

Ann Diers

From: Ann Bleed [ableed@dnr.state.ne.us]
Sent: Monday, December 12, 2005 2:05 PM
To: Ann Diers
Subject: FW: 46-229.04(5)

-----Original Message-----

From: Dennis Strauch [mailto:dstrauch@earthlink.net]
Sent: Thursday, December 08, 2005 2:41 PM
To: Ann Bleed; Brian Barels; Don Kraus
Cc: Steven C. Smith
Subject: 46-229.04(5)

<<...>>

Hi Everyone,

At our last surface water subcommittee meeting I proposed a change to Statute 46-229.04(5), which the group agreed to forward to the Task Force for consideration. Steve Smith contacted me with another change which is shown in green in the attached. This change would give those districts that have completed the map adjudication process, the ability to transfer under an assignment. I know of only two districts that have completed the map adjudication process they are Enterprise Irrigation and Central Nebraska Public Power and Irrigation Districts. If no one knows of a problem with this change, I would like it included in the changes the Task Force will consider on December 22nd. The language in red and blue on the attachment are the one's we agreed to at our last meeting.

Thanks,
Dennis

12/13/2005

DNR 014255

46-229.04

Appropriations; hearing; decision; nonuse; considerations; consolidation of proceedings; when.

(1) At such hearing the verified field investigation report of an employee of the department shall be prima facie evidence for the forfeiture and annulment of such water appropriation. If no person appears at the hearing, such water appropriation or unused part thereof shall be declared forfeited and annulled. If an interested person appears and contests the same, the department shall hear evidence, and if it appears that such water has not been put to a beneficial use or has ceased to be used for such purpose for more than five consecutive years, the same shall be declared canceled and annulled unless the department finds that (a) there has been sufficient cause for such nonuse as provided for in subsection (2), (3), or (4) of this section or (b) subsection (5) or (6) of this section applies.

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

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

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

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

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

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

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

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

- (c) Circumstances were such that a prudent person, following the principles of good husbandry, would not have been expected to use the water;
- (d) The works, diversions, or other facilities essential to use the water were destroyed by a cause not within the control of the owner of the appropriation and good faith efforts to repair or replace the works, diversions, or facilities have been and are being made;
- (e) The owner of the appropriation was in active involuntary service in the armed forces of the United States or was in active voluntary service during a time of crisis;
- (f) Legal proceedings prevented or restricted use of the water; or
- (g) The land subject to the appropriation is under an acreage reserve program or production quota or is otherwise withdrawn from use as required for participation in any federal or state program or such land previously was under such a program but currently is not under such a program and there have been not more than five consecutive years of nonuse on that land since that land was last under that program.

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

(5) When an appropriation is held in the name of an irrigation district, reclamation district, public power and irrigation district, or mutual irrigation company or canal company and the director determines that water under that appropriation has not been used on a specific parcel of land for more than five years and that no sufficient cause for such nonuse exists, the right to use water under that appropriation on that parcel shall be terminated and notice of the termination shall be posted on the department's web site and shall be given in the manner provided in subsection (2), (3), or (4) of section 46-229.03. The district or company holding such right shall have five years after the determination, or five years after an order of cancellation issued by the department following the filing of a voluntary relinquishment of the water appropriation that has been signed by the landowner and the appropriator of record, to assign the right to use that portion of the appropriation to other land within the district and/or the area served by the district or company or to file an application for a transfer in accordance with section 46-290 or sections 46-2,127 through 46-2,129. The department must issue its order of cancellation within 60 days of receipt of the voluntary relinquishment. The department shall be notified of any such assignment within thirty days thereafter. If the district or company does not assign the right to use that portion of the appropriation to other land, does not file an application for a transfer within the five-year period, or does not notify the department within thirty days after any such assignment, that portion of the appropriation shall be canceled without further proceedings by the department and the district or company involved shall be so notified by the department. During the time within which assignment of a portion of an appropriation is pending, the allowable diversion rate for the appropriation involved shall be reduced, as necessary, to avoid inconsistency with the rate allowed by section 46-231 or with any greater rate previously approved for such

appropriation by the director in accordance with section 46-229.06.

(6) When it is determined by the director that an appropriation, for which the location of use has been temporarily transferred in accordance with sections 46-290 to 46-294, has not been used at the new location for more than five years and that no sufficient cause for such nonuse exists, the right to use that appropriation at the temporary location of use shall be terminated. Notice of that termination shall be posted on the department's web site and shall be given in the manner provided in subsection (2), (3), or (4) of section 46-229.03. The right to reinitiate use of that appropriation at the location of use prior to the temporary transfer shall continue to exist for five years after the director's determination, but if such use is not reinitiated at that location within such five-year period, the appropriation shall be subject to cancellation in accordance with sections 46-229 to 46-229.04.

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

Source:

Laws 1919, c. 190, tit. VII, art. V, div. 2, § 9, p. 837

C.S.1922, § 8428

C.S.1929, § 81-6309

R.S.1943, § 46-229

Laws 1947, c. 172, § 1(5), p. 521

Laws 1973, LB 186, § 6

Laws 1983, LB 380, § 3

Laws 1987, LB 140, § 4

Laws 1987, LB 356, § 1

Laws 1995, LB 350, § 3

Laws 2000, LB 900, § 100

Laws 2004, LB 962, § 9

Annotations:

The statutory procedure set forth is not the only procedure for canceling water rights. When an application is made to transfer water rights which no longer exist because of nonuse, the director may cancel the rights in the transfer proceeding if the evidence shows that the rights have expired through nonuse. In re Applications T-61 and T-62, 232 Neb. 316, 440 N.W.2d 466 (1989).

This section does not violate constitutional notions of due process. In re Water Appropriation Nos. 442A, 461, 462, and 485, 210 Neb. 161, 313 N.W.2d 271 (1981).

Reports of department engineers are prima facie evidence on issue of abandonment. State v. Birdwood Irr. Dist., 154 Neb. 52, 46 N.W.2d 884 (1951).

~ Reissue Revised Statutes of Nebraska