

Notes from Surface Water Transfers Subcommittee Meeting

July 1, 2003

The subcommittee recommendation is based on previously drafted legislation LB 671 and LB 672. The two bills are identical except that LB 671 pertains to transfers by an irrigation district and LB 672 pertains to transfers by an individual. The recommended legislation combines the two bills by simply adding the words irrigation district to the sections referring to the lessor. Sections 1-13 of LB671 and LB 672 would be additions to the current statutes. Sections 14-16 pertain to existing statutes, which are amended by the underlined portions. Changes to LB 671 and LB 672 combined that are recommended by the subcommittee are shown in bold.

The precise wording of the additions were written by the mere mortals on the subcommittee and will no doubt have to be revised by a proper attorney.

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 \_\_\_\_\_ -

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. *[Question: who holds the water right, the irrigation district or the individual contractor? Do we need both the irrigation and land owners signature? The subcommittee is conflicted over whether land owner's signatures should be required to lease the water right]* **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 consumptive 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 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, 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.**

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 does not exceed **30 years** except as provided in section 11 of this act; and
- (6) **That the volume of water likely to be consumed- 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. If the water being transferred by the lease 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 original water right and as long as there is no adverse impacts on another water right because of the lease.**

- (7) 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.
- (8) The lease will not be contrary to any state decree, compact, or contract.

Section 8. The director shall independently review each application filed under section 3 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.

Section 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 10. A water right leased pursuant to the Water Rights Leasing Act shall not be subject to cancellation if the irrigation district, the lessor or the lessee makes beneficial use of the water at least once every five years or as long as the use of the water is in accordance with the plan or conditions of the original water right or any existing leases if such water rights or leases allow for expansion of uses in the future. 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 11. At the end of the lease term of a leased water right, or at a point half-way between the beginning of the lease term and the end of the lease term, 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 from the time the lease expires may not exceed thirty years in duration.

Section 12. 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.

Section 13. The director shall adopt and promulgate rules and regulations to carry out the Water Rights Leasing Act.

Section 14. 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. Section 46-229, Reissue Revised Statutes of Nebraska is amended to read:

46-229. All appropriations for water must be for some beneficial or useful purpose and, except as provided in sections 46-290 to 46-294 and 46-2,122 to 46-2,125 and section 10 of this act, when the appropriator or his or her successor in interest ceases to use it for such purpose for more than ~~three~~ five years, the right may be terminated only by the Director of Natural Resources following a hearing pursuant to sections 46-229.02 to 46-229.05.

Section 16. Original sections 46-122 and 46-229, Reissue Revised Statutes of Nebraska are repealed.

**Adjudication – if a water right is adjudicated, the DNR will determine the required amount of water to maintain the original beneficial use and that diversion rate can be maintained up to but no greater than the original permitted diversion rate, regardless of the number of acres being irrigated. NOTE: THIS IS WHERE A LIMITATION ON SPREADING COULD BE INSERTED IF THE SUBCOMMITTEE CHOOSES TO DO SO. If the water right is subsequently leased or transferred, only the CU or if the lease is from agricultural uses to agricultural uses, only the actual number of acres being irrigated can be transferred.**

**If an irrigation district is adjudicated, they will have up to five years to put ANY unused portion(s) of the water right to another beneficial use.**

**Section**

**Leases and water rights should be recorded both at DNR and on the title to the property at the Register of Deeds. We will need to provide a window of opportunity for this to occur.**

Need to consider permanent transfers between preferences within an irrigation district.

Change 46-294 May authorize a greater number of acres to be irrigated as long as the increase will not adversely affect any other water appropriator.

If an existing use as of January 1, 2004 is exceeding the permitted use, the water right holder will have five years from the January 1, 2004 to insure that the number of acres being irrigated is covered by a water right either by obtaining an additional water right or if a basin is overappropriated, through the transfer of a water right.