

Urban Runoff. Serious drainage problems have occurred in urban areas due to the disregard of drainage patterns. Damages often result, with downstream landowners often the victims of this disregard of both internal and external water impacts of urban developments. To deal with these problems, the Commission recommends legislation requiring that comprehensive drainage plans be prepared and approved by the appropriate local unit of government prior to the initiation of new urban developments. These plans would have to give due regard to the interests of downstream landowners. Implementation would involve a comparatively minimal cost and would assure that construction activities would be properly carried out.

Natural Lakes. The natural lakes in Nebraska are a valuable natural resource and should not be destroyed without consideration of the resulting impacts. Present laws are inadequate in providing the needed protection for these lakes; therefore, the Commission recommends amending existing law to provide greater protection. Recommended is an alternative which would require an appropriation permit to be issued before the water in a natural lake could be used for beneficial purposes. A second recommendation is to require approval to drain a natural lake when no beneficial use of the water was intended.

Wetlands. A wide variety of potential uses and values have been identified for Nebraska's wetland areas. Preservation of these areas is a need not addressed by existing law. The Com-

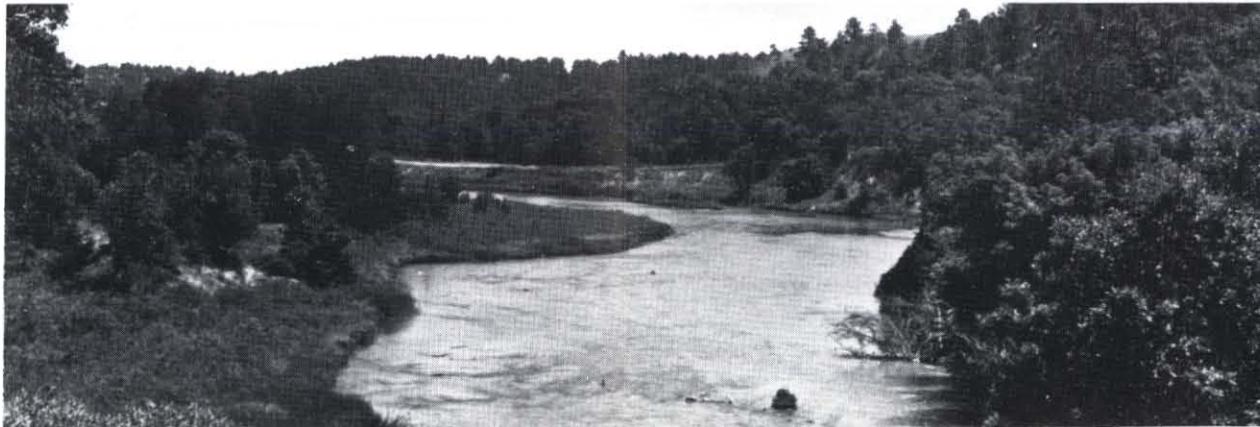
mission recommends the adoption of a comprehensive regulatory program designed to identify, preserve, and protect critical wetland areas. This approach is favored because it incorporates the identification of wetlands, a task critical to the preservation of important wetlands.

Governmental Responsibilities. The appropriate governmental involvement in drainage activities was also considered by the Commission. Two major recommendations are made in this category. First, it is recommended that future drainage projects be handled by either NRD's or cities and villages. The Commission believes that counties should no longer have to undertake drainage activities.

A second recommendation calls for the enactment of a uniform set of drainage powers for cities and villages, thus eliminating current disparities based on city classification.

Disputes are Inevitable

Although in the midst of drought Nebraskans lament the lack of rain, precipitation in some form is inevitable in the long run. Also inevitable are disputes concerning the drainage of this precipitation. The adoption of well planned drainage laws will help reduce misunderstandings in these disputes, and thus, excessive litigation in the courts. Yet, the drainage of diffused surface waters is a problem which cannot be legislated away. It may only be regulated, with the interests of Nebraska's citizens in mind.



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POLICY ISSUE STUDY ON SELECTED WATER RIGHTS ISSUES

DRAINAGE OF DIFFUSED SURFACE WATER



State Water
Planning and Review Process

Nebraska
Natural Resources Commission

DRAINAGE OF DIFFUSED SURFACE WATER

When water drains from the property of one individual onto the property of another, and damages result, who, if anyone, is liable for those damages?

Example #1: A developer builds an apartment complex adjacent to a residential district. A heavy rain follows, and residents in the area find that storm water runoff from the new complex is being drained directly onto their property. They protest, and seek damages and an injunction against the developer.

According to Nebraska drainage law, is the developer liable for damages, and must he control runoff from his newly developed property?

Example #2: A rural landowner constructs a ditch in which to drain unwanted surface water from his property. He directs this water into a natural drainage ditch which leads onto the property of a neighbor. The neighbor protests, and seeks an injunction to stop the increased flow of water onto his property.

According to Nebraska drainage law, is the first landowner required to stop diverting water onto the land of the second landowner?

The most likely answer in both of these examples is no. Neither the urban nor rural developer will be responsible for damages caused to the owner of the lower lands.

The general rules derived from these examples are well established, but how those general rules are applied in specific cases is not as clear. Laws governing drainage and diffused surface water are a combination of numerous statutes and over 100 Nebraska Supreme Court decisions. These decisions comprise the majority of all water law cases decided by the court, indicating the great source of conflict in drainage and diffused

surface water issues. These conflicts have directly affected the lives of more Nebraska citizens than any other single water law issue.

In light of such far-reaching effects, the need, both practically and financially, for clear and appropriate policy is obvious. In this regard, the Natural Resources Commission has completed a report entitled "Drainage of Diffused Surface Water." The report, available from the Commission upon request, analyzes current policies and recommends several actions by the Legislature. The purpose of this brochure is to briefly summarize the report and the Commission's recommendations.

Diffused Surface Water Defined

Diffused surface water is "water that flows across the surface of the land but which has not yet entered a natural water course." This water is distinguished by its detached state, its existence apart from streams, rivers, and lakes. It also lacks a permanent source of supply. Its sources are varied, and include precipitation, melting snow, and permanently detached flood water.

Once this water enters a lake or water course, it is no longer classified as diffused surface water. Flood water which returns to the stream at a downstream point, and irrigation waste water, which does not percolate into the soil, are not considered diffused surface water.



Current Law

Conflicts involving diffused surface water are generally of two types: (1) the right to capture and use diffused surface water, and (2) the right to dispose of unwanted diffused surface water. Statutory drainage authority and common law rules, as mentioned earlier, address resolution of these conflicts. However, this legal mixture of statutes and rules is often unclear as to legal liability in both avoiding and draining surface waters. This lack of clarity frequently causes misunderstanding, misconceptions, and costly litigation.

Alternatives and Recommended Policy Changes

The lack of comprehensive drainage law involving diffused surface waters emphasizes the need for changes to existing statutes. The Commission report "Drainage of Diffused Surface Waters" includes a number of policy alternatives for use in guiding new legislation. After considering public input on these alternatives, the Commission recommended the adoption of several. Those recommendations are summarized below for each subject area addressed.

Definitions. The Commission recommends legislative definition of those terms that are crucial to the proper classification of water. Terms in need of definition include: surface water, watercourse, natural drainway, lake, wetland, diffused surface water, flood water, and irrigation waste water. Uncertainty and confusion are often created by the present lack of definitions for terms such as these. While some flexibility would certainly be sacrificed in the adoption of definitions, the Commission feels that gains derived from reduced confusion would outweigh losses in flexibility.

The Commission also recommends that "natural drainway" be defined with reference to historical drainage patterns unless it is demonstrated that rights to current drainage patterns have been acquired by more than 10 years continuous use. The Commission believes this to be a more reasonable approach than other al-

ternatives offered. Those persons damaged by another's alterations in the characteristics of a natural drainway are given a reasonable degree of protection. This protection would essentially be provided for 10 years, sufficient time to raise a valid objection.

Disputes between Landowners. The Commission believes this to be an area clearly in need of revision and clarification. It is recommended that Nebraska statutes be amended to specifically recognize a landowner's right to capture and use diffused surface water present on his land as long as that use was for



reasonable or beneficial purposes. This alternative is recommended because it prevents the capture and use of water solely for malicious purposes.

Also recommended is legislative action making landowners liable for injuries to others if interference with the flow of diffused surface water was unreasonable or caused substantial damage. This alternative deals with the question of how to dispose of unwanted diffused surface water. This approach is favored because it appears to best promote equity between landowners.

The final alternative recommended in this category is the adoption of a comprehensive soil and water conservation statute which requires landowners to adopt practices that will bring soil erosion losses within acceptable limits. This alternative would help to keep unwanted water and unwanted soil off of neighboring lands.