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SUBJECT: LB 396 – Whether an NRD can sell its land and retain the ability to use ground water for augmentation.

REQUESTED BY: Senator Steve Erdman
Nebraska State Legislature

WRITTEN BY: Mike Hilgers, Attorney General
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INTRODUCTION

You have requested an opinion from this office about whether an entity formed pursuant to the Interlocal Cooperation Act, Neb. Rev. Stat. § 13-801 *et seq.* (2021), can be compelled to sell real property but retain and reserve the right to use ground water associated with that property. You refer specifically to the N-CORPE project, which was undertaken by four natural resources districts to augment surface water flows in the Republican River to ensure compliance with the Republican River Compact, and in the Platte River. Your question relates to LB 396, which you introduced to specifically authorize natural resources districts ("NRDs") to enter into augmentation projects and to require the NRDs to sell the overlying land after the augmentation project has been developed. Although your request mentions only "interlocal agreements," after reviewing your bill it is our understanding that you are asking specifically about NRD-led augmentation projects which may (like N-CORPE) or may not (like the Rock Creek augmentation project in the Upper Republican NRD) be accomplished by using an interlocal agreement. At root, your request implicates the more basic question of whether the right to use ground water can be severed from the overlying land. At common law, the right to use ground water is tied explicitly to the land, and therefore would preclude selling the land but reserving the right to use the ground water.

BACKGROUND

Your question implicates the legal relationship between an owner's rights in their land and corresponding rights to water. To help address that question, a brief description of the law regarding the right to use ground water is necessary.

Common Law Right to Use Ground Water

Under Nebraska common law, ground water is subject to the modified correlative rights doctrine. This approach is distinct from the English Rule, the American Rule, and the general correlative rights doctrine, also called the California Rule, that are used to regulate ground water in other places.

English Rule

Under the English Rule, also called the absolute ownership rule, "a landowner ha[s] absolute ownership of the waters under his or her land." *Spear T. Ranch v. Knaub*, 269 Neb. 177, 186, 691 N.W.2d 116, 127 (2005) ["*Spear T.*"]. Texas administers its ground water this way. *See* Texas Water Code Ann. § 36.002 ("The Legislature recognizes that a landowner owns the groundwater below the surface of the landowner's land as real property."); *Sipriano v. Great Spring Waters of America, Inc.*, 1 S.W.3d 75, 75 (1999) ("For over ninety years, this Court has adhered to the common-law rule of capture in allocating the respective rights and liabilities of neighboring landowners for use of groundwater flowing beneath their property. The rule of capture essentially allows, with some limited exceptions, a landowner to pump as much groundwater as the landowner chooses, without liability to neighbors who claim that the pumping has depleted their wells."). However, "[m]ost American courts . . . have criticized the English Rule, recognizing that the rule protected landowners from liability even when water was diverted for malicious purposes" and that "the overlying owner with the deepest well or largest pump could control water that would otherwise be available to wall." *Spear T.*, 269 at 187, 691 N.W.2d at 127.

American Rule

Under the American Rule, "the owner of the land is entitled to appropriate subterranean or other waters accumulating on the land, but cannot extract and appropriate them in excess of a reasonable and beneficial use of land, especially if the exercise of such use is injurious to others." *Id.* The American Rule "does not consider a balancing of the parties' interests." *Id.* at 188. "Under the American rule, a person who is deprived of surface water because of the use of ground water by a nearby landowner will recover only when the water was not used for a beneficial purpose on the ground water user's land." *Id.* at 188, 691 N.W. 2d at 128.

California Rule

The California Rule "provides that the rights of all landowners over a common aquifer are coequal or correlative and that one cannot extract more than his or her share of the water even for use on his or her own land if other's rights are injured by the withdrawal." *Id.* at 188, 691 N.W. 2d at 128. "[T]he overlying landowners have no proprietary interest in the water under their ground and each owner over a common pool has a correlative right to make a beneficial use of the water on his or her land. Priority of use is irrelevant because in times of shortage, the common supply is apportioned among the landowners based on their reasonable needs." *Id.* at 188, 691 N.W. 2d at 128.

Nebraska's Rule – Modified Correlative Rights

Under Nebraska common law, ground water is subject to the modified correlative rights doctrine, which pulls from both the American Rule and the California Rule. Under this doctrine:

> [T]he owner of land is entitled to appropriate subterranean waters found under his land, but he cannot extract and appropriate them in excess of a reasonable and beneficial use upon the land which he owns, especially if such use is injurious to others who have substantial rights to the waters, and if the natural underground supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole....

Sorenson v. Lower Niobrara Nat. Resources Dist., 221 Neb. 180, 188, 376 N.W.2d 539, 546 (1985) ["*Sorenson*"] (quoting *Olson v. City of Wahoo*, 124 Neb. 802, 811, 248 N.W. 304, 308 (1933)). Put otherwise, "[q]ualified by the requirement of a reasonable, proportionate sharing during shortage of ground water, Nebraska's common law permits a landowner to use ground water extracted from beneath the owner's land, provided such landowner's extraction does not exceed a reasonable and beneficial use on the landowner's property." *Id.* at 189, 376 N.W.2d at 546 (citing *Olson v. City of Wahoo*, 124 Neb. 802, 248 N.W. 304 (1933)). This rule takes the "reasonable and beneficial use on the user's land" aspect from the American Rule and the entitlement "to a reasonable proportion of the whole" during times of shortage from the California Rule.

This doctrine has been recognized by the Legislature in the Ground Water Management and Protection Act: "Every landowner shall be entitled to a reasonable and beneficial use of the ground water underlying his or her land subject to the provisions of Chapter 46, article 6, and the Nebraska Ground Water Management and Protection Act and the correlative rights of other landowners when the ground water supply is insufficient to meet the reasonable needs of all users." Neb. Rev. Stat. § 46-702 (2021); *see also* Richard S. Harnsberger & Norman W. Thorson, Nebraska Water Law and Administration, p. 249 (Butterworth Legal Publishers, 1984) (referring to an earlier version of the above-quoted language as "notable" because "the legislature specifically accept[ed] the

correlative-rights doctrine as defining the underlying system of groundwater property rights").

Under Nebraska common law, the right to use ground water has always been tied explicitly to ownership of the overlying land. *See, e.g., Sorenson,* 221 Neb. at 191, 376 N.W.2d at 547 ("[T]he right to use ground water is a derivative right immediately dependent on ownership of the surface over a source of ground water."). In fact, the Supreme Court has gone so far as to hold that the right to use ground water cannot be separated from ownership of the overlying land. In *Upper Republican Natural Resources District v. Dundy County Board of Equalization*, 300 Neb. 256, 912 N.W.2d 796 (2018), the Court considered the question of whether property was being used for a public purpose when the primary purpose for owning the property was for the ground water underneath the land, rather than for the surface estate. The Court found that there was "no reason to treat underground uses – in this case, the aquifer, wells, and pipeline system – differently from any other use of the property." 300 Neb. at 285; 912 N.W.2d at 814. The Court further stated: "[I]t is clear that the right to use ground water is an attribute of owning fee simple title to land overlying a source of ground water **and is inseparable from the land to which it applies**." 300 Neb. at 285, 912 N.W.2d at 814-15 (*quoting Sorenson*, 221 Neb. at 191, 376 N.W.2d at 548) (emphasis added). There is no support in case law or current Nebraska statute for the proposition that the right to use ground water can be severed from ownership of the overlying land.

In addition, the right to appropriate ground water is a usufructuary right, which is a legal term meaning it is a right to use rather than an absolute ownership right. So a landowner has a right to use ground water, but does not actually own the ground water under the land. *See, e.g., Bamford v. Upper Republican Nat. Resources Dist.,* 245 Neb. 299, 313, 512 N.W.2d 642, 652 (1994) ("[G]round water, as defined in § 46-657, is owned by the public, and the only right held by an overlying landowner is in the use of the ground water."). This is different than states like Texas that use the English Rule, where the ground water is owned as part of the real property.

These features distinguish ground water from other subterranean interests, such as mineral interests, which can be owned, sold, resold, leased, or subleased separately from the overlying land. *See, e.g.*, Neb. Rev. Stat. §§ 57-227 to 57-239. A mineral right can be severed from ownership of the overlying land. *See, e.g.*, Neb. Rev. Stat. §§ 57-227 to 57-231. "'When by appropriate conveyance the mineral estate in lands is severed from the surface, separate and distinct estates are thereby created which are held by separate and distinct titles, and each is a freehold estate of inheritance subject to the laws of descent, devise, and conveyance.'" *Wheelock v. Heath*, 201 Neb. 835, 841, 272 N.W.2d 768, 771 (1978) (quoting 54 Am.Jur.2d, Mines and Minerals, s. 116, p. 298). Further, "[a] grantee of the minerals underlying the land becomes the owner of them; his interest is not a mere mining privilege. The minerals thus severed become a separate corporeal hereditament. Their ownership is attended with all the attributes and incidents peculiar to ownership of land, and they may be embraced in the terms 'land' or 'real property' in a subsequent conveyance.'" *Id.* Therefore, mineral interests differ from the right to use ground water both because they can be severed from the surface estate and

because an interest can be held in the minerals themselves, rather than simply a right to use the minerals.

At common law, the use of ground water is tied to the land and cannot be separated, as it could be in states that consider ground water to be owned by the landowner as real property. Therefore, under Nebraska's common law, an NRD could not separate water rights from the ownership of the land for projects such as N-CORPE.

Legislative Abrogation of Common Law

The Nebraska Legislature may alter the common law through statute. The Supreme Court has specifically noted the primacy of the Legislature in making policy decisions regarding the use of ground water. *See, e.g., In re Metropolitan Utilities Dist. of Omaha*, 179 Neb. 783, 801, 140 N.W.2d 626, 637 (1966) (Describing its limited decision as "thus preserving the right of the Legislature, unimpaired, to determine the policy of the state as to underground waters and the rights of persons in their use."); *Estermann v. Bose*, 296 Neb. 228, 258, 892 N.W.2d 857, 877 (2017) ("We have previously stated that Nebraska's common law does not allow water to be transferred off overlying land. However, we have made it clear that the Legislature may provide exceptions to this common-law rule." (internal citations omitted)).

Such alterations to the common law can be through authorizing actions not previously recognized by the common law or by abrogating the common law through specific statutory language. There are at least two examples where the Legislature has authorized actions not recognized by the common law regarding land ownership and the ability to use ground water for specific purposes on that land. The first is the Municipal and Rural Domestic Ground Water Transfers Permit Act ("Municipal Transfers Act"), Neb. Rev. Stat. § 46-638 *et seq.* (2021), which allows a public water supplier to apply to the Department of Natural Resources ("DNR") for a permit to pump ground water to be transported off the overlying land to serve other areas beyond that owned by the applicant. The applicant must show the amount of water requested, maps of all water wells, and any other necessary information. Neb. Rev. Stat. § 46-639 (2021). After public notice, DNR evaluates the application to determine if "the withdrawal and transportation of ground water requested by the applicant are reasonable, are not contrary to the conservation and beneficial use of ground water, and are not otherwise detrimental to the public welfare." Neb. Rev. Stat. § 46-642 (2021).

The second is the Industrial Ground Water Regulatory Act ("Industrial Transfers Act"), Neb. Rev. Stat. § 46-675 *et seq.* (2021), which allows industrial users to apply to DNR for a permit to pump and transfer ground water. Again, DNR must evaluate the application for a number of factors, including "[p]ossible adverse effects on existing surface or ground water users," "[t]he effect of the withdrawal and any transfer of ground water on surface or ground water supplies needed to meet reasonable anticipated domestic and agricultural demands in the area of the proposed ground water withdrawal," "[t]he availability of alternative sources of surface or ground water reasonably accessible to the applicant in or near the region of the proposed withdrawal or use," and "[t]he effects on interstate compacts or decrees and the fulfillment of the provisions of any other state

contract or agreement." Neb. Rev. Stat. § 46-683 (2021). Although these Acts authorize actions not previously authorized by the common law, they do not abrogate the nature of the use right under common law.

Statutes that purport to alter or abrogate the common law, as opposed to statutory authorizations not previously recognized by the common law, are strictly construed and a statute will not be interpreted to remove a common law right unless the plain words of the statute require such an interpretation. *See In re 2007 Administration of Appropriations of the Waters of the Niobrara River*, 283 Neb. 629, 653, 820 N.W.2d 44, 64 (2012) ["*Niobrara River*"] ("Furthermore, statutes which effect a change in the common law or take away a common-law right should be strictly construed, and a construction which restricts or removes a common-law right should not be adopted unless the plain words of the statute compel it."). For example, in *Niobrara River*, the Supreme Court determined that a statute regarding cancellation of water rights did not abrogate common law methods of cancellation because the plain language of the statute did not compel such a conclusion:

> The plain and unambiguous language of §§ 46-229 to 46-229.05 merely provides the procedure by which the Department must abide when terminating an owner's or a successor's appropriation right. This language does not explicitly address the common-law theories of abandonment and nonuse. Absent express statutory provision, we must construe § 46-229 in a manner which does not restrict or remove the common-law method of cancellation. As such, we determine that § 46-229 is a procedural provision that does not abrogate the common law.

Id. The Court has further made clear that "the common law will be abrogated no further than expressly declared or than is required from the clear import of the language employed by the statute." *Dykes v. Scotts Bluff County Agr. Society, Inc.*, 260 Neb. 375, 383, 617 N.W.2d 817, 823 (2000).

The force of these decisions is clear: if the Legislature chooses to alter or abrogate the common law, it must do so clearly and explicitly by declaring with specificity what aspects of the common law the statute intends to abrogate. It is within this framework that we analyze LB396.

ANALYSIS

Having concluded that the Legislature has the power to authorize actions not previously recognized by the common law or that abrogate the common law, we turn now to the language of LB 396. We presume that your intent was to abrogate the common law connection between land ownership and the ability to use ground water to "reserve and retain" the right for the NRDs exclusively, meaning that the new owners of the augmentation project property would not reserve the right to use ground water themselves. LB396 includes three provisions. We discuss each of them in turn.

LB 396 first provides express authority to NRDs to "develop augmentation projects as described in subdivision (3)(e) of section 46-715 and to acquire real property for such

augmentation purposes." LB 396, at ¶ 1. This would explicitly codify the Nebraska Supreme Court's ruling in *Estermann v. Bose* that the NRDs already have this power under various Nebraska statutes. *See Estermann*, 296 Neb. 228, 892 N.W.2d 857. This section does not purport to modify the common law.

Next, LB 396 provides that "[a]fter an augmentation project has been developed, the natural resources district or districts owning such project shall sell the overlying surface interest but may retain and reserve the right to ground water located beneath such land." *Id.* at ¶ 2. We conclude that this provision does not expressly abrogate the common law with regard to whether the new owners of the augmentation property could use ground water. Rather than include express language to that end, the provision operates mostly by implication—it introduces a (new) concept in the ground water context, the "retain and reserve" language from law relating to mineral rights. This may authorize an action not previously authorized by common law, but probably does not abrogate the common law connection between land ownership and ground water use for the new owners of the augmentation property.

The final section of LB 396 states that "[t]he owner or owners of the augmentation project are entitled to the reasonable and beneficial use of ground water to which such right was retained and reserved pursuant to subsection (2) of this section. The quantity of such ground water available to the augmentation project shall be the same as if the overlying surface interest had been retained by the owner or owners of the augmentation project." *Id.* at ¶ 3.

This section, like the others, does not purport to directly abrogate the common law connection between land ownership and ground water use for the new owners of the augmentation property. Instead, this section attempts to define the nature of the right held by the NRD after sale of augmentation property. While such a reservation is common in the realm of mineral interests, this would appear to be unique in Nebraska water law and it is not defined. *See generally* Neb. Rev. Stat. § 57-229 (2021) (referring to "rights conveyed or reserved" in the context of mineral rights). We conclude that this section, like the others, is not sufficiently explicit and clear in its attempt to abrogate the common law connection between land ownership and ground water use for new owners of the augmentation property.

First, the section lacks any explicit language abrogating the common law rights; if it purports to do so at all, it does so only by implication. And even this implication is unclear, as there is a lack of direction for how this term could be used in the ground water context. Because ground water has never been classified or treated as a mineral interest in Nebraska, its use here in the ground water context does not define the scope of an NRD's right to continue withdrawing ground water for augmentation purposes after a forced sale is completed and therefore cannot form an explicit and sufficient basis on which a statutory abrogation of the common law could rest.

Second, even assuming that there existed an explicit authorization to abrogate the common law in this way, the current language presents multiple potential conflicting interpretations regarding this phrase. For example, as indicated above, this language

could be interpreted such that the NRD "retains and reserves" the ability to use ground water as if it still owned the overlying land, but that the new owners of such land would still be able to use ground water consistent with the common law right—particularly because the language used is probably not sufficient to sever the connection between land ownership and ground water use for the new owners of the augmentation property. At the same time, it is possible that the language "retain and reserve" is meant to sever the common law right to use ground water associated with the overlying land and allocate such ground water rights to the NRD exclusively. These are conflicting interpretations which create an inherent ambiguity.

Third, the use of the phrase in this paragraph is inconsistent with the use of the phrase in the previous paragraph. Paragraph 2 mentions "the right to the ground water beneath such land." That language would tend to indicate an interest in the water itself, as a landowner would have in a state that follows the English Rule, as opposed to the use of the water. This would contradict the usufructuary, or use, nature of a ground water right. At the same time, Paragraph 3 refers to "the reasonable and beneficial use of ground water," which would appear to refer to the normal right to use under the modified correlative rights doctrine, rather than an interest in the actual water. And paragraph 3 also refers to "the quantity of ground water available," which seems to refer to an interest in a specific amount of water rather than a use right limited by the effect of that use on other ground water users. This conflict—between a modification of the right to use the water and an attempted creation of an ownership interest in the water—creates a structural ambiguity and conflict in the law that is inconsistent with the mandate that the Legislature act "clearly and expressly" in order to abrogate the common law.

We conclude from these factors, considered independently and in combination, that LB 396, if strictly construed, does not explicitly abrogate the common law modified correlative rights doctrine. To the extent it purports to authorize an action not previously recognized by the common law, the bill contains no details with regard to how such authorization would operate.

We note that there are additional follow-on questions that are not addressed in LB396 and therefore outside the scope of this analysis. For instance:

- If both the landowner and the NRDs have equal entitlement to use ground water from the same parcel, how would the correlative rights doctrine be applied?
- Would the augmentation project be prohibited or limited from the use of ground water, or owe damages, due to its effect on the use by the landowner?
- If the right to use ground water is severed from the land and only the NRDs retain the right to use, what happens if the NRD abandons the augmentation project?
- Is that right then held by the NRD for another purpose? Can it be transferred further? Does it revert to the purchasers of the overlying acres?

- If LB 396 legally severs the ability to use ground water on those acres, by what mechanism could that right be granted again?

Because you specifically mentioned N-CORPE in your request, we would also mention that there is no language in the bill that indicates whether LB 396 is intended to be retroactive in effect. Thus, it is unclear whether LB 396 would apply to N-CORPE. We have not addressed the constitutionality of retroactive application of LB396.

CONCLUSION

At common law, the ability to use ground water has always been tied to ownership of the overlying land and so would not allow N-CORPE or other similarly situated augmentation projects to sell the land and retain the ability to pump ground water as if they still owned the land. The Legislature has the authority to abrogate the common law by statute but must do so with clear and express language. We conclude that the language of LB 396 is not sufficiently clear and express so as to abrogate the common law.

Sincerely,

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Approved by:

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pc. Brandon Metzler
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