

# Declaring a River Basin Overappropriated: The Need for Reevaluation of the Republican River Basin

by Katherine Vogel

With the passage of LB 962, Nebraska's legislature recognized, for the first time, the hydrological connection between portions of Nebraska's ground water and surface water resources. Until LB 962, Nebraska had neglected to recognize the need to manage its ground water and surface water resources in a cohesive manner. Instead, the Department of Natural Resources (DNR) managed surface water and twenty-three Natural Resources Districts (NRDs) managed the ground water within each district's jurisdiction. Now, under LB 962, in areas where surface water and ground water are hydrologically-connected and water uses have either surpassed or equaled the available supply, the DNR and NRD must work together to manage Nebraska's water resources.<sup>1</sup>

One element of this cohesive management is an initial determination by the DNR whether a river basin or subbasins is fully appropriated or overappropriated. While there is no formal, single definition for either term, the DNR has stated that

generally, a basin is fully appropriated when water use equals supply and a basin is overappropriated when water demands surpass supply.<sup>2</sup> This article will focus on the criteria necessary for declaring a river basin overappropriated and the legal and practical consequences that stem from such determination.

The statutory criteria for determining a river basin to be overappropriated are found at Neb. Rev. Stat. § 46-713(4)(a). That statute provides that the DNR can declare a river basin, subbasin, or reach overappropriated

if, on **July 16, 2004**, the river basin, subbasin, or reach is subject to an interstate cooperative agreement among three or more states and if, prior to such date, the department has declared a moratorium on the issuance of new surface water appropriations in such river basin, subbasin, or reach and has requested each natural resources district with jurisdiction in the affected area in such river basin, subbasin, or reach either (i) to close or to continue in effect a previously adopted closure of all or part of such river basin, subbasin, or reach to the issuance of additional water well permits . . . or (ii) to temporarily suspend or to continue in effect a temporary suspension . . . on the drilling of new water wells in all or part of such river basin, subbasin, or reach.<sup>3</sup>

The DNR was required to designate which river basins were overappropriated within sixty days of July 16, 2004.<sup>4</sup>

Under the statute, a river basin can only be declared overappropriated if the DNR determines it to be overappropriated as of July 16, 2004. Stated another way, on July 16, 2004, a river basin is either overappropriated or its not, and if it's not, then under the statute, it can never be declared overappropriated. While there are some mechanisms in the statute to allow the DNR to reevaluate a river basin if it has reason to believe that

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the reevaluation might lead to a different determination about whether the basin is fully appropriated or over appropriated,<sup>5</sup> in reality, the statute does not allow for a basin to be declared overappropriated in the future.

The criteria for determining a basin overappropriated has nothing to do a scientific evaluation or technical determination of the actual conditions of the river basin. The only criteria for declaring a basin overappropriated is whether the DNR had take certain actions on or before July 16, 2004, namely entering into an interstate cooperative agreement, declared a moratorium on surface water appropriations, and requested a moratorium on ground water well construction permits. In 2004, the DNR evaluated Nebraska's river basins and concluded that only portions of the upper Platte River Basin could be designated overappropriated because as of July 16, 2004, only the Platte was subject to a three state cooperative agreement.

One can only assume that logic behind such a statute would be that if a basin was not overappropriated on July 16, 2004, that it will never become over appropriated because those basins that are only fully appropriated would be subject to regulations that, theoretically, would prevent it from becoming over appropriated. But many would argue that in the Republican River Basin, that logic does not hold up against the factual evidence. Furthermore, there are significant consequences and problems that arise when the DNR is precluded from declaring a basin over appropriated.

When a basin is designated fully appropriated or overappropriated, the DNR places an immediate stay on the issuance of any new natural-flow, storage, or storage-use appropriations in the basin. The local NRDs whose jurisdiction includes the basin must issue a stay on issuance of water well construction permits in the area preliminarily determined by the DNR to include hydrologically-connected surface water and ground water.<sup>6</sup> If a basin is only declared fully appropriated, the NRDs are not required to regulate ground water uses that were in place at the time of the DNR's preliminary determination that the basin was fully appropriated. If a basin is declared overappropriated, additional steps have to be taken. Specifically, an incremental reduction in uses to offset any stream flow depletions that occurred after July 1, 1997 must be implemented.<sup>7</sup> The DNR would have to address the impact of stream depletions from surface water appropriations and the NRDs would have to analyze the effect of stream flow depletions due to a lack of recharge from ground water wells if the water uses were initiated after July 1, 1997.<sup>8</sup> A determination that a basin is fully appropriated requires the DNR and NRDs to regulate and address uses initiated after that determination, but not before.

Recently, the DNR determined that it could not reevaluate the Republican River Basin to determine whether it was overappropriated. It concluded that the Basin was not subject to an

"interstate cooperative agreement" because while the Basin is subject to an interstate compact, the DNR does not consider a compact to be the same as an agreement. For many reasons, some practical and some legal, the DNR should have determined that it has the authority to declare a river basin overappropriated.

Legally, if no other basin can be declared overappropriated, then § 46-714 is arguably unconstitutional as it would create a closed class in violation of Neb. Const. art. III, § 18, which provides

[t]he Legislature shall not pass local or special laws in any of the following cases, that is to say: . . . Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever; . . . In all other cases where a general law can be made applicable, no special law shall be enacted.

The Nebraska Supreme Court has held that "[a] legislative act violations Neb. Const. art. III, § 18, as special legislation in one of two ways: (1) by creating a totally arbitrary and unreasonable method of classification or (2) by creating a permanently closed class."<sup>9</sup> A classification "which limits the application of the law to a present condition, and leaves no room or opportunity for an increase in the numbers of the class by future growth or development, is special," and in violation of Nebraska's constitutional provision against special legislation.<sup>10</sup> In determining whether an act constitutes special legislation, the analysis is not limited to the face of the legislation but may also include the act's application.<sup>11</sup> If there is no actual probability that others will come under the act's operation, then the act is unconstitutional special legislation in violation of Neb. Const. art. III, § 18.<sup>12</sup> Furthermore, when determining whether a statute is unconstitutional, a court must presume that the statute is constitutional and resolve all reasonable doubts in favor of its constitutionality.<sup>13</sup>

In determining that it could not declare the Republican River Basin overappropriated, the DNR is arguably interpreting the statute unconstitutionally. First, no river basin but the Platte River Basin is currently subject to a three state cooperative agreement. And because the Republican River Basin is already subject to a three state interstate compact, there is little chance that it will be subject to an interstate cooperative agreement as well. The only other basins which could become subject to a three state cooperative agreement are the Niobrara River, which is already subject to a two state cooperative agreement,<sup>14</sup> or the Missouri River. But even if another basin were to become subject to a three state cooperative agreement, it could still never be declared overappropriated because it was not subject to the agreement as of July 16, 2004. Since the Platte River was the only river in Nebraska subject to a cooperative agreement as of that date, there is not only a reasonable certainty, but absolute certainty, that no other member will join the class of overappro-

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appropriated basins. And thus, the statute, as currently interpreted by the DNR, is unconstitutional because it creates a closed class.

The second element of this discussion is that the DNR has both the ability and the authority to declare a river basin overappropriated under the current statutory scheme. First, the Legislature has given the DNR jurisdiction "over all matters pertaining to water rights for irrigation, power, or other useful purposes except as such jurisdiction is specifically limited by statute."<sup>15</sup> So by statute, the DNR has broad and exclusive authority to regulate surface water.<sup>16</sup> Furthermore, the statutes related to a reevaluation of the basin provide that a petition may be filed with the DNR by an interested person asking the DNR to reevaluate the status of a river basin if new scientific data or other information relevant to the determination is now available; if the DNR relied upon incorrect or incomplete information in making its original determination; or if the DNR erred in its interpretation or application of the information available when the first determination was made.<sup>17</sup> If these factors allow the DNR to reevaluate a basin that has never been declared fully appropriated or is currently classified as fully appropriated, why cannot similar factors allow the DNR to reevaluate whether a fully appropriated basin is now overappropriated?

As previously mentioned, the only reasonable explanation for this limitation is that in a basin that is fully appropriated, new water uses will be restricted so the basin should never become overappropriated. Unfortunately, one factor that may have not been considered sufficiently is the lag effect, or the delayed effect of ground water pumping on stream flows. The lag effect, and the increase in better scientific data, are practical, factual reasons why the DNR should be allowed to reeval-

uate and declare a basin overappropriated.

For there to be effective management of the water resources in Nebraska, but especially in the Republican River Basin, the DNR must have the authority to declare a basin overappropriated so that the incremental reduction mechanisms in the overappropriation statutes can be applied to reduce the consumptive use of water in the Republican River Basin. 

## Endnotes

- <sup>1</sup> See Neb. Rev. Stat. §§ 46-713 to 46-718 (Reissue 2004).
- <sup>2</sup> Nebraska Department of Natural Resources, "What Is the Meaning of LB962's Fully Appropriated Basin Designation," published Sept. 2005, available at [http://dnr.ne.gov/IWM/Newsletter/FullyAppropriatedDesignation\\_0905B.pdf](http://dnr.ne.gov/IWM/Newsletter/FullyAppropriatedDesignation_0905B.pdf).
- <sup>3</sup> Emphasis added.
- <sup>4</sup> § 46-713(4)(b).
- <sup>5</sup> See, generally, § 46-713(1) and (2).
- <sup>6</sup> Neb. Rev. Stat. § 46-714.
- <sup>7</sup> Neb. Rev. Stat. § 46-715(5).
- <sup>8</sup> § 46-715(5).
- <sup>9</sup> *Henry v. Rocky*, 246 Neb. 398, 404, 518 N.W.2d 658, 662 (1994) (citing *Haman v. Marsh*, 237 Neb. 699, 467 N.W.2d 836 (1991)).
- <sup>10</sup> *Haman*, 237 Neb. at 716, 467 N.W.2d at 848.
- <sup>11</sup> *Id.* at 717, 467 N.W.2d at 849.
- <sup>12</sup> *Id.* See, also, *City of Scottsbluff v. Tiemann*, 185 Neb. 256, 175 N.W.2d 74 (1970).
- <sup>13</sup> *In re Interest of J.R.*, 77 Neb. 362, 368, 762 N.W.2d 305, 314 (2009).
- <sup>14</sup> Neb. Rev. Stat. App. § 1-112 (Reissue 2008).
- <sup>15</sup> Neb. Rev. Stat. § 61-206(1) (Reissue 2009).
- <sup>16</sup> See, *Hickman v. Loup River P.P. Dist.*, 173 Neb. 428, 113 N.W.2d 617 (1962).
- <sup>17</sup> § 46-713(2)(a).

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