

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 both types of leases into one bill. Sections 1-13 would be additions to the current statutes. Sections 14-16 pertain to existing statutes, which would have to be amended by the underlined portions. 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. The subcommittee would also suggest several changes to the existing adjudication and transfer statutes.

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. 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 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.
- (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.

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. [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 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. At 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.

Section 11. 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 to alternative provision that will enable a public entity to maintain its tax base.]

Section 12. 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 13. 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 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:

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 Original sections 46-122 and 46-229, Reissue Revised Statutes of Nebraska are repealed.

[Note: The subcommittee believes the following should be added to the statutes pertaining to joint surface water-ground water management plans in overappropriated basins.]

In an overappropriated basin, the water removed from lands by a lease may not be replaced by water from a hydrologically connected well.

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.
- 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.

Suggested change to 46-294 relating to "spreading"

The subcommittee spent a considerable amount of time discussing the issue of allowing spreading. At the current time, the subcommittee is leaning toward recommending the following changes to 46-294.

Change 46-294(2) a to read In approving an application, the director may (a) authorize a greater number of acres to be irrigated if the amount and rate of water approved under the original appropriation is not increased by the change of location and the conditions of section 1 are met.

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.

The subcommittee would also suggest that the same rules as in 46-294 should be applied to ground water users in an overappropriated basin

However, there is still debate on whether one or more of the following recommendations should be made:

1. Eliminate spreading completely.
2. Allow a person a grace period to transfer or add a water right.
3. Allow a certain de minimis amount of spreading if increase the efficiency of the system once per permit.
4. Maintain existing statute but push the DNR to make rules.

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?