to those residing within a basin of origin, and the court held further that the “very purpose” of section 6 was to guarantee diversion rights in unappropriated water absent public interest considerations to the contrary. Based on this reasoning, the court remanded the case to the DWR for a determination of whether this particular interbasin transfer proposal was within the public interest. On remand, the director of the DWR ordered all litigants to submit briefs on the stipulated issue. After consideration of the briefs and completion of the oral arguments, the director determined that the diversion would not harm the public interest, and he issued the permits.

Contemporaneous with this, the Nebraska state legislature enacted statutory criteria for the DWR to use in defining the new “public interest” requirement for interbasin transfers. Although these new criteria were in place in time, the DWR did not employ them in passing upon the Little Blue NRD’s application. Appar-
ently, the DWR believed that the criteria applied only to decisions on applications filed with the DWR after the legislation's effective date. Objectors appealed the new DWR action to the state supreme court. In *Little Blue N.R.D. v. Lower Platte N.R.D.* (*Little Blue II*), the court held that the legislature's new statutory criteria should control DWR decisionmaking in this case, even if the application predated the effective date of the statute.

The court then discussed a new question, whether the Nebraska Nongame and Endangered Species Conservation Act (NESCA) presented a *statutory* barrier to this proposed water diversion. NESCA, enacted in 1975, is a measure designed to protect, conserve, and manage endangered species. Under its terms, any species deemed to be threatened or endangered under the federal Endangered Species Act of 1973 is considered to be likewise threatened or endangered under NESCA. Substantial protection accrues to species so designated. NESCA is relevant to the Little

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(1) The economic, environmental, and other benefits of the proposed interbasin transfer and use;
(2) Any adverse impacts of the proposed interbasin transfer and use;
(3) Any concurrent beneficial uses being made of the unappropriated water in the basin of origin;
(4) Any reasonably foreseeable future beneficial uses of the water in the basin of origin;
(5) The economic, environmental, and other benefits of leaving the water in the basin of origin for current or future beneficial uses;
(6) Alternative sources of water supply available to the applicant; and
(7) Alternative sources of water available to the basin of origin for future beneficial uses.

The statute goes on to require that permit applications must be denied if "the benefits to the state from granting the application do not outweigh the benefits to the state from denying the application," *Id.* (emphasis added) demonstrating that "public interest" assessments shall be statewide in scope rather than local or basin wide.

The statute affects interbasin transfers only, even though the *Little Blue I* rationale logically applies to both intra and inter-basin diversions.

33. 210 Neb. 862, 317 N.W.2d 726 (1982).
34. *Id.* at 874, 317 N.W.2d at 733-34. The court held that the new statute, Neb. Rev. Stat. § 46-289 (Supp. 1982), is in part procedural in nature rather than substantive and "is to be applied to hearings held after the passage of the Act even though the application was filed prior to the passage of the procedural law" (*citing* Romano v. B.B. Greenberg Co., 108 R.I. 132, 273 A.2d 315 (1971), and Schultz v. Gosselink, 260 Iowa 115, 148 N.W.2d 434 (1967)). *Id.*
39. Neb. Rev. Stat. § 37-434(7)-(9). The statute requires agencies to take such measures as are necessary to "insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered or threatened species or result in the destruction or modification of habitat of such
Blue litigation because two species designated as endangered under the federal law, the whooping crane and the bald eagle,\textsuperscript{40} are known to use the Platte River as habitat. The whooping crane, rarely sighted in recent years, has used the river as a staging area during spring and autumn migrations,\textsuperscript{41} while the bald eagle is a wintertime resident.\textsuperscript{42}

In its Brief on remand to the DWR in these proceedings, the National Wildlife Federation (NWF) argued that the proposed diversion would violate NESCA by jeopardizing the continued existence of these species\textsuperscript{43} and by adversely modifying their habitat.\textsuperscript{44}

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\textsuperscript{40} 50 C.F.R. § 17.11 (1981). The whooping crane has been specifically designated under state law as well. See Neb. Admin. R. § 6-4.01 (Game & Parks—Wildlife 1982).
\textsuperscript{41} “A staging area is, to use a military analogy, an R & R area. It is a place where certain migratory species—cranes especially—can rest and recuperate from the rigors of their long (3,000 mile) flights between southern wintering areas and northern breeding grounds. Without this recuperative pause in their journey, the reproductive rate of these species would be severely reduced due to stress and poor health (6838: 6-19).” Nebraska Wildlife Federation Save the Platte Committee, Brief on Remand of Objectors National Wildlife Federation at 3 n.3, (Nov. 26, 1980) (on file with Creighton Law Review).
\textsuperscript{43} Nebraska Wildlife Federation Save the Platte Committee, Brief on Remand of Objectors Natural Wildlife Federation at 12-18 (Nov. 26, 1980).
\textsuperscript{44} Id. The Secretary of the United States Department of the Interior, under section 7(a) of the Endangered Species Act, has designated a portion of the Platte River between Lexington and Denham (downstream from the proposed diversion) as “critical habitat” for the whooping crane, making the habitat eligible for protection under both the federal and state statutes. See 43 Fed. Reg. 20938 (1978). See also Cooperative Agreement Between the United States Fish and Wildlife Service and the Nebraska Game and Parks Commission for Conservation of Endangered and Threatened Animals, July 7, 1977. Nebraska’s federally approved program for carrying out this agreement requires that the state:
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\item Enhance, preserve, and manage all species and their habitat so that populations can be maintained in sufficient numbers to satisfy demands for education and scientific use, recreation, economic benefits and for preservation of aesthetic [sic] values.
\item Provide sufficient management and protection so that as many species as possible can be removed from the endangered and threatened lists.
\end{enumerate}
\textsuperscript{Id} See General Description of Nebraska’s Program for the Conversation of Endangered and Threatened Animals, cited in Exhibit A to Nebraska Wildlife Federation Save the Platte Committee, Brief of Objector National Wildlife Federation at 13
Citing *TVA v. Hill* as analogous authority, the NWF argued that the protection under NESCA is "absolute," and that the burden of proof fell to the DWR to demonstrate that the proposed diversions would not jeopardize the species or its habitat. The DWR had rejected the "absolute protection" argument, commenting that "the potential affects" to fish and wildlife habitat "are deemed minimal or would be mitigated by offsetting or even enhancing circumstances derived from operation of the proposed project." It did not address the burden of proof question. It reached its fact-sensitive determination only upon consideration of the new briefs and the original hearing record.

In its review, the Nebraska Supreme Court, in line with the NWF's contentions, relied on *TVA v. Hill* for the notion that NESCA confers absolute protection. The court concluded further that the DWR examination of factual matters attendant to this claim was "inadequate." It consequently remanded the issue for a third round of administrative proceedings, which at the time of this writing has not yet taken place.

The court was careful during this discussion not to decide an issue of obvious concern to it. The issue is whether the strictly-construed NESCA, with its absolute prohibition of activities harmful to endangered species or their habitats, itself violates article XV, sections 4-6, of the state constitution. On this matter, the court was concerned particularly with the section 6 declaration that...
rights to divert unappropriated waters "shall never be denied except when such denial is demanded by the public interest." Read strictly, that section would seem to supersede statutory law which attempts to nullify a potential appropriation by creating an enforceable constitutional right in individuals to divert unappropriated waters. Aware of this possibility, the court added a paragraph to its opinion which both raised and skirted the issue:

We should note at this point that the provisions of NESCA may not repeal the provisions of Neb. Const. art. XV, §§ 4, 5, and 6. To the extent that the prohibition contained in the Act denied to a citizen of the State of Nebraska a right otherwise guaranteed to the citizen, the Act would have to give way. That issue is not before us at this time, and we do not consider what conflicts between the Act and the Constitution of Nebraska may arise. Absent a constitutional conflict, however, the requirements imposed upon a state agency by the Act, as presently enacted, are rather clear and may not be either ignored or waived.53

Although that paragraph avoided ruling on the issue, a later sentence in the opinion seemed to decide the question: "The substantive right to divert the water unless the public interest demands otherwise is found in the Constitution and cannot be denied by statute. Neb. Const. art. XV, § 6; Little Blue N.R.D. v. Lower Platte North N.R.D., 206 Neb. 535, 294 N.W.2d 598 (1980)."54

These comments by the court raise a critical issue. The issue is generally the inter-relationship between statutory law in Nebraska and article XV, sections 4-6, of the state constitution, and specifically the operation of NESCA in light of article XV, sections 4-6.

II. Article XV, Sections 4-6, and Nebraska Statutory Law

Article XV, sections 4-6,55 which are typical of provisions found in some other western state constitutions,56 illustrate the significance of water resources in states either with limited usable quantities of the resource or with agriculture-based economies, or both. Taken separately, the provisions acknowledge and establish the importance of water to Nebraska and its citizens (section 4), dedicate the water of natural streams to public benefit (section 5), and, with strong language, assert that: "[T]he right to divert unap-

53. Id. at 867, 317 N.W.2d at 730.
54. Id. at 874, 317 N.W.2d at 733.
55. See note 26 and accompanying text, supra.
56. See note 87 and accompanying text, infra. See also note 92 infra.
appropriated waters of every natural stream for beneficial use shall never be denied except when such denial is demanded by the public interest . . . ” (section 6.)

The issue is how these provisions, especially section 6 work. There are two possibilities. On the one hand, the provisions could be read as requiring administrative decisions on specific water diversion proposals to turn on determinations of the “public interest” viability of each. Under this construction, each proposal would be examined to see how it serves or disserves the “public interest,” and an approval or disapproval in line with the examination would follow. It is this approach that Little Blue I seemingly advocates. On the other hand, the provisions could be read as not supplying a new and independent decisionmaking criterion but instead as restraining legislative power. Under this construction, the provisions would serve as a check on the exercise of legislative power. The amendments would provide a test for assessing the constitutionality of legislative enactments, but would not affect case-by-case administrative decisions.

Stated in another way, the issue is whether article XV, sections 4-6, are self-executing. A self-executing provision is one which is fully operative in the absence of implementing legislation and which, conversely, may not be limited or altered by legislation. If article XV, sections 4-6, are self-executing, they are avail-

57. See note 26 and accompanying text, supra.
58. Some may argue that an early case, Loup River Pub. Power Dist. v. North Loup River Pub. Power & Irrigation Dist., 142 Neb. 141, 5 N.W.2d 240 (1942) [hereinafter cited as Loup River], has already ruled on the self-executing status of § 6. Loup River dealt with the latter sentences of § 6, which establish that “[P]riority of appropriation shall give the better right as between those using the water for the same purpose . . . ” See note 26 supra. The case specifically inquired into whether the superiority of one right to another should be determined strictly on considerations relating to duration of the right, or whether the character of beneficial use to which water would be employed should control. Preliminary to deciding the issue, the court commented in a one sentence paragraph that article XV, § 6, “fixing a priority of uses for which public waters may be appropriated, is a self-executing provision.” 142 Neb. at 153, 5 N.W.2d at 248. This isolated statement, unsubstantiated in the opinion, has not been cited again by the Nebraska courts.

To the extent that this sentence is still good law, it should only stand for the proposition that the part of § 6 which deals with rights among appropriators is self-executing. One clause of a constitutional provision may be self-executing while another is not. Rose v. State, 105 P.2d 302, 307, modified on other grounds, 19 Cal. 2d 712, 123 P.2d 505 (1940); Fairall v. Frisbee, 104 Colo. 553, —, 92 P.2d 748, 749 (1939); State ex rel Miller v. O’Malley, 342 Mo. 641, —, 117 S.W.2d 319, 322 (1938); State ex rel. Perkins v. Kellaher, 90 Ore. 538, —, 117 P. 944, 946 (1919); State v. Rogers, 31 N.M. 485, —, 247 P. 828, 831 (1926); Sheriff v. City of Easley, 178 S.C. 504, —, 183 S.E. 311, 315 (1938); Chick Springs Water Co. v. State Highway Dept., 159 S.C. 481, —, 157 S.E. 842, 847 (1931); In re Interrogatories by the Governor Concerning Initiated Amend. No. 4, 99 Colo. 591, —, 65 P.2d 7, 10 (1937).
59. Burnham v. Bennison, 121 Neb. 291, 297, 236 N.W. 745, 748 (1931). See gener-
able for use in defense against statute-based attempts to deny specific water diversions. If they are not self-executing, they would not supply decisional criteria in specific cases and, in that event, would be unavailable to persons defending against statute-based attempts to deny specific water diversions.60

The question of whether constitutional provisions are self-executing has been before the Nebraska Supreme Court on several occasions.61 The court's comprehensive statement on the issue is contained in State ex rel. Walker v. Board of Comm'rs for Educ. Lands and Funds:62

Constitutional provisions are not self-executing if they merely indicate a line of policy or principles, without supplying the means by which such policy or principles are to be carried into effect, or if the language of the Constitution is directed toward the legislature, or if it appears from the language used or the circumstances of its adoption that subsequent legislation was contemplated to carry it into effect.63

It is against this test that article XV, sections 4-6 must be measured. The test requires three separate inquiries: (1) whether the provision is a stipulation of policy without a corresponding provision of a specific means of implementation; (2) whether the provision is directed to the legislature rather than to individuals; and (3) whether the provision contemplates subsequent legislation to carry it into effect. If article XV, sections 4-6, satisfy any of these tests, they should be considered as not being self-executing.

Nebraska law requires that questions of constitutional construction be resolved with reference to the intent of the framers.64

ally 6 C.J.S. Constitutional Law § 48 at 145 (1956). An example of a constitutional provision considered to be self-executing is the due process clause of the United States Constitution. U.S. Const. amend. V.

60. See generally 16 C.J.S. Constitutional Law § 48 at 146 (1956). An example of a constitutional provision considered to be not self-executing is the commerce clause of the United States Constitution. U.S. Const. art. I, § 8, cl. 3.


62. 141 Neb. 172, 179, 3 N.W.2d 196, 200 (1942) (citing 16 C.J.S. Constitutional Law, § 48 at 146-47 (1956)). The court characterized its holding as "comprehensive." Id. at 179, 3 N.W.2d at 200.

63. Id. at 179, 3 N.W.2d at 200.

That intent is ascertainable by a review of the circumstances surrounding the adoption of the amendments as well as by an examination of express language. In this case, the history of circumstances surrounding the adoption of article XV, sections 4-6, although sparse in quantity, is particularly helpful in addressing the exact questions at issue.

The primary author of the amendments was Joseph G. Beeler, Chairman of the Water Power and Natural Resources Committee of the Constitutional Convention of 1919-1920, the Committee which drafted and submitted article XV, sections 4-6, for approval. Although the three sections were submitted to the Convention as a unit, Beeler took the time to address each section individually before the delegates to the Convention.

Regarding section 4 (declaring water to be a "natural want"), Beeler stated somewhat uncritically: "It is a declaration which intends to give to irrigation the standing of being so necessary that it is considered as a natural want."

Regarding section 5 (dedicating water to the beneficial use of the public), he spoke at greater length, explaining that the provision expressed Nebraska's opposition to the water policies of the state of Colorado. As described by Beeler, Colorado was contending at that time that its citizens enjoyed full ownership rights in water within Colorado and consequently had no responsibility to recognize and provide for appropriation rights already perfected in downstream states, including Nebraska. Nebraska, Wyoming and Kansas balked at this ruinous policy, the former two states taking the lead in arguing that water in running streams should not be subject to full fee ownership. Instead, claimed the states,

65. Tallon, 196 Neb. at 606, 244 N.W.2d at 186; Ramsey, 151 Neb. at 341, 37 N.W.2d at 507. See generally, 16 C.J.S. Constitutional Law § 48 (1956).
67. The history of the 1919-1920 Constitutional Convention is limited to two volumes of transcriptions of formal meetings of the whole Conventions. There are no records of committee meetings.
68. PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION 1914 (1920) [hereinafter cited as PROCEEDINGS].
69. Colorado has for many years taken the position that by virtue of her statement in the constitution which says that the water of the State that is found in the natural streams is the property of the State, and that as her constitution was approved by the authorities at Washington, she thereby acquired the ownership of the running waters of the various inter-state streams, and that by way of that ownership she was not compelled to recognize any appropriation of water in the State of Nebraska, Kansas or Wyoming.

Id. at 1914 (Statement of Beeler).
interests in water are limited to use rights only. As characterized by Beeler:

"[T]he State of Nebraska contends that when an appropriation of water is made out of the stream in this state which is prior to an appropriation made of the same stream in the State of Colorado, that the appropriator in the State of Nebraska has the right by virtue of his prior appropriation to have that water come down to him and that the State of Colorado, nor any other citizen cannot deprive that appropriator of the use of that water by virtue of any ownership either in the state or in its citizens or by virtue of the appropriation which has been made for a beneficial use."

Section 5 was meant to express Nebraska's view that rights to water are use rights, not full fee interests.

The Chairman characterized section 6 (declaring that the right to divert unappropriated waters of any stream shall not be denied unless demanded by the public interest) as an assurance that Nebraska would not do what Colorado was attempting to do, i.e., to eliminate prior vested appropriative rights:

Section [6] is a limitation upon the right of the Legislature of the state to do such a thing. The first is that the right to divert unappropriated waters of every natural stream for beneficial use shall never be denied. That is, if this becomes part of the Constitution, the Legislature of the State of Nebraska will have no right to pass any law which will deny . . . the right to appropriate unappropriated waters of the stream except when such denial is demanded by the public interests.

It is in light of these proceedings that the self-execution issue must be examined.

70. Id. at 1915. The issue was ultimately resolved by the United States Supreme Court. In Wyoming v. Colorado, 259 U.S. 419 (1922), the Court ruled that, as between states employing the prior appropriation system of water rights, appropriative rights vested in persons in one state could not be abrogated by actions of the other state. The case involved a proposed diversion in Colorado which would have removed water from the Laramie River and its basin, so that no return flows would reenter the river. Nebraska was a concerned bystander in the litigation because the Laramie River is tributary to the North Platte River, which in turn supplies a large amount of water to the Platte River in Nebraska. Id. at 423. Nebraska, moreover, had its own litigation pending in the United States District Court at Denver. The litigation involved the same defendant and the same issue, but a different stream, the South Platte River. Proceedings, supra note 68, at 1914.

71. Proceedings, supra note 68, at 1915. The remainder of the history deals with issues of municipal rights and priority uses. Id. at 1915-32.
(1) Whether the Provisions Are Stipulations of Policy without a Corresponding Provision of Specific Means of Implementation

The Convention proceedings demonstrate that the provisions are policy stipulations. Section 4, a statement of broad scope, is a "declaration" of the cruciality of irrigation to Nebraska. Section 5 is an encapsulation of the state's position on the character of water rights. Section 6 is the "limitation" on the legislature's power to mischaracterize those rights. These uncontroverted descriptions of the amendments demonstrate their policy nature: the measures are in the Constitution to give legal force to policy judgments regarding the nature and force of water rights in the state and region.

The provisions, moreover, do not provide any specific means of policy implementation. Section 6 does caution the legislature on its range of permissible activity, but such advice to the legislature cannot be characterized as a policy implementation directive.  

(2) Whether Article XV, Sections 4-6, Are Directed to the Legislature Rather Than to Individuals

The next inquiry embodies the obvious notion that amendments directed to the legislature are designed to guide legislative action rather than to furnish independent rights to individuals.

The answer to this question seems also to be clear. These amendments, being policy statements, are logically intended for the legislature, the primary policy-making organ in the state. Bee-ler, moreover, expressly characterized section 6 as a "limitation upon the right of the Legislature of the state . . . [to jeopardize appropriators' vested rights]." This description manifests the undeniable implication that the section is directed to the legislature, not to the public.

(3) Whether the Language of the Amendments Contemplates Subsequent Legislation to Carry Them into Effect

The foregoing considerations resolve the final question of whether the amendments contemplate subsequent legislation. As noted above, sections 4-6 assert policy and are directed to the legis-
lature rather than to individuals. These conclusions are persuasive here, as policy statements normally are refined and effectuated by subsequent legislation. Provisions speaking to the legislature, furthermore, demonstrate an intention that the legislature abide by the policy in its subsequent legislative activity. Lastly, constitutional provisions which establish policy become essentially meaningless in the absence of subsequent implementing legislation, a result not favored in constitutional construction.

All three parts of the Walker test are, therefore, easily satisfied. As only one of the three tests must be satisfied to support the conclusion, it is apparent that article XV, sections 4-6, are not self-executing.

Although the Little Blue I court did not hold flatly that the amendments were self-executing, it certainly left a strong impression of its preference in that direction. While characterizing the terms of the amendments as "clear and unambiguous," the court asserted that: "[T]he very purpose of art. XV, section 6, is to guarantee the right to divert unappropriated waters and to prohibit the denial of such diversion except when demanded by the public interest." The court, moreover, remanded the case for a decision on whether the waters could be taken without harming the public interest. "If [the waters] can [be taken without damage to the public interest]," said the court, "the permit should be granted."

The court's apparent position on this issue is determinative of the balance of legal controls over water diversions in Nebraska. Suppose that a Natural Resource District seeks a permit for a major interbasin water diversion for the purpose of supplementing its declining groundwater supplies. Suppose further that the diversion would drain the affected stream segment and consequently jeopardize the habitat of a state-protected endangered species. In this case, the facts of which closely correspond with the facts of Little Blue I, a NESCA, standing alone, would require that the permit be denied.

76. See note 63 and accompanying text supra.
77. An indicator that supports this analysis is the location of article XV, §§ 4-6, within the Nebraska Constitution. The framers could have placed the provisions in the Bill of Rights, that part of the constitution traditionally assembling the rights of individuals to resist state power (article I). This would have helped to clarify any supposed intention that the provisions be self-executing. Instead, they placed the provision in article XV, entitled "Miscellaneous Provisions."
78. See notes 53-54 and accompanying text supra.
79. Little Blue I, 206 Neb. at 543, 294 N.W.2d at 602.
80. Id. at 543-44, 294 N.W.2d at 602.
81. Id. at 548, 294 N.W.2d at 604.
A self-executing article XV, sections 4-6, however, would yield an opposite result by vesting the permit applicant with a constitutional right to divert unless the public interest demanded a contrary result. Under these circumstances, the otherwise precluded applicant could submit evidence arguing, for example, that his diversion represented the only viable means of saving the agricultural economy of the region. The upshot of this and related arguments would be that the diversion, despite the statutory prohibition, must receive approval because of the constitution-based public interest criterion. The applicant would contend—rightly—that the NESCA prohibition must yield to the superior constitutional flat, and that the specific decision in question must turn on a public interest analysis, not on otherwise relevant statutory limitations. The statute would become inoperable, leaving only the unexplored limits of the constitutional provisions to guide permit decisionmaking.

This deflating impact of a self-executing article XV, sections 4-6, intrudes again with regard to instream flow protection. The Nebraska Unicameral, at the time of this writing, is considering legislation designed to protect state surface streams from over-appropriation.\textsuperscript{82} The idea of the legislation is to assure that some flow will remain always in the stream so that numerous instream uses are not sacrificed. These uses include "protection of fisheries, recreation, conformance with interstate compacts and court decrees, generation of hydroelectric power, instream stockwatering, recharge of aquifers, maintenance of subirrigation, navigation, water supply for wildlife and riparian vegetation, aesthetic appreciation, preservation of wild and scenic rivers, and maintenance of water quality."\textsuperscript{83} One legislative way to extend this protection to

\textsuperscript{82} The Natural Resources Commission of the State of Nebraska, as part of its work under the State Water Planning and Review Process, prepared and submitted to the Governor and legislature in January, 1982, its Policy Issue Study on Instream Flows. Nebraska Natural Resources Comm’n, Policy Issue Study on Instream Flows (1982) (on file with Creighton Law Review) [hereinafter cited as Instream Flows Report]. The report was commissioned for the purpose of assisting the lawmakers during their consideration of the issue. Letter from Alvin Narjes, Chairman, Natural Resources Commission, to Hon. Charles Thone, Governor of Nebraska, and to Members of the Eighty-Seventh Nebraska Legislature, Instream Flows Report. The Legislature had deferred consideration of the issue pending completion of the report.

streams is by the designation of specific stream reaches and a prohibition against appropriations of water which would drop the flow below predetermined levels.\textsuperscript{84}

Such a law would, of course, die aborning in the face of a self-executing article XV, sections 4-6. The state could not statutorily protect streamflows if a permit applicant could demonstrate that denial of his or her proposed out-of-stream diversion was not demanded by the public interest.

The experience in Colorado confirms these projections. Colorado has a constitutional provision analogous to article XV, section 6. It declares, in even less flexible terms, that "[T]he right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied."\textsuperscript{85} The provision has been held to be self-executing\textsuperscript{86} and has been interpreted as guaranteeing individual diversion rights, subject only to reasonable regulation: "While the legislature cannot prohibit the appropriation or diversion of unappropriated water, for useful purposes, from natural streams upon the public domain, that body has the power to regulate the manner of effecting such appropriation or diversion. It may, by reasonable and constitutional legislation, designate how the water shall be turned from the stream, or how it shall be stored and preserved."\textsuperscript{87}

Thus, Colorado, which accords findings of self-execution the same impact as Nebraska,\textsuperscript{88} has ruled that its constitutional amendments preclude legislative prohibitions of water diversion rights. In Nebraska, a similar ruling would mean, among other

\begin{footnotes}
\item[84] Protection in this form was recommended in Instream Flows Report, supra note 81, at viii.
\item[85] \textsc{Colo. Const.} art. XVI, § 6.
\item[86] People \textit{ex rel. Park Reservoir Co. v. Hinderlider}, 98 Colo. 505, 507, 57 P.2d 894, 895 (1936).
\item[87] Larimer County Reservoir Co. \textit{v. People}, 8 Colo. 614, —, 9 P. 794, 797 (1886) (emphasis added). Diversion rights, of course, would not exist if their exercise would impair the prior rights of other appropriators. \textit{Id.} at 616, 9 P. at 797.
\item[88] "[A self-executing constitutional provision] does not merely declare principles. On the contrary, it is complete in itself, and by its own terms confers a right and prescribes the rules and conditions by means of which such right may be enforced. It employs no language to indicate that the subject with which it deals is to be referred to the Legislature for action." Lyons v. Longmount, 54 Colo. 112, 114, 129 P. 198, 200 (1913). Moreover, stated the court: "[C]onstitutional principles are self-executing when it appears that they shall take immediate effect, and ancillary legislation is not necessary to the enjoyment of the right thus given, or the enforcement of the duty thus imposed. In short, if a constitutional provision is complete in itself, it executes itself." \textit{Id.}
\end{footnotes}
possibilities, that the prohibitory effect of the NESCA, as well as potential instream flow legislation,89 would be nullified.90

These results would not be forthcoming if the amendments served as a test of the constitutionality of legislative action rather than of individual permit decisions. In this event, the NESCA, instream flow legislation, and other controls on water-related activity, would be reviewed to determine whether their prohibitory effects on water diversions as a policy matter are demanded by the public interest. In such a review, deference would be due the legislative decision. The constitutionality of legislation would turn on section 6 public interest analysis, rather than having each and every water diversion proposal tested by that criterion.91

89. Not all instream flow protection schemes would be precluded. A legal system recognizing instream uses as beneficial and allowing appropriation of unappropriated waters for that end would be permissible because the constitutional amendment, if self-executing, would extend diversion rights to individuals only with regard to water that is unappropriated at the time the individual seeks permission to divert. Colorado has adopted this scheme. COLO. REV. STAT. § 37-92-105(4) (1973).

90. The issue may arise in Nebraska in connection with a bill introduced before the Nebraska Unicameral in January, 1983. The bill would amend NEB. REV. STAT. § 46-229 by allowing appropriation rights to be cancelled “if the owner of such appropriation fails to comply with any of the conditions of approval in the permit.” L.B. 380 (submitted January 17, 1983).

The law of Idaho, moreover, supports the notion that a self-execution of art. XV, § 4-6, would nullify some legislative attempts to prohibit water diversions in appropriate circumstances. Idaho’s constitution provides that “the right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power purposes....” IDAHO CONST. art. XV, § 3. In interpreting the provision, the Idaho Supreme Court stated: “While the legislature is given power to regulate the manner and method of appropriating and applying to a beneficial use the public waters of the state, they must do so in such a manner that the right to divert and appropriate will not be denied.” Speer v. Stephenson, 16 Idaho 707, —, 102 P. 365, 367 (1909).

The only other western state with a comparable constitutional provision is Wyoming, whose constitution states that “[N]o appropriation shall be denied except when such denial is demanded by the public interest.” WYO. CONSTR. art. 8, § 3. In a case involving the issue of forfeiture for failure to file a required notice, the court commented that “a water user should not be required to suffer the loss of a valuable water right when there has been beneficial use. We think § 3, Art. VIII, Wyoming Constitution, . . . [supports this result].” Snake River Land Co. v. State Bd. of Control. — Wyo. —, —, 560 P.2d 733, 737 (1977). The case indicates that “beneficial use,” not “public interest,” is the criterion for determining water use rights in Wyoming. The case treats the constitutional provision as if it is not self-executing, although there is no express judicial decision in Wyoming to this effect.

91. At this point, one final comment on the court’s reading of § 6 is noteworthy. The court in Little Blue I directed the DWR to grant the permit if the director determined that the unappropriated waters “may be taken without damage to the public interest.” Little Blue I, 206 Neb. at 546, 294 N.W.2d at 604 (emphasis added). By this phrasing, the court was directing the DWR to deny the permit if the proposed diversion would cause damage to the public interest. Article XV, § 6, refutes this reading. By proclaiming that water rights “shall not be denied except when demanded
III. THE LITTLE BLUE III OPPORTUNITY

The Nebraska Supreme Court should have an opportunity in the near future to give close consideration to the question of the self-executing nature of article XV, sections 4-6. Soon the Director of the DWR will issue his ruling in accordance with the remand in Little Blue II on the applicability of the NESCA to this permit proceeding. That decision should bloom with Little Blue III.

When Little Blue III arrives at the court’s doorstep, the court should end this controversy by ruling that these constitutional amendments are not self-executing.

In addition to implementing the framers’ intent, this ruling in addition to reviving the NESCA and liberating the instream flow debates would yield some important benefits. For one, it would remove any pall now cast upon current legislative efforts to redefine the basic tenets of the state’s statutory water laws. Nebraska has underway at this time a sweeping examination of its water resources and the legislative options available for long-term care and use of those resources. The Nebraska Water Resources Commission is spearheading the effort with the assistance of an impressive assembly of experts and the general public alike. The goal of the effort is to restructure the state’s water management statutes in line with the most current information on hydrology and consumption trends. This effort, which promises new and widespread improvement in Nebraska water law, could be jeopardized if article XV, sections 4-6, operate to frustrate statutory modifications of the water management system.

Second, a holding that article XV, sections 4-6, are not self-executing would eliminate the troubling “public interest” criterion now controlling permit decisionmaking. Divining the “public interest” in a specific water diversion proposal is not a simple task. Such nebulous decisions, even if issued by experienced regulatory

by the public interest,” the section, if self-executing, would require permits to be issued even in the presence of damage, so long as standing alone or as counterbalanced by public benefit, the damage did not demand a denial in the public interest.

92. See text and accompanying notes 56-83 supra.

93. The State Water Planning and Review Process, established in 1978, has identified twelve areas for analysis. They are: (1) instream flows; (2) water quality; (3) groundwater reservoir management; (4) water use efficiency; (5) selected water rights issues; (6) municipal water needs; (7) supplemental water supplies; (8) interbasin transfers; (9) weather modification; (10) water-energy; (11) water decisions funding alternatives; and (12) surface groundwater integration. Three of these studies (No.’s 1-3) are complete at this writing, five (No.’s 8-12) are not yet started, and the remainder are in various stages of preparation. Note that the group of studies not yet started includes the policy issue analysis of the interbasin transfer issue.
bodies and even if aided by explanatory legislation, are simply too complex to form the basis for even-handed, fair regulation. The standard is too soft: one official may perceive a public interest benefit or detriment while another may not (although one can speculate that administrators would be chary to deny permits as most diversions would not so transgress the public interest as to demand denial). This softness, of course, is increased considerably by the requirement that public interest values be evaluated on a statewide basis. Determinations of "public interest" are better left to legislature.

94. The court in Little Blue I determined that the question must "in the first instance, be determined by the [DWR]." Little Blue I, 206 Neb. at 547, 294 N.W.2d at 604.


96. The court in Little Blue I concluded that article XV, § 5, by dedicating the use of waters of natural streams to "the people of the state," intended this result: Nothing in art. XV, § 5, indicates or authorizes limiting the use of the water of every natural stream to within a particular watershed basin or dedicating its use to the people living within a particular watershed basin. Quite to the contrary, the clear and unambiguous language constitutionally mandates that the use of every stream, regardless of its location, be dedicated to all of the people of the state, regardless of their location, and not just to those who happen to live within the confines of a particular valley or watershed basin. Nowhere within the Constitution can such limiting words be found.

Little Blue I, 206 Neb. at 543, 294 N.W.2d at 602 (emphasis added). The legislation enacted in response to Little Blue I requires consideration of the "public interest" on a statewide basis. Neb. Rev. Stat. § 46-289 provides that: "The application shall be denied if the benefits to the state from granting the application do not outweigh the benefits to the state from denying the application." See note 32 supra.

97. The Nebraska Supreme Court has spoken to this concern. In a matter involving government appropriations, it stated:

As stated in Oxnard Beet Sugar Co. v. State, supra: It is the province of the legislature to determine matters of policy. In appropriating the public funds if there is reason for doubt or argument as to whether the purpose for which the appropriation is made is a public or a private purpose, and reasonable men might differ in regard to it, it is generally held that the matter is for the Legislature; . . . " See, also, Power Oil Co. v. Cochran, 138 Neb. 827, 295 N.W. 805, State ex rel. Douglas County v. Cornell, 53 Neb. 556, 74 N.W. 59, 39 L.R.A. 513, 68 Am. S. R. 629, State ex rel. Custer County Agricultural Society & Live Stock Exchange v. Robinson 35 Neb. 401, 53 N.W. 213, 7 L.R.A. 383.


It is notable that protecting the "public health, safety, morals, and general welfare" is a traditional duty of state legislatures. Eckstein v. City of Lincoln, 202 Neb. 741, 743-44, 777 N.W.2d 91, 93 (1979); Schaffer v. City of Omaha, 197 Neb. 328, 330-31, 248 N.W.2d 764, 766 (1977); Central Markets W., Inc. v. State, 186 Neb. 79, 81-82, 180 N.W.2d 880, 882 (1970). This duty has been considered to be functionally identical with acting for a "public purpose." Fitzgerald v. Kupinger, 163 Neb. 286, 293-95, 79 N.W.2d 547, 552-53 (1957); Power Oil Co. v. Cochran, 138 Neb. 827, 835, 295 N.W. 805, 810 (1941); and with protecting the "public interest," Munn v. Illinois, 94 U.S. 113, 126
It is important, also, to emphasize that using Little Blue III to declare article XV, sections 4-6 not to be self-executing would not mean that these constitutional provisions become meaningless. To the contrary, they would remain useful to restrain inappropriate exercises of legislative power\(^\text{98}\) despite their unavailability for use as quasi-statutory exceptions in specific cases. In this event, statutes would offend the constitution if they imposed prohibitions on water diversions not demanded by public interest considerations. DWR regulations likewise could unconstitutionally infringe individual rights.\(^\text{99}\) The amendments would operate as a constitutional check on legislative enactments.

Such a declaration, moreover, would not mean that the Osterman prohibition of interbasin diversions must stand. As the Little Blue I opinion noted, it would be a sad commentary if, "in rationing this necessity of life [i.e., water], large areas of the state outside a particular valley were ruined while unappropriated waters flowed into the Missouri River and on to other states."\(^\text{100}\) Moreover, "[W]here the reasonable use of the riparian landowner is not impaired, the public interest demands that such waters be applied to a needed public purpose rather than be lost by proceeding unmolested to the sea."\(^\text{101}\) These considerations argue forcefully that a complete statutory ban on interbasin diversions is not only not demanded by the public interest, but is contrary to it. Indeed, to justify a complete statutory ban, the court would have to find that interbasin diversions as a class are inimical to the public interest. It obviously is unwilling to do that.\(^\text{102}\)


\(^{99}\) If the statutory authorities provided to the DWR or other agencies are themselves constitutional, agency regulations not exceeding those statutory authorities would not, in the normal case, violate the constitution. See Neb. Rev. Stat. §§ 46-701 to -707 (Reissue 1978).

\(^{100}\) Little Blue I, 206 Neb. at 547, 294 N.W.2d at 604.

\(^{101}\) Id. at 546-47, 294 N.W.2d at 604, (quoting Metropolitan Util. Dist. v. Merritt Beach Co., 179 Neb. 783, 800, 140 N.W.2d 626, 637 (1966)).

\(^{102}\) This is an argument of constitutional construction. The court could avoid discussing these constitutional considerations by basing its decision to overturn Osterman exclusively on statutory grounds. The Little Blue I decision accomplished
Finally, the legislature’s rapid-fire reaction to *Little Blue I* has given the court by statute what it wanted via the constitution. As mentioned earlier, the legislature has enacted new statutory law. One provision which was amended was section 46-204, which now asserts as a matter of statutory law that diversion rights in unappropriated water shall never be denied unless demanded by the public interest. This legislation requires, independent of constitutional considerations, that public interest determinations influence (although not necessarily control) permit decisionmaking. The end result is that, even if the court should clarify the *Little Blue I* decision as proposed, administrative decisionmaking on permit applications can continue to factor public interest assessments into each permit decision.

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103. See note 32 and accompanying text *supra*. Also amended was § 46-206, the provision requiring that interbasin diversions not initiate from streams of less than one hundred feet in width. The section was made subject to new Neb. Rev. Stat. § 46-289 (Supp. 1982).

104. This statute may or may not be an extension of individual rights to persons, depending on its legislative history. With the specific provisions of § 46-289 now in place, the issue is moot.