

**Ann Diers**

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**From:** Ann Diers [adiers@dnr.state.ne.us]  
**Sent:** Thursday, December 15, 2005 12:29 PM  
**To:** Susan France (sfrance@dnr.state.ne.us); Ann Bleed (ableed@dnr.state.ne.us); Ann Diers (adiers@dnr.state.ne.us); Brian Barels (blbare@nppd.com); Dennis Strauch (dstrauch@earthlink.net); Don Kraus (dkraus@cnppid.com); Steve Gaul (sgaul@dnr.state.ne.us); 'Tom Schwarz'; 'Dave Sands'; 'Frank Albrecht'; 'James Nelson'; 'Larry Hutchinson'; 'Steve Huggenberger'  
**Subject:** Addition to proposed legislation re 46-229.04

Good afternoon:  
Attached is a pdf document of statute Section 46-229.04, showing the changes that the WPTF has approved to date, and with additional changes hand-written in on the page marked as page 12. The hand-written changes were the changes that Dennis Strauch mentioned in our meeting the other day.

If the Task Force is okay with these additional changes when it meets next week, I will try to get the changes added to the draft we have sent to Senator Schrock's office.  
Ann

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1           46-229.04 (1) At such hearing the verified field  
2 investigation report of an employee of the department, or such  
3 other report or information that is relied upon by the department  
4 to reach the preliminary determination of nonuse, shall be prima  
5 facie evidence for the forfeiture and annulment of such water  
6 appropriation. If no person appears at the hearing, such water  
7 appropriation or unused part thereof shall be declared forfeited  
8 and annulled. If an interested person appears and contests the  
9 same, the department shall hear evidence, and if it appears that  
10 such water has not been put to a beneficial use or has ceased to  
11 be used for such purpose for more than five consecutive years, the  
12 same shall be declared canceled and annulled unless the department  
13 finds that (a) there has been sufficient cause for such nonuse as  
14 provided for in subsection (2), (3), or (4) of this section or (b)  
15 subsection (5) or (6) of this section applies.

16           (2) Sufficient cause for nonuse shall be deemed to exist  
17 for up to thirty consecutive years if such nonuse was caused by the  
18 unavailability of water for that use. For a river basin, subbasin,  
19 or reach that has been designated as overappropriated pursuant  
20 to section 46-713 or determined by the department to be fully  
21 appropriated pursuant to section 46-714, the period of time within  
22 which sufficient cause for nonuse because of the unavailability  
23 of water may be deemed to exist may be extended beyond thirty  
24 years by the department upon petition therefor by the owner of  
25 the appropriation if the department determines that an integrated  
26 management plan being implemented in the river basin, subbasin, or  
27 reach involved is likely to result in restoration of a usable water

1 supply for the appropriation.

2 (3) Sufficient cause for nonuse shall be deemed to exist  
3 indefinitely if such nonuse was the result of one or more of the  
4 following:

5 (a) For any tract of land under separate ownership, the  
6 available supply was used but on only part of the land under the  
7 appropriation because of an inadequate water supply;

8 (b) The appropriation is a storage appropriation and  
9 there was an inadequate water supply to provide the water for the  
10 storage appropriation or less than the full amount of the storage  
11 appropriation was needed to keep the reservoir full; or

12 (c) The appropriation is a storage-use appropriation and  
13 there was an inadequate water supply to provide the water for the  
14 appropriation or use of the storage water was unnecessary because  
15 of climatic conditions.

16 (4) Sufficient cause for nonuse shall be deemed to exist  
17 for up to fifteen consecutive years if such nonuse was a result of  
18 one or more of the following:

19 (a) Federal, state, or local laws, rules, or regulations  
20 temporarily prevented or restricted such use;

21 (b) Use of the water was unnecessary because of climatic  
22 conditions;

23 (c) Circumstances were such that a prudent person,  
24 following the principles of good husbandry, would not have been  
25 expected to use the water;

26 (d) The works, diversions, or other facilities essential  
27 to use the water were destroyed by a cause not within the control

1 of the owner of the appropriation and good faith efforts to repair  
2 or replace the works, diversions, or facilities have been and are  
3 being made;

4 (e) The owner of the appropriation was in active  
5 involuntary service in the armed forces of the United States  
6 or was in active voluntary service during a time of crisis;

7 (f) Legal proceedings prevented or restricted use of the  
8 water; or

9 (g) The land subject to the appropriation is under  
10 an acreage reserve program or production quota or is otherwise  
11 withdrawn from use as required for participation in any federal or  
12 state program or such land previously was under such a program but  
13 currently is not under such a program and there have been not more  
14 than five consecutive years of nonuse on that land since that land  
15 was last under that program.

16 The department may specify by rule and regulation other  
17 circumstances that shall be deemed to constitute sufficient cause  
18 for nonuse for up to fifteen years.

19 (5) When an appropriation is held in the name of  
20 an irrigation district, reclamation district, public power and  
21 irrigation district, or mutual irrigation company or canal company  
22 and the director determines that water under that appropriation  
23 has not been used on a specific parcel of land for more than  
24 five years and that no sufficient cause for such nonuse exists,  
25 the right to use water under that appropriation on that parcel  
26 shall be terminated and notice of the termination shall be posted  
27 on the department's web site and shall be given in the manner

1 provided in subsection (2), (3), or (4) of section 46-229.03. The  
2 district or company holding such right shall have five years after  
3 the determination, or five years after an order of cancellation  
4 issued by the department following the filing of a voluntary  
5 relinquishment of the water appropriation that has been signed by  
6 the landowner and the appropriator of record, to assign the right  
7 to use that portion of the appropriation to other land within <sup>the district or area</sup> ~~and~~  
8 served by the ~~district~~ of company or to file an application for  
9 a transfer in accordance with section 46-290. The department shall <sup>issue its order</sup>  
10 be notified of any such assignment within thirty days thereafter. <sup>of cancellation</sup>  
11 If the district or company does not assign the right to use that <sup>within 60 days</sup>  
12 portion of the appropriation to other land, does not file an <sup>of receipt of</sup>  
13 application for a transfer within the five-year period, or does not <sup>the voluntary</sup>  
14 notify the department within thirty days after any such assignment, <sup>relinquishment.</sup>  
15 that portion of the appropriation shall be canceled without further  
16 proceedings by the department and the district or company involved  
17 shall be so notified by the department. During the time within  
18 which assignment of a portion of an appropriation is pending, the  
19 allowable diversion rate for the appropriation involved shall be  
20 reduced, as necessary, to avoid inconsistency with the rate allowed  
21 by section 46-231 or with any greater rate previously approved  
22 for such appropriation by the director in accordance with section  
23 46-229.06.

24 (6) When it is determined by the director that an  
25 appropriation, for which the location of use has been temporarily  
26 transferred in accordance with sections 46-290 to 46-294, has not  
27 been used at the new location for more than five years and that

1 no sufficient cause for such nonuse exists, the right to use that  
2 appropriation at the temporary location of use shall be terminated.  
3 Notice of that termination shall be posted on the department's  
4 web site and shall be given in the manner provided in subsection  
5 (2), (3), or (4) of section 46-229.03. The right to reinstate  
6 use of that appropriation at the location of use prior to the  
7 temporary transfer shall continue to exist for five years after the  
8 director's determination, but if such use is not reinstated at  
9 that location within such five-year period, the appropriation shall  
10 be subject to cancellation in accordance with sections 46-229 to  
11 46-229.04.

12 (7) If at the time of a hearing conducted in accordance  
13 with subsection (1) of this section there is an application for  
14 incidental or intentional underground water storage pending before  
15 the department and filed by the owner of the appropriation, the  
16 proceedings shall be consolidated.