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### Providing for Fisheries, Recreation, and Other Instream Benefits

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**PROVIDING FOR FISHERIES, RECREATION,  
AND OTHER INSTREAM BENEFITS**

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**Water Organizations in a Changing West**

**Natural Resources Law Center  
University of Colorado School of Law  
Boulder, Colorado  
June 14-16, 1993**

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CENTRAL PLATTE NRD'S  
INSTREAM FLOW WATER RIGHTS

I. INTRODUCTION

A. Summary

Historically the use of surface water in the State of Nebraska has been dedicated to people of the state with rights to use the water granted by the state for out-of-stream beneficial uses.

Only in the last few years have Nebraska law recognized that there were instream uses that may be beneficial to the people of the state by changing the surface water appropriations statutes to allow the State Game and Parks Commission or the Natural Resources Districts to acquire an instream flow water right for fish, wildlife, or recreation.

To date the Game and Parks Commission has acquired an instream flow right on Long Pine Creek in North Central Nebraska for trout and the Central Platte Natural Resources District has acquired instream flow rights on various reaches of the Central Platte River for the benefit of interior least terns, piping plovers, whooping cranes, and sandhill cranes.

**II. SURFACE WATER RIGHTS IN NEBRASKA**

**A. Historic Use of Surface Water**

1. The use of water of every natural stream within the State of Nebraska is dedicated to the people of the state for beneficial purposes by the Nebraska Constitution (Article XV, § 5).
2. The state constitution goes on to say that "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."  
(Article XV, § 6)
3. From the adoption of the state constitution up through the mid 1980's it was recognized that, other than storage uses of one type or another, surface water appropriations were granted only for beneficial uses that diverted water out of the stream.
4. The recognized beneficial uses were:
  - (a) domestic;
  - (b) agricultural; and
  - (c) industrial;in that order of preference.

**B. CURRENT USE**

1. In the mid-80's, however, the Nebraska legislature recognized that there were instream uses that were beneficial to the people of the state and set out to define a system whereby beneficial instream uses were identified and a method of securing an instream flow for these uses was established.
2. The legislation that was adopted set forth a system whereby recreation and fish and wildlife were recognized as beneficial uses of instream flows and application for instream flow water rights could be made for those uses.

**C. INSTREAM FLOW REQUIREMENTS**

1. The law spelled out that applications could be made by either the Nebraska Game and Parks Commission or by a Natural Resources District.
2. The applications for an instream flow are required to include:
  - (a) a description and maps showing the locations on the stream where the need for the instream flow begins and ends;
  - (b) details on the time of year when the instream flows are the most critical; and
  - (c) a detailed description of the amount of water necessary.
3. The Department of Water Resources will approve the application if the Director finds that:
  - (a) unappropriated water is available;
  - (b) the appropriation is necessary to maintain the use;
  - (c) the appropriation will not interfere with senior water rights;
  - (d) the rate and timing is the minimum necessary; and
  - (e) the application is in the public interest.
4. The instream flow water right granted may vary from the application in that the director may approve a rate of flow less than requested or may approve for a shorter period of time than requested.

**III. INSTREAM FLOW WATER RIGHT ON PLATTE RIVER**

**A. Basis for Application**

1. In 1983 Congress authorized and funded a study of the Prairie Bend Unit in Central Nebraska to be conducted by the U.S. Bureau of Reclamation.
2. The Prairie Bend Unit is a multi-purpose water resources project that is for:
  - (a) ground water recharge;

- (b) water quality;
  - (c) fish;
  - (d) wildlife;
  - (e) recreation; and
  - (f) migratory habitat on the Platte River.
3. As a result of that study the U.S. Bureau of Reclamation, the U.S. Fish and Wildlife Service, our Natural Resources District, and several other state and local agencies and organizations identified habitat needs on the Platte River for several threatened and endangered species, as well as for sandhill cranes which use the river as a major staging area each spring.

**B. Application by Central Platte NRD**

1. With the study completed in late 1989 and the NRD's legislative authority to acquire instream flow water rights, our Central Platte Natural Resources District made application to the State Department of Water Resources for several instream flow water rights on July 25, 1990.
2. An application for a year-round instream flow water right for maintaining forage fish and macro invertebrates for interior least terns and piping plover was submitted.
  - (a) The flow requested was 500 cfs throughout the year except,
  - (b) during the hot summer period of June 24 to August 22, when 600 cfs was requested.
3. During the winter period of December 10 through February 25 a flow of 1,100 cfs was requested for feeding habitat for wintering bald eagles.
4. A late winter flow of 1,100 cfs was requested from February 15 to February 28 to initiate biological



activity in wet meadows that are used as feeding habitat for cranes.

5. Instream flow water rights in the amount of 1,100 cfs in the spring (March 1 to April 14) and in the fall (October 1 to October 11) were sought for staging a stop-over habitat for migrating sandhill cranes, and
6. the district applied for an instream flow water right for stop-over habitat for migrating whooping cranes.
  - (a) During the period April 1 to April 14 the flow requested was 1,300 cfs, and
  - (b) during the periods of April 15 to May 3, and October 12 to November 10, the requested flow was 1,500 cfs.

**C. Department of Water Resources Considerations**

1. The Department of Water Resources published notice of applications for instream flows.
2. Filing as Objectors were:
  - (a) the State of Wyoming;
  - (b) the National Audubon Society;
  - (c) Lower Platte North NRD;
  - (d) Keith County Economic Development Corporation;
  - (e) Nebraska Chapter of the Sierra Club;
  - (f) Nebraska Water Users, Inc.;
  - (g) Twin Platte NRD;
  - (h) Gary Phillips;
  - (i) Platte Valley Irrigation District;
  - (j) Nebraska Public Power District;
  - (k) North Platte Valley Irrigators' Association;
  - (l) Joe Jeffrey, D.V.M.;
  - (m) Upper Big Blue NRD;
  - (n) Tri-Basin NRD;
  - (o) Central Beerline Canal Company; and
  - (p) City of Kearney.

3. Subsequently withdrawing from the proceeding were:
  - (a) The North Platte Valley Irrigators' Association;
  - (b) Keith County Economic Development Corporation; and
  - (c) Gary Phillips.
4. Changing their status to proponents during the course of the hearing were:
  - (a) Audubon, and
  - (b) Sierra Club.
5. Dismissed as parties before the conclusion of the hearing were:
  - (a) the City of Kearney;
  - (b) Beerline;
  - (c) Jeffrey; and
  - (d) Platte Valley Irrigation District.
6. On July 1, 1991 the Department of Water Resources began a hearing in which there were 19 days of testimony involving 29 witnesses, 177 exhibits and 4,165 pages of testimony and record.

**D. Department Order**

1. On July 2, 1992, the Department issued an order dismissing or denying the applications on:
  - (a) habitat for food for bald eagles, and
  - (b) on the initiation of biological activity in wet meadows.
2. All other applications were approved for the time periods, segments of the river, and magnitude of flow requested.
3. What the Central Platte NRD ended up with are a series of surface water rights for instream flows having a priority date of July 25, 1990.
4. The best way to summarize the district's water rights is that we have a year around base flow of 500 cfs for maintenance of forage fish and macro invertebrates that

are the food source for interior least tern and piping plover on an approximately 145-mile reach of the Platte River, extending from the J-2 return just below Lexington, Nebraska, downstream to Columbus, Nebraska.

5. During various times of the year a water right for additional flows are added to that base on part or all of that 145-mile reach.
  - (a) During the hot summer period of June 24 to August 22 an additional 100 cfs is added to compensate for the potentially harmful effect to fish of warmer water, making the water right 600 cfs during that period.
  - (b) In the spring (March 1-March 31) and in the fall (October 1-October 11) of each year 600 cfs are added to bring the water right to 1,100 cfs for staging and stopover habitat for sandhill crane on a 90-mile reach of the Platte from the J-2 return to Chapman, Nebraska.
  - (c) From April 1 to April 14 an additional 800 cfs was granted for sandhill and early arriving whooping cranes making the instream flow water right 1,300 cfs on a 75-mile reach of the river from the J-2 return to Grand Island, Nebraska.
  - (d) And an additional 1,000 cfs was added during the spring period of April 15 to May 3 and during the fall period of October 12 to November 10 for stopover habitat for whooping cranes in the 75-mile reach from the J-2 return to Grand Island, making the water right 1,500 cfs during those time periods.

**E. Order Appealed**

1. The Order of the Department of Water Resources granting the instream flow water rights to Central Platte NRD

was appealed to the Nebraska Court of Appeals by the State of Wyoming and others.

2. Briefs were filed last winter and oral arguments before the Court were presented earlier this spring.
3. We anticipate a ruling from the Court in June or July 1993.
4. Regardless of the Court of Appeals opinion, there will most likely be an attempt to have the case heard by the State Supreme Court.