





DEPARTMENT OF NATURAL RESOURCES

CONCEPT PAPER FOR SURFACE WATER AND GROUND WATER SUBCOMMITTEE

Ground Water Transfers Off the Overlying Land

May 2007

APPLICABLE STATUTES:

1. Industrial Ground Water Regulatory Act, §§ 46-675 to 46-690
2. § 46-691 (Allows transfers of ground water for agricultural purposes or for any purpose pursuant to a ground water remediation plan.)
3. § 46-691.01 (Allows transfers of ground water for domestic use with specific conditions, one being well is less than 50 gpm.)
4. § 46-691.03 (Allows transfers of ground water for environmental or recreational benefits.)
5. Municipal and Rural Domestic Ground Water Transfers Permit Act, §§ 46-638 to 46-650
6. § 46-613.01 (Allows transfer to another state.)
7. § 46-739(k) (Allows NRD to require district approval of (i) transfers of ground water off the land where the water is withdrawn or (ii) transfers of rights to use ground water that result from district allocations imposed.)

CONCERNS AND ISSUES

1. All of the above statutes discuss the conditions under which certain types of transfers may occur. However:

A. Some transfers described above require permits from DNR--- Industrial transfers over 150 acre-feet per annum, industrial transfers less than 150 acre-feet where the land on which the well is located and the land where the use occurs are not owned or leased by the same person, transfers across state lines.

B. Some require no permits from DNR---transfers for agricultural use, domestic use with specific conditions, transfers for environmental or recreational benefits.

C. Some say persons **may** apply for permits---Municipal and Rural Domestic

D. Some have objections go to the NRDs, some to DNR. The transfer across state lines has no objection provision in the law.

E. The requirements for the transfers are different in each instance. Even when permits are required from DNR the conditions for approval or requirements of the application are not the same.

F. In certain instances, if the NRDs require permits from the NRD for the transfer, the individual has to obtain permits from both the NRD and DNR.

G. The requirements for notice are different in the acts that require a permit, as are the requirements for hearing to some extent.

2. There are still certain types of transfers that are not authorized under Nebraska law. For instance, if an industry has its own water well for industrial use, and then has an additional well drilled solely for the purpose of providing water to its staff for domestic uses, and the domestic well is larger than 50 gallons-per-minute, it appears that there is no law that allows for such transfer of water off the overlying land unless you interpret § 46-739(k) as allowing any type of transfer. Basically any type of public water supplier that does not meet the definition of public water supplier that can transfer and has a well over 50 gpm is possibly transferring illegally.

3. There is no definition of "off the overlying land." The Department has historically interpreted this to mean the smallest contiguous tract under one ownership.

4. There is a definition of public water supplier as it relates to the Municipal and Rural Domestic Ground Water Transfer Act and the statutory spacing act. HHSS has a definition of public water supplier that relates to the number of people served and the number of connections served. Often we get in situations where someone has a well that serves enough people to be a public water supply well under HHSS definitions, but it is not a public water supplier as defined by DNR statutes, and therefore cannot transfer water and does not gain spacing protection. HHSS has asked that we try to make the definitions coincide. (See concept paper on Public Water Supplier Definitions.)

5. All of the above statutes concern themselves with transfers off the overlying land. We often get questions about large uses of water where there is no transfer involved and whether the state or NRD should have some authority over such uses. (Remember not all NRDs have management areas.) Should there be some amount of use from one user or one contiguous tract that requires a permit? The original industrial act was only about withdrawing a large amount of water.

6. There have been complaints and concerns filed concerning the transfer of water by tank, trucks, and trains. Specifically we have had complaints about transfers where the local fertilizer dealer fills up a nurse tank from a well located on his property and takes it out of town to the field and then mixes fertilizer. People have questioned whether that is an industrial transfer under the provisions of the Industrial Transfer Act. Likewise we have had calls concerning people filling up tank trucks and selling the water for drinking water. Remember the scare we had with the individual from Colorado that wanted to fill up train cars with water out of the Sandhills? The one situation that brought up a problem is when the person wanted to withdraw water in Nebraska, fill a tanker truck and deliver the water across the state line to a road project for compaction. If the Department determined that was a transfer under the laws of Nebraska that required an out-of-state permit,

then it was a transfer for in-state permits under the provisions of the Sporhase case. Current laws require a notice that gives the location of use. If we are to require permits for tankers being filled and taking water out of the overlying land, we believe it would be helpful for the law to describe that the location of use can be a broad description, not a unique description for each tank.

The effects of a transfer on the local aquifer or on surrounding users, usually has more to do with whether it is a consumptive use or not, where that use actually occurs and whether any return flows would occur and where, and the amount of the withdrawal. Would it not be in the State's best interest to have comprehensive statutes that address all types of transfers and the conditions under which they can and should occur? Another issue of course remains the large user question and whether such uses should require permits.

DEPARTMENT OF NATURAL RESOURCES

CONCEPT PAPER FOR SURFACE WATER AND GROUND WATER SUBCOMMITTEE

Irrigation Season Vs Storage Season

April 2007

STATUTES:

46-241 (In part) Upon the approval of such application under this section and any approval required by the act, the applicant shall have the right to construct and impound in such reservoir or store in and recover from such underground water storage facility, all water not otherwise appropriated and any appropriated water not needed for immediate use, to construct and operate necessary ditches for the purpose of conducting water to such storage reservoir or facility, and to condemn land for such reservoir, ditches, or other facility.... The owner or possessor of a reservoir or intentional underground water storage facility does not have the right to store water in such reservoir or facility during the time that such water is required in ditches for direct irrigation or for any reservoir or facility holding a senior right.

46-253. No owner of any ditch or canal shall change the line of the ditch or canal so as to interfere with the use of water by anyone, who, prior to the proposed change, had used water for irrigation purposes from such ditch or canal, and the owner of such ditch or canal shall keep the same in good repair so as to permit the water to flow in a quantity sufficient to furnish the statutory amount to the lands entitled thereto at all reasonable times. The majority of the water users under any ditch may designate such reasonable time for the use of water as such majority may determine upon, upon a written notice signed by such majority to the persons in control of such ditch or canal. The owners, or those in control may limit the flow of water in the canal in accordance with such notice, between April 1 and May 1, and October 1 and November 15. No ditch shall be closed between May 1 and October 1. For a failure to cause the water to flow as aforesaid, the owners, or those in control, of any such ditch or canal shall be liable to anyone for any damage resulting from such failure, unavoidable accidents and shortage in the source of supply excepted.

ATTORNEY GENERAL'S OPINION

November 1, 1921 In Part. There seems to be no fixed time for an irrigation season. Section 9 (Pg. 849), laws of Nebraska for 1919, among other things states that the majority of the water users under any ditch may designate such reasonable time for the use of water as such majority may determine upon, upon a written notice signed by such majority to the persons in control of such ditch. The section also provides that the ditch shall be kept open between April 1 and October 1, and ditches or canals which are supplied wholly or mainly from reservoirs shall not be required to furnish water for irrigation between November 1<sup>st</sup> and April 15<sup>th</sup>, next.

This would indicate that as to the natural streams where irrigation is taken direct, that the ditches must be kept open from April 1<sup>st</sup> to October 1<sup>st</sup> and it would seem, under the water rights given by section 11 (Pg. 837) that unless the appropriators shall receive all the water to which they are entitled prior to October 1<sup>st</sup>, that upon petition or written notice of the majority of the water users that such ditch may be kept open for a reasonable time as agreed upon. The statute does not attempt to define what shall constitute a reasonable time, but we presume that it was left to the good judgment of the persons in charge, as the seasons might be different in different years, requiring more water, possibly, during the latter part of the season in some years than in others.

Section 17 (pg. 852), Laws of Nebraska for 1919, provides that conditions under which persons entitled to construct and maintain storage reservoirs for irrigation, or other useful purposes, may construct and maintain such reservoirs. Under this section, such applicants have the right to impound all waters not otherwise appropriated and any appropriated water not needed for immediate use. This would indicate that irrigation direct from the stream should have priority to the extent of the appropriations allowed by law and within such time as should be determined as to be reasonable by a majority of the water users under any ditch, as provided in Section 9 (pg 849). This seems to be specifically provided in Section 17 by the following language, "*The Owners or possessors of reservoirs shall not have the right to impound any water whatever in such reservoirs during the time that such water is required in ditches for direct irrigation or for reservoirs holding senior rights.*"

While the statute does not attempt to define what shall constitute a reasonable time by the users of the water taken by direct irrigation from the stream, yet it is stated in Section 9 that ditches or canals which are supplied wholly or mainly from reservoirs shall not be required to furnish water for irrigation between November 1<sup>st</sup> and April 15<sup>th</sup> following. This would seem to indicate that between the dates of November 1<sup>st</sup> and April 15<sup>th</sup> irrigation from such reservoirs should be discontinued, probably upon the theory that such time was required for the filling of such reservoirs and during such time it would not be necessary for further irrigation. This might indicate that the Legislature had in mind that the ordinary irrigation season would close October 1<sup>st</sup>, except where the majority of the water users under any ditch should designate such reasonable time as they might determine upon which in turn the Legislature seems to hint might not be later than November 1<sup>st</sup>, although this is not expressly provided and for that reason we must say that the statute simply provides that a reasonable time shall be designated by a majority of the water users.

We believe that the foregoing will serve as a proper guide to you in determining the question of priority and the length of the irrigation season.

May 13, 1931 In Part. "*Upon the approval of such application the applicant shall have the right to impound all waters not otherwise appropriated and any appropriated water not needed for immediate use, ... The owner or possessors of Reservoirs shall not have the right to impound any water whatever in such reservoirs during the time that such water is required in ditches for direct irrigation or for reservoirs holding senior rights.*"

It will be noted that the first part of the above quotation only authorizes the storage of water not otherwise appropriated or needed for immediate use. The latter part provides that no water whatever may be stored which is required in

ditches for direct irrigation or by reservoirs having a senior right. It says nothing about power. However, it seems that the right to store water is limited to unappropriated waters or appropriated waters not needed for immediate use. I am of the opinion that storage appropriator has no right to store water when the same is needed by the power appropriator.

November 27, 1936 I have received a verbal opinion from the Attorney General on the section of the law regulating the storage season. Any appropriator having a priority antedating June 26, 1925, can use water at any time for beneficial use, regardless of the season. However, an appropriator is not permitted to use to exceed three acre-feet per year. Any direct flow appropriator having a priority subsequent to June 26, 1925, can be closed between November 1 and April 1 for the benefit of storage appropriators.

#### CURRENT SITUATION

DNR has received inquiries about canal systems and individual irrigation systems using water (supposedly under the authority of their existing irrigation surface water rights) after the crops have been harvested, or using water on their pastures after the ground has frozen in the fall. Likewise we are hearing of systems starting to apply water to the ground prior to any crops being planted, sometimes again, even when the ground is frozen. Some canals are turned on very early for weed control even though there is no use being made of the water for irrigation at that time.

DNR knows that there are many years when canals are closed between May 1 and October 1.

The Department has received calls, from non-irrigation permits (i.e. storage permits and power permits) that have or will in the future extend throughout the year.

Many of our reservoirs are not filling.

All three of the above described occurrences lead us to believe a discussion needs to be held on the following:

1. Does § 46-253 need to be amended under current day situations?
2. In order to protect our storage reservoirs, do we need statutory changes that allows for a time when storage is not subjected to immediate use calls, or should we amend our statutes to state that storage should be subject to priority in the same manner as all other uses?
3. Should "recharge of the soil profile" be allowed under an irrigation permit and should it be allowed at any time, or are restrictions required?
4. Is weed control a valid use of water under an irrigation water right, or should there be restrictions?