

Nebraska's Groundwater Law Turns 90

by Hannes D. Zetzsche and Vanessa A. Silke

Olson v. City of Wahoo,¹ Nebraska's foundational groundwater-law case, turns 90 this year. In 1933, Olson itself acknowledged that Nebraska lacked a rule of groundwater allocation: "the law in relation to surface water is not applicable to subterranean waters," and "it is admitted that this court had not yet adopted [a] view" of groundwater rights.² The court, in *Olson*, thus crafted a unique rule of modified-correlative groundwater rights.

At 90, the *Olson* rule remains both unique and largely intact. This article examines the decision, its rule, and some legacy issues that have grown out of it.

Olson v. City of Wahoo

Olson involved a dispute between two neighbors who relied on groundwater. George Olson owned a gravel pit and with-

drew groundwater to wash his gravel and separate it into grades for sale. Nearby, the City of Wahoo ("City") pumped groundwater to supply its municipal needs. When the City installed a much larger pump that could pump 900 gallons per minute, Olson sued. He claimed that the City's new pump was depressing the water table beneath his gravel pit, limiting the gravel mine's effectiveness and diminishing the value of his property.

Both parties conceded that Nebraska lacked a rule allocating groundwater rights. Surface-water quantity was (and remains) governed by a combination of the riparian and prior-appropriation doctrines.³ The court had also considered groundwater quality in a pair of nuisance-type actions.⁴ Groundwater quantity, however, remained undefined. Partly due to that lack of a governing groundwater-use limit, the trial court dismissed Olson's action.

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On appeal, Olson argued that the Nebraska Supreme Court should adopt “the American rule” of groundwater use.⁵ The American rule, also known as the rule of reasonable use, limits a landowner’s groundwater use to the amount he or she can reasonably use on overlying land.⁶ The landowner may only be held liable by another landowner if he or she unreasonably affects the other landowner’s reasonable groundwater use.⁷ Under this theory, Olson asked for an injunction “restraining the [City] from taking said water in such unreasonable quantities.”⁸

The City conversely advocated for “the English rule.”⁹ Also known as the rule of capture, this rule confers a quasi-property right in groundwater to the owner of land overlying the groundwater’s source.¹⁰ This rule, according to the City, would protect it from any liability for exercising its right to use the underlying groundwater, “regardless of the fact that such use cuts off the flow of such waters to adjoining land”¹¹

The Olson Rule

Neither party’s proposed rule ultimately prevailed. To be sure, the court purported to adopt the American rule. That rule, according to the court, was “supported by the better reasoning.”¹² Then, after surveying the various experts’ testimony in the record, the court affirmed the trial court’s dismissal of Olson’s claim because “it [was] quite improbable that the pumping done by the [C]ity, 3,400 feet away, was the proximate cause of plaintiffs’ damage.”¹³

Despite purporting to adopt the American rule, however, *Olson* deviated from a pure statement of that rule. The court instead held that:

1. Each landowner is entitled to the “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
2. “[I]f the natural underground supply is insufficient for all owners, each is entitled to a reasonable proportion of the whole.”¹⁴

These dual prongs made Nebraska an outlier. Prong one essentially restated the American rule. But during times of water shortage, prong two invoked what is known as the correlative-rights rule. During a groundwater shortage, overlying landowners must proportionally share the groundwater source based on the quantity of each landowner’s overlying land.¹⁵ While prong two was unnecessary to the court’s decision and consequently dicta, it distinguished the *Olson* rule. A plurality of states have applied some version of the American rule, and two have adopted the correlative-rights rule.¹⁶ But, beginning in *Olson*, only Nebraska has combined those rules in this way.

Nebraska courts, over the past 90 years, have repeatedly upheld and reaffirmed *Olson*.¹⁷ In substantially similar language, the Nebraska Legislature has also codified the modified-correlative-rights rule at Neb. Rev. Stat. § 46-702:

. . . 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

Modernizing *Olson* for Changing Conditions

What has best enabled *Olson* to endure is its prescience. Just four years after *Olson*, a Nebraskan invented the high-speed centrifugal pump.¹⁸ It enabled agricultural producers to tap into groundwater, including the Ogallala Aquifer, and reliably irrigate crops throughout the state. Beginning in the 1940s, centrifugal pumps began routinely withdrawing more than 800 gallons of groundwater per minute.¹⁹ As one historian wrote, the centrifugal pump turned much of the arid Midwest into a rich and fertile groundwater-irrigated cropland.²⁰

In the decades since *Olson*, mass pumping has raised concerns about environmental quality, interstate comity, and integrated management of groundwater and surface water.²¹ *Olson*

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could not have addressed these issues, because the issues were neither in the public conscience in the same way nor before the court. But those factors have spurred at least three different lawmaking bodies to adapt the reasoning of *Olson* to meet changing conditions.

First are Nebraska's courts. After devising the *Olson* rule, they have applied it in various other contexts. Courts, for instance have, held that a groundwater user may be subject to interference claims by a hydrologically connected surface-water user.²² Courts have also held that *Olson* does not generally entitle a landowner to sever its groundwater right from its ownership of overlying land.²³ And, a line of opinions have held that competing state policies, such as compact compliance, may override a landowner's right to pump underlying groundwater.²⁴

Second, the Nebraska Legislature has also adapted the *Olson* rule. In response to concerns about drought and groundwater mining, for instance, the Legislature adopted regulations in 1957 and 1963 that for the first time defined groundwater,²⁵ required the registration of irrigation wells,²⁶ prescribed minimum well-spacing distances,²⁷ and designated preferences among classes of groundwater users.²⁸ In 1975, the Legislature supplemented those provisions by enacting the Ground Water Management and Protection Act, which provided an even more robust regulatory framework for regulating issues of groundwater quality and quantity.²⁹ Subsequent legislative sessions have yielded additional tweaks.

Third, in addition to directly adapting *Olson*, the Legislature has also delegated significant authority for local natural resources districts ("NRDs") to regulate groundwater uses. NRDs, among other powers, may "[a]dopt and promulgate rules and regulations" governing the use of groundwater within their districts.³⁰ Today, almost all of the state's 23 NRDs have exercised that authority to prohibit new groundwater uses locally.³¹ To control impacts to local aquifers and hydrologically connected surface water, existing users typically must certify their irrigated acres.³² Whereas *Olson* would permit any landowner to irrigate either a reasonable or proportionate share of underlying groundwater, NRDs regulations add a layer of controls that limits the pool of potential groundwater users. In some areas of the state, these regulations have spurred the early stages of a market for the sale and transfer of certified irrigated acres.³³

As these adaptation measures demonstrate, *Olson* does not itself answer the many questions that have arisen about groundwater rights over the past 90 years. Still, even in addressing the issues of today, lawmakers have kept the *Olson* rule and looked for answers with which to pair it. The courts, Nebraska Legislature, and NRDs have all consistently paid homage to *Olson*. As one opinion wrote, "[w]e are committed to the [*Olson*] rule."³⁴ So, 90-year old *Olson*, Nebraska's foundational groundwater case, remains alive and well. 



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Endnotes

- ¹ 124 Neb. 802, 248 N.W. 304 (1933).
- ² *Id.* at 802, 248 N.W. at 307, 308.
- ³ See *Clark v. Cambridge & A. Irr. & Imp. Co.*, 45 Neb. 798, 64 N.W. 239, 240 (1895); accord *Hill v. State*, 296 Neb. 10, 18-19, 894 N.W.2d 208, 215 (2017).
- ⁴ See *Lowe v. Prospect Hill Cemetery Ass'n*, 58 Neb. 94, 78 N.W. 488 (1899); *Beatrice Gas Co. v. Thomas*, 41 Neb. 662, 59 N.W. 925 (1894).
- ⁵ *Olson*, 124 Neb. at 802, 248 N.W. at 307.
- ⁶ See *Bassett v. Salisbury Manufacturing Co.*, 43 N.H. 569 (1862); accord Restatement (Second) of Torts § 858 (Am. Law. Inst. 1979).
- ⁷ *E.g. Bassett*, 43 N.H. at 439-440.
- ⁸ *Olson*, 124 Neb. at 802, 248 N.W. at 305.
- ⁹ *Olson*, 124 Neb. at 802, 248 N.W. at 307.
- ¹⁰ See *Acton v. Blundell*, 152 Eng. Rep. 1223 (Ex. Ch. 1843); see generally *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 823-24 (Tex. 2012).
- ¹¹ *Olson*, 124 Neb. at 802, 248 N.W. at 308; see also *e.g. Drinkwine v. State*, 129 Vt. 152, 274 A.2d 485 (1970); *Menne v. City of Fond Du Lac*, 273 Wis. 341, 77 N.W.2d 703 (1956); *Rose v. Socony-Vacuum Corp.*, 54 R.I. 411, 173 A. 627 (1934).
- ¹² *Olson*, 124 Neb. at 802, 248 N.W. at 308.
- ¹³ *Olson*, 124 Neb. at 802, 248 N.W. at 308.
- ¹⁴ *Id.* at 802, 248 N.W. at 308.
- ¹⁵ See *Katz v. Walkinsbaw*, 141 Cal. 116, 74 P. 766 (1903); accord 82 Okla. Stat. § 1020.9(B) (1972).
- ¹⁶ See *Spear T Ranch, Inc. v. Knaub*, 269 Neb. 177, 186-192, 691 N.W.2d 116, 127-131 (2005) (collecting cases).
- ¹⁷ See *e.g. Springer v. Kubns*, 6 Neb. App. 115, 121, 571 N.W.2d 323, 327 (1997).
- ¹⁸ See generally Steve Schafer, Technology, in *Flat Water: A History of Nebraska and its Water* 87 (Charles A. Flowerday ed., 1993); J. David Aiken & Raymond J. Supalla, Ground Water Mining and Western Water Rights Law: The Nebraska Experience, 24 S.D. L. Rev. 607, 610 n.18 (1979).
- ¹⁹ See Marc Reisner, *Cadillac Desert: The American West and Its Disappearing Water* 453 (2d ed. 1993).
- ²⁰ *Id.* at 10-11.
- ²¹ See *e.g. Aaron R. Young et al., Nebraska Statewide Groundwater-Level Monitoring Report 2022*, University of Nebraska-Lincoln School of Natural Resources, Conservation and Survey Division, available at https://snr.unl.edu/csd-esic/GWMapArchives/GWReports/GW_Level_Report_2022.pdf (documenting “modest groundwater-level declines ... throughout Nebraska over the past 10 years”); see generally Mira Rojanasakul, Christopher Flavelle, Blacki Migliozi and Eli Murray, *America Is Using Up Its Groundwater Like There's No Tomorrow*, The New York Times (Aug. 28, 2023), available at <https://www.nytimes.com/interactive/2023/08/28/climate/groundwater-drying-climate-change.html>.
- ²² See *e.g. Spear T Ranch*, 269 Neb. at 183, 691 N.W.2d at 125.
- ²³ See *Upper Republican Nat. Res. Dist. v. Dundy Cnty. Bd. of Equalization*, 300 Neb. 256, 285, 912 N.W.2d 796, 814 (2018); *Springer*, 6 Neb. App. at 127, 571 N.W.2d at 330; *Sorensen v. Lower Niobrara Nat. Res. Dist.*, 221 Neb. 180, 191, 376 N.W.2d 539, 548 (1985).
- ²⁴ *Cappel v. State Dep't of Nat. Res.*, 298 Neb. 445, 456, 905 N.W.2d 38, 48 (2017); *Hill*, 296 Neb. at 23, 894 N.W.2d at 217; but see *Prather v. Eisenmann*, 200 Neb. 1, 10, 261 N.W.2d 766, 771 (1978) (finding a taking of constitutionally protected groundwater rights).
- ²⁵ Neb. Rev. Stat. § 46-635 (Reissue 1963) (“Ground water is that water which occurs or moves, seeps, filters, or percolates through the ground under the surface of the land.”).
- ²⁶ Neb. Rev. Stat. § 46-602 (Reissue 2019).
- ²⁷ Neb. Rev. Stat. §§ 46-608 to -611.
- ²⁸ Neb. Rev. Stat. § 46-613.
- ²⁹ Neb. Rev. Stat. § 46-701 et seq.
- ³⁰ Neb. Rev. Stat. § 46-707(1)(a).
- ³¹ See *NRD Groundwater Regulations Across Nebraska*, NRD.net, available at https://www.nrdnet.org/sites/default/files/state_map_water_management_status_14feb2014.pdf.
- ³² See *e.g. Rules and Regulations for Management and Protection of Land and Water Resources § 10.2(C)*, Tri-Basin Natural Resources District, available at <https://www.tribasinrdr.org/sites/default/files/Rules%20%26%20Regs/GMA%20Rules%20Revision%20TBNRDFinal0921.pdf>.
- ³³ *E.g. id.* § 10.5 (permitting the transfer of certified irrigated acres).
- ³⁴ *In re Applications Nos. 2151, 2351, 2354, 2355, 2358, 2374 of Cent. Nebraska Pub. Power & Irrigation Dist.*, 131 Neb. 356, 268 N.W. 334, 338 (1936), overruled on other grounds by *Wasserburger v. Coffee*, 180 Neb. 149, 141 N.W.2d 738 (1966).



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