Water Transfers, Leasing and Banking
Outline Of
Presentation to the Water Policy Task Force

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Water Transfers

General Comments:

1. Banking and leasing are possible only if transfers, in one form or another, are allowed.
2. Neither transfers, leasing, or banking are needed unless access to new water supplies is prevented by water supply shortages, whether those shortages are created by actual exhaustion of the supply or by regulatory limits on the extent to which the supply can be used, i.e. you don't need to worry about transfers etc. if you can just drill a new well or get a new surface water appropriation without limitation.
3. Transfers can involve either movement of the water itself from one place to another or the transfer of the right to use water from one place to another.

Existing laws:

1. **Surface water**
   - A. Movement of the water from one place to another
     - (1) Every surface water appropriation but those for instream flows (and arguably those for induced recharge of public water supply wellfields) involves a physical transfer of the water from one location to another. The basic criteria for approving surface water appropriations are:
       - (a) that there is unappropriated water available,
       - (b) that the water use would not be detrimental to the public welfare, and
       - (c) that denial of the use is not demanded by the public interest
     - (2) Transfers of surface water across state lines have additional criteria designed to protect the state from adverse impacts; they are in the form of factors to consider when deciding whether the transfer is in the public interest:
       - (a) the economic, environmental and other benefits of the proposed use
       - (b) any adverse economic, environmental and other impacts of the proposed use
       - (c) any current beneficial uses being made of the unappropriated water
       - (d) the economic, environmental and other benefits of not allowing the appropriation and preserving the water supply for beneficial uses with the state
       - (e) alternative sources of water supply available to the applicant

(f) any other factors consistent with the purposes of the statute and that the director deems relevant to protecting the interests of the state and its citizens

B. Transfers of the rights to use surface water
   (1) The rights to use surface water can be transferred if the new use :
      (a) will be in the same river basin,
      (b) will not adversely affect another appropriator,
      (c) will use water from the same source of supply
      (d) will not diminish the supply of water
      (e) the water will be applied to the same preference category as the previous use, i.e. domestic, agricultural, or manufacturing, and
      (f) the transfer is in the public interest.
   (2) DNR must approve the transfer
   (3) There is a separate process that allows transfers within irrigation districts to be approved by the irrigation district using the same criteria as are applied by DNR.
   (4) Does not matter whether money or other consideration is involved in the transaction
   (5) Transfer could be reversed at a later date, but only by making a new transfer back to the old use and only if that transfer back was consistent with the criteria noted above.

2. Groundwater

A. Movement of water from one place to another
   (1) Common law prohibits transfers of groundwater off of the overlying land and the right to do that depends upon the legislature authorizing such physical transfers.
   (2) Transfers for municipal or other public water supply use may be approved by DNR if:
      (a) the withdrawal and transportation of water are reasonable
      (b) the transfer is not contrary to conservation and beneficial use
      (c) the transfer is not otherwise detrimental to the public welfare
   (3) Transfers for industrial purposes (including the watering of golf courses) may be approved by DNR if the withdrawal and transfer are considered to be in the public interest after considering:
      (a) possible adverse effects on existing surface or groundwater users,
      (b) the effect of the withdrawal and transfer on surface or ground water supplies to meet reasonably anticipated domestic and agricultural demands
      (c) the availability of alternative sources of surface or groundwater
      (d) the economic benefits of the applicant's proposed use
      (e) the social and economic benefits of existing uses of surface or groundwater in the area of the proposed use
      (f) any waivers of liability from existing users
      (g) other factors affecting the equity of granting the permit.
   (4) Transfers across state lines require a permit from DNR and DNR can grant the permit after considering:
      (a) whether the proposed use is a beneficial use

(b) the availability of alternative sources of surface water or groundwater
(c) any negative effect of the proposed withdrawal on surface or groundwater supplies needed to meet reasonable future demands for water in the area of the proposed withdrawal
(d) any other factors consistent with the purposes of the statute and that the director deems relevant to protect the interests of the state and its citizens

(5) Transfers off the overlying land for agricultural purposes or for remediation of ground water quality under the Nebraska Environmental Protection Act may be made without permission from DNR or any other entity. However, any party affected by such a transfer may file an objection with the NRD, who will then decide if the transfer violates any district rule or regulation. If the NRD concludes that it does violate a district rule, it may prohibit such withdrawal and transfer. If the NRD concludes that the withdrawal and transfer does not violate any district rule, but may significantly adversely affect any other water user or may violate another statute or rule or is not in the public interest, it may forward the complaint to DNR for a hearing. DNR may issue a cease and desist order if it concludes after the hearing that the use or transfer is inconsistent with those criteria.

(6) Transfers off the overlying land to provide water for domestic use (unless the water is for a public water supplier) may be made without permission from DNR or any other entity as long as all the necessary land rights for the well and/or the pipeline are acquired and the capacity of the well or wells connected together does not exceed 50 gallons per minute.

(7) Transfers of groundwater off the overlying land that are not encompassed by items (2) through (6) above (includes transfers for environmental purposes and transfers by public water suppliers who are not eligible for a permit under the Municipal and Rural Domestic Ground Water Transfers Permit Act—item (2) above) could be enjoined especially if someone can show injury as a result of such a transfer.

(8) To the extent transfers of groundwater are allowed, it does not matter whether money or other consideration is involved in the transaction.

B. Transfers of rights to use groundwater

(1) The right to use groundwater is derived from ownership of the overlying land and, in groundwater management areas, by obtaining a permit from the NRD where the well is to be located.

(2) There are no specific statutes relating to transfers of the rights to use groundwater. However, such rights can be effectively transferred in the following ways:

(a) By transferring, with the permission of the applicable NRD, all or part of any right to use water that is derived from the NRD's water use allocations.

(b) By constructing a replacement well at a different location than the well being replaced and/or for a different use than the well being replaced if the NRD defines the term "replacement well"

in such a way that new wells for different uses or at different locations can qualify as replacement wells.

(3) To the extent transfers of the rights to use groundwater are permitted, it does not matter whether money or other consideration is involved.

Issues Relating to Transfers

1. Should the statutes relating to surface water right transfers be modified to allow transfers to uses other than the original use for which the water right was obtained?
2. Should temporary surface water right transfers be allowed (see next section on water rights leasing)?
3. Should transfers of groundwater be authorized for additional kinds of groundwater use?
4. Should the criteria and/or processes to allow physical transfers of groundwater be made more uniform?
5. Others?

Water Leasing

General Comments

- Leasing is just a limited form of transfer
- Leasing is sometimes proposed as a way of easing into a more flexible transfer process, especially for transfers of surface water rights

Surface Water Right Leasing

- Can do now, but at some risk because restoring use on the original tract would have to be approved through a transfer back to that land under the regular transfer statutes—it might not be approved.
- Legislative approval of surface water right leasing has been proposed before. Some of the proposed conditions for such leases were: (1) leases would be no longer than 5 years, but renewals could be allowed; (2) approval of the irrigation district would have been required if the right was for land in an irrigation project; (3) approval of DNR would have been required; (4) leases could have been for the same or another use; and (5) taxes would still be paid on the land where the water had been used so that the taxing entities would not suffer lost revenues.
- Issues to address include: (1) should only leases be allowed (as opposed to more permanent transfers) or should they be an optional form of transfer; (2) should there be limits on how long a lease transfer could last; (3) should the criteria for approval of a lease be less burdensome than for approval of more permanent transfers; and (4) should third party impacts of lease transfers be addressed and if so, how and to what extent?

Groundwater Leasing

- Leases that involve the physical transfer of groundwater are possible now as long as the transfer is consistent with state law and NRD regulations.
- If approved by the NRD, leases of rights to use groundwater, i.e. of water use allocations, are also possible now.
- Issue: Other than the right to withdraw and transfer groundwater to another location and the right to lease some or all of a water use allocation from an NRD, does a groundwater user have anything that could be leased?

Water Banking

Water Banking—What is It?

- Keeping track of changes in water use that reduce water consumption or otherwise alter water use patterns so that the stream or aquifer either has a greater total supply or has additional supply when demands are not otherwise met, and
- Making water collected ("banked") available for new or additional use.
- There is no one form of water banking that is the "right" form; several different forms of banking have been approved in other states, including in Kansas and Colorado in the last two years.

Benefits of Water Banking

- A bank can serve a brokerage function, i.e. match up those needing water with those willing to make it available.
- The method for determining the "water value" (quantity, location and timing of activities that make water available to the "bank" would be approved in advance—should speed up the well permit/water right process.
- Greater overall potential for freeing up water by "pooling" resources.
- Should improve tracking of the "big picture", i.e. the overall effect of all new water uses and all corresponding offset activities.

Sources of Water for Offset (With or Without Water Banks)

- Retire existing uses
- Water right transfers
- Water right leasing
- Conservation or other practices that add water to the water source.
- Development of surplus water supplies.
- Others—creativity should be encouraged, but a water bank should not, by itself, change water law or the way water could be secured for offset.

Water Banks—Issues to Resolve

- Who should be able to operate a water bank?
  - The State?

- NRDs?
- Irrigation/public power and irrigation districts?
- Cities?
- Other public entities?
- Private enterprises?
- Combinations of the above?
- All of the above?

- Who should charter the bank?
- How should the jurisdictional area of a water bank be defined?
  - For purposes of acquiring the water credits, i.e. the deposits?
  - For purposes of allocating those water credits, i.e. the withdrawals?
- Should water banks also be responsible for quantifying the depletion effects of new or expanded water uses?
- How should third party impacts be addressed?
- How should water banks deal with the interface between surface water and groundwater?