

NOTES

DEPARTMENT OF NATURAL RESOURCES

CONCEPT PAPER FOR SURFACE WATER AND GROUND WATER SUBCOMMITTEE

Transfers For Surface Water Rights

April 2007

REFERENCE STATUTES:

1. Expedited and non-expedited transfers §§ 46-290 to 46-294
2. Map transfers for districts and canal companies §§ 46-2,120 to 46-2,130

SITUATION:

There are across Nebraska many farmers who hold water rights in their own names. Over the years since the water rights were originally approved, because of improvements in technology and equipment and changes in farming practices, the farmers are now not irrigating exactly the same lands that were approved under the original appropriation. In some instances, the total number of acres irrigated is now less than what was originally approved, in some instances the acres now irrigated is more than what is originally approved. In many instances, you will have multiple water rights with multiple priority dates on one field, irrigated with one system of works.

Under the current laws of Nebraska, water rights attach to specific lands and become appurtenant to such lands. Therefore, under any specific permit, water diverted under authority of that permit cannot be placed on other lands, even if the other lands are approved for diversion under another permit.

In the last ten years, with the increase in the amount of water administration that has occurred across the state for different reasons, farmers are finding that when their junior water rights are closed, they cannot legally operate under their senior rights because to do so would cause water to be applied to lands not approved under the senior right.

When the delivery of water is through a center pivot system, the farmer has in certain situations, moved his water rights around such that the water rights are placed under the pivot like slices of a pie, with the senior water right being placed on the best ground under the pivot, and the next junior water right beside it and then the next junior, etc. This way, depending upon what priority is closed, the farmer can continue to operate his/her pivot using a wiper method. The difficulty with this method is maintaining a permanent marker system in the field to designate the location of each appropriation. It is difficult for the farmer, and difficult for field staff doing checking during administration.

Other states have told us that they will do a similar transfer action, except that there will be donuts under the pivot, with the senior water right being on the outside ring of the pivot and the junior rights in order to the most junior being the inside small ring under the pivot. This way during administration, certain nozzles on the pivot can be closed and field staff can

count nozzles when doing administration. We have not done any of these at this time.

For systems that deliver water under a system other than a pivot, farmers have placed senior permits at the upper part of a field (for tube or pipe irrigated fields) and that when the junior permits are closed the farmer must construct a dike so that water does not flow onto the junior permitted land.

Prior to LB 962, the Department allowed for "spreading" water rights. Spreading was like what a district can do under the provisions of the map transfer statutes referenced above. All the water rights of an individual farmer can be picked up, and spread across the irrigated lands of the farmer, layering them on top of each other as long as they do not exceed one cubic foot per second for 70 acres irrigated. This way, when the junior water right is closed, the farmer can continue to irrigate all his property with a senior water right.

Under current expedited and non-expedited transfer statutes as referenced above, it is very difficult to approve a "spreading" transfer. The law for expedited requires that the same number of acres under the water right be irrigated as the number of acres that could be legally irrigated before the transfer (§ 46-291(1)c). The law on non-expedited requires 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 (§ 46-294(e)) and the transfer will not diminish the supply of water available for or otherwise adversely affect any other water appropriator (§ 46-294(d)). Under the first requirement (e) the applicant will lose the right to divert part of his water appropriation. The second requirement (d) is almost impossible to meet if there is a spread, as there will be more crops irrigated and more consumptive use, and thus less water available.

The concept is to allow for a "spreading" transfer for individual farmers to allow for a layering of water rights on top of one another. If people are favorable to such an idea, some questions are:

1. Should it be a one-time possibility for each set of water rights such as it is for an irrigation district.
2. Should it only be allowed only for those farms where the change occurred prior to:
 - a. Any informal or formal moratorium ?
 - b. Only formal moratoriums?
 - c. The date of the act that allows for such a change?
3. Should it be an expedited (not noticed) transfer or should it be a non-expedited transfer (one that gets noticed in a paper).