LB 962
DISCUSSION ITEMS

DNR MEMO

May 23, 2005

Transfer is allowed but IMP has to exist when it is in effect. Don't think there is a problem.

TO: Task Force Subcommittee on Surface Water Transfers

FROM: Susan France

SUBJECT: Discussion Items

Since LB 962 was passed, while I was writing rules, reviewing applications, and discussing different projects with people, it seems to me that there may be some possible conflicts in the law, or how to interpret the laws. Below are some different scenarios that I would like to discuss at our meeting later this month. I thought it would be helpful to give them to you prior to the meeting so that you could think about them.

Transfers/Adjudications

Under the non-expedited transfer law (specifically Neb. Rev. Stat. § 46-294(1)(d)) the Department cannot approve an application if we find that the transfer will diminish the supply or adversely affect any other water appropriator. So lets say that an irrigation district located within a fully or overappropriated basin wants to transfer surface water off of land that will continue to be irrigated with ground water to lands that have not historically been irrigated. It is highly likely that the district could not show that such a transfer would not diminish the supply or adversely affect any other appropriator. In addition, under Neb. Rev. Stat. §§ 46-714(2) or (10) there is a stay on "the use of an existing surface water appropriation to increase the number of acres historically irrigated in the affected area." However, if the surface water is not used on the lands for five years, the district could ask the Department to adjudicate. Neb. Rev. Stat. § 46-229.04(5) says the district could then "assign" the right to the acres that it could not transfer the water rights to under § 46-294(1)(d). Yet, if the district did so, it would be ignoring § 46-714(10). There appears to be a conflict here. What is our intent as it relates to these differing laws?

Map Transfers

For any district that has gone through the map transfer process (Neb. Rev. Stat. §§ 46-2,120 to 2,129) the district can do its own transfers under § 46-2,127. In reading statute § 46-2,127 it appears that there is no requirement that would stop the district from transferring water off of lands that will continue to be irrigated with ground water to lands that have not been historically irrigated. Yet, as mentioned above, §§ 46-714(2) and (10) say that in a fully or overappropriated basin there is a stay on the use of an existing surface water appropriation to increase the number of acres historically irrigated in the affected area. Did we intend that §§ 46-714 (2) and (10) to

govern? If yes, should we mention that in § 46-2,127? If there are stays in place, should § 46-714 (2) and (10) and the map transfer statutes be amended to make it clear that the map transfer cannot be used to increase irrigated acres?

Increases In Consumptive Use for Industrial Uses or Municipalities

What if a power plant has a senior surface water right for cooling purposes for one power plant and diverts all of its appropriation which is 600 cubic feet per second. The plant consumes only 60 cubic feet per second (cfs) through evaporation. The owner of the plant wants to build a second plant right beside the first plant, does not want to divert more water, but will now consume 120 cfs. Should we cut the senior appropriation back to 60 cfs and make them find other water rights to bring their diversion back up to 600 cfs? (See Neb. Rev. Stat. §46-294(e).) What if a city has a senior surface water appropriation for municipal uses that states the location of use is the city limits as it existed on the date of the appropriation. Do we now have to determine what the consumptive use portion is for the area of the city that existed say back in the early 1900's and then cut back their diversion to that amount and make them find water rights that allows them to continue to divert their original appropriation?