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January 1987

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# PROTECTING PUBLIC VALUES IN THE PLATTE RIVER\*

ERIC PEARSON AND J. DAVID AIKEN†

## I. INTRODUCTION

In *Little Blue Natural Resources District v. Lower Platte North Natural Resources District* ("Little Blue I"),<sup>1</sup> a 1980 case dealing with the proposed transfer of Platte River water by the Catherland Irrigation Project to the Blue River basin, the Nebraska Supreme Court ruled that, for the first time in almost half a century, interbasin<sup>2</sup> transfers of surface water were legal in Nebraska.<sup>3</sup> Prior to *Little Blue I*, the 1936 *Osterman v. Central Nebraska Public Power & Irrigation District*<sup>4</sup> decision had prohibited interbasin transfers. That prohibition had frustrated large-scale water development, limiting water use controversies to a scale decidedly more local and defined. Instream water uses for fish, wildlife and recreation, moreover, had not yet become a direct legal threat to Platte basin irrigation developers, although this too would change.

*Little Blue I* signalled the end of this apparent calm in the Platte River Valley. By allowing interbasin development for the first time, the decision triggered a rush for Platte River water by would-be irrigators in nearby river basins. These irrigators were facing water shortages caused by earlier drastic drawdowns of groundwater supplies. They now saw an open door and raced to obtain appropriations

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\* Research support for this article was provided in part by the Nebraska Agricultural Experiment Station.

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1. 206 Neb. 535, 294 N.W.2d 598 (1980) [hereinafter *Little Blue I*].

2. Interbasin transfers are now defined by statute to include "the diversion of water in one river basin and the transportation of such water to another river basin for storage or utilization for a beneficial use." NEB. REV. STAT. § 46-288(3) (Reissue 1984).

3. *Little Blue I*, 206 Neb. at 548, 294 N.W.2d at 604, *overruling* *Osterman v. Central Neb. Pub. Power & Irrigation Dist.*, 131 Neb. 356, 268 N.W. 334 (1936). See R. HARNSBERGER & N. THORSON, NEBRASKA WATER LAW AND ADMINISTRATION 362-64 (1984); Aiken, *New Directions in Nebraska Water Policy*, 66 NEB. L. REV. 8, 53-55 (1987); Note, *Water Law—Transbasin Diversions in Nebraska*, 14 CREIGHTON L. REV. 887, 887 (1981).

4. 131 Neb. 356, 268 N.W. 334 (1936). Regarding *Osterman*, see R. HARNSBERGER & N. THORSON, *supra* note 3, at 354-57; Oeltjen, Harnsberger & Fischer, *Interbasin Transfers: Nebraska Law and Legend*, 51 NEB. L. REV. 87, 104-07 (1971).

for "rescue projects."<sup>5</sup>

This release of enthusiasm for development was restrained by *Little Blue Natural Resources District v. Lower Platte North Natural Resources District* ("Little Blue II"),<sup>6</sup> the followup decision in the same case, in which the Nebraska Supreme Court ruled that water appropriations are subject to the Nebraska Nongame and Endangered Species Conservation Act ("NESCA").<sup>7</sup> Specifically the court ruled that interbasin transfers could not be approved by the Nebraska Department of Water Resources ("DWR") until it had consulted with the Nebraska Game and Parks Commission ("GPC") regarding whether proposed water transfers would interfere with endangered wildlife species or their GPC-designated critical habitats.<sup>8</sup>

*Little Blue II* forced a realization among the water development community that Nebraska irrigation projects were subject to state (as well as federal) environmental laws. No more would irrigators enjoy the tacit assumption that their proposed projects and water transfers would be viewed as beneficial public values.<sup>9</sup> Now, just as federal laws could delay and even stop irrigation projects on public interest grounds,<sup>10</sup> so could state laws and state judicial decisions.<sup>11</sup>

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5. The Platte River Irrigation Project promoters are without exception representatives of irrigators in areas with declining ground water supplies. Aiken, *supra* note 3, at 46 nn.226-27. If irrigators can obtain a publicly subsidized water project, they can avoid imposing ground water regulations to control ground water depletion. *Id.*

6. 210 Neb. 862, 317 N.W.2d 726 (1982) [hereinafter *Little Blue II*].

7. *Id.* at 866, 317 N.W.2d at 730. See Pearson, *Constitutional Restraints on Water Diversions in Nebraska: the Little Blue Controversy*, 16 CREIGHTON L. REV. 695, 703 (1983); Aiken, *supra* note 3, at 55-57. See also NEB. REV. STAT. §§ 37-430 to -438 (Reissue 1984) (codifying the NESCA).

8. *Little Blue II*, 210 Neb. at 872, 317 N.W.2d at 733. The so-called "no jeopardy" provision of the NESCA is section 37-435(3) of the Nebraska Revised Statutes. NEB. REV. STAT. § 37-435(3) (Reissue 1984). The central reach of the Platte River, the Platte River bottoms, has been designated as critical habitat by the United States Fish and Wildlife Service. See 43 Fed. Reg. 20,938, 20,941 (1978) (codified at 50 C.F.R. § 17.95(b) (1985)). This action was taken pursuant to the Federal Endangered Species Act of 1973, 16 U.S.C. §§ 1531-40 (1982 & Supp. I 1983).

9. Aiken, *supra* note 3, at 9-18.

10. Federal statutes imposing environmental evaluation and protection requirements on irrigation projects include the National Environmental Policy Act of 1969 ("NEPA"), Pub. L. 91-190, 83 Stat. 852 (codified at 42 U.S.C. §§ 4321-4370a (1982)); section 404 of the 1972 Federal Water Pollution Control Act Amendments ("Clean Water Act"), 33 U.S.C. § 1344 (1982) (dredge and fill permit requirements), and the Federal Endangered Species Act of 1973 ("FESA"), 16 U.S.C. §§ 1531-1543 (1982 & Supp. I 1983). For an in-depth discussion of each requirement, see Aiken, *supra* note 3, at 22-40. The O'Neill irrigation project has been delayed by NEPA litigation to the point that the project itself is in doubt. Aiken, *supra* note 3, at 26. The Catherland project is the first to be delayed by state environmental requirements, although the Twin Platte water project appropriation application was later denied by the DWR for failing to comply with state endangered species consultation requirements. *In re Applications A-15995 and A-16006*, 223 Neb. 430, 437-38, 390 N.W.2d 506, 511 (1986).

11. "State adjudicative decisions" includes administrative ones, a point driven

These legal developments have set the stage for a struggle for Platte River water now prototyped by the Catherland case itself and surely to be reenacted for the remainder of the century. The struggle casts at loggerheads the economic interests of irrigators who view Platte River water as a means to continue irrigated agriculture and the conservation interests of others who view interbasin transfers as ominous to wildlife, recreation, and aesthetic use of the stream. The struggle raises, moreover, water use conflicts decidedly of a statewide (if not national) nature, conflicts which importantly implicate the public interest.

This Article will discuss the matter of water rights administration in Nebraska when such administration significantly affects public interests. First, it will examine substantive legal requirements in Nebraska that should govern protection of the public interest in these cases. In this regard, the Article will focus especially on how public interest factors should enter into decisionmaking. Second, the Article will comment on procedures appropriate for such water allocation decisionmaking. Lastly, it will review the administrative handling of the Catherland irrigation project proposal itself as a case study of how the primary state agency implicated in these matters, the DWR, is addressing its substantive and procedural responsibilities to date.<sup>12</sup>

## II. SUBSTANTIVE LEGAL REQUIREMENTS

Both common and statutory law require the DWR to protect the public interest when making water allocation decisions that significantly affect environmental values. This law has been little litigated in Nebraska, although it has been more extensively developed in other western states.

### A. THE PUBLIC TRUST DOCTRINE

The first source of law requiring consideration of public interest and values in water rights decisionmaking can be found in what is

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home by the GPC in its subsequent ruling that the Catherland project would, if constructed, violate the Nebraska Nongame and Endangered Species Conservation Act. See Neb. Game & Parks Comm'n, Biological Op., Little Blue-Catherland Project 81 (Feb. 8, 1985); Aiken, *supra* note 3, at 57. The DWR refused to follow the GPC opinion. See Order Approving Applications A-15145, A-15146, A-15147 and A-15148 assigned to the Catherland Reclamation District (July 29, 1986) (Neb. Dep't of Water Resources) ("DWR order").

12. This Article will not deal with the basic principles or procedures of water project appropriation. For a discussion of those issues, see R. HARNSBERGER & N. THORSON, *supra* note 3, at 73-86; Aiken, *supra* note 3, at 12-16.

known as the public trust doctrine.<sup>13</sup> The public trust doctrine was established by judicial decree of the United States Supreme Court in 1892 in the landmark decision of *Illinois Central Railroad v. Illinois*.<sup>14</sup> In that case, the legislature of the state of Illinois had attempted to statutorily transfer into private hands submerged lands off the Chicago harbor on Lake Michigan. Recognizing the folly of this endeavor, it later reneged by enacting another statute purportedly voiding the initial transfer. The Railroad challenged the legality of the recant, prompting the Supreme Court's far-reaching opinion.

In ruling that the submerged land did indeed belong to the state, the Court held that title held by states in submerged lands is "different in character" from that held by the state in other lands.<sup>15</sup> Such title, said the Court, is "held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties."<sup>16</sup> Thus was the public trust doctrine born.

The message of the doctrine is a straightforward one. First, there are legitimate public values in waters of a state.<sup>17</sup> These include recreational pursuits, commerce, and general use. Second, states holding title to resources of particular value to the general public hold that title in a trust capacity, a trust the state "can no more abdicate . . . than it can abdicate its police powers in the administration of government and the preservation of the peace."<sup>18</sup> This trust responsibility proscribes significant<sup>19</sup> proposed transfers of rights unless they promote trust purposes (i.e. the public interest); alienations of public rights to private control are not permissible when they undercut trust purposes.

Numerous states have moved forward in developing a public trust jurisprudence. Two cases are particularly notable. The first case is *United Plainsmen Association v. North Dakota State Water*

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13. For an excellent overview of the public trust doctrine, see R. HARNSBERGER & N. THORSON, *supra* note 3, at 307-13; Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 490 (1972). The Sax article traces the historical development of the public trust doctrine.

14. 146 U.S. 387, 455-56 (1892).

15. *Id.* at 452.

16. *Id.*

17. The trust has been held routinely to apply to waters, extending the rationale of *Illinois Cent.* which applied it to submerged lands. See *Crawford Co. v. Hathaway*, 67 Neb. 325, 351, 93 N.W. 781, 789 (1903).

18. *Illinois Cent.*, 146 U.S. at 453.

19. The trust does not apply to all transfers of property rights out of public control, but only to those which due to the resource affected and the transfer itself undercut trust purposes. See Sax, *supra* note 13, at 556-66.

*Conservation Commission*.<sup>20</sup> In *United Plainsmen*, the North Dakota Supreme Court ruled that the public trust doctrine required state water officials to establish short- and long-term plans for natural resource conservation and development before granting water appropriations, even though the statutes authorizing such studies were permissive.<sup>21</sup> The case is significant for it rejected water rights allocation on a first-come-first-served basis if such an administrative scheme ignored relevant public interest considerations. *United Plainsmen* stands for the obvious principle that water rights applications may not be viewed in isolation; to the contrary, they must be viewed in the larger context of overall stream management.

The second major case is *National Audubon Society v. Superior Court*.<sup>22</sup> In this decision, the California Supreme Court gave a more expansive reading to the trust. It held that the trust not only applied to publicly held resources, and not only imposed a duty to consider public values during administrative decisionmaking, but actually could require the divestiture of private rights in water if the public interest so required.<sup>23</sup> Under this reading, the trust flatly subordinates private property rights to the public interest, a major theoretical step in its development.

The public trust doctrine has received wide acceptance in varying degrees since its announcement. Nebraska itself has recognized the trust in the case of *Crawford Co. v. Hathaway*.<sup>24</sup> *Crawford* stated that "the water and the soil [under navigable streams] belong to the state, and are under its sovereignty and domain, in trust for the people."<sup>25</sup> Beyond these general acknowledgements, however, the trust remains unrefined in Nebraska's jurisprudence.

While these decisions among the states do not conform in all particulars, they do make it clear that the public trust is real, that it applies to significant water rights decisionmaking, and that it exists in Nebraska. That it does exist in Nebraska means that the DWR must, at the least, insure that its decisions to grant private property rights in public waters include, in some real way, a consideration of public interests and values. In the context of the Platte River, it means that the DWR should not award valuable water rights simply because the applicant is first in line and meets some minimal age-worn statutory criteria fashioned for use in a time when most water rights disputes

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20. 247 N.W.2d 457 (N.D. 1976).

21. *Id.* at 459.

22. 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346 (1983). For an in-depth analysis of the case, see R. HARNSEBERGER & N. THORSON, *supra* note 3, at 309-13.

23. *National Audubon*, 33 Cal. 3d at 440, 658 P.2d at 723, 189 Cal. Rptr. at 360.

24. 67 Neb. 325, 351, 93 N.W. 781, 789 (1903).

25. *Id.*

were between neighbors. To the contrary, the trust requires independent public interest review with decisionmaking based on the outcome of that review.

How should the review affect decisions? The answer is not fully revealed, given the scant common law development of the trust in Nebraska. But, at a minimum, one would reasonably extract two principles. First, in an absolute sense, the DWR should only grant interbasin water rights to an applicant if its application proposes a project and water diversion that, considered in isolation and on its merits, would better serve the public interest than would no project or diversion at all (a "project merit" analysis). Second, in a relative sense, the DWR should only grant a water right to an applicant if its application proposes a project and water diversion that, considered along with other competing applications for projects and diversions, would better serve the public interest than would the competing proposals (a "project comparison" analysis).<sup>26</sup>

#### B. PUBLIC INTEREST PROTECTION

In addition to trust responsibilities, most western states have an independent statutory obligation to assure public interest protection in water rights decisionmaking. The statutes imposing these obligations usually fail to detail the range of considerations which agencies must undertake to satisfy the mandate, leaving courts to flesh out the requirements.

The New Mexico Supreme Court did so in *Young v. Hinderlider*.<sup>27</sup> In that case, it ruled (in line with public trust-based decisions) that states need not grant water rights to any applicant which satisfies minimal water rights criteria regarding "diversion," "beneficial use" and so forth. While grants of water rights on these exclusive bases might suffice in some, indeed many, more routine cases, in situations when more than one application for water rights from the same hydrologic source is pending before the agency, and the stream has insufficient water to support both, the agency, said the court, may give the nod to the more beneficial project proposal and reject the other.<sup>28</sup> The water rights denial could occur even if the rejected applicant's project met these same minimal criteria.

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26. It need not be argued here whether the public interest/public trust responsibilities of the DWR would require the rejection of a pending project because some hypothetical future project could well arise. The argument made here is more narrow, that the DWR must conduct the comparison analysis at least insofar as other projects in relatively concrete and complete stages of design and implementation are concerned. Perhaps the DWR should consider all competing projects contemporaneously.

27. 15 N.M. 666, 110 P. 1045 (1910).

28. *Id.* at —, 100 P. at 1050.

This holding — that water rights may be withheld from one project so that a subsequently filed but more beneficial one may go forward — is important because it defeats applicants' claims of any "entitlement" status under applicable statutes.

This incorporation of public interest protection as an independent element of water rights decisionmaking has found its way also into Nebraska law. In *Kirk v. State Board of Irrigation*,<sup>29</sup> the Nebraska Supreme Court faced for the first time the basic question of whether the State Board of Irrigation, the predecessor agency to the DWR, was authorized by statute to place conditions on water rights secured by individuals. In other words, could the state limit private rights to water for public benefit? The court was unambiguous in its conclusion:

In this state, running water is *publici juris*. Its use belongs to the public and is controlled by the state in its sovereign capacity. A riparian proprietor cannot appropriate it without permission of the state. The state then has such a proprietary interest in the running water of its streams and in the beneficial use thereof that it may transfer a qualified ownership or right of use thereof. When it grants such ownership or right of use it may impose such limitations and conditions as its public policy demands.<sup>30</sup>

The case goes on to note that the State Board of Irrigation is the "guardian of the public welfare in the appropriation of the public waters of the state, and this necessarily devolves upon that board a large discretion in such matters."<sup>31</sup>

*Kirk* establishes a principle subordinating private claims in water to public rights. Such conditions and limitations on private water rights "as public policy demands" are not only authorized but are required. As with the public trust, the precise parameters of the public right are unspecified in Nebraska, but some conclusions are again warranted. First, the DWR, having inherited the duties of the State Board of Irrigation,<sup>32</sup> must protect the public interest. Second, the range of protection is at least coextensive with that required by the public trust doctrine. In underlying rationale and purpose, the two are parallel: the DWR should conduct both a project merit analysis and a project comparison analysis to protect the public interest.

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29. 90 Neb. 627, 134 N.W. 167 (1912).

30. *Id.* at 631, 134 N.W. at 168-69 (citations omitted).

31. *Id.* at 632, 134 N.W. at 169.

32. NEB. REV. STAT. § 46-209 (Cum. Supp. 1986). See also *In re Application of Ainsworth Irrigation Dist.*, 170 Neb. 228, 238, 102 N.W.2d 429, 434-35 (1960) (holding that the DWR has exclusive original jurisdiction over all matters pertaining to water rights for irrigation).



In addition to these judicially formulated responsibilities, the DWR must also meet a new statutory requirement. After the *Little Blue I* decision prompted release of pent-up demand for Platte River water, the legislature moved to protect the river. It did so by enacting section 46-289 of the Nebraska Revised Statutes, which establishes a list of public interest criteria to be considered and satisfied before any grant of water rights for an interbasin diversion can go forward.<sup>33</sup> Those criteria are:

- (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 current beneficial uses being made of the unappropriated water in the basin of origin;
- (4) Any reasonably foreseeable future beneficial use 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.<sup>34</sup>

The statute goes on to stipulate that an application shall be deemed to be in the public interest if the overall benefits to the state and the applicant's basin are greater than or equal to the adverse impacts to the state and the basin of origin.<sup>35</sup> Any order of the DWR under the section must be accompanied by a discussion of the enumerated factors and a recitation of the totality of reasons for the decision, complete with factual findings, documentation and references to hearing transcripts and other sources relied upon in the formation of the decision.<sup>36</sup>

This list of criteria postulates an interbasin public interest decisionmaking process in Nebraska of a rather sophisticated sort. The first two criteria demand consideration of water use factors, the next three criteria demand consideration of impacts to the basin of origin, and the last two demand consideration of alternative water supply possibilities. The list is not exclusive, setting forth the only considerations to be made; the legislature rather made it expressly

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33. NEB. REV. STAT. § 46-289 (Cum. Supp. 1986).

34. *Id.*

35. *Id.*

36. *Id.*

noninclusive.<sup>37</sup>

These criteria reiterate the same kinds of substantive requirements established earlier by judicially formulated public trust and public interest protection rationales. Again, it is clear that the DWR has far-reaching responsibilities to guard the public interest. As expressly set forth in section 46-289, they include duties to undertake a project merit analysis to consider carefully the hydrological consequences of its decisions, and to be especially sensitive to the problems of the basin of origin. In its general thrust, section 46-289 indicates that projects, even if they meet conventional minimum criteria for water rights, must not infringe impermissibly on public values.

The statute, moreover, mandates the DWR to undertake the project comparison analysis required by public trust and common law considerations. First, because the section recites a noninclusive list of criteria, it is meant to expand and clarify, not contract, DWR public interest protection. The section thereby in a real sense statutorily ratifies the pre-existing judicially imposed public trust and public interest responsibilities.

Second, considerations (1) and (2) of the statute (the so-called water use requirements) by their terms require assessment of benefits and adverse impacts of each proposed interbasin transfer and use. Obviously, the DWR cannot assess such impacts in isolation. The only way to assess such impacts is by reviewing all in-basin and out-of-basin benefits and adverse impacts, a review which necessarily entails an examination of opportunities to be realized or foreclosed by grants or denials of water rights to competing applicants. The DWR simply cannot realistically assess beneficial and adverse impacts of a proposed water rights allocation without looking to the effects its decision would visit on other water use possibilities.

Consideration (5) of section 46-289 lends further support to this interpretation. That consideration expressly requires the DWR to evaluate "economic, environmental, and other benefits of leaving the water in the basin of origin for current or future beneficial uses."<sup>38</sup> The DWR can only do this, of course, with reference to other "current or future beneficial uses" to which remaining unappropriated water could be allocated. Those "current or future beneficial uses" would include all other pending intrabasin and interbasin water rights proposals seeking diversion rights from the stream of origin.

It is notable that the legislature, when enacting section 46-289, was not focusing on the precise issue of whether the DWR should undertake project comparison analyses when reviewing interbasin di-

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37. *Id.*

38. *Id.* § 46-289(5).

version water rights applications. The legislature rather was predominantly attentive to the more parochial concern of whether intrabasin uses of waters should be legally preferred over interbasin ones.<sup>39</sup> But the political debates of 1981 do not alter the meaning of the statutory text, nor do they dilute the legislature's obvious desire, as demonstrated by section 46-289 itself, to heighten protection of public values rather than reduce it.

We would be remiss at this juncture not to note the ultimate source of state law, the Nebraska Constitution. It also injects public interest protection into the water rights decisional mix. Article XV, section 6, of the Nebraska Constitution states 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."<sup>40</sup> This section, which is a guide for legislative action,<sup>41</sup> demonstrates a fundamental state policy elevating public rights to a superior position. This constitutional acknowledgement is significantly distinguishable from that in other states.<sup>42</sup> Among other things, it serves to encourage a broad interpretation of public rights and public interest protection statutes.

### C. ENDANGERED SPECIES PROTECTION

A final relevant source of law is the NESCA.<sup>43</sup> This act provides that no state agency may take actions which will jeopardize the continued existence of an endangered or threatened species or modify its critical habitat.<sup>44</sup> The NESCA is modeled after the federal Endangered Species Act,<sup>45</sup> but if anything it is more stringent than its model. While the federal legislation admonishes federal agencies to insure their actions "[are] not likely to jeopardize . . . endangered species,"<sup>46</sup> the state analog demands that agencies "do not jeopardize . . . endangered . . . species."<sup>47</sup> It is, in short, a nondegradation standard.

Like its federal counterpart, the NESCA sets forth a procedural

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39. 1 NEB. LEG. J., 87th Leg., 1st Sess. 1120-21, 1518, 1534-35, 1791-95, 1861-63, 2144-45 (1981) (noting various amendments to L.B. 252 affecting intrabasin and interbasin uses). *Accord* *Tanner v. Bacon*, 103 Utah 494, 506, 136 P.2d 957, 962 (1943).

40. NEB. CONST. art. XV, § 6.

41. *See* Pearson, *supra* note 7, at 704-12.

42. *See* COLO. CONST. art. XVI, § 6, which provides: "The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied." This section contains no qualifier to protect the public interest, as is found in article XV, section 6, of the Nebraska Constitution.

43. NEB. REV. STAT. § 37-430 to -438 (Reissue 1984).

44. *Id.* § 37-435(3).

45. 16 U.S.C. § 1536(a)(2) (1982). *See* Aiken, *supra* note 3, at 29-40.

46. *Id.* § 1536(a)(2).

47. NEB. REV. STAT. § 37-435(3) (Reissue 1984).

requirement in addition to this substantive nondegradation standard. Section 37-435(3) requires state agencies other than the Water Management Board<sup>48</sup> to "consult with" the GPC<sup>49</sup> to determine whether proposed agency action would threaten the continued existence of threatened<sup>50</sup> or endangered<sup>51</sup> species or their critical habitats.<sup>52</sup> The consultation provision is meant to improve the quality of the agency's ultimate decision by informing it with the expertise of the GPC.

While final decisional responsibility in these matters rests with the agency proposing action, the GPC opinion is more than advisory. The GPC cannot veto proposed agency actions,<sup>53</sup> but if its views are contrary to those of the agency proposing action, courts on judicial review will likely grant less deference to the final determination.<sup>54</sup>

### III. PROCEDURAL LEGAL REQUIREMENTS

#### A. DEPARTMENT OF WATER RESOURCES ADJUDICATION PROCEDURES

Having outlined substantive legal requirements for protection of the public interest incumbent upon the DWR in its interbasin transfer water rights decisions, let us now turn to procedural matters. The DWR enjoys both rulemaking and adjudication powers.<sup>55</sup> Water rights allocation decisionmaking invokes primarily the adjudicative powers of the agency.<sup>56</sup> Traditionally, the DWR undertakes its adju-

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48. Projects evaluated by the GPC during initial agency review need not be reevaluated a second time during any subsequent Water Management Board consideration. *Id.* § 2-15, 111 (Cum. Supp. 1986). See *infra* notes 67-80 and accompanying text.

49. The consultation process involves both informal and formal discussion, correspondence and other contacts between the agency and the GPC in accordance with GPC regulations. NEB. ADMIN. R. & REGS. tit. 163, ch. 6 (1986).

50. "Threatened species" are defined as "any species of wild fauna or flora which appears likely to become endangered, either by determination of the [Game and Parks] commission or by criteria provided by the [federal] Endangered Species Act." NEB. REV. STAT. § 37-431(11) (Reissue 1984).

51. "Endangered species" are defined as "any species of wildlife or wild plants whose continued existence as a viable component of the wild fauna or flora of the state is determined to be in jeopardy or any species of wildlife or wild plants which meets the criteria of the [federal] Endangered Species Act." *Id.* § 37-431(4).

52. Critical habitat is habitat designated as such by the GPC. *Id.* § 37-435(3).

53. *Little Blue Natural Resources Dist. v. Lower Platte N. Natural Resources Dist.*, 210 Neb. 862, 872-73, 317 N.W.2d 726, 733 (1982) [hereinafter *Little Blue II*]. *Accord* *National Wildlife Fed'n v. Coleman*, 529 F.2d 359, 371 (5th Cir. 1976) (interpreting section 7 of the Federal Endangered Species Act); *Hill v. Tennessee Valley Auth.*, 549 F.2d 1064, 1070 (6th Cir. 1977), *aff'd*, 437 U.S. 153 (1978) (interpreting section 1536 of the federal Endangered Species Act). See Aiken, *supra* note 3, at 30-32 nn.120-38.

54. *Universal Camera Corp. v. National Labor Relation Bd.*, 340 U.S. 474, 496-97 (1951).

55. NEB. REV. STAT. § 46-209 (Reissue 1984).

56. As a general matter, adjudications are narrowly focused decisions on whether a closed set of persons have complied with some pre-existing standard. Rulemaking is

dicative role by using what can be called "conventional" procedures.<sup>57</sup> Using this approach, the agency adjudicates as would a court. It receives evidence dispassionately from applicants, objectors, and other interested persons in a relatively formal setting. A hearing is convened, at which parties are afforded the chance to both submit and refute evidence and to make arguments on the legal issues of the case. The agency, of course, monitors the hearing and at its conclusion evaluates the evidence received. The end product is (hopefully) a well-reasoned decision based exclusively on the record produced during the hearing itself.<sup>58</sup> This decisionmaking format is understandably popular on the theory that agencies undertaking adjudication are well to model themselves on those institutions created for that sole function, such as the courts.

This conventional approach is not the only one available to agencies, however. Another avenue that we might call a "protective" approach incorporates much of the conventional, but does not confine the agency to the exclusive role of a recipient of independently submitted evidence. Under a protective approach, an agency undertakes an additional function. While continuing its conventional role, it assumes the additional responsibility of generating and affirmatively submitting evidence bearing on the issues under review. This approach expands the agency function beyond the mere evaluation of third-party evidence into the realm of first-hand investigation and advocacy.<sup>59</sup>

The question becomes which of these generally described adjudicative models is appropriate for the DWR when it makes decisions implicating both private and public interests. Some general reference to DWR water rights administration is helpful at this point. Histori-

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quasi-legislative decisionmaking that establishes policy of future impact and general effect, governing actions of persons potentially unascertained at the time of rulemaking. The distinction between rulemaking and adjudication is of constitutional significance, as greater due process rights attach generally to matters appropriate for adjudication than to matters appropriate for rulemaking. See *Bi-Metallic Investment Co. v. Colorado*, 239 U.S. 441, 445 (1915); *Londoner v. Denver*, 210 U.S. 373, 379 (1908).

57. Agencies typically enjoy a wide latitude when selecting decisionmaking procedures. See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.* 435 U.S. 519, 524 (1978).

58. Agency adjudicative procedures will vary greatly and can be compared in a variety of ways. The comparison undertaken here should be read in light of the arguments presented. See *infra* notes 59-66 and accompanying text.

59. Agencies may, and routinely do, undertake functions that are quasi-legislative, quasi-executive, and quasi-judicial in nature. Such a combination of functions presents no constitutional infirmity, so long as the undertaking of one function does not encumber the agency's ability to undertake the others. See *Withrow v. Larkin*, 421 U.S. 35, 58 (1975); *Ash Grove Cement Co. v. Federal Trade Comm'n*, 577 F.2d 1368, 1376 (9th Cir. 1978).

cally, the DWR adjudication task has been in large part ministerial.<sup>60</sup> Disputes presented for DWR adjudication in the common case arose from local water rights competition implicating no major public values controversies. The DWR would receive a request for a water right from a party seeking to secure water from a running stream. The applicant would show in the proceeding that unappropriated water is indeed available for diversion, and that the diversion would serve some stipulated beneficial use.<sup>61</sup> The only parties likely to object, if any, would be persons living immediately downstream of the water rights claimant. Objections would be futile if the claimant satisfied the minimum criteria. The DWR's decision would turn on factual findings easily made, for example, whether there was sufficient unappropriated water in the stream.<sup>62</sup>

The conventional adjudication model suited these cases well. The agency could rely on the contestants to produce evidence of a quality and comprehension sufficient to decide the relatively narrow issues presented, and the agency could rest reasonably assured that contestants would understand fully the issues of the case and participate actively in it.

The conventional model, however, is less suitable when the agency's decision involves an interbasin transfer. These water rights controversies are qualitatively different than local, intrabasin ones. Interbasin transfer proposals are regional and statewide in scope, implicate complex environmental and economic concerns, and often can pit the interests of the residents of one basin against those of another.<sup>63</sup>

In short, these decisions unavoidably implicate the public interest. For that reason, the DWR should adopt a protective adjudication model. Conventional adjudication procedures offer no assurance that such protection of public values will be forthcoming or even that any person interested in protecting public values will be present and participating. If the DWR does not affirmatively protect the interests of the public in these circumstances, those interests may go unconsidered. Public values will be protected by coincidence, or not at all.

Adopting a protective model of adjudication would not be a novel undertaking. The approach has been assertively ratified by the

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60. See *State ex rel Cary v. Cochran*, 138 Neb. 163, 292 N.W. 239, 246 (1940).

61. For a discussion of the factual demonstration required of an applicant, see R. HARNESBERGER & N. THORSON, *supra* note 3, at 74-75.

62. This is not to say that every decision lacks complexity. The interstate allocation of water rights, see *Arizona v. California*, 373 U.S. 546 (1963), and cases involving deliverable quantities of water, as well as others may appropriately be characterized as complex.

63. See NEB. REV. STAT. § 46-289 (Cum. Supp. 1986).

courts. Exemplary is the landmark 1965 decision in *Scenic Hudson Preservation Conference v. Federal Power Commission*,<sup>64</sup> a case dealing with the proposed construction of a pumped storage hydroelectric facility on a stream in New York. The case supplied the Second Circuit Court of Appeals an opportunity to comment on the adjudicative procedures of the Federal Power Commission:

In this case, as in many others, the Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission.<sup>65</sup>

This theme has been echoed among the federal courts, including the United States Supreme Court, since its announcement.<sup>66</sup>

These cases confirm that agency adjudicative procedures should assure active public interest review and protection. If private litigants, therefore, do not present the "public rights case," it is the agency's duty to do so. In such instances, it is incumbent upon the agency to obtain and present such evidence to agency decisionmakers as is necessary to inform them fully of the public interest ramifications of their decisions. To the extent that the conventional model of adjudication fails to accomplish this, it is deficient.

## B. WATER MANAGEMENT BOARD WATER PROJECT REVIEW

Even though the DWR has occupied our attention thus far, it is

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64. 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

65. *Id.* at 620.

66. *Baltimore & O.R.R. v. United States*, 386 U.S. 372, 386-92 (1967) (stating that the agency's outlook and powers must extend beyond, in this case, the interest of railroads); *Power Auth. v. Federal Energy Regulatory Comm'n*, 743 F.2d 93, 103-12 (2d Cir. 1984) (stating that the public must receive affirmative protection at the hands of the agency); *RKO General, Inc. v. Federal Communications Comm'n*, 670 F.2d 215, 232 (D.C. Cir. 1981) (quoting *Scenic Hudson*, 354 F.2d at 620) (stating that "'proceedings before the Commission are not private law suits,'" and the Commission should not simply receive evidence); *Natural Resources Defense Council, Inc. v. United States Nuclear Regulatory Comm'n*, 547 F.2d 633, 645 (D.C. Cir. 1976) (footnote omitted) (stating that the agency should not "depend solely on whatever contributions intervenors happen to make to develop a fair representation of scientific opinion for the record."); *Transamerican Trailer Transp., Inc. v. Federal Maritime Comm'n*, 492 F.2d 617, 628 (D.C. Cir. 1974) (stating that the weight to be given the public interest criterion shall vary from one context to the next); *Iowa Citizens for Envtl. Quality, Inc. v. Volpe*, 487 F.2d 849, 857 (8th Cir. 1973) (Lay, J., dissenting) (citing *Scenic Hudson* favorably); *Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n*, 449 F.2d 1109, 1119 (D.C. Cir. 1971) (citing *Scenic Hudson*, 354 F.2d at 620) (stating that the agency should consider environmental values "at every distinctive and comprehensive stage" of the decisionmaking); *Aberdeen & R.R.R. v. United States*, 270 F. Supp. 695, 711-12 (E.D. La. 1967) (stating that the national interest should not be determined and depend on evidence offered or held back by interested parties).

not the only agency in Nebraska involved in water rights decision-making. There also exists the Water Management Board ("WMB"), which has independent power to affect public values in the Platte River and other major Nebraska streams.

Created in 1984 by Legislative Bill 1106 ("L.B. 1106"),<sup>67</sup> the WMB was the legislature's response to developers' concerns that state and federal environmental litigation was unduly delaying needed water projects.<sup>68</sup> Comprised of five members, its charge is to "identify, propose, support, advocate, resolve conflicts regarding, and expedite water development projects in the state in the most efficient manner possible."<sup>69</sup> Project review is accomplished by requiring sponsors of major water projects costing more than \$10 million, and for which sponsors are requesting state advocacy for federal funding assistance, to submit their projects for WMB review.<sup>70</sup> Project sponsors requesting state financial assistance for project construction must also file with the WMB.<sup>71</sup>

In reviewing proposed projects, the WMB must make several public interest-founded determinations. It must: (1) determine whether the proposed project is consistent with Natural Resources Commission water use goals; (2) determine whether the project is technically, environmentally, financially and economically feasible; (3) attempt to resolve conflicts regarding the project, including plac-

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67. L.B. 1106, 1984 Neb. Laws 1341, 88th Leg., 2d Sess. (1984) (codified at NEB. REV. STAT. § 2-15,107 (Cum. Supp. 1986)). The bill itself was based on recommendations to Governor Robert Kerry from his "Water Independence Congress," a group of private citizens convened over several months to formulate water policy for the state. See Aiken, *supra* note 3, at 58-59. The Congress was called as a direct response to *Little Blue II* and the GPC Catherland jeopardy opinion. *Id.* at 55-57. One of the primary purposes of the Congress was to find a way to resolve developer-environmentalist disputes by negotiation rather than by expensive and time-consuming litigation. For a review of this litigation, see *id.* at 32-40. The case affecting Platte River development was *Nebraska v. Rural Electric Administration*, 12 ENV'T REP. CAS. (BNA) 1156 (D. Neb. 1978). In that case a Wyoming project was delayed for filing an inadequate environmental review of, *inter alia*, the project's effects on downstream whooping crane critical habitat in the central Platte area. When the court enjoined the project pending a revised impact statement, the settlement included establishing a \$7.5 million Platte River Whooping Crane Habitat Maintenance Trust. The Trust has been correctly identified by developers as a *de facto* environmental defense fund regarding Platte River development.

68. NEB. REV. STAT. §§ 2-15,107 to -15,117 (Cum. Supp. 1986). See Aiken, *supra* note 3, at 57-59.

69. NEB. REV. STAT. § 2-15,107 (Cum. Supp. 1986). WMB members include the Director of the University of Nebraska Conservation and Survey Division (the State Geologist), the GPC director, the Director of Natural Resources, and two gubernatorial appointees, one with expertise in water resources development and management. *Id.* § 2-15,108. The Director of Natural Resources chairs the WMB. *Id.*

70. *Id.* § 2-15,114(1). The application must be filed prior to filing with the DWR for project water appropriations. *Id.* § 2-15,114(2).

71. *Id.* § 2-15,116(2).



ing conditions on project design and operation if necessary; and (4) determine whether a project is in the state's interest.<sup>72</sup> If the proposed project meets these project approval criteria, the WMB must "assume acquisition of state interest [in the project] and take such actions as are necessary for the implementation, financing, water right approval, or advocacy regarding the project."<sup>73</sup> WMB approval is also a prerequisite for project sponsors to obtain state water planning grants or state advocacy for federal water planning assistance.<sup>74</sup>

The WMB review process is yet another legislative ratification of the requirement to protect public interest in cases involving major water transfers, although the attainment of this goal is compromised by the express requirement that the WMB "promote" large-scale irrigation projects.<sup>75</sup> Nonetheless, its integral function in water project development gives it substantial leverage to encourage project development and design compromises on behalf of the public. It now plays a critical structural role in the water rights administration process, a role different from that played by the DWR.

This role, however, has been circumscribed by the same legislation that created it. L.B. 1106, while mandating project sponsors to file for WMB approval<sup>76</sup> as a general matter, makes that same filing requirement elective for project applicants who have filed with the DWR for water rights prior to February 15, 1985.<sup>77</sup> This circumscription is especially disconcerting because all of the projects currently competing for Platte River water fall into the pre-February 15, 1985 category.<sup>78</sup> Thus, the potential exists that, at this critical point in Nebraska's natural resources history, the WMB will never perform the function for which it was designed.

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72. *Id.* § 2-15,110(1). Project sponsors seeking construction funds must also comply with endangered species requirements. *Id.* §§ 2-15,111-15,116(2). Project sponsors seeking state water planning assistance must also demonstrate via preliminary project designs that spending additional project planning funds is "a reasonable use of state or federal funds." *Id.* § 2-15,116(3).

73. *Id.* § 2-15,116(2).

74. *Id.* §§ 2-15,114(1) to 15,116(3).

75. *Id.* Presumably the WMB would be prohibited from promoting, financing, or supporting unapproved projects at state and federal levels.

76. *Id.* § 2-15,114(2).

77. *Id.* § 2-15,114(3). While others "must" file for WMB approval (assuming they seek state financial or other assistance), pre-February 15, 1985 projects "may" do so.

78. There are currently six such proposed projects, each of which is the general subject matter of numerous applications filed before the DWR. The projects, by popular name, and their filing dates are as follows: Prairie Bend project, filed April 1, 1976; Catherland project, filed Nov. 28, 1977; Enders project, filed Dec. 19, 1980; Plum Creek project, filed Sept. 1, 1981; Twin Platte project, filed Sept. 23, 1981 and Oct. 9, 1981; and Landmark project, filed Dec. 17, 1981. Summary of Proposed Projects from the Platte and South Platte Rivers (rev. Jan. 27, 1986) (available at the Neb. Dep't of Water Resources, Lincoln, Neb.).

Certainly the legislature was aware of this disingenuous possibility. Presumably for that reason, it gave the DWR in the same legislation the power to rectify the problem. Section 46-209, amended by L.B. 1106, provides that the DWR "may submit any application received by it to the Water Management Board for review."<sup>79</sup> If the DWR chooses to do so, then the public interest-protective role of the WMB can be realized. The authors would take the principle a step further. We submit that the overriding duty of the DWR to protect the public interest, a duty which arises from its public trust and public interest responsibilities,<sup>80</sup> argues convincingly for routine DWR submissions of major water project appropriation applications to the WMB. Such referrals should be foregone only if the WMB plainly could provide no palpable benefit by its additional review.

By way of interim summary, we draw the following conclusions:

(A) The DWR has common law, public trust, and statutory duties to protect the public interest. These duties attach to any significant water rights allocation decisionmaking, including those involving interbasin transfers. The DWR neglects these responsibilities if its review process fails to consider public interest factors fully. A full consideration includes both project merit and project comparison analyses;

(B) The DWR has independent duties under the NESCA to protect endangered species. In meeting those responsibilities, it must give great weight to relevant findings and opinions of the GPC on those matters;

(C) DWR procedures must assure an active and affirmative representation of the public interest;

(D) The DWR should routinely incorporate the WMB into the decisionmaking process even with respect to water projects not expressly covered by the applicable statutory law.

How the DWR will honor these responsibilities in the future is unknown. The recent administrative handling of the Catherland project, however, provides us with some insights on the DWR's current understanding of its responsibilities. To this case study, we now turn.

#### IV. THE CATHERLAND PROJECT

The DWR first formally learned of the Catherland project on November 28, 1977, when the Little Blue Natural Resources District

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79. NEB. REV. STAT. § 46-209 (Reissue 1984).

80. See *supra* notes 13-42 and accompanying text.

filed several applications for water rights.<sup>81</sup> The project as proposed would draw water from the Platte River basin near the "Big Bend" area of the stream for transportation into the Little Blue River basin in part to replenish declining groundwater reserves there.<sup>82</sup>

The director of the DWR initially denied the applications, relying on the aforementioned *Osterman* ban on interbasin diversions in the state. After the Nebraska Supreme Court reversed that holding in *Little Blue I*, the DWR undertook its first substantive review of the applications. The review yielded the expected preliminary conclusion that the proposal met all of the basic requirements necessary for a favorable water rights decision,<sup>83</sup> but because the applications proposed an interbasin diversion, the DWR also considered public interest factors. Specifically, it reviewed the proposal in light of the section 46-289 public interest considerations and those set forth in the NESCA to protect endangered species.<sup>84</sup> As part of its review, it held an extensive adjudicatory hearing on the case, during which both proponents and opponents were heard. At the conclusion of the proceedings, the Director of the DWR, who himself presided at the hearing, ruled in favor of the applicants. The water rights were granted by administrative order on July 29, 1986.<sup>85</sup>

#### A. DID THE DWR ADEQUATELY CONSIDER THE PUBLIC INTEREST?

The DWR order acknowledged rightly that the degree of economic gain occasioned by the project would vary depending upon the availability of federal crop subsidies.<sup>86</sup> Other project benefits ad-

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81. Order, *supra* note 11, at 1.

82. *Id.*

83. *Id.* at 2-3. Other noncontroversial issues were also presented: whether unappropriated water was available for appropriation as per section 46-234, whether the width of the river was at least 100 feet at the proposed water diversion point as per section 46-206, and whether the Catherland Reclamation District had demonstrated by documentary evidence that it, together with the Central Nebraska Public Power and Irrigation District ("Tri-County"), had agreed that Catherland would be permitted to use Tri-County's canals to deliver water for Catherland, as per section 46-234(1). The DWR concluded that Catherland complied with all three requirements. *Id.* at 3. However, the original agreement authorizing use of the Tri-County supply canal was executed between Tri-County and the Little Blue Natural Resources District, the Catherland Reclamation District's predecessor in interest. When Little Blue assigned its rights to Catherland, that assignment had not been formally ratified by Tri-County. *Id.* The DWR concluded that because Tri-County had formally supported the Little Blue application, it seemed reasonable to assume that Tri-County continued to support the project now that it was being promoted by Catherland. In fact, Tri-County had not formally ratified the assignment. However, subsection 46-234(1) is discretionary, so the DWR's failure to require documentary evidence of Tri-County's granting permission to Catherland to use the Tri-County supply canal probably is not reversible error.

84. Order, *supra* note 11, at 3-5.

85. *Id.* at 18-19.

86. *Id.* at 4. The order did not acknowledge, however, that a withdrawal of fed-

ressed by the Director included potential fish, wildlife and recreation enhancements, although the director conceded that such benefits were modest.<sup>87</sup>

The Director found few adverse impacts. Some private parties complained of land use interference, but the Director concluded their arguments were not factually supported.<sup>88</sup> Concerns regarding reduced groundwater recharge resulting from reduced river flows were also dismissed as largely insignificant.<sup>89</sup> Adverse effects on game species, other species, fisheries, and recreation were also deemed "negligible," "not significant," or "minimal."<sup>90</sup>

This discussion of public interest considerations fulfilled the DWR's duty under the first two considerations of section 46-289.<sup>91</sup> Thereafter, the Director dutifully marched through the remaining seven criteria and ultimately concluded that "benefits to the state . . . which would result from operation of the Catherland project outweigh those which would result if the four water appropriation applications were denied. In the context of § 46-289 they should be approved."<sup>92</sup>

Setting aside the credibility of the particular factual findings of the Director, and the ultimate water rights approval those findings purportedly support,<sup>93</sup> it is immediately clear that the DWR failed to conduct an inquiry as broad as legally required. Specifically, it never undertook any effort to compare the Catherland water use proposal with others pending before it,<sup>94</sup> an obligation mandated by the judicially pronounced public trust and public interest responsibilities of the agency and, as we view it, by section 46-289 itself.

Moreover, in reaching its conclusion, the DWR also failed to incorporate available information regarding the Platte River itself. There are currently underway several studies designed to supply new

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eral crop supports would leave irrigators with high production costs generally in excess of the available price. Thus while the project economic benefits from irrigation may be positive as long as crops are subsidized, the removal of crop subsidies could turn economic benefits into economic losses. Regarding the inadvisability of publicly subsidizing irrigation projects in order to increase production of publicly subsidized crops, see Aiken, *supra* note 3, at 40-43.

87. Order, *supra* note 11, at 5-6. Flood control benefits were also noted. *Id.* at 6.

88. *Id.* at 6-8. Similarly, the loss in lost riparian real estate values from reduced ground water recharge and reduced streamflows was deemed insignificant. *Id.* at 8.

89. *Id.*

90. *Id.* at 13-17.

91. See *supra* notes 33-34 and accompanying text.

92. Order, *supra* note 11, at 11-13.

93. The DWR order is now on review before the Nebraska Supreme Court. *Catherland Reclamation Dist. v. Central Neb. Conservation Ass'n*, No. 86-692 (filed Aug. 27, 1986).

94. See *supra* notes 13-42 and accompanying text.

and helpful data on the entire Platte River ecosystem, the carrying capacity of the stream, and so forth.<sup>95</sup> At a minimum, this data is sufficiently relevant and important to warrant its close review by the DWR.

B. DID THE DIRECTOR ADEQUATELY PROTECT ENDANGERED SPECIES AND GIVE APPROPRIATE WEIGHT TO THE FINDINGS AND CONCLUSIONS OF THE GAME AND PARKS COMMISSION?

The DWR's primary responsibility under the NESCA is to "tak[e] such action necessary to insure that actions authorized, funded, or carried out by [it do] not jeopardize the continued existence of such endangered or threatened species or result in the destruction or modification of habitat of such species which is determined by the commission to be critical."<sup>96</sup> As its terms indicate, the duty is a stringent one. The agency's goal is the total abolition of jeopardy, as distinct from allowing some reasonable or minimal harm. Additionally, the agency must *insure*, not reasonably hypothesize, that this nondegradation result will materialize. Not even a reasonable uncertainty is authorized. In the absence of certainty, the DWR must deny a permit, not grant it, as uncertainty strips away the ability to insure no jeopardy.

Did the DWR meet this stringent requirement in its *Catherland* decision? Clearly, it did not. First, the order only discussed three species: the whooping crane, bald eagle and interior least tern.<sup>97</sup> It did not discuss potential jeopardy to other endangered or threatened species, species with habitat requirements that may vary greatly from those species actually considered.<sup>98</sup> Second, the Director based his determinations not on affirmative evidence demonstrating no jeopardy but instead on a lack of evidence to the contrary. Regarding the whooping crane, for example, the Director dismissed as unconvincing evidence advanced by wildlife proponents and adopted in large part by the GPC, which evidence tended to show that the project would harm such species.<sup>99</sup> Following that, he commented on the uncertainty of the interrelationship of streamflow reductions and wet

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95. See A. BLEED, N. GALLEHAN, D. RAZAVIAN & R. SUPALLA, ECONOMIC, ENVIRONMENT AND FINANCING OPTIMIZATION ANALYSIS OF PLATTE RIVER DEVELOPMENT ALTERNATIVES (Univ. of Neb. Conservation & Survey Div., June 1986) (stating that the GPC instream flow requirements can be met and several projects can be built while meeting the requirements, although they would have to be reduced in size).

96. NEB. REV. STAT. § 37-435(3) (Reissue 1984).

97. Order, *supra* note 11, at 13-17.

98. It only mentioned, for example, and did not consider, the piping plover. *Id.* at 13.

99. *Id.* at 13-15.

meadow maintenance.<sup>100</sup> Finally, the Director concluded that, as few cranes use the Platte Valley anyway, and as there are other habitat locations in the state, and as the project would effect its diversions at times when cranes would not be in the area, and as the overall numbers of cranes nationally are on the rise, "it is inconceivable" that harm could occur.<sup>101</sup>

This rationale, of course, is essentially irrelevant to the issue of whether the project will jeopardize the species or its habitat. Even if there are few cranes using the Platte Valley, those could be harmed, and the species jeopardized thereby. Even if there are other habitats available, this one could be harmed. Even if Catherland diversions would be off-season, they still could harm stream habitat and ecology. Even if the number of cranes overall is increasing, the project could jeopardize their numbers and continued existence.

Regarding bald eagles, the DWR's decisional pattern was the same. It began by dismissing evidence and opinion of the GPC and concluded by substituting an unsubstantiated alternative view. Here its discussion centered exclusively on supposed defects and unwarranted assumptions in the GPC opinion.<sup>102</sup> Then, the Director announced his disagreement with the GPC conclusions<sup>103</sup> and pronounced that "[t]hus, approval of Catherland's project is not deemed to jeopardize the continued existence of bald eagles or their habitat."<sup>104</sup>

The entire exercise concluded as follows: "With an absence of evidence to the contrary, approving Catherland's applications is deemed not to jeopardize ferrets, falcons, plovers, or other rare and endangered species or their habitat."<sup>105</sup> This conclusion concedes the defect: the order rests not upon affirmative evidence of an absence of jeopardy. Instead, the order is a default adjudication. It unflinchingly reaches conclusions even regarding species about which the DWR considered no evidence.<sup>106</sup>

This approach is further deficient because it reverses the appropriate burden of proof under the NESCA. The DWR understands where the burden lies, having stipulated in an earlier case that "[t]he Nongame and Endangered Species Act places an obligation on Appli-

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100. *Id.* at 14. The discussion concluded: "There appears no basis for concluding that the absence of 1,100 cubic feet per second during that time period would jeopardize whooping cranes." *Id.*

101. *Id.* at 15.

102. *Id.*

103. *Id.* at 16.

104. *Id.* The Order takes the same approach in its discussion of jeopardy to interior least terns. *Id.* at 16-17.

105. *Id.* at 13.

106. *Id.*

cants to show that their proposal will not adversely impact endangered or threatened species."<sup>107</sup> Yet in this case it silently shifts the burden to wildlife proponents by approving the Catherland project when evidence failed to demonstrate no jeopardy. Presumably, the failure to prove no jeopardy should have produced a permit denial, not a permit award. This treatment falls palpably short of insuring no jeopardy to endangered or threatened species or their habitat.

C. DID THE DWR ADJUDICATION PROCEDURES ACTIVELY AND AFFIRMATIVELY ASSURE REPRESENTATION OF THE PUBLIC INTEREST?

The preceding discussion has already partially answered this question. It is apparent that no active and affirmative representation of the public interest by the DWR was undertaken here. Had the DWR undertaken such an affirmative posture, the order would have found its basis in fact rather than in default.

Citations to the opinion are demonstrative. For example, the Director concedes in the text that "limited evidence pertaining to environmental matters in the Catherland area" was available for its review.<sup>108</sup> Despite this limited evidence, the decision purporting to protect the public interest was made. The order also admitted that "[i]n terms of economic analysis, the record is without expert evidence indicating the likelihood of adverse economic consequences in the Platte Valley should the Catherland project be built and operated."<sup>109</sup> Thus, the critical issue of economic impact was made "without expert evidence."<sup>110</sup> Regarding endangered species protection, the decision comments that despite "considerable effort [by the parties] in presenting evidence on the subject of nongame and endangered species,"<sup>111</sup> still, "considering the entire spectrum of such species, only a small segment was addressed."<sup>112</sup>

D. DID THE DWR ADEQUATELY INCORPORATE THE WATER MANAGEMENT BOARD INTO ITS DECISIONMAKING?

The answer to this question is no. The DWR decided the case without any record reference or consultation with the WMB. For reasons unexplained, it did not elect to refer the matter for WMB re-

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107. Order Denying Application A-15738 for a Permit to Divert Water from the South Platte River for Storage in Enders Reservoir, Water Divisions 1-A and 1-B (Nov. 4, 1985) (Neb. Dep't of Water Resources) ("*Enders Opinion*").

108. Order, *supra* note 11, at 5.

109. *Id.* at 6.

110. *Id.*

111. *Id.* at 13.

112. *Id.*

view and comment. The DWR thus decided to forego any benefit this separate and uniquely configured agency could have provided.

## V. CONCLUSION

At this point in Nebraska's history, there is a critical need for intelligent and broadbased water resources management. We believe that an assertive protection of public values in water, especially in the critical Platte River, is essential. That protection can only come if agencies charged with protecting those public values do so carefully, and in line with their substantive and procedural obligations. The public does not receive this careful protection when the primary agency regulating such interests fails to secure sufficient data upon which to base its regulatory decisions, misinterprets and misapplies the statutes it is bound to discharge, and adopts procedures inadequate to inform decisionmakers of the fundamental complexities their decisions implicate. Based on the *Catherland* decision, one must conclude there is great cause for concern.

Were *Catherland* an aberration, that cause for concern would diminish. But it may not be an aberration, as demonstrated by the only other relevant administrative decision by the DWR. The *Enders* case also involved a water rights application for an interbasin diversion that would affect Platte River flows<sup>113</sup> and presented the same kinds of public interest issues as did the *Catherland* case. Although in this case the DWR denied the requested permit,<sup>114</sup> its administrative order bore the stamp of *Catherland*. A representative sample of the *Enders* opinion is demonstrative: "[w]ithout additional data, most of the witnesses acknowledged they could make only qualitative assessments. With the exception of [one expert witness], who termed positive versus negative impacts on birds to be a 'toss-up,' the experts stated that fish and wildlife impacts would most likely be negative if the project were built and operated."<sup>115</sup> On the matter of diminished flows for fish and wildlife, the agency characterized evidence as "especially questionable for certain wildlife species."<sup>116</sup> "But, Applicants did not convincingly refute that assertion, and they propose no operational scheme to assure that it would not happen. . . . Thus, in the context of fish and wildlife, benefits to the state in granting [their

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113. Specifically, the *Enders* project would take water from the South Platte River, directly upstream and tributary to the Platte River itself, for transport with and use in the Frenchman River Watershed. Order, *supra* note 104, at 2.

114. *Id.* at 11. The *Enders* case is now on appeal before the Nebraska Supreme Court. *In re* Application No. A-15738, No. 86-008 (filed Jan. 3, 1986).

115. Order, *supra* note 107, at 8.

116. *Id.*



permit] would not outweigh benefits to the state from denying it."<sup>117</sup>

Only by a more comprehensive and careful decisional process can the DWR fulfill its statutory missions. Its failure to do so may result in a de facto shift of decisionmaking power to the Nebraska Supreme Court.

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117. *Id.* at 8-9.