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**11-08-03 Draft  
WPTF Legislation  
Surface Water Right Transfers,  
Changes in Type of Appropriation And Changes in Use  
(Both Permanent and Temporary)**

**Note: Changes shown are to 10-07-03 draft as that draft was modified at the  
10-15-03 subcommittee meeting, the 1-21-03 EC meeting and  
the 11-7-03 subcommittee meeting/conference call**

46-290. (1) Except as limited by this section and as separately and additionally authorized by sections 46-2,120 through 46-2,130, any person having a permit to appropriate water for beneficial purposes issued pursuant to sections 46-233 through 46-235, section 46-241, or 46-242 and who desires (a) to transfer the use of such water appropriation to a location other than the location specified in the permit, (b) to change that appropriation to a different type of appropriation as provided in subsection (3) of this section, and/or (c) to change the purpose for which the water is to be used under a natural flow or storage use appropriation to a purpose not then permitted under that appropriation shall apply for approval of such transfer and/or change to the Department of Natural Resources. The application for such approval shall contain the number assigned such appropriation by the department; the name and address of the present holder of the appropriation; if applicable, the name and address of the person or entity to whom the appropriation is proposed to be transferred or who will be the water user of record after a change in the type of appropriation or purpose of use under the appropriation; the legal description of the land to which the appropriation is now appurtenant; if applicable, the legal description of the land to which the appropriation is proposed to be transferred; if a transfer is proposed, whether other sources of water are available at the original location of use and whether any provisions have been made to prevent either use of a new source of water at the original location or increased use of water from any existing source at that location; if applicable, the legal descriptions of the beginning and end of the stream reach to which the appropriation is proposed to be transferred for the purpose of augmenting the flows in that stream reach; if a proposed transfer is for the purpose of increasing the quantity of water available for use pursuant to another appropriation, the number assigned such other appropriation by the department; the purpose of the current use; if a change in use is proposed, the -proposed purpose of use; if a change in the type of appropriation is proposed, the type of appropriation to which a change is desired; if a proposed transfer or change is to be temporary in nature, the duration of the proposed transfer or change; and such other information as the department shall require by rule and regulation.

(2) If a proposed transfer or change is to be temporary in nature, a copy of the proposed agreement between the current appropriator and the person who is to be responsible for use of water under the appropriation while the transfer or change is in effect shall be submitted at the same time as the application.

(3) Regardless of whether a transfer or a change in the purpose of use is involved, the following changes in type of appropriation, if found by the director to be consistent with section 46-294,, may be approved in accordance with this act: (a) a natural flow appropriation for direct out-of-stream use may be changed to a natural flow appropriation for above ground water storage or for intentional underground water storage; (b) a natural flow appropriation for above ground water storage may be changed to a natural flow appropriation for direct out-of-stream use or for intentional underground water storage ; (c) a natural flow appropriation for intentional underground water storage may be changed to a natural flow appropriation for direct out-of-stream use or for above ground water storage; and (d) a natural flow appropriation for direct out-of stream use, for above ground water storage or for intentional underground water storage may be changed to an instream appropriation subject to sections 46-2,107 through 46-2,119 if the director determines that the resulting instream appropriation would be consistent with subdivisions (2), (3), and (4) of section 46-2,115; (e) a natural flow appropriation for direct out-of-stream use, for above ground water storage or for intentional underground water storage may be changed to an appropriation for induced ground water recharge if the director determines that the resulting appropriation for induced ground water recharge would be consistent with subdivisions (a)(i) and (a)(ii) of subsection (2) of section 46-235; and (f) if the consumptive use under an appropriation with previously recognized incidental underground water storage, whether or not previously quantified, is transferred to another location, the incidental underground water storage portion, whether or not previously quantified, of a natural flow or storage use that appropriation, may be separated from the direct use portion of that appropriation and may be changed to a natural flow or storage use appropriation for intentional underground water storage at the same location if the historic consumptive use of the direct use portion of that appropriation is transferred to another location, but such a separation and change may may be approved only if, after that separation and change, (i) the total permissible diversion under the appropriation will not increase; (ii) no greater the proportion of the water-intentionally stored water that is consumed will be no greater than the proportion of the incidentally stored water that consumed than was historically consumed under the incidental underground water storage portion of the appropriation prior to the change; and (iii) the projected consequences of that separation and change are consistent with the provisions of any integrated management plan adopted in accordance with section 8 or 11 of \_\_\_\_\_ (The Proactive Legislation) \_\_\_\_\_ for the geographic area involved.

(4) The legislature finds that induced ground water recharge appropriations issued pursuant to sections 46-233 and 46-235 and instream appropriations issued pursuant to section 46-2,115 are specific to the location identified in the appropriation. Until the legislature provides additional guidance by legislative act, (a) neither of those types of appropriations shall be transferred to a different location, changed to a different type of appropriation, or changed to permit a different purpose of use; and (b) an appropriation that may otherwise be changed in accordance with this act shall not be changed so as to make it an induced ground water recharge appropriation or an instream appropriation.

(5) Subsection ~~(4)~~ shall not be construed to prevent the temporary<sup>A</sup> transfer of or change in an appropriation of a type for which transfers and changes are permitted by this act may be approved in accordance with this act if the purpose of such transfer or change is (a) to augment the flow in a specific stream reach for any instream use that the department has determined, through rules and regulations, to be a beneficial use or (b) to increase the frequency that a diversion rate or rate of flow specified in another valid appropriation is achieved. For any transfer or change approved pursuant to subdivision (a) of this subsection, the department shall be provided with a report at least every five years while such transfer or change is in effect. The purpose of such report shall be to indicate whether the beneficial instream use for which the flow is augmented continues to exist. If the report indicates that it does not or if no report is filed within sixty days of the department's notice to the appropriator that the deadline for filing the report has passed, the department may cancel its approval of the transfer or change and such appropriation shall revert to same location of use, type of appropriation and purpose of use as prior to such approval. ~~Any such transfer or change shall not be construed as increasing the rate of flow specified for an instream flow appropriation or for an induced ground water recharge appropriation.~~

~~(6)~~ A quantified or unquantified appropriation for incidental underground water storage may be transferred to a new location along with the direct use appropriation with which it is recognized if the director finds such transfer to be consistent with section 46-294 and determines that the geologic and other relevant conditions at the new location are such that incidental underground water storage will occur at the new location. The director may request such information from the applicant as is needed to make that determination and may modify any such quantified appropriation for incidental underground water storage, if necessary, to reflect the geologic and other conditions at the new location.

(7) If a natural flow irrigation appropriation with which incidental underground water storage has been recognized previously is transferred to lands within the boundaries of or area and to be served by the same irrigation district, public power and irrigation district, or irrigation company, and if the point of diversion will remain at the same location after the transfer, the incidental underground water storage recognized with that appropriation may be transferred along with the direct irrigation use. The director may, if necessary, modify the boundaries of the incidental underground water storage area to reflect any change in the location of that storage consistent with that transfer.

(8) Unless an incidental underground water storage appropriation is changed as authorized by subdivisions ~~(d) or (e)~~ (f) of subsection (3) of this section or is transferred as authorized by subsection (6) or subsection (7) of this section, such appropriation shall be cancelled or be modified, as appropriate, by the director to reflect any reduction in water that will be stored underground as the result of a transfer or change, pursuant to this act, of the direct use appropriation with which the incidental underground water storage was recognized prior to the transfer or change.

46-291 (1) Upon receipt of an application filed under section 46-290 for a transfer in the location of use, the department shall review it for compliance with this subsection. The director may approve the application without notice or hearing if he or she determines as follows: (a) that the appropriation is used and will continue to be used exclusively for irrigation purposes; (b) that the only lands involved in the proposed transfer are (i) lands within the quarter section to which the appropriation is then appurtenant, (ii) lands within such quarter section and one or more quarter sections each of which is contiguous to that quarter section, or (iii) lands within the boundaries of and capable of service by the same irrigation district, public power and irrigation district, or canal company; (c) that, after the transfer, the total number of acres that will be irrigated under the appropriation will be no greater than the number of acres that could be legally irrigated under the appropriation prior to the transfer; (d) that all the land involved in the transfer is under the same ownership or is within the same irrigation district, public power and irrigation district, or canal company; (e) that transfer will not result in a change in the point of diversion; and (f) that the transfer will not diminish the water supply available for or otherwise adversely affect any other water appropriator. Transfers shall not be approved pursuant to this subsection until the department has adopted and promulgated rules and regulations establishing the criteria it will use to determine whether proposed transfers are consistent with subdivision (f) of this subsection.

(2) If after reviewing an application filed under section 46-290, the Director of Natural Resources determines that it cannot be approved pursuant to subsection (1) of this section, he or she shall cause a notice of such application to be posted on the department's web site and to be published at the applicant's expense at least once a week for three consecutive weeks in at least one newspaper of general circulation in each county containing lands to which the water appropriation is then appurtenant and, if applicable, in at least one newspaper in each county containing lands to which the appropriation is proposed to be transferred.

Such notice shall contain a description of the water appropriation; the number assigned such appropriation in the records of the Department of Natural Resources; the date of priority; if applicable, a description of the land or stream reach to which such water appropriation is proposed to be transferred; if applicable, the type of appropriation to which the appropriation is proposed to be changed; if applicable, the proposed change in the purpose of use; whether the proposed transfer or change is to be permanent or temporary, and if temporary, the duration of the proposed transfer or change; and any other information deemed by the director to be relevant and essential to provide the interested public with adequate notice of the proposed transfer or change.

The notice shall state (1) that any interested person may object to and request a hearing on the application by filing such objections in writing specifically stating the grounds for each objection and (2) that any such objection and request shall be filed in the office of the department within two weeks after the date of final publication.

Within the time period allowed by this section for the filing of objections and requests for hearings, the county board of commissioners or supervisors for any county containing lands to which the appropriation is then appurtenant and, if applicable, the county board of commissioners or supervisors for any county containing lands to which the appropriation is proposed to be transferred may provide the department with comments about the projected effects of the proposed transfer or change on property tax revenues in that county and on other potential economic impacts of the proposed transfer or change in that county. The filing of any such comments by a county board shall not make the county a party in the application process, but such comments shall be considered by the director in determining, as provided in section 46-294, whether the proposed transfer or change is in the public interest.

46-292 The Department of Natural Resources may hold a hearing on an application filed under section 46-290 on its own motion and shall hold a hearing if a timely request therefore is filed by any interested person in accordance with subsection (2) of section 46-291.

46-293 (1) The director shall independently review each application subject to subsection (2) of section 46-291 to determine whether the requirements of section 46-294 will be met if the transfer or change is approved. This duty is not altered when there are objectors who have become parties to the proposed transfer or change, but if a hearing is called by the department on its own motion or as the result of a request therefore filed in accordance with subsection (2) of section 46-291, any evidence considered by the director in making such determinations shall be made a part of the record of the hearing as provided in section 84-914.

(2) Either on his or her own motion or in response to objections or comments received pursuant to subsection (2) of section 46-291, the director may require the applicant to provide additional information before a hearing will be scheduled or, if no hearing is to be held, before the application will receive further consideration. The information requested may include economic, social or environmental impact analyses of the proposed transfer or change, information about the water historically consumed under the appropriation, copies of any plans for mitigation of any anticipated adverse impacts that would result from the proposed transfer or change, and such other information as the director deems necessary in order to determine whether the proposed transfer or change is consistent with section 46-294.

46-294 (1) The Director of Natural Resources shall approve an application filed pursuant to section 46-290 if the application and the proposed transfer or change meet the following requirements:

- (a) The application is complete and all other information requested pursuant to section 46-293 has been provided;
- (b) The proposed use of water after the transfer or change would be a beneficial use of water;
- (c) Any requested transfer in the location of use is within the same river basin as defined in section 46-288 or the basin from which the appropriation is to

be transferred is tributary to the basin to which appropriation is to be transferred;

- (d) Except as provided otherwise in subsection (4) of this section, the proposed transfer or change, in and of itself, or when combined with any new or increased use of any other source of water at the original location for the original or other purposes, will not diminish the supply of water available for or otherwise adversely affect any other water appropriator and will not significantly adversely affect any riparian water user who files an objection in writing pursuant to section 46-291;
- (e) The quantity of water that is transferred for diversion or other use at the new location will not exceed the historic consumptive use under the appropriation or portion thereof being transferred, provided that this subdivision shall not apply to a transfer in the location of use if both the current use and the proposed use are for irrigation, the number of acres to be irrigated will not increase after the transfer, and the location of the diversion from the stream will not change;
- (f) The appropriation, prior to the transfer or change, shall not be subject to termination or cancellation pursuant to sections 46-229 through 46-229.05;
- (g) If a proposed transfer or change is of an appropriation that has been used for irrigation and is in the name of the irrigation district or is dependent upon an irrigation district's facilities for water delivery, such district has approved the transfer or change;
  - (h) If the proposed transfer or change is of a storage use appropriation and if the owner of that appropriation is different from the owner of the associated storage appropriation, the owner of that storage appropriation has approved the transfer or change;
  - (i) If the proposed transfer or change is to be permanent in nature, either (i) the purpose for which the water is to be used before the transfer or change is in the same preference category established by section 46-204 as the purpose for which the water is to be used after the transfer or change or (ii) the purpose for which the water is to be used before the transfer or change and the purpose for which the water is to be used after the transfer or change are both purposes for which no preferences are established by that section;
  - (j) If the proposed transfer or change is to be temporary in nature, it will be for a duration of no less than one year and, except as provided in section \_\_\_ of this act, no more than thirty years;
  - (k) The transfer or change will not be inconsistent with any applicable state or federal law and will not jeopardize the state's compliance with any applicable interstate water compact or decree or cause difficulties in fulfilling the provisions of any other formal state contract or agreement; and
- (k) The proposed transfer or change is in the public interest. The director's considerations relative to the public interest shall include but not be limited to (a) the economic, social, and environmental impacts of the proposed transfer or change; and (b) whether and under what conditions other sources of water are available for the uses to be made of the appropriation after the proposed transfer or change. The department shall adopt and promulgate rules and regulations to govern the director's determinations of whether proposed transfers and changes are in the public interest.

(2) The applicant has the burden of proving that the proposed transfer or change will be in compliance with subdivisions (a) through (k) of this subsection, except (a) 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; and (b) if both the current use and the proposed use after a transfer are for irrigation, the number of acres to be irrigated will not increase after the transfer and the location of the diversion from the stream will not change, there shall be a rebuttable presumption that the transfer will be consistent with subsection (d) of this section.

(3) In approving an application, the director may impose any reasonable conditions deemed necessary to protect the public interest, ~~or to ensure consistency with any of the other criteria in subsection (1) of this section, or to provide the department with information needed to properly and efficiently administer the appropriation while the transfer or change remains in effect.~~ If necessary to prevent diminution of supply for any other appropriator, the director ~~shall~~ may require that historic return flows be maintained or replaced in quantity, timing and location. After approval of any such transfer or change, the appropriation shall be subject to all water use restrictions and requirements in effect at any new location of use and, if applicable, at any new diversion location. An appropriation for which a transfer or change has been approved shall retain the same priority date as that of the original appropriation. If an approved transfer or change is temporary in nature, the location of use, purpose of use and/or type of appropriation shall revert to the location, purpose of use and type of appropriation prior to the transfer or change.

~~(2)~~(4) In approving an application for a transfer, the director also may ~~(a)~~ authorize the overlying of water appropriations on the same lands, provided that if any such overlying of appropriations would result in either the authorized diversion rate or the authorized aggregate annual quantity that could be diverted to be greater than is otherwise permitted by section 46-231, the director shall limit the total diversion rate or aggregate annual quantity for the appropriations overlain to the rate or quantity that he or she determines is necessary, in the exercise of good husbandry, for the production of crops on the land involved. ~~or (b) The director also may~~ 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, provided that, an increase in the number of acres to be irrigated shall be approved only if ~~(4a)~~ such an increase would not diminish the supply of water available to or otherwise adversely affect another water appropriator or ~~(2b)~~ the transfer would not adversely affect the water supply for any basin, sub-basin or reach that has been determined to be fully appropriated pursuant to section \_\_\_ of LB \_\_\_ *(the proactive legislation)* and ~~(a)~~ the number of acres authorized under the appropriation when originally approved have not been increased previously; ~~(b)~~ the increase in the number of acres irrigated would not exceed five percent of the number of acres being irrigated under the permit before the proposed transfer or a total of ten acres, whichever acreage is less; and ~~(c)~~ all the use will be either on the quarter section to which the appropriation was appurtenant before the transfer or on an adjacent quarter section.



Section \_\_. Whenever a temporary transfer is approved in accordance with this act, the department shall cause copies of the following to be filed with the county clerk or register of deeds of the county in which the land subject to the appropriation prior to the transfer is located: (1) the permit by which the appropriation was ~~established~~ approved; (2) the agreement by which the temporary transfer is to be effectuated; and (c) the director's order approving the temporary transfer. Such documents shall be indexed to that land. The costs of the filing and indexing shall be charged to the applicant for the transfer and failure to pay such costs shall be grounds for the director to negate any prior approval of the transfer.

Section \_\_. A temporary transfer or a change in the type or purpose of use of an appropriation may be renewed or otherwise extended by the parties thereto at any time following the midpoint of the transfer or change term, but any such renewal or extension is subject to review and approval pursuant to sections \_\_ to \_\_ of this act. No renewal or extension shall cause the term of any such temporary transfer or change to exceed thirty years in duration from the date the renewal or extension is approved by the director.

Section \_\_. For purposes of assessment pursuant to sections 77-1343 to 77-1365, neither the temporary transfer or change of an appropriation nor any resulting land use changes on the land to which the appropriation was appurtenant prior to the transfer or change shall cause that land to be reclassified to a lower value use or the valuation of that land to be reduced, but that land may be reclassified to a higher value use and its valuation may be increased if a higher value use is made of that land while the temporary transfer or change is in effect. Land from which an appropriation has been permanently transferred shall be classified and valued for tax purposes in accordance with the use of that land after the transfer.

Section \_\_. During the time within which a temporary transfer or change in purpose of use of an appropriation is in effect, that appropriation may not be used to invoke any rights of condemnation that are based on preference of use, but such appropriation shall be subject to the exercise of such rights by owners of other appropriations that are for water uses superior to the pre-transfer or pre-change use of the water under the transferred or changed appropriation..

Section \_\_. In addition to the rule and regulation requirements found in sections \_\_ and \_\_ of this act, the director may adopt and promulgate such other rules and regulations as are deemed necessary to carry out the purposes of this act.