



State Water Rights as They Apply to Irrigation

Wyoming and Nebraska
Ground and Surface Water Laws

Kara Brighton
Steve Smith

Introduction

- History of Wyoming's Ground Water Statutory Framework
- Regulation of Ground Water
- Conclusion

- Photo courtesy uwyo.edu



History of Ground Water Laws in Wyoming

- 1945 – Chapter 139
 - Declared public interest in underground waters and a vested right in certain uses of such waters
 - Directed State Engineer to investigate underground water conditions

History of Ground Water Laws in Wyoming

- 1947 – Chapter 107
 - Filing of Claims to wells completed prior to April 1, 1947
 - Statement of Claim
 - Registration of wells completed after April 1, 1947
 - Well Registration
 - Exception for Stock, Domestic Wells
 - Adjudication Procedure

History of Ground Water Laws in Wyoming

- 1957 – Chapter 169 – “Title 41”
 - Required Permit from State Engineer PRIOR to commencing construction
 - Permits issued as a matter of course unless “critical area”
 - Exemption for Stock, Domestic Wells
 - Preferred Use for Stock & Domestic Wells
 - Subject to Abandonment

History of Ground Water Laws in Wyoming

- 1969 Amendments
 - Any Well, including Stock, Domestic, drilled after May 24, 1969 required Permit
 - December 31, 1972 registration for Stock and Domestic Wells
 - Priority not based on Application Date
 - State Engineer MAY deny a permit if demanded by public interest

Wyoming's Ground Water Statutory Framework

- Definitions
- Priorities
- Policy
- Interference
- Control Areas

- Photo courtesy uwyo.edu





Definitions

- Underground Water –
 - 41-3-901(a)(ii)
- Aquifer – 41-3-901(a)(iii)
- Well – 41-3-901(a)(iv)



Priorities

- Statement of Claims - Ends with C
 - Priority before April 1, 1947
- Well Registrations - Permit Ends with G
 - Priority Between April 1, 1947 and 1957
- Permits
 - Permits Ends with W
 - Permits Ends with P
 - Stock or Domestic Well Drilled prior to May 24, 1969 and Registered before December 31, 1972



Policy – W.S. 41-3-931

- If located in an area not designated as a critical area, it SHALL be granted as a matter of course
- Proposed Use is Beneficial
- Proposed Means of Diversion and Construction are Adequate
- Deny for Public Interest
 - Reviewed by Board of Control

Interference – Statutory Req.

- W.S. 41-3-911
 - Complainant Must Have a Valid Water Right
 - Complaining Well Must be “Adequate”
 - Substantial Evidence of Actual Interference
 - \$100 Filing Fee
 - State Engineer Undertakes Investigation
 - State Engineer Reports
 - Appeal to Board of Control



Adequate Well

- Well Depth
 - Completed in a manner that allows maximum beneficial use of ground water
- Well Construction
 - Allow water to efficiently enter and flow out
- Well Condition
 - Useful life of pump and other equipment
- Responsibility of Well Owner to Maintain

Interference – Case Law


- “Adequate” Well
 - Bishop v. City of Casper
 - 420 P.2d 446 (Wyo. 1966)
- Application of Statute
 - Willadsen v. Christopoulos
 - 731 P.2d 1181 (Wyo. 1987)
 - Denial of Due Process - Remanded
 - 792 P.2d 1376 (Wyo. 1990)
 - Board of Control’s Determination Upheld



Control Area BOC Designation

W.S. 41-3-912

- Use of ground water approaching a use equal to the current recharge rate
- Ground water levels are declining or have declined excessively
- Conflicts between users are occurring or are foreseeable
- The waste of water is occurring or may occur
- Other conditions exist that require regulation for protection of public interest



Control Area Advisory Board

W.S. 41-3-913

- Shall Consist of 5 Adults who Own Land in the Control Area
- Election – 1 vote per acre
- Following formation, Terms are 4 Years
- Reimbursed for Board Activities



Other Control Area Statutes

- Adjudication
 - W.S. 41-3-914
- Corrective Controls
 - W.S. 41-3-915
 - Moratorium on Permits
 - Limit Permissible Total Withdrawal
 - Order Junior Appropriators Off



Regulation of Ground Water

- Prior Appropriation Doctrine
- Physical Complications
- Geohydrologic Data
 - Initiation of New Rights
 - Exercise of Existing Rights
- Practical Examples



Prior Appropriation Doctrine

- Groundwater Regulated for the Benefit of Surface Water When:
 - Interference Established
 - Determination of Same Source of Supply
 - W.S. 41-3-916
 - Can Adopt Corrective Measures Provided in W.S. 41-3-915



Physical Complications in Integrating Priorities

- Delayed Impact of Junior Diversions
- Selection of Junior Appropriators for Closure
 - Can be determined to be arbitrary and violation of equal protection rights
- Overlong Delay



Geohydrologic Data

- Integrated Management Requires Detailed Water Supply Data
- Data Often Lacking
 - Initiation of New Rights
 - Burden of Proof – Not on Applicant
 - Exercise of Existing Rights
 - Burden of Proof – Senior Water Right



Conclusion

- Drought has Exposed Surface and Ground Water Conflict
- Little or No Recognition in New Permitting
- Surface Water or Senior Ground Water have Burden of Proof to Regulate Junior Ground Water Rights

Questions?

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Introduction

- Nebraska has two separate systems for the distribution of its water resources: one allocates surface water, and the other allocates ground water. The Department of Natural Resources regulates surface water appropriators (§61-201 et seq.), and ground water users are statutorily regulated by the natural resources districts through the Nebraska Ground Water Management and Protection Act. (§ 46-701 et seq.)



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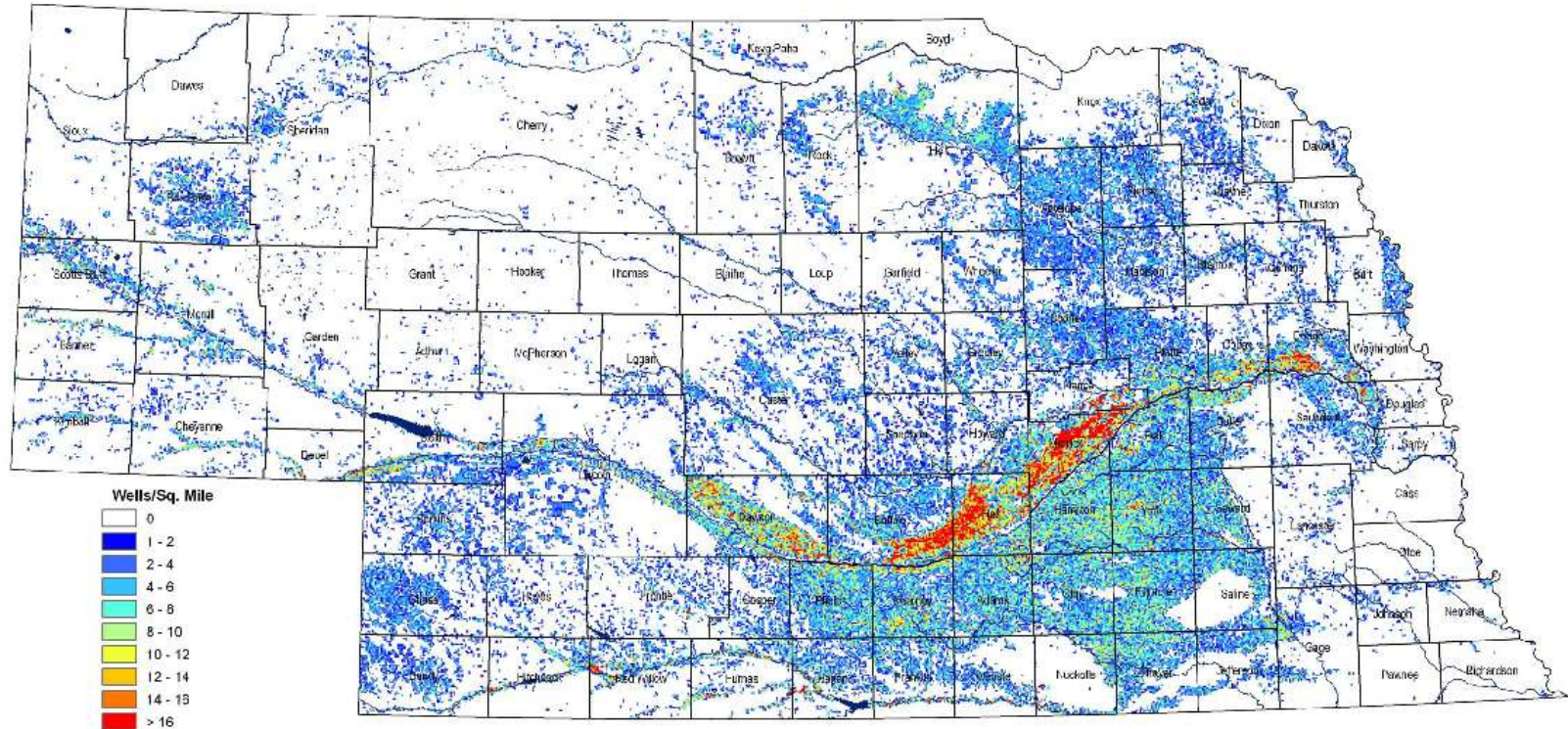
- Nebraska's Ground Water Common Law and Statutory Framework
- Regulation of Ground Water
- Nebraska's Surface Water Laws
- Regulation of Surface Water
- Judicial Remedy for Ground Water/Surface Water Conflicts
- Regulation of Ground Water/Surface Water Conflicts
- North Platte Natural Resources District
- Conclusion



Ground Water

- Fewer than 2000 irrigation wells in the State of Nebraska before 1940.
- Irrigation well development progressed rapidly, boosted by sprinkler irrigation.
- Today, approximately 8 million acres irrigated by ground water and over 90,000 irrigation wells – more than any other state.

Density of Registered Irrigation Wells in Nebraska August 2007

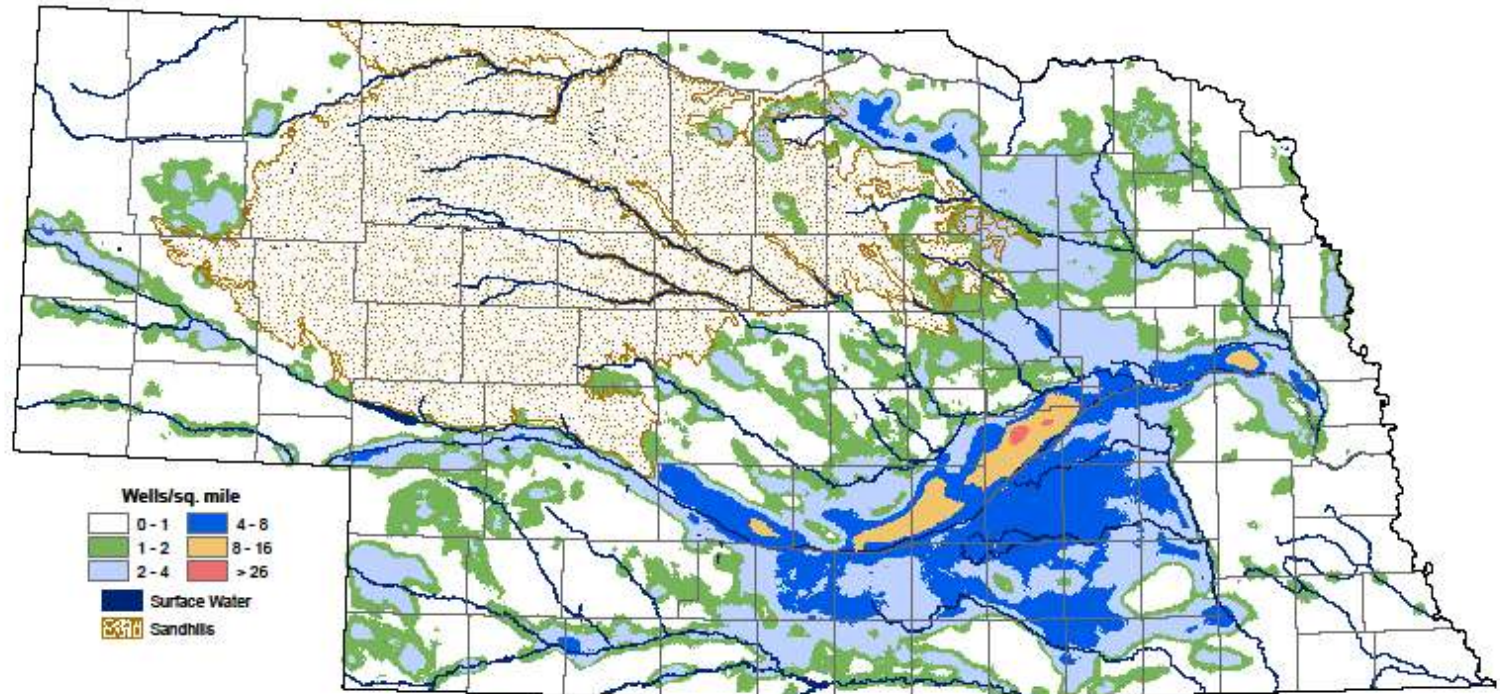


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Mark Burbach, Water Levels Coordinator, CSD

Density of Active Registered Irrigation Wells - January 2011



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Ground Water – Nebraska Common Law

- 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.

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

- Owned by the public.
 - *Hagan v. Upper Republican Natural Resources Dist.*, 261 Neb. 312, 622 N.W.2d 627 (2001).

Ground Water Statutory Framework: Definitions

- Ground water means that water which occurs in or moves, seeps, filters, or percolates through ground under the surface of the land Neb. Rev. Stat. §46-706 & Neb. Rev. Stat. §46-635.
- 1)(a) Water well means any excavation that is drilled, cored, bored, washed, driven, dug, jetted, or otherwise constructed for the purpose of exploring for ground water, monitoring ground water, utilizing the geothermal properties of the ground, obtaining hydrogeologic information, or extracting water from or injecting fluid as defined in section 81-1502 into the underground water reservoir.
- (b) Water well includes any excavation made for any purpose if ground water flows into the excavation under natural pressure and a pump or other device is placed in the excavation for the purpose of withdrawing water from the excavation for irrigation. For such excavations, construction means placing a pump or other device into the excavation for the purpose of withdrawing water for irrigation.
 - (excludes certain oil and gas operations and permitted surface water works) Neb. Rev. Stat. §46-601.01

Ground Water – Statutory Framework

- First meaningful ground water regulation was well registration passed in 1957—State responsibility until 1983.
- 1972. Natural resources districts (NRDs) are local units of government, organized along river basin lines, which replaced over 150 special purpose districts.
- The Nebraska Legislature substantially incorporated the common law rule in its declaration of intent and purpose in the Nebraska Ground Water Management and Protection Act.
 - Every landowner shall be entitled to a reasonable and beneficial use of the ground water underlying his or her land subject to the provisions of Chapter 46, article 6, and the Nebraska Ground Water Management and Protection Act and the correlative rights of other landowners when the ground water supply is insufficient to meet the reasonable needs of all users.

Ground Water – Statutory Framework

- Preference in the use of ground 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 the water for agricultural purposes shall have the preference over those using the same for manufacturing or industrial purposes. §46-613.
- Defendant liable in damages for withdrawal of irrigation ground water resulting in loss of artesian pressure in plaintiffs' adjacent domestic use wells.
 - *Prather v. Eisenmann*, 200 Neb. 1, 261 N.W.2d 766 (1978).
- Spacing - §46-651 et seq.; §46-609 and §46-610.

Ground Water Statutory Framework

- Ground water transfers
 - §46-638 et seq.– Municipal and Domestic transfers.
 - §46-613.01 – Transfers to another state.
 - §46-691 et seq. – Transfers off overlying land.
 - §46-678.01 et seq. – Industrial transfers.
 - §46-739.01 et seq. – GWMPA transfers.

Regulation of Ground Water

- Initially, NRDs had significant authority but little direction.
- 1977 GWMPA (presently codified as §46-701 et seq.).
- (1) A natural resources district may establish a groundwater management area in accordance with this section to accomplish any one or more of the following objectives:
 - (a) Protection of ground water quantity
 - (b) Protection of ground water quality
 - (c) Prevention or resolution of conflicts between users of ground water and appropriators of surface water, which groundwater and surface water are hydrologically connected (§ 46-712).



Regulation of Ground Water

- Natural resources districts through the Nebraska Ground Water Management and Protection Act, now have virtually plenary regulatory authority over all ground water users.



Nebraska Surface Water Laws

- As between appropriators, the one first in time is first in right. §46-203.
- Water declared a natural want, and use is dedicated to the public for beneficial purposes. Nebraska Constitution, Article XV, Sections 4, 5, 6 and 7.



Nebraska Surface Water Laws

- The right to divert unappropriated waters of every natural stream for beneficial use shall never be denied except when such denial is demanded by the public interest. Priority of appropriation shall give the better right as between those using the water for the same purposes, but when the waters of any natural stream are not sufficient for the use of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming it for any other purpose, and those using the water for agricultural purposes shall have the preference over those using the same for manufacturing purposes. §46-204 and Nebraska Constitution, Article XV, Section 6.
- The priority of an appropriation shall date from the filing of the application in the office of the Department of Natural Resources. §46-205.

Regulation of Surface Water

- Permitted, regulated and administered by NDNR.
- *Keating v. Nebraska Pub. Power Dist.*, 10-2441 (8th Circuit -2011).
 - In *Keating et al*, the United States Court of Appeals for the 8th Circuit entered an opinion on November 7, 2011, affirming the Nebraska Federal District Court that even though surface water appropriations were essentially a property right to use the water, subject to the restraints of the appropriative permit, permit holders were not entitled to a pre-deprivation hearing under Nebraska's surface water stream administration scheme.
- A related case (*In re 2007 Administration of Waters of Niobrara River*) was argued before the Nebraska Supreme Court in November, 2011, in which the irrigator/Plaintiffs argued the NPPD's appropriations were not valid due to 65 years of nonuse, or in the alternative if the appropriations were valid, Plaintiffs argued that NDNR failed to consider key factors in water administration. A decision is expected soon.



Regulation of Surface Water

- Approximately 600,000 acres irrigated (approximately 50% commingled).
- All appropriations for water must be for a beneficial or useful purpose and, except as provided in sections 46-290 to 46-294 and 46-2,122 to 46-2,125, when the owner of an appropriation or his or her successor in interest ceases to use it for such purpose for more than five consecutive years, the right may be terminated only by the director pursuant to sections 46-229.02 to 46-229.05. (§46-229.)
- Adjudications by NDNR.
- NDNR Controls under IMPS for hydrologically connected surface water.
- Transfers §46-290 to §46-294.

Judicial Remedy for Ground and Surface Water Conflicts

- Prior to *Spear T Ranch, Inc. v. Knaub*, 269 Neb. 177 (2005), the Nebraska Supreme Court had never addressed the issue of whether a surface water appropriator could bring a common law claim against the users of hydrologically connected ground water.

Judicial Remedy for Ground and Surface Water Conflicts

- The Court adopted the rule embodied in the Restatement (Second) of Torts.

A proprietor of land or his [or her] 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 of another, unless...the withdrawal of the ground water has a direct or substantial effect upon a watercourse or land and unreasonably causes harm to a person entitled to the use of its water.



Judicial Remedy for Ground and Surface Water Conflicts

Whether a ground water user has unreasonably caused harm to a surface water user is decided on a case-by-case basis. In making the reasonableness determination, §850A, provides a valuable guide, but we emphasize that the test is flexible and that a trial court should consider any factors it deems relevant.

Judicial Remedy for Ground and Surface Water Conflicts

- The listed factors in Section 850A include:
 - A) the purpose of the use
 - B) the suitability of the use to the watercourse or lake,
 - C) the economic value of the use,
 - D) the social value of the use,
 - E) the extent and amount of the harm it causes,
 - F) the practicality of avoiding the harm by adjusting the use or method of use of one proprietor or the other,
 - G) the practicality of adjusting the quantity of water used by each proprietor,
 - H) the protection of existing values of water uses, land, investments and enterprises, and
 - I) the justice of requiring the user causing harm to bear the loss.
- Court expressed serious doubt about injunctive remedy.



NRD/NDNR Regulation of Ground Water/Surface Water Conflicts

- Prior to LB 962, which was effective in 2004, the authority of the State and the NRDs to enact meaningful regulations to prevent conflicts was limited. The measures were primarily discretionary.



Regulation of Ground Water/Surface Water Conflicts

- LB 962 made several significant changes:
 - NDNR was required to evaluate hydrologically connected water supplies for both existing and new surface and ground water supplies for each of the State's river basins to determine fully or overappropriated status. (§46-713(3) – fully appropriated; §46-713(4) – overappropriated).

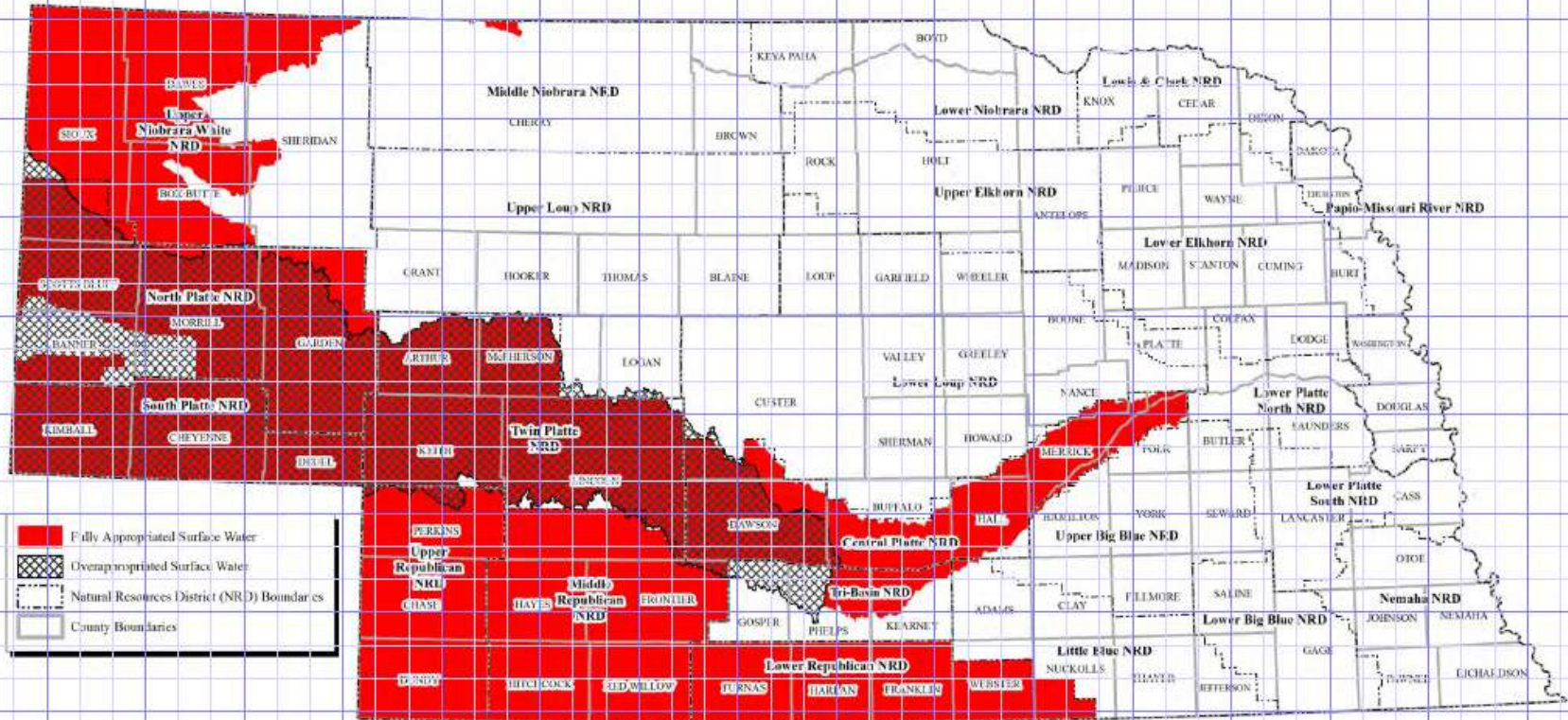
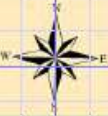
Regulation of Ground Water/Surface Water Conflicts

- *Middle Niobrara Natural Resources District et. al v. Nebraska Department of Natural Resources*, 281 Neb. 634, ___ N.W.2d. ___, (2011).
 - Four NRDs challenged the NDNR designation of a portion of the Lower Niobrara River Basin, upstream of the Spencer hydropower facility as fully appropriated.
 - Supreme Court clarified that political subdivisions have standing to challenge state action that adversely affects them or requires them to expend public funds.
 - The Court concluded that NDNR's fully appropriated designation for a portion of the Niobrara River was arbitrary and invalid because NDNR failed to comply with its own regulations when it determined the basins fully appropriated, and that NDNR's reports showed a complete lack of consistency in the way that it applied its averaging methodology. With regard to its methodology, the Department failed to plainly describe the same so that they could be replicated and assessed, all in compliance with Neb. Rev. Stat. §46-713.



Fully Appropriated and Overappropriated Surface Water in Nebraska

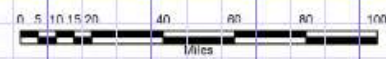
Determinations made by the Department of Natural Resources as of September 09, 2011



Legend:

- Fully Appropriated Surface Water
- Overappropriated Surface Water
- Natural Resources District (NRD) Boundaries
- County Boundaries

This map represents all areas in Nebraska where the surface water resources have been determined to be fully appropriated or overappropriated by The Department of Natural Resources (DNR) as of September 09, 2011. Detailed information regarding these determinations can be found in the individual Notices and Orders issued by DNR.





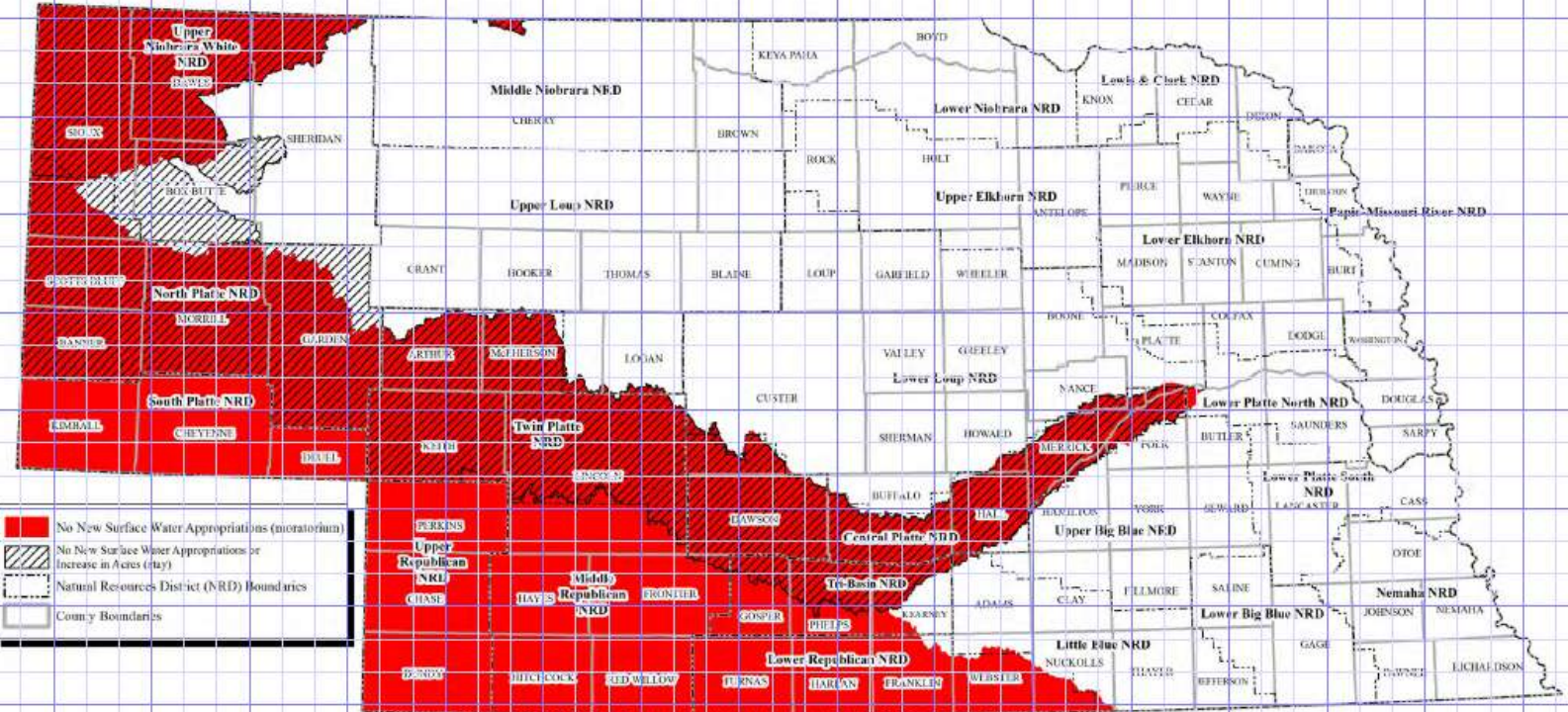
Regulation of Ground Water/Surface Water Conflicts

- Authority was given to issue stays and moratoriums on new surface water appropriations and water wells.
- NDNR and each NRD were authorized to adopt integrated management plans and basin-wide management plans.



Restrictions on Surface Water Appropriations in Nebraska

Moratoriums and Stays Issued by the Department of Natural Resources as of September 09, 2011



Legend:

- No New Surface Water Appropriations (moratorium)
- No New Surface Water Appropriations or Increase in Acres (stay)
- Natural Resources District (NRD) Boundaries
- County Boundaries

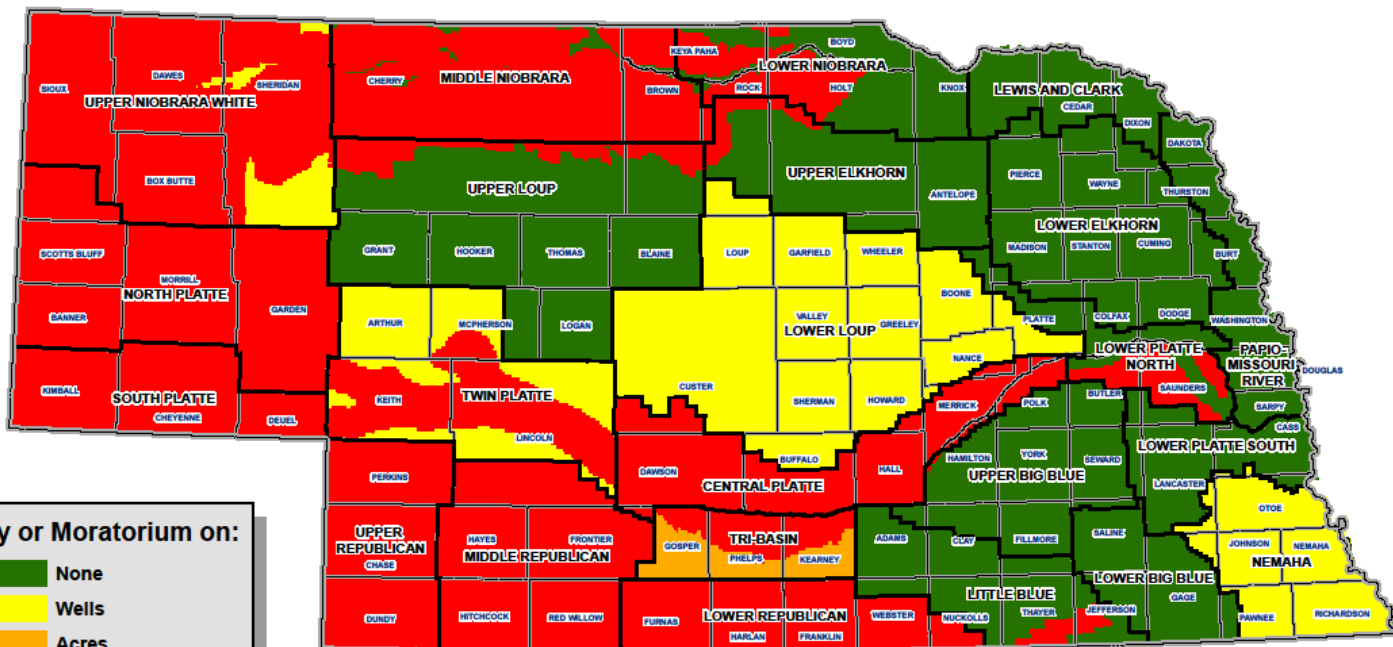
THIS MAP IS FOR GENERAL REFERENCE ONLY.
Contact DNR for detailed information regarding specific locations affected by these restrictions and any potential exceptions.

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Miles



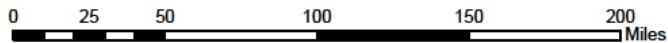
Planning and Assistance Division

RESTRICTIONS ON GROUNDWATER IRRIGATION DEVELOPMENT AS OF 11/12/2007



Stay or Moratorium on:

- None
- Wells
- Acres
- Wells and Acres



This map is for general reference only.
 Portions of some sections represented as subject to a stay or moratorium may not be restricted.
 Contact the local NRD regarding potential exceptions to stays or moratoriums.

Map Authored by Tina Kurtz – 2/16/2007
 Map Produced by Kevin J. Schwartman – 2/21/2007
 Map Updated by Kevin J. Schwartman – 11/2/2007



Regulation of Ground Water/Surface Water Conflicts

- Integrated Management Plans
 - Plans to be based on continuing studies and available science. (§46-715)
 - Collaborative and cooperative approach with input from interested parties and stakeholders.
 - These integrated management plans authorized both surface water controls (§46-716) and a multitude of ground water controls including ground water allocations, a system of rotation, more restrictive well spacing requirements, the installation of measuring devices, a system requiring reduction of irrigated acres, a limit on the expansion of irrigated acres, a limit on increases in the consumptive use of ground water, use of best management practices, and several other options as are necessary to carry out the purpose for which the management area was designated. (§46-739).



Regulation of Ground Water/Surface Water Conflicts

- The plans are required to include clear goals and objectives with the purpose of sustaining a balance between water uses and water supplies so that the economic viability, social and environmental health, safety and welfare of the river basin, subbasin, or reach can be achieved and maintained for both the near term and the long term. §46-715(2).

Regulation of Ground Water/Surface Water Conflicts

- All integrated management plans developed were required to include an incremental approach to achieve the goals and objectives identified under subdivision (2), using certain mandatory steps:
 - (i) first incremental goal was to address the impact of stream flow depletions to surface water appropriations and hydrologically connected water wells to extent that the depletions were due to water use initiated after July 1, 1997.
 - DNDR and the NRDs could also pursue voluntary efforts to offset increase in stream flow depletion occurring after July 1, 1997, but caused by ground water uses initiated prior to that date. The planning process requires ongoing review and consideration of available science. If necessary, subsequent increments will be completed to take effect not more than 10 years after the adoption of the previous increment.

Regulation of Ground Water/Surface Water Conflicts

- Increments shall be repeated until NDNR and the NRD agree that the goals of subsection 2 have been met and the overall difference between the current and fully appropriated levels of development have been addressed so that the river basin has been returned to a fully appropriated condition.
- NRDs are given statutory authority through general fund levies, issuance of bonds and an occupation tax of up to \$10 per irrigated acre for these purposes. (§2-3225 thru §2-3226.05).
- Supreme Court held this occupation tax constitutional in *Kiplinger v. Nebraska Department of Natural Resources*, 282 Neb. 237, ___ N.W. ___ (2011), after the Court had earlier ruled that a property tax levy authorized by LB701 in 2007 was a property tax for a state purpose (Kansas, Nebraska, Colorado Compact), and therefore unconstitutional, in violation of Nebraska Constitution, Article VIII, Section 1.A.



Regulation of Ground Water/Surface Water Conflicts

- Interrelated Water Review Board
Neb. Rev. Stat. §46-719
 - Utilized if NDNR and the affected natural resources district cannot resolve disputes over the content of a integrated or basin wide management plan.
 - Five members appointed by the governor to resolve a specific dispute. (the governor or his designee, one additional member of the governor's choosing, three members from a list of no fewer than six nominees provided by the Nebraska Natural Resources Commission) No more than two members can reside within the geographic area involved in the dispute.
 - No appeal directly provided.

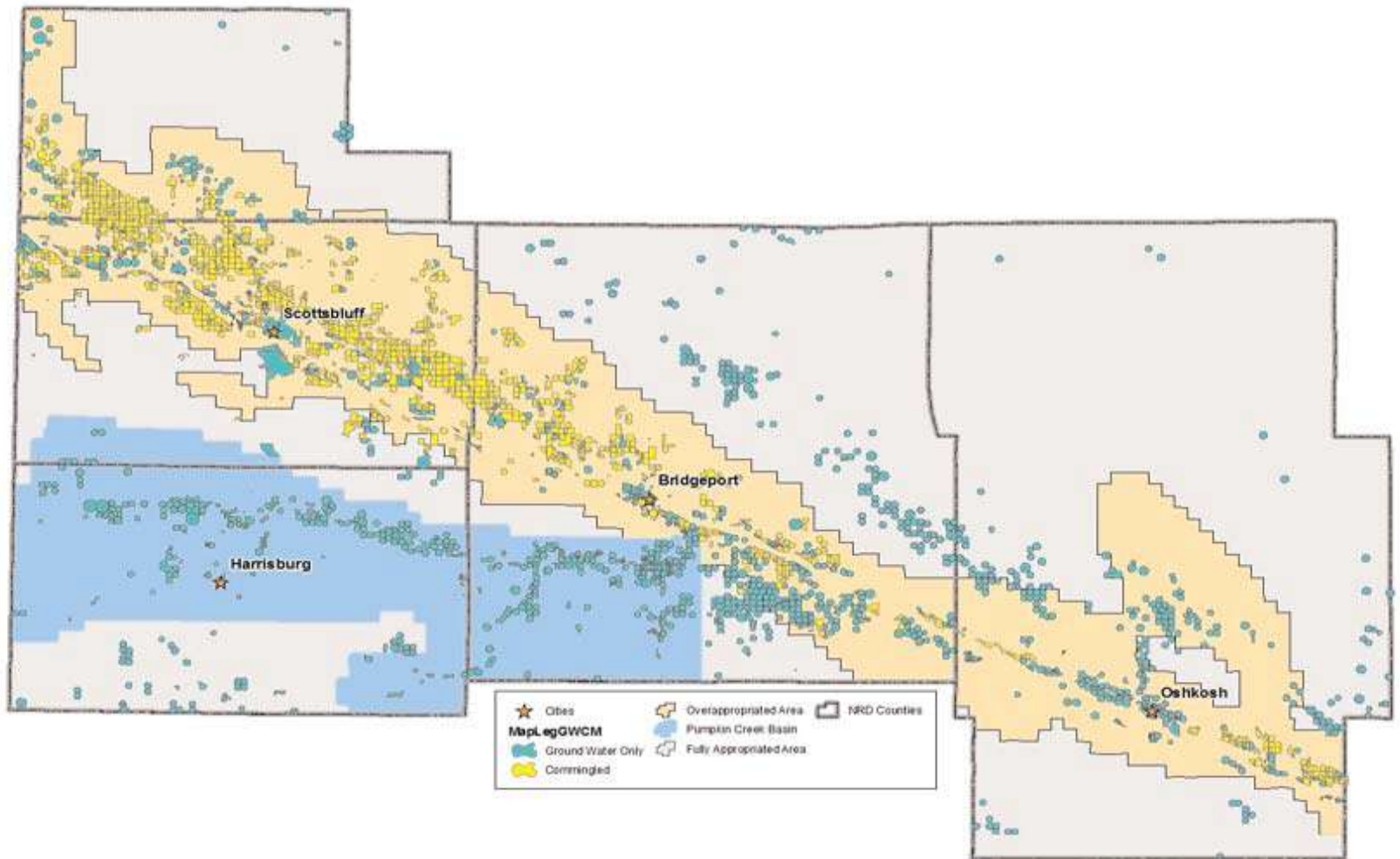
Regulation of Ground Water/Surface Water Conflicts

- Does LB962 Limit Or Restrict Judicial Review Of Integrated Management?
 - Any person aggrieved by any order of the district, the Director of Environmental Quality, or the Director of Natural Resources issued pursuant to the Nebraska Ground Water Management and Protection Act may appeal the order. The appeal shall be in accordance with the Administrative Procedure Act. (§46-750).
 - Language in 2005 *Spear T* decision.

Regulation of Ground Water/Surface Water Conflicts

- Subsequent LB962 changes.
- Limited, if any, judicial review of controls adopted pursuant to a legislative rule making process.
- Standing Restrictions
- *Central Nebraska Public Power and Irrigation District v. North Platte Natural Resources District*, 280 Neb. 533, 788 N.W. 2d 252 (2010) (no standing); *Frenchman Cambridge Irrigation District v. Nebraska Department of Natural Resources*, 281 Neb. 992, ___ N.W.2d. ___ (2011)(no standing); *Middle Niobrara Natural Resources District et. al v. Nebraska Department of Natural Resources*, 281 Neb. 634, ___ N.W.2d. ___, (2011) (standing found).

North Platte Natural Resources District



North Platte Natural Resources District

- Integrated Management Plan (IMP) adopted August 13, 2009.
- Basin Wide IMP adopted September 14, 2009.
- One objective in IMP: Manage and maintain existing surface water diversions within the NPNRD to protect existing surface water irrigation rights to the extent possible in order to maintain or enhance ground water recharge and return flows in the NPNRD.
 - 260,000 certified ground water acres
 - Approximately 340,000 surface water permitted acres
 - Approximately 112,000 commingled acres



North Platte Natural Resources District

- Leasing of surface water and ground water for ground water recharge projects and stream flow enhancement.
- Agreements with irrigation districts/canal companies for diversion of early and late season flows when available for ground water recharge.
- 12 inch average annual allocation – Pumpkin Creek Basin.
- 14 inch average annual allocation in overappropriated areas.
- Retirement of hydrologically connected irrigation wells.
- Strict requirements to offset all new depletions.
- Flow meters required on irrigation wells.
- Conflict resolution procedure in Basin Wide IMP.



Conclusion

- Nebraska likely to maintain two separate systems and regulatory authorities for ground water and surface water.
- Regulation, control and elimination of conflicts is best accomplished on the administrative level through the integrated management process, recognizing that each NRD has unique characteristics and circumstances calling for different regulations.
- Capture and use of “excess” flows (2011) when available can help eliminate conflicts among present water users.

Questions

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