July 21, 2003

To: Subcommittee on Surface Water Transfers
From: Ann Bleed
Re: Remaining Items for Consideration on August 4, 2003 1:30 p.m.conference call

The following changes in the draft legislation have been suggested for your consideration. I have gone ahead and drafted potential language in the document just to speed up the discussion (underlined and in red). I hope we can discuss these items and resolve them at our next conference call.

Section 1. Sections 1 to 13 of this act shall be known and may be cited as the Water Rights Leasing Act:

Section 2. For purposes of the Surface Water Leasing Act:

(1) Department means the Department of Natural Resources;
(2) Director means the Director of Natural Resources; and
(3) Surface water appropriations means _____-Jim Cook - do we need this definition? Do we need other definitions?

Section 3. Surface water appropriations may be leased between persons, entities, or political subdivisions subject to the conditions set out in the Water Rights Leasing Act.

Section 4. An appropriator seeking to lease a water right or a portion of a water right to any other person, entity, or political subdivision shall file an application with the department on a form approved by the department. The application shall contain the name of the lessor, the name and address of the proposed lessee, the permit number and priority date of the water right proposed to be leased, the name and address of the owner of and the legal description of the land to which the water right is attached if appropriate, the use, the legal description of the land to which the water right is to be transferred if appropriate, the stream segment to which the water right is to be transferred, the current use, the proposed use, and the proposed term of the lease.. The director can also require the applicant to provide a mitigation plan and or economic, social and environmental analyses with the application and such other information as the director deems necessary, including information on historical consumption as needed for Section 7 below.

Section 5. Upon receipt of an application filed under section 4 of this act, the director shall cause a notice of such application to be published at the applicant's expense at least

once a week for three weeks in at least one newspaper of general circulation in the county in which the water is currently beneficially used and in a newspaper of general circulation in Nebraska. Such notice shall contain a description of the water right, the number assigned such permit in the records of the department, the priority date, a description of the land to which such water right is proposed to be transferred, if appropriate, the term of the lease and any other relevant information. The notice shall state that any interested person may in writing object to and request a hearing on the application at any time prior to the expiration of two weeks after the date of final publication.

Section 6. The department may hold a hearing on an application filed under section 4 of this act on its own motion and shall hold a hearing if requested by any interested person. Any hearing held pursuant to this section shall be conducted in accordance with sections 46-209 and 46-210. The County in any area from which water is proposed to be leased shall have standing to request a hearing or to express its concerns at a hearing, regarding the potential economic impacts of the lease. If the lease pertains to land irrigated under a water right held by an irrigation district, the lease shall be subject to approval by the irrigation district board. ***[Dave Cookson will look for language to allow counties to have the proper input.]***

Section 7. The director shall approve an application filed under section 4 of this act if he or she finds:

(1) That the application is complete;
(2) That the lessee's proposed use of the water is a beneficial use;
(3) That exercise of the water right pursuant to the lease will not diminish the supply of water available for or adversely affect any other holders of water rights;
(4) That the lease is in the public interest. In assessing the public interest, the director's considerations shall include, but not be limited to, (a) the economic, social, and environmental impact of the lease (b) whether other sources of water are available to the proposed lessee;
(5) That the duration of the lease is not less than one(?) year and does not exceed 30 years except as provided in section 10 of this act;

Comment by Kraus - Section 7(5). Should there also be a minimum duration (i.e. one year). It could be an administrative nightmare for the DNR to deal with extremely short-term leases, etc (let's keep in mind, for example, that DNR will need to have a flexible way to modify PWAP every time a lease results in water rights being transferred to a new location).

(6) That the volume of water to be transferred by the lease shall not be greater than the amount of water consumed in accordance with the historical beneficial use allowed under the permit. The applicant is required to provide evidence of previous consumptive use of the water to the director.

(7) If the water being leased is from an irrigation use to another irrigation use, the transfer may be allowed on an acre per acre basis, as long as the leased water is not applied to a greater number of acres than was irrigated under the existing water right .

Comment by Kraus Section 7(7) Add to the end of the last sentence "and is exempt from the Section 7(6) requirements as long as it is within the same irrigation district".

(8) If the lease is from irrigation to irrigation within an irrigation district, the leases shall be subject to the same conditions as transfers under 46-2120-2129.

(9) That the lease will not put the state out of compliance with applicable state and federal laws and with any applicable interstate water compact, decree, any other formal state contract or agreement pertaining to surface water use or supplies.

(10) That the lease addresses the reversion of the water right after five years of nonuse.

Comment by Kraus Section 7(10). What does this mean? Shouldn't the statutes address what happens as result of non-use, rather than having it set by lease?

Suggest:

7(10) The use of leased water shall be monitored by the DNR on an annual basis

Comment by Kraus 7(11) After five years of non-use, the lease shall be cancelled and the use of the water shall transfer back to the original appropriator.

3) We support a five year period for transferring a water right to a new irrigator within the same irrigation district. However we do not support a lease of water that has not been put to use for irrigation within the last five years. The water that is "held in limbo" is being witheld from the next junior appropriator for a period of time and should not be leased away.

Section 8. A water right leased pursuant to the Water Rights leasing Act shall not be subject to cancellation as long as the lessor or the lessee makes beneficial use of the water in accordance with the provisions of 46-229. The provisions of subsection (3) of section 46-229.04 shall apply to excuse nonuse of a water right leased pursuant to the act.

Section 9. Any water leased or any other water applied to land from which water has been leased shall be subject to the rules of any integrated surface and ground water management plan for the basin from which the water was and in which the leased water is used.

Section 10~~8~~. The director shall independently review each application filed under section four of this act to determine whether the public-interest requirement of section 7 of this act is met. The director's duty to independently analyze the public interest relative to each application is not altered by the presence of an adverse party in a contested-case setting. ***[Note: This section is in LB 671 and LB 672 but the subcommittee is not sure that it is necessary or helpful here. Jim Cook is looking into the need for this section.]***

Section 11~~9~~. Any lease under the Water Rights Leasing Act is contingent upon the approval of the director, and the director may impose conditions upon such approval to ensure consistency with section 7 of this act. The leased water right shall retain its original priority date and shall revert to the lessor or his or her successor in interest for the original use upon expiration of the lease.

Section 12~~0~~. At least six months prior to the end of the lease term of a leased water right, or at any time after the mid-point of the term of the lease, the irrigation district or the lessor of the water right may apply for an extension of the lease and the director may approve the application upon review and determination that the lease remains consistent with section 7 of this act. For purposes of sections 4 to 8 of this act, such request for extension shall be treated the same as an application for approval of a new lease. Any extension may not exceed thirty years in duration from the time the extension is granted.

Comment by Kraus Section 10. Application for extension should be made prior to the conclusion of the current lease. Perhaps prior to six months before end of current lease, to allow time for hearings, etc., before lease runs out? Also, the notice on an extension should be clear on the duration. We may not want to set up the opportunity for someone getting a one year lease just to avoid any serious opposition, and then add a thirty-year extension.

Section 13~~1~~. Neither the lease of a water right pursuant to the Water Rights Leasing Act nor any resulting land use changes on the land from which the water right is transferred shall result, solely by reason of such lease or land use change, in a reduced valuation or change in classification of the real property from which such water right was transferred for purposes of assessment under sections 77-1343 to 77-1365. ***[Note: The subcommittee has questions of whether this section is constitutional. If not, we wonder if there are alternative provisions that will enable a public entity to maintain its tax base.)***

Section 14~~2~~. Notices of leases from irrigated land shall be provided by DNR on an annual basis to the county assessors office in the county from which the irrigation water is leased and to the county where the leased water is to be used for irrigation. *[Need to contact the county assessors and bankers to get their input on this provision.].*

Section 15~~3~~. The director shall adopt and promulgate rules and regulations to carry out the Water Rights Leasing Act.

[Note: the following sections are changes that would need to be made to other related statutes. Jim Cook will review this section and add any other changes that would also need to be made to related statutes.]

Section 164. Section 46-122, Reissue Revised Statutes of Nebraska is amended to read:

46-122. It is hereby expressly provided that all water distributed for irrigation purposes shall attach to and follow the tract of land to which it is applied unless a change of location has been approved by the board of directors pursuant to sections 46-2,127 to 46-2,129 or by the Department of Natural Resources pursuant to the Water Rights Leasing Act, section 46-294, or sections 46-2,122 to 46-2,126.

The board of directors may by the adoption of appropriate bylaws provide for the suspension of water delivery to any land in such district upon which the irrigation taxes levied and assessed thereon ~~shall~~ remain due and unpaid for two years. It shall be the duty of the directors to make all necessary arrangements for right-of-way for laterals from the main canal to each tract of land subject to assessment, and when necessary the board shall exercise its right of eminent domain to procure right-of-way for the laterals and shall make such rules in regard to the payment for such right-of-way as may be just and equitable.

Section 15. Original sections 46-122 and 46-229, Reissue Revised Statues of Nebraska are repealed.

Suggested changes relate to the adjudication statutes.

1) Change the period of nonuse from three years to five years.
2) Add: If a portion of the water right is cancelled through an adjudication process, the appropriator may provide information describing the amount of water required to maintain the remaining beneficial use and the director may allow that diversion rate to be maintained at a rate up to but no greater than the original permitted diversion rate, for a reduced number of acres being irrigated, not exceed the amount of water that can be beneficially used on the land being irrigated under the permit. If the water right is subsequently leased or transferred, only the consumptive use or if the lease is from agricultural uses to agricultural uses, only the actual number of acres being irrigated can be transferred.

Comment by Kraus Page 4, suggested changes to adjudication statutes.

May need some limitations (i.e. don't know that we want a canal continuing to divert 100 cfs to cover losses, even if is only serving 100 acres). One cfs per 70 acres establishes a beneficial use standard. If there is to be a new definition, then the

process should establish standards. Why should they continue to increase their per acre diversion rate ratio because customers are signing off without implementing efficiency standards. Don's concern is echoed by the concern of the Executive Committee that we need to encourage water conservation. On the other side of the coin is the concern, also expressed in the Executive Committee meeting that we have to be careful to determine whether the water is conserved for the individual or the system. If the return flows from the diversion are essential for a downstream water right, we may want to see these return flows continue. Perhaps we should state the diversion should be the minimum amount needed for good husbandry unless the continuation of the existing return flows are necessary to maintain the water supply of a downstream appropriator, in which case an incidental underground permit may be granted.

3) If the water right held by an irrigation district is adjudicated and water rights would be cancelled under current adjudication statutes because of nonuse by the land owner, the water right shall revert to the irrigation district. The district shall have up to five years to reassign the water right through processes in **Section ???** and put it - to another beneficial use. During the up to five years that the water right is in limbo, the water right cannot be used until another beneficial use has been assigned through leasing, transfers etc.

Add to 46-2,120 TRANSFER OF APPROPRIATIONS to allow an individual to do the equivalent of a map transfer under certain conditions.

Each individual holding a surface water right is responsible for maintaining accurate records of the current land owner to which the water right pertains, the owner's current address and phone number, the current address and phone number of the operator actually using the water right and an accurate map showing the acres irrigated under the right in accordance with 46-233(2)? If the existing irrigated acres map on filed with the Department of Natural resources is incorrect, the owner may submit an ammended map. The director shall accept the map as the current water rights map if (1) the ammended map accurately portrays the number of acres currently being irrigated and the new map (2) does not show a greater number of acres being irrigated than were shown as being irrigated by the map previously on file with the department; (3) the newly irrigated areas shown on the ammended map are contiguous with the irrigated area on the map on file with the department and (4) all the land irrigated under the permit is still owned by the owners of record on the map filed with the department, and (5) the change in location does not adversely impact another water right.

The following is from a memo on spreading -by Jim Cook

Issue: The Nebraska statutes require DNR to periodically determine if water rights have been used in the last three years and to adjudicate (cancel) those rights or

portions thereof that have not been used within that time period or, if certain exceptions apply, have not been used within the last ten years. In the course of a typical adjudication process, it is fairly common to find that water has been used but that some or all of that use has been on land other than the land identified on the permit. Sometimes, the discrepancies are relatively minor, involving a few acres in an adjacent tract and no increase in actual acres irrigated. At other times more significant discrepancies exist, such as all use being made on a different field than the one identified in the permit. Under current statutes, any application of the water to lands other than those listed on the water right is contrary to that right. The only way to relocate the use of the water to the other land is to request and obtain approval of a water right transfer pursuant to Sections 46-290 through 46-294 of the statutes. The dilemma presented is that if use on the listed land has not occurred within the previous three, or as applicable, ten years, the water right has technically been lost already and there is nothing left to transfer. There is no opportunity to determine that if a timely request for a transfer under Sections 46-290 through 46-294 had been made, it would have been consistent with the statutory criteria and would have been granted. Cancellation of the right under those circumstances seems unduly harsh.

Potential Solution: The adjudication statutes could be amended to allow transfers for irrigation purposes to be approved through the adjudication process and without using the more cumbersome procedures found in Sections 46-290 through 46-294 if the water has actually been used within the appropriate time period and if all such use is consistent with the following:

- ***All use is either on the quarter section to which the water right applies or is on an adjacent quarter section;***
- ***All lands involved are in the same ownership;***
- ***The point of diversion remains unchanged;***
- ***There is no increase in amount of water diverted or the rate of diversion;***
- ***The number of acres irrigated do not exceed those under the applicable permit, provided that increases in acreage of up to 5% could be approved if necessary to the efficiency of the irrigation system; and***
- ***There is no reduction in the quantity of return flows reaching the stream and no other appropriator is harmed because of any change in the location where the return flows reach the stream.***

If all the above criteria were satisfied, the outcome of the adjudication process would be modification of the permit and preparation of a new map to reflect the lands actually irrigated.

The above language or something similar could be added to 46-290 as indicated below:

Natural Resources shall approve an application filed pursuant to section 46-290 if:

(a) The requested change of location is within the same river basin, will not adversely affect any other water appropriator, and will not significantly

adversely affect any riparian water user who files an objection in writing prior to the hearing, except as provided for in Section 46-294 (2);

(b) The requested change will use water from the same source of supply as the current use;

~~The change of location will not diminish the supply of water otherwise available;~~ The subcommittee has also asked Jim Cook to look into eliminating section 1c pending more information on why it was put in the statute in the first place.

~~(c)~~

~~(d)~~ (c) The water will be applied to a use in the same preference category as the current use as provided in section 46-204; and

~~(e)~~ (d) The requested change is in the public interest.

The applicant has the burden of proving that the change of location will comply with subdivisions (a) through ~~(e)~~ (d) of this subsection, except that the burden is on the riparian user to demonstrate his or her riparian status and to demonstrate a significant adverse effect on his or her use in order to prevent approval of an application.

(2) In approving an application, the director may impose any reasonable conditions deemed necessary to protect the public interest. An approved change of location shall retain the same priority date as that of the original water rights. In approving an application, the director may (a) authorize the overlying of water appropriations on the same lands as long as the limits provided in section 46-231 are not exceeded or (b) authorize a greater number of acres to be irrigated if the increase is needed to allow the installation of a more efficient irrigation application system. The authorization for a greater number of acres can only be granted if 1) the number of acres granted under the original permit has not already been increased in accordance with this act; 2) the amount and rate of water approved for diversion under the original appropriation is not increased; 3) all the use is either on the quarter section to which the water right applies or is on an adjancent quarter section; 4) all lands involved are in the same ownership; 5)the point of diversion remains unchanged unless a change in point of diversion is authorized by the director in accordance with Section ; 6) there is no reduction in the qunatity of return flows reaching the stream and no other appropriator is harmed because of any change in the location where the return flows reach the stream; 7) the total increase in the number of acres being irrigated does not exceed 5% of the number of acres currently being irrigated under the permit before the transfer, or a total of 10 acres, whichever is less

There is also one remaining question that the subcommittee did not address but believes needs to be discussed by both the surface and ground water subcommittees: Should we allow a transfer of use from surface water to ground water uses or vice-versa?

Fundamentally, we still believe there is something significant which should be considered. Public Power and Irrigation Districts, and perhaps other political entities with publicly elected boards of directors, should have the ability to establish "leasing programs" where the Program is approved by the director (similar to the way individual leases are handled), but after the Program is established, individual leases are handled within the Program, with reporting to DNR. Other details, such as duration of Program , limitations on quantities and types of uses, compliance monitoring requirements, etc. could be a part of the statutes, or could be an option available to the Director as he deems appropriate. Does this process have this flexibility?

Ann's Notes from the Executive Committee pertaining to Surface Water Transfers

If there is a reduction of consumptive losses with a change to a more efficient system, this could be considered. The questions is how much consumption is actually reduced.

A little bit of live and let live would be much appreciated.

Needs to some practical application. The DNR doesn't have the personnel to determine if are actually irrigating 36 as opposed to 30 acres.

May also need to talk about a ground water pumper who is spreading.

Also have people putting ground water in stream and person is diverting surface and ground water from the stream. To worry about which water is going on which acre is nonsense.

Question – if well is pumping water from the stream, then the well might diverting from the stream.

The center pivots have created a real dilemma in how surface water rights are managed. If don't remap surface water right to match the circle, then we have a problem. It is not good to have the law say one thing but have the DNR just look the way because it is impractical to administer. We need to find a practical way to address this problem.

Perhaps have the transfer within an irrigation district be made simpler, i.e. do we need to run an add in the newspaper so long as it hasn't left the district? Within an irrigation district, one can use a map transfer. As long as what is actually being irrigated is not

greater than total of permit, the district can transfer, but irrigation district must get signatures from the owners of the land from which the water is being transferred.

Key concerns:

1. Make sure law is congruent with actual practice.
2. May have different procedures in fully appropriated versus under appropriated basin.
3. May be some limited amount if can show that there is a true reduction in consumptive use due to an improvement in the efficiency of the application system.
4. Committee needs to be clear that the executive committee agrees that in a fully appropriated basin, no spreading should be allowed. Executive committee agreed there should be no spreading if the basin is fully appropriated. However, the executive committee agreed that the subcommittee should explore some of the other ideas in the basins that are not fully appropriated?
5. We need to do things to encourage irrigators to conserve water where they can.
6. Some states do address how conserved water may be utilized, but have to be careful to determine whether the water is conserved for the individual or to the system. Also some states mandate conservation and the water then goes back into the system for the next junior.
7. How do we address the problem of leasing a surface water right and then have a well drilled to irrigate that land. This may not be a problem because if you are in a fully appropriated basin, the integrated management plan will deal with the problem. Whatever we put out in the leasing bill, this issue must be clearly explained to people that they cannot automatically replace a leased water right with a well. Perhaps put in leasing bill, any other water applied to land from which water has been released is subject to the rules of the integrated management plan. The concern is that the standards of the integrated management plan has not gotten to this level. If put some language in the leasing bill, have some protection, but must be careful not to get two conflicting laws. Conceptually, can't lease your water and then replace the CU by using ground water.
8. Consumptive use is not a fixed number. May be different, based on soil type. But we do need to allow some flexibility. However, on average, as acres are increased, consumptive use is increased and return flows are decreased. The task is to encourage conservation but also need to find ways to allow some spreading, not just ignore the problem. The University could do a study to provide the necessary data so that the burden does not fall on the individual.
9. Perhaps put a rebuttable presumption in the law. Problem is when a large number of people spread.
10. Need to have a collective means of allowing new development without putting the full burden on the individual.

Committee will talk more about the need for flexibility in underappropriated basins.

Concerns about giving county standing to request a hearing. The intent of the language in Section 6 is to address the concerns about the economic impacts of the lease on the county without explicitly laying out standards in the bill. Also, in the past, the county has not had standing to protest a lease because the county does not have a water right. The concern is not to give the county the opportunity to speak but not give them the right to sue to overturn an opinion. The committee is not trying to give the county the right to sue the department. Dave Cookson will look for language to allow counties to have input.

Section 11 on land assessment and evaluation may be beyond the authority of the task force. However, the key concern about leasing is the third party impacts.

Section 10 – If the committee says the extension is x years beyond the end of the term of the lease, this would be different than other states which would only allow 15 years beyond the extension of the lease if the extension was done at the 15 year point. The subcommittee is envisioning only extending no more than 30 years at a time.

The subcommittee would assume that if the water is leased for instream flow right, what would be needed to protect the water. How would this be done?