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# Institutions in Water Policy: The Case of Nebraska

## ABSTRACT

*Experts in Nebraska water law suspect that the courts, because of legislative inaction, are heavily involved in making basic decisions about groundwater. It is true that there is a great deal of legislative inaction, but our research indicates that the courts seldom decide water-related cases and when they do, there is a tendency to defer to the local administrative units. The bureaucracy makes the most water policy, and the idea that there is excessive "judicialization" of public policy may be exaggerated.*

## INTRODUCTION

American legislators, faced with insoluble problems and pressured by deeply committed groups, have willingly forfeited and delegated their lawmaking powers to courts and administrators.<sup>1</sup> In Meier's words, they have "sublimated political issues into professional, technical, and administrative questions."<sup>2</sup> Rather than framing definitive statements of policy, there is a desire to make some vague effort so that legislators can claim that any unfavorable outcomes (and today almost any action is likely to strike some ferocious Political Action Committee as unfavorable) will not come back to haunt them on election day. The American policy process is increasingly expressed in the passive voice ("decisions were made") instead of the active voice ("we made the decision").

Congress and state legislators are willing to complain about the "usurpation" of their powers by the judiciary or bureaucracy. At the same time they proceed, as described by Lowi<sup>3</sup> and others, to relinquish their policy-making responsibilities. Water policy in the western states exemplifies this abdication of legislative responsibility. With ever greater demands on a basically stable resource, politicians prefer to avoid the hard questions

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1. R. Shumavon & H. Hibbelin, *Administrative Discretion and Public Policy Implementation* 6 (1986).

2. K. Meier, *Politics and the Bureaucracy: Policymaking in the Fourth Branch of Government* 47 (1987).

3. T. Lowi, *The End of Liberalism* (2d ed. 1979).

by playing a non-zero sum game with Mother Nature. No major water user will be denied access to an adequate supply even if the demands exceed the supply. Few lawmakers want to make drastic reallocations, for example, from agriculture to urban uses, but reality must intrude into these fantasies. As Ingram, Laney, and McCain concluded from their study of the Four-Corners states, where the political costs of allocative decisions are high, "legislatures are likely to make 'structural' decisions, that is they are apt to delegate decisionmaking responsibilities to the groups involved or to defer to some other decisionmaking process. Negotiated agreements lessen the risks of offending important interests. Legislators are often willing to ratify decisions made outside the legislature, for if another level of government decides the issue, then that level can be blamed."<sup>4</sup> Smith observed much the same behavior in a study of California, Arizona, and New Mexico.<sup>5</sup> He found that the players in the water game are concerned with preserving access to loose legal structures. Smith concluded that "groundwater users, as represented by interest groups concerned with the matter fear, *not centralized administration of groundwater rights, but rather the form that administration will take.*"<sup>6</sup> Students of the policy process in natural resources need to be better able to identify the situs within which the post-legislative negotiations take place.

Nebraska provides an intriguing example for those wishing to learn where and how water policy is actually made. In particular, the state's precious groundwater supply has been managed only tangentially by authoritative policy statements by the legislature. The courts are seen by most observers as the primary recipients of power over the resource. In the most comprehensive treatise on Nebraska water law, the authors concluded that the state suffers not from any physical shortages but instead from a "legislative and judicial framework that prevents effective utilization and management."<sup>7</sup>

In 1973, professors from the University of Nebraska College of Law predicted a breakdown in the jerry-built system of management: "It is generally recognized that neither local management nor a workable long-term state water plan can be evolved by the process of private litigation which offers only a narrow perspective on problems throughout an area. Courts can only react to cases before them, and future guidelines must come from legislative leadership."<sup>8</sup> Even after the legislature made a stab

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4. Ingram, Laney & McCain, *Managing a Limited Resource: The Political Constraints on Water Policy in the Four Corner States*, 1979 Utah L. Rev. 719, 743 (1979).

5. Smith, *Centralized Decisionmaking in the Administration of Groundwater Rights: The Experience of Arizona, California and New Mexico and Suggestions for the Future*, 24 Nat. Res. J. 641 (1984).

6. *Id.* at 688 (emphasis added).

7. R. Harnsberger & N. Thorson, *Nebraska Water Law and Administration* 1 (1984).

8. Harnsberger, Oeltjen & Fisher, *Groundwater: From Windmills to Comprehensive Public Management*, 52 Neb. L. Rev. 179, 240 (1973).

at groundwater management in 1975, there was speculation that the law had only created the framework for further litigation.<sup>9</sup> By 1984, a general survey of state water policy suggested that "in the absence of legislative action on groundwater, users have resorted to informal agreements, contracts and lawsuits. Consequently, the courts, according to some, have become the major water policymaking body in regards to the state's underground water supplies."<sup>10</sup>

In the absence of legislative action, then, it is presumed that the courts have become the major determinants of water policy. When that presumption is nourished enough, one can then go on to speak portentously of the "judicialization of water policy." The next step is to draw conclusions about the current state of democratic government in the United States, when in fact, the causal connection between legislative inaction and judicial activity is weak, since obviously lawmakers do not tell the courts directly, "We can't do it, so you judges take over." Any avoidance of power by the legislature is not a direct transfer to the judiciary. The courts may indeed become involved eventually, but there is likely to be a more immediate recipient.

The Nebraska case can help us to uncover the intermediaries who, in reality, may be far more than a conduit to the courtroom, and the courts may be far less important than has been supposed. The Nebraska legislature, as Ingram and Smith predicted, has become more involved with the construction of a constitution of water policy than with the resolution of substantive decisions. With the realization that the groundwater supply is not inexhaustible, policymakers have been forced to grapple with the need for some sort of allocative mechanisms. An awareness of limitations, however, was not associated with a desire on the part of any major actors to relinquish their "fair share" of water.

While an omniscient master planner might be able to come up with a perfect system of allocation, the legislature is filled with ordinary mortals whose major concern has been the high political costs in being connected to any definitive statement about who will get what. Further analysis of the problem as a never-ending process is to be preferred to a bold announcement of winners and losers. The non-partisan legislature has never been noted for strong leadership, a deficiency all the more pronounced since no Nebraska governor has ever given the development of water policy a high priority. So when the issue can no longer be ignored, the furniture of government must be rearranged so that the real policymakers become more obscure. The legislature has provided an aura of legitimacy to its avoidance of controversy by creating or enhancing two institutions,

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9. Klein, *Groundwater Management in Nebraska Without a Legislative Solution: Is There an Alternative?* 57 Neb. L. Rev. 78 (1978).

10. J. Aucoin, *Water in Nebraska: Use, Politics, Policies* 64 (1984).

one a state agency and the other at the local level. Together, these institutions seem to provide both scientific certainty and grass-roots democracy in the making of water policy.

### THE DEPARTMENT OF WATER RESOURCES

For many years, the Nebraska Department of Water Resources (DWR), headed by a director, was primarily a bookkeeping operation for the management of the claims for water rights filed under the state's system of prior appropriation. Its basic function was largely the ministerial one of recording claims and insuring that senior appropriators had an adequate supply of water for surface irrigation.<sup>11</sup> Later laws also gave to the department the responsibility for recording the registration of wells, but there was no provision for the denial of permission to drill.

As the state faced a new set of pressures on water resources in the 1970s, especially on groundwater, greater discretion was given, albeit in piecemeal fashion, to the director of DWR. As discussed below, the director was given a role in the management of critical groundwater problems, although the degree of involvement is somewhat uncertain. In another area, after a court decision reopened the controversial question of interbasin water transfers within the state in 1980, the legislature gave the director the authority to approve such transfers after taking into consideration several enumerated factors.<sup>12</sup>

The result of these legislative moves has been the transformation of a number of political issues into technical questions. Instead of elected officials clearly stating their policy preferences, the science of hydrology is called upon to settle a variety of significant questions. The latest step in the "scientizing" of politics was in 1987 with the Nebraska Supreme Court decision in *In re Application U-2*.<sup>13</sup> In 1983, the legislature passed an act to deal with the complex question of the incidental recharge of underground water reservoirs. The law provided in part:

Any person having an approved perfected appropriation may file with the department an application for recognition of incidental underground water storage associated with such appropriation on a form prescribed and furnished by the department without cost. Upon receipt of an application, the department shall proceed in accordance with rules and regulations adopted and promulgated by the department.<sup>14</sup>

In 1984, the Central Nebraska Public Power and Irrigation District, which manages a large irrigation system in western Nebraska, applied for recognition of the incidental storage of water beneath 684,000 acres.

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11. Neb. Rev. Stat. § 46-209 (1984).

12. *Id.*

13. 226 Neb. 594, 413 N.W. 2d 290 (1987).

14. Neb. Rev. Stat. § 46-226.01 (Supp. 1986).

The district maintained that the aquifers within this area had been recharged by seepage from its extensive system of irrigation canals. The director approved the application.

The Nebraska Supreme Court in *In re Application U-2* rejected the protest of landowners in the area and accepted the department's reasoning that the district's facilities were largely responsible for the creation of an "underground water mound." The court reasoned that "[t]he proper standard of review for this court to follow in cases involving appeals from the DWR . . . is to search only for errors appearing in the record; i.e., to determine if the judgment conforms to the law, if it is supported by competent and relevant evidence, and if the DWR action is neither arbitrary or capricious nor unreasonable. . . ."<sup>15</sup>

The opinion was based primarily on the testimony of hydrologists about the increase in the water table within the area in a 50-year period. The court admitted that "the problem facing the director of DWR in determining this issue is the fact that this underground water storage is not held in neatly confined reservoirs or bins, but is available as nature presents the situations to humans trying to avail themselves of something furnished by nature—the underground strata making water storage possible."<sup>16</sup>

In order to solve the problem of ownership of stored water, the court agreed with the department's conclusion that owners of overlying land must respect the control of the water by the district. This indicates that the next step in refinement of this legal development would be the sale of the water by the district to buyers, whether or not those buyers are owners of the land over the water, but how can we tell the difference between the stored water and the water naturally occurring under a user's land? The court said "[t]he calculation of the amount of that water is now more difficult, but clearly can be made."<sup>17</sup> The immediate editorial response to this sense of great confidence was "We'll see!"<sup>18</sup>

Much of the court's faith in the director of DWR was a reflection of the gestures made by the legislature that science would be served. In referring to the department's jurisdiction "over all matters pertaining to water rights of irrigation, power and other useful purposes," the court said, in effect, that the problem had been solved by fiat: "The Legislature has recognized the expertise and experience needed to determine the difficult question presented in the overall water situation in this state when it required that the director of DWR be a professional engineer with at least 5 years' experience in a position of responsibility in irrigation work."<sup>19</sup>

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15. *In re Application U-2*, 226 Neb. at 599, 413 N.W. 2d at 295.

16. *Id.* at 601, 413 N.W. 2d at 296.

17. *Id.* at 606, 413 N.W. 2d at 299.

18. Lincoln Sunday Journal-Star, Oct. 4, 1987, at F2, col. 1.

19. *In re Application U-2*, 226 Neb. at 608, 413 N.W. 2d at 300 (citing Neb. Rev. Stat. § 46-701 (1984)).

Under the guise of "expertise and experience," the legislature has abetted the rapid accretion of power by the director of DWR. This growth in authority, however, has apparently not been the result of any definitive plan. No one would dare suggest that policy had been handed to a "water czar." Instead, legislators have preferred, in several instances, to translate the political problems into scientific ones. Insofar as the courts have played a role, it has been to acquiesce in this transfer, so they have not seriously challenged the legislative maneuvers. The courts have not been making the policy but instead have ratified the new water constitution premised on technical expertise.

### NATURAL RESOURCES DISTRICTS

The second major repository of legislative power in the field of water policy has been the Natural Resources District (NRD). In this instance, however, the guiding principle has been local democracy rather than technical competence. The courts have been willing allies of the legislature in recognizing this aspect of state water management. In 1969, after several years of study and negotiations, the legislature passed the Natural Resources District Act.<sup>20</sup> This act consolidated more than 150 water-related special districts, the most important of which was the soil conservation district. After the consolidation went into effect in 1972, twenty-four multipurpose districts, based on hydrologic lines, covered the entire state. The legislature soon learned that the NRDs were a convenient place to locate some of the more troublesome political problems associated with groundwater management.

The Natural Resources Districts are governed by locally elected boards of directors. Funding for the NRDs is derived primarily from a local property tax. The districts have broad powers to manage water resources: erosion prevention, soil conservation, flood control, sanitary drainage, water supply development, pollution control, fish and wildlife habitat, forestry and range management, development of recreational facilities, and, most importantly, the management of the quality and quantity of groundwater. Most districts have a professional staff headed by a full-time manager.

The act, together with its amendments, seems to offer a good deal of potential for effective water management. Additionally, the act embraces several elements of democratic participation, and conceivably, the contending water users might profitably shift their attention from the legislature to the NRDs. As successors to the soil conservation districts, the NRDs have retained much of their rural flavor and the boards have been

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20. Codified at Neb. Rev. Stat. § 2-3201-3261.

dominated by rural water users. In the districts around the metropolitan areas of Omaha and Lincoln, the provisions for the nomination and election of board members made it almost impossible for urban interests to elect any more than a bare majority of the directors. As an instrument for groundwater management, the NRD was destined to preserve the *status quo* while giving the appearance of movement toward the solution of pressing water problems.

The NRD legislation did not provide adequate funding to completely address the needs of a comprehensive water plan. Harnsberger et al. observe that "the legislature by repealing the authorization in the original bill for general obligation bonds, has severely limited the ability of a district to raise funds for a large project."<sup>21</sup> The 1987 session of the legislature did finally authorize an increase in the property tax, after overriding a gubernatorial veto. It is not anticipated, however, that the additional funding will be enough for any major initiatives by the districts. Whether or not the NRDs were effectively designed for the solution of water problems, they certainly created great potential for litigation. If the judicialization thesis is correct, then the NRDs should have stimulated a large number of lawsuits, leading eventually to the determination of water policy by the courts. The possibility for court involvement in the 1970s increased as attention was directed toward what appeared to be an emerging crisis in the area of groundwater regulation.

The foundation for confusion and the litigation had been laid by the Groundwater Preference Act of 1957.<sup>22</sup> A priority system for the distribution of surface water had been established by the state constitution. The 1957 act was a legislative attempt at determining groundwater priorities. The statute gives preference in the use of groundwater to those using it for domestic purposes.

Those using groundwater for agricultural purposes have preference over those using the same for manufacturing or industrial purposes. On its face, the statute is very general. This lack of specificity has led to serious criticism. Water policy expert David Aiken best summarized the failure of Nebraska's preference statute when he claimed that "the legislation did not establish whether domestic use included industrial water supply by municipalities, did not specify the type of preference created, and did not specify in what circumstances the preference would apply."<sup>23</sup>

The statute only expressed a general legislative concern, without any specific direction. Nebraska legislators insulated themselves from any political fallout. Senators from rural and urban Nebraska were able to avoid confrontation over future distribution by leaving the specifics for

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21. Harnsberger, Oeltjen & Fisher, *supra* note 8, at 262.

22. Neb. Rev. Stat. § 46-60 (1984).

23. Aiken, *Nebraska Groundwater Law and Administration*, 59 Neb. L. Rev. 917, 951 (1980).



others to determine. As the rapid increase in center-pivot irrigation and unfavorable climatic conditions created a water crisis in the mid-1970s, the NRDs and the courts were left with little realistic direction for making allocative decisions.

### GROUNDWATER MANAGEMENT LEGISLATION

As groundwater management became a major issue in the 1970s, the legislature passed the Ground Water [sic] Management Act of 1977.<sup>24</sup> This act, in effect, left groundwater regulation to the local areas but provided a few guidelines for the NRDs to follow. The legislature's explanation for this approach was that the details were better left to the localities: "[t]he Legislature recognizes its duty to define broad policy goals concerning the utilization and management of groundwater and to ensure local implementation of those goals." However, when the stated goal is "To extend groundwater reservoir life to the greatest extent practicable, consistent with the beneficial use of groundwater and best management practices,"<sup>25</sup> it is clear that the implementation phase will include a large portion of actual policymaking.

The most significant aspect of the implementation stage is that any action will be largely at the discretion of the NRDs. Consequently, "natural resources districts are given the authority to enforce all Nebraska groundwater legislation. However, the authority apparently is discretionary, not mandatory."<sup>26</sup> The NRDs are not compelled to do anything when faced with crucial groundwater quantity problems, especially if those issues might contain some serious political risks. The ability to avoid issues is enhanced by the major tool (or "non-tool") for the establishment of regulations within an area experiencing shortages of groundwater.

The Ground Water Management and Protection Act empowers the NRDs to establish "control areas" within those parts of a district where declining water tables are a problem. However, a control area becomes a control area only upon the initiative of the water users within that area. Once those in an affected part of a district ask to be made a control area, the NRD directors conduct a hearing and make a decision as to whether a control area should be declared. The problem is that "without some initiation of discussion within the area sought to be regulated, the Act has no management effect at all. . . . The Director of Water Resources and Natural Resources Districts, charged with the responsibilities to administer the Act, is thus helpless to identify and initiate control over problems."<sup>27</sup>

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24. Neb. Rev. Stat. § 46-656 (1984).

25. *Id.* § 46-656 (1984).

26. *Supra* note 8, at 251.

27. *Supra* note 9, at 81.

State officials were rendered even more helpless in 1982 when the legislature amended the bill to provide for "management areas" as an alternative to control areas. The major feature of this device is that management areas can be instituted over the objections of the director of DWR. Otherwise, an area can impose the same sorts of regulations permitted to the control area, although the amendment supposedly was to encourage planning before the imposition of formal regulations. Whatever the reasoning behind this change, it weakened the already weak direction of groundwater policy by state government.

In terms of substantive solutions to groundwater problems, the 1978 act is deliberately vague. For example, the act gives to the NRDs no clear indication of how to deal with the critical interrelationship between ground and surface water. The act does state that "the Legislature finds that the pumping of water for irrigation purposes from pits located within fifty feet of the banks of any natural stream may have a direct effect on the flow of such stream. . . ." <sup>28</sup> However, this recognition of natural facts does not necessarily provide the NRDs with guidelines to settle the status of proprietary interests.

Klein comments on this problem: "Just what the legislature intended to accomplish by this rather inarticulate and poorly drafted piece of legislation is unclear. The legislative history of the Ground Water Management Act indicates that one of the initial complaints against the act was its failure to recognize that groundwater and surface flows are directly connected to the hydrologic cycle." <sup>29</sup> The inevitable consequence, Klein concluded, was that the act "encourages litigation based on proprietary issues." <sup>30</sup>

In summary, the pieces of legislation discussed above seem to promote the judicialization of water policy. Have the NRDs, as the policy situs designated by the legislature, done little more than provide the raw material for the real decisionmakers in the courts? The legislation examined here seems to suggest a certain amount of legislative hesitation and uncertainty. The local institutions seem poorly equipped, because of these legislative failures, to formulate clear policy directives. This does not necessarily mean, however, that the NRDs do not make the bulk of water policy in Nebraska, nor does it mean that the courts in the state are overwhelmed by water cases.

### ARE THE COURTS INVOLVED?

These pieces of legislation seem to encourage the judicialization of groundwater policy, but could it be that local government, in this case

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28. Neb. Rev. Stat. § 46-636 (1984).

29. *Supra* note 9, at 81.

30. *Id.* at 84.

the NRD, has prevented the courts from becoming the chief policy makers? Are the NRDs more than the fields from which the fodder of litigation is harvested? If judicialization is occurring, one might expect the courts to be swamped with cases, as various interests strive to achieve a favorable policy statement.

Porter and Tarr point out that state supreme courts are generally assuming a more energetic role in policymaking, but that the study of these courts is at an early stage.<sup>31</sup> Studied even less are the activities of the state trial courts where most citizens have their initial contact with the law. At this level, one may presume, policy issues both large and small are resolved. This obscurity of lower state courts might be understandable if we still adhered to the concept, as described by Handberg,<sup>32</sup> that the courts were an ordered hierarchy in which higher decisions were regularly transmitted to subordinate levels. If that were the way the judiciary functioned, state trial courts might not be any more significant in public policy than, say, a field office of the IRS. Of course, the courts do not represent any such bureaucratic purity and, in fact, a distinctive feature of the judiciary is that all questions originate at the bottom. Furthermore, higher courts have claimed great latitude in picking the cases they will take up for consideration. For most issues, the cases begin and remain at the trial court level. Therefore, the present study into judicialization began at the lowest level.

We identified ten counties in rural Nebraska in which water problems had been reported in the media. We visited the courthouses to review all district court actions involving water between 1965 and 1985. Since the local courts have only the most rudimentary indexing system, we had to go over several thousand pages of docket book abstracts. At the end of our field work, we could come up with only 17 cases out of the several thousand decided during the 20-year period that dealt in any way with either surface or groundwater. Several of these cases reflected the age-old conflicts between neighbors over runoff and drainage problems. Eleven of the cases were tests of the powers of the NRDs in one form or another. With one minor exception, these latter cases were decided in favor of the NRD.

At the Nebraska Supreme Court there was a similar lack of water cases. There are approximately 1,000 cases appealed per year to the supreme court, the highest court in the state. During the period of 1965-1985 there were only 52 water-related cases. Less than three cases a year on average suggests that water cases do not dominate the court's agenda. Academics

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31. M. Porter & G. Tarr, *State Supreme Courts: Policymakers in the Federal System* 5 (1982).

32. Handberg, *Pushing the String on Policy Implementation: Using the Judiciary and Other Quaint Novelties*, 13 *Pol'y Stud. J.* 831 (1985).

are fond of saying that the courts are busy making water policy, but a look at the supreme court's docket does not support this claim.

The first and most obvious conclusion from this research is that the judicialization of water policy is grossly overstated. The courts are not active centers of debate among contending social forces over the distribution and management of water resources. Conflict resolution undoubtedly takes place through other channels, primarily the DWR and NRDs. The district courts have placed considerable reliance on the NRDs, while the supreme court apparently defers to the expertise of the director of DWR. In both cases, the courts are tools for the administrative units and are not the important arbiters of water disputes.

### CONCLUSION

If it is true that the Nebraska legislators are behaving in the same way as those in California, Colorado, New Mexico, Arizona and Utah, as described by Ingram,<sup>33</sup> and Smith,<sup>34</sup> the question remains: who is actually making water policy? Beneath all the concern about the judicialization of water policy, we find that it is not the courts who are making policy. Rather, it is the legislatively empowered DWR and NRDs. These two sub-arenas, the technical and the democratic, have not necessarily led to a more open policy process for water in Nebraska. While the courts may not be the significant actors, the alternatives we have identified here are equally insulated from direct popular control.

The NRDs have been most disappointing as political entities. They seem to fit in well with the localistic Nebraska political culture, but it is surely true that one can become entangled in the grass roots. In the 17 years of operation, the NRDs have not been bastions of democratic participation. Put another way, they have not been perceived as general purpose units of government which reflect the political aspirations of a wide diversity of interests. In the Omaha and Lincoln areas until 1988, there was such gross malapportionment in voting for district directors that, in some cases, a farmer's vote was worth ten times the vote of a city person.

The situation would have been even more deplorable if in fact the city person was at all interested in the work of the NRDs. Despite their broad powers, NRDs have generated little excitement among the urban public. They still retain many of the political characteristics of the traditional, rural special district. Thus, only those citizens most directly concerned with irrigation have been inspired to get involved. Especially in rural

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33. *Supra* note 4, at 743.

34. *Supra* note 5, at 641.

areas, NRDs tend to be closed clubs of irrigators, and most of the members see that it is in their interest to avoid any controversy which might lead to a curtailment of their power, especially by urban legislators who occasionally voice their misgivings about how the cities are being short-changed in water development projects.

The NRDs, it must be noted, have adjusted to new political pressures and are developing some sophistication in protecting their power. In 1986 after some cities threatened to withdraw from the districts because of a feeling that tax dollars went disproportionately to rural projects, and after some state senators voiced their concern about district malapportionment, the NRDs promoted a compromise. A 1987 act required that all districts set up a system whereby the largest sub-district from which directors are elected will not have more than three times the number of voters of the smallest sub-district. In the area of groundwater quality, the NRDs also responded to a perceived threat of greater statewide control by instituting their own quality control plans. It is clear that the districts see the political forces in the state, and not the courts, as the greatest threat to their best interests and to their central role in water policymaking.

Water will remain a critical resource in the nation and is especially important in the western states. In the case of Nebraska, the legislature has failed to fully address the crucial issues of water management. Water legislation that claims to resolve the issues is more illusory than substantive. For the study of public policy, Nebraska's statutes are only the beginning, and not the end. A true picture of water policy making requires an investigation of all the policy actors. With respect to other states, the message from the Nebraska case is clear: Even though it appears that the state legislature has acted decisively on water issues, a thorough examination of all policy actors is necessary to identify the real center of political gravity.