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11-08-03
Draft Legislation
Modifications to Surface Water Adjudication Statutes

Note: the changes shown are to the 10-4 draft as that draft was modified at the 10-15 meeting of the subcommittee and in response to comments at the 10-21 E.C. meeting and later comments received from the subcommittee

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, when the owner of an appropriation or his or her successor in interest ceases to use it for such purpose for more than five consecutive years, the right may be terminated only by the director pursuant to sections 46-229.02 to 46-229.05.

46-229.02 (1) If based upon the results of a field investigation or upon information provided by the owner of an appropriation or otherwise obtained by the department, the department makes preliminary determinations (a) that a water appropriation has not been used, in whole or in part, for some beneficial or useful purpose or having been so used at one time has ceased to be used, in whole or in part, for such purpose for more than five consecutive years and (b) that there is no reason known to the department that would constitute sufficient cause, as provided in section 46-229.04, for such nonuse or that such nonuse has continued beyond the additional time permitted because of the existence of any applicable sufficient cause, the department shall serve notice of such preliminary determinations upon the owner or owners of such appropriation and upon any other person who is an owner of the land under such water appropriation. Such notice shall contain the information required by section 46-229.03, shall be provided in the manner required by that section, and shall also be posted on the department's web site. Each owner of the appropriation or of the land under the appropriation shall have ~~thirty~~twenty-one days after the mailing or last publication, as applicable, of such notice to notify the department, on a form provided by the department, that he or she contests the department's preliminary determination of nonuse or the department's preliminary determination of the absence of sufficient cause for such nonuse. Such notification shall indicate the reason or reasons the owner is contesting the department's preliminary determination and may be accompanied by any information the owner believes is relevant to the issues of nonuse or sufficient cause for such nonuse.

(2) If no owner of the water appropriation or of the land under the water appropriation provides notification to the department in accordance with subsection (1) of this section, the director may issue an order canceling the water appropriation, in whole or in part. The extent of such cancellation cannot exceed the extent described in the department's notice to the owner or owners in accordance with subsection (1) of this section. A copy of the

order canceling the appropriation, or part thereof, shall be posted on the department's web site and shall be provided to the owner or owners of the appropriation and to any other owner of the land under the appropriation in the same manner as notices are to be given in accordance with subsection (2), (3), or (4), as applicable, of section 46-229.03.

(3) If an owner of the appropriation provides notification to the department in accordance with subsection (1) of this section, the department shall review the owner's stated reasons for contesting the department's preliminary determination and any other information provided with the owner's notice. If the department determines that the owner has provided sufficient information for the department to conclude that the appropriation should not be cancelled in whole or in part, it shall inform the owners of the appropriation and any other owners of the land under the appropriation of that determination.

(4) If the department determines that an owner has provided sufficient information for the department to conclude that the appropriation should be cancelled only in part and if (a) the owner or owners filing the notice of contest agree in writing to that cancellation in part; and (b) the owner or owners agreeing thereto are the only known owners of the appropriation and of the land under the appropriation, the director may issue an order canceling the appropriation to the extent agreed to by the owner or owners and shall provide a copy of such order to such owner or owners.

(5) If the department determines that subsections (2), (3) and (4) of this section do not apply, it shall schedule and conduct a hearing on the cancellation of the appropriation, in whole or in part. Notice of the hearing shall be provided to the owner or owners who filed notices with the department pursuant to subsection (1) of this section, to any other owner of the appropriation known to the department, and to any other owner of the land under the appropriation. The notice shall be posted on the department's web site and shall be served or published, as applicable, in the manner provided in subsection (2), (3) or (4), as applicable, of section 46-229.03.

(6) Following a hearing conducted in accordance with subsection (5) of this section and subsection (1) of section 46-229.04, the director shall render a decision by order. A copy of the order shall be provided to the owner or owners of the appropriation and to any other person who is an owner of the land under the appropriation. The copy of the order shall be posted on the department's web site and shall be served or be published, as applicable, in the same manner as notices are to be given in accordance with subsection (2), (3) or (4), as applicable, of section 46-229.03, except that if publication is required, it shall be sufficient for the department to publish notice that an order has been issued. Any such published notice shall identify the land or lands involved and shall provide the address and phone number that may be used to obtain a copy of the order.

46-229.03 (1) The notice provided by the department in accordance with subsection (1) or subsection (5) of section 46-229.02 shall contain: (a) a description of the water appropriation; (b) the number assigned thereto by the department; (c) the date of priority; (d) the point of diversion; (e) a description of the lands

which are located under such water appropriation; (f) if the notice is being served personally or by registered or certified mail, a description of the information used by the department to arrive at the preliminary determinations of nonuse; (g) a description of the owner's options in response to the notice; (h) if the notice is being served personally or by registered or certified mail, a copy of section 46-229.04; (i) a department telephone number which any person may call during normal business hours for more information regarding the owner's rights and options, including what constitutes sufficient cause for nonuse; (j) if the notice is being provided in accordance with subsection (1) of section 46-229.02 and is being mailed, a copy of the form that such owner may file to request a departmental hearing; (k) if the notice is being provided in accordance with subsection (1) of section 46-229.02 and is being published, the location where the owner may obtain a form to file to request a departmental hearing; and (l) if the notice is being provided in accordance with subsection (5) of section 46-229.02, the date, time and location for the hearing.

(2) For any owner whose name and address is known by the department or can be reasonably obtained by the department, the notice shall be served personally or by registered or certified mail. Any landowner's name or address shall be considered reasonably obtainable if that person is shown as an owner of the land involved on the records of the county clerk or register of deeds for the county where that land is located.

(3) For any owner whose name and address is not known to the department and cannot be reasonably obtained by the department, such notice shall be served by the publication in a legal newspaper published or of general circulation in any Nebraska county in which the place of diversion is located and in a legal newspaper published or of general circulation in any Nebraska county that contains land for which the right to use water under the appropriation is subject to cancellation. Each such publication shall be once a week for three consecutive weeks.

(4) Landowners whose property under any such appropriation is located within the corporate limits of a city or village shall be served by the publication of such notice in a legal newspaper published or of general circulation in the county in which the city or village is located. The notice shall be published once a week for three consecutive weeks.

46-229.04 (1) At such hearing the verified field investigation report of an employee of the department shall be prima facie evidence for the forfeiture and annulment of such water appropriation. If no one appears at the hearing, such water appropriation or unused part thereof shall be declared forfeited and annulled. If someone interested appears and contests the same, the department shall hear evidence, and if it appears that such water has not been put to a beneficial use or has ceased to be used for such purpose for more than five consecutive years, the same shall be declared canceled and annulled unless (a) the department finds that there has been sufficient cause for such nonuse as provided for in subsection (2), (3) or (4) of this section or (b) subsection (5) of this section applies.

(2) Sufficient cause for nonuse shall be deemed to exist for up to thirty consecutive years if such nonuse was caused by the unavailability of water for that use. For a basin, sub-basin or reach that has been determined to be fully appropriated by the department, the period of time within which sufficient cause for nonuse because of the unavailability of water may be deemed to exist may be extended beyond thirty years by the department upon petition therefor by the owner of ~~the~~ appropriation if the department determines that an integrated management plan being implemented for the basin, sub-basin or reach involved is likely to result in restoration of a usable water supply for that appropriation.

(3) Sufficient cause for nonuse shall be deemed to exist indefinitely if such nonuse was the result of one or more of the following:

- (a) For any tract of land under separate ownership, the landowner used the available supply was used but on only part of the land under the water appropriation because of an inadequate water supply;
- (b) The appropriation is a storage appropriation and there was an inadequate water supply to provide the water for the storage appropriation or less than the full amount of the storage appropriation was needed to keep the reservoir full; or
- (c) The appropriation is a storage use appropriation and there was an inadequate water supply to provide the water for the appropriation or use of the storage water was unnecessary because of climatic conditions.

(4) Sufficient cause for nonuse for up to fifteen consecutive years shall be deemed to exist if (a) the land subject to the appropriation is then under an acreage reserve program or production quota or is otherwise withdrawn from use as required for participation in any federal or state program or (b) such land previously was under such a program but currently is not under such a program and there have been no more than five consecutive years of nonuse on that land since that land was last under that program.

(5) Sufficient cause for nonuse shall be deemed to exist for up to ten consecutive years if such nonuse was a result of one or more of the following:

- (a) Federal, state, or local laws, rules, or regulations temporarily prevented or restricted such use;
- ~~(b) The appropriation is a natural flow appropriation and the available water supply was inadequate to enable the owner to use the water for a beneficial or useful purpose;~~
- ~~(bc) Use of the water was unnecessary because of climatic conditions;~~
- ~~(cd) Circumstances were such that a prudent person, following the dictates of good husbandry, would not have been expected to use the water;~~
- ~~(ed) The works, diversions, or other facilities essential to use the water were destroyed by a cause not within the control of the owner of the appropriation, and good faith efforts to repair or replace the works, diversions, or facilities have been and are being made;~~

- (fe) The owner of the appropriation was in active involuntary service in the armed forces of the United States or was in active voluntary service during a time of crisis; or
- (gf) Legal proceedings prevented or restricted use of the water.

The department may specify by rule and regulation other circumstances that shall be deemed to constitute sufficient cause for nonuse for up to ten years.

(6) When an appropriation is held in the name of an irrigation district, public power and irrigation district, irrigation company or canal company and the director determines that water under that appropriation has not been used on a specific parcel of land for more than five years and that no sufficient cause for such nonuse exists, the right to use water under that appropriation on that parcel shall be terminated and notice of that termination shall be posted on the department's web site and shall be given in the manner provided in subsection (2), (3) or (4) of section 46-229.03. However, ~~the~~ the district or company holding that right shall have five years after that determination to assign the right to use that portion of the appropriation to other land or lands within and served by that district or company. The department shall be notified of such assignment within thirty days thereafter. If the district or company does not assign the right to use that portion of the appropriation to other land or lands within that five year period or does not notify the department within 30 days of that assignment, that portion of the appropriation shall be cancelled without further department proceedings and the district or company involved shall be so notified by the department. During the time within which assignment of a portion of an appropriation is pending, the allowable diversion rate for the appropriation involved shall be reduced, as necessary, to avoid inconsistency with the rate allowed by section 46-231 or with any higher rate previously approved for that appropriation by the director in accordance with section _____ of this act.

(7) When it is determined by the director that an appropriation for which the location of use has been temporarily transferred in accordance with LB (the surface water transfer legislation) , has not been used at the new location for more than five years and that no sufficient cause for such nonuse exists, the right to use that appropriation at the temporary location of use shall be terminated. Notice of that termination shall be posted on the department's web site and shall be given in the manner provided in subsection (2), (3) or (4) of section 46-229.03. The right to reinstate use of that appropriation at the location of use prior to the temporary transfer shall continue to exist for five years after the director's determination, but if such use is not reinstated at that location within that five year period, the appropriation shall be subject to cancellation in accordance with this act.

(78) If at the time of a hearing conducted in accordance with subsection (1) of this section there is an application for incidental or intentional underground water storage pending before the department and filed by the owner of the appropriation, the proceedings shall be consolidated.

Section ____ . When a department proceeding that is conducted pursuant to sections 46-229 through 46-229.04 concerns the partial cancellation of an appropriation, the department may receive evidence on the question of whether, following such partial cancellation, a reduction in the rate of diversion to the maximum rate prescribed in section 46-231 would result in an authorized diversion rate less than the rate necessary, in the interests of good husbandry, for the production of crops on the lands that remain subject to that appropriation. If the director determines, based on the preponderance of the evidence, that such rate would be less than the rate necessary for the production of crops, he or she may approve a diversion rate for the remaining portion of that appropriation greater than the maximum rate authorized by section 46-231. Such increased rate can be no greater than the rate authorized for that appropriation prior to the partial cancellation and no greater than the rate determined by the director to be necessary, in the interests of good husbandry, for the production of crops on the lands that remain subject to that appropriation.

46-2,127. After obtaining approval of an application for transfer and map pursuant to sections 46-2,122 to 46-2,126, the board of directors of any irrigation district, reclamation district, public power and irrigation district, rural water district, or mutual irrigation or canal company may transfer an appropriation of water distributed for agricultural purposes from a tract or tracts of land within the district or served by the company to another tract or tracts of land within the boundaries of the district or served by the company if:

- (1) The district or company finds that the transferring tract of land has received and had water, delivered by the district or company pursuant to a valid appropriation, beneficially applied in at least one of the preceding five consecutive years or that there has been sufficient cause for nonuse of the water as provided in section 46-229.04;

(No changes would be needed in the remaining subsections of section 46-2,127.)