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Ann Diers

From: Ann Diers [adiers@dnr.state.ne.us]
Sent: Wednesday, December 14, 2005 5:59 PM
To: Susan France; Ann Bleed; Ann Diers; Brian Barels; Dennis Strauch; Don Kraus; Steve Gaul; 'Tom Schwarz'; 'Dave Sands'; 'Frank Albrecht'; 'James Nelson'; 'Larry Hutchinson'; 'Steve Huggenberger'
Cc: Dean Edson; Jay Rempe
Subject: Revisions to Chapter 9: Expedited Transfers Rule

Good afternoon;
Based on our meeting on Monday of this week, we have revised two sections of the Rule. The revised areas are highlighted in yellow on the attached.

Ann

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NEBRASKA ADMINISTRATIVE CODE
Title 457 - DEPARTMENT OF NATURAL RESOURCES
RULES FOR SURFACE WATER

Chapter 9 - TRANSFERS AND CHANGES

001 EXPEDITED TRANSFERS IN LOCATION OF USE

001.01 Expedited Transfer Process may only be used when:

001.01A All the land involved in the transfer is under the same ownership or is within the same irrigation district, reclamation district, public power and irrigation district, or mutual irrigation or canal company.

001.01B The appropriation is used and will continue to be used exclusively for irrigation purposes.

001.01C The only lands involved in the proposed transfer are:

001.01C1 Lands within the quarter section of land to which the appropriation is appurtenant, or

001.01C2 Lands within such quarter section of land and one or more quarter sections of land each of which is contiguous to the quarter section of land to which the appropriation is appurtenant (for purposes of this section, contiguous shall mean any quarter section adjacent to, including those quarter sections which share corners with, the original quarter section(s) to which the appropriation is appurtenant), or

001.01C3 Lands within the boundaries or service area of and capable of service by the same irrigation district, reclamation district, public power and irrigation district, or mutual irrigation or canal company

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001.01D After the transfer, the total number of acres irrigated under the appropriation will be no greater than the number of acres that could legally be irrigated under the appropriation prior to the transfer. There may be less acres irrigated after the transfer, if:

001.01D1 All of the current water appropriation is going to be placed on fewer acres and all water appropriations that exist at the new place of use after the proposed transfer do not exceed one-seventieth (1/70) of a cubic-foot per second per acre. In such situations the Department will also reduce the maximum annual amount allowed under the appropriations pertaining to the proposed tract such that they do not exceed three-acre feet per acre per annum or that amount allowed under the appropriation, whichever is less.

001.01D2 The applicant relinquishes any remaining rights.

001.01E The transfer will not result in a change in the point of diversion.

001.01F The transfer will not diminish the water supply available for or otherwise adversely affect any other water appropriator. Rule 001.03 herein describes the criteria that must be met in order for the Department to make this determination as it relates to the expedited process.

001.01G The associated incidental underground water storage is to be transferred and the transfer is within the boundaries of the incidental underground water storage appropriation, or the Department has sufficient documentation to conclude that incidental underground storage can and will occur at the new location of use.

If applications are not found to meet the above criteria, they will be processed under the non-expedited process described in 46-291 R.R.S. 1943, as amended, and Department Rule Title 457, Chapter 9, subsection 002.

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| ~~04.01~~001.02 Applications:

001.02A Separate application on a form provided by the Department (see Appendices K, K-1, K-2, K-3) must be completed and filed:

001.02A1 For each appropriation to be modified

001.02A2 For each appropriator

001.02B Applicant must be the appropriator of record as shown in the Department's records.

001.02C Temporary Applications. If a transfer is approved as a temporary transfer, the duration of the use will be no less than one year and no more than thirty years. Temporary transfers shall expire on September 30 of the last year of the proposed temporary transfer. If during the term of the temporary transfer the appropriator wishes to revert back to the original place of use, a new transfer application shall be filed and processed.

001.02D Applications shall include the information described in 46-290(1)(b) R.R.S. 1943, as amended, and the following:

001.02D1 The amount of water (both the instantaneous diversion rate and the total annual volume) requested to be transferred to the new location of use.

001.02D2 For individual water rights (those not held by irrigation districts, reclamation districts, public power and irrigation districts, or irrigation or canal companies), the names, addresses, telephone numbers and title of persons, other than applicant, who should receive water administration notices during times of shortage for the appropriation. Examples may be tenants, farm managers, sons or daughters who are responsible for the irrigation

or persons having power of attorney. If the appropriator of record is someone other than the landowner, the landowner must also be listed and must sign the application.

~~001.02D3 For situations where the Applicant is proposing to move the water right to lands that have not previously been irrigated, the Applicant shall certify whether the land currently under appropriation from which the water right will be moved after the transfer has been irrigated within the preceding five years. Historical water use made of the appropriation for each of the last five years, including number of acres irrigated and the maximum diversion or pumping rate. Applicant, or if under an irrigation district, the Applicant, shall certify, on a form provided by the Department, that water diverted under the appropriation has been used at some time during the last five years to irrigate the same number of acres or more acres than the number of acres proposed to be irrigated after the transfer. If the appropriation has not been used during~~

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the five years prior to the filing of the application because the land was enrolled in a government program, documentation of such enrollment shall accompany the application and information shall be provided as to the last five years of use of water under the appropriation.

001.02D4 For temporary transfers, copies of agreements or leases shall accompany the application forms. For individual water appropriations, the agreement shall be a statement by the individual appropriator as to the duration of the temporary use at the proposed location. For water appropriations held by an irrigation district, reclamation district, public power and irrigation company, or mutual canal or irrigation company, copies of leases or agreements shall be signed by all the landowners whose land is involved in the transfer and by the proper district or company official.

001.02D5 For applications filed by irrigation districts, reclamation districts, public power and irrigation districts, or mutual canal companies, the names, addresses, and signatures of the landowners agreeing to have the water appropriation transferred off of their land must be included.

001.02D6 For applications filed by an appropriator of record that is not the landowner (and is not an irrigation district, reclamation district, public power and irrigation district, or mutual canal company) the name(s), address(es), and signature(s) of the landowner(s) must be included.

001.02D7 If facilities are used that are not owned or operated by the applicant, documentation must be provided that the owner or operator of the facilities agrees to the transfer, or if the Applicant is an irrigation district, reclamation district, public power and irrigation district, mutual canal or irrigation company, the Applicant certifies that: (1) the proposed change is in compliance with any applicable contracts or agreements, or (2) that the owner of the facilities has approved the proposed change.

001.02D8 Whether the lands proposed to be irrigated have been cultivated or contain native grass.

001.02E Applications shall be accompanied by a current legible aerial photograph marked to indicate the location of lands proposed for irrigation by the transfer.

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001.03 A transfer in location of use for irrigation water rights will not diminish the supply available for or otherwise adversely affect any other water appropriator, and may be processed as an expedited transfer if all of the following criteria are met:

001.03A

~~001.03B~~ If (1) There are no surface water users with a point of diversion within one mile downstream of the Applicant's point of diversion, or (2) There is a tributary source of water between the Applicant's point of diversion and the next surface water point of diversion that is reliable and sufficient to supply the downstream appropriators needs, or (3) The Applicant submits a waiver of objection by all surface water users with a point of diversion within one mile downstream of the Applicant's point of diversion. These do not apply when the applicant is an irrigation district, reclamation district, public power and irrigation district or irrigation or mutual canal company.

~~001.03C~~ No surface water appropriation will exist on the land (from which the water appropriation is proposed to be transferred) after the transfer that existed on the land prior to the transfer process.

~~001.03D~~ Water diverted under the appropriation has been used at some time during the last five years to irrigate the same number of acres or more acres than the number of acres proposed to be irrigated after the transfer.

~~001.03E~~ Except as provided in 001.01D1, ~~the appropriations that will exist at the proposed location of use if the transfer is approved will not exceed the previously permitted diversion rates and volumes. For transfers that result in overlying appropriations, §§46-231 and 46-294(4)94-(4) shall govern.~~

~~001.03E~~ If the land currently under appropriation is located in an area determined to be fully or over appropriated, the surface water right cannot be transferred under Section 46-291(1) if the land currently under the appropriation is also ~~with~~ ~~not be irrigated with ground water unless~~ ~~1) offsets for use of the well are provided as certified by the transferee, transferor, natural resources district, or irrigation district, reclamation district, public power and irrigation~~

~~district, or irrigation or mutual canal company, or 2) the department will provide notification to the landowner and the natural resources district that the well on the property being transferred from will not be used for irrigation of that tract of land unless such use is in compliance with natural resources district rules and regulations and would not result in an increase in consumptive use, after the proposed transfer. The Department shall condition orders to which this section applies in order to comply with this requirement.~~

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~~01.02~~001.04 Review - An application that is incomplete or incorrect shall be returned to the applicant for correction. The corrected application must be refiled in the Department within 90 days of the date it is returned to the applicant. Failure to return the corrected application within 90 days shall cause the application for expedited transfer to be dismissed.

001.05 Decision

001.05A - If the application is determined not to meet the requirements of Chapter 9, 001.01 above, the Department will issue a written order notifying the applicant of its determination and including the specific findings supporting the Department's determination that the application cannot be processed under the expedited process. The applicant will be given 90 days to:

001.05A1 Submit further information in an attempt to satisfy the requirements of the expedited process,

001.05A2 Supply the additional information needed to meet the requirements of the non-expedited transfer process, and request that the application be considered under the non expedited process,

001.05A3 Request a hearing as described in the Department's Rules of Practice and Procedure, Title 454, Chapter 9 on the issue of whether the application should be allowed to proceed pursuant to the expedited process.

If the applicant fails to take any of the above three actions, the application shall be considered dismissed without any further action of the Department.

001.05B The Department shall issue a written order denying or approving the application. A copy of the order shall be delivered or mailed to all persons listed in the application. A final project map, drawn in accordance with Title 457, Chapter 10, shall be required to be filed within six months of an order approving the application.

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~~01-06001.06~~ Filing Temporary Transfer Decisions in County – Copies of the original appropriation permit documents, the agreement by which the temporary transfer is to be effected, and the written decision approving the temporary transfer is required to be filed with the county clerk or register of deeds in the county where the appropriation was established prior to transfer within 60 days from issuance of the order of approval. The applicant shall pay the County for the costs of filing and indexing such documents to the land subject to the appropriation prior to the transfer. Within 90 days of the issuance of the order of approval, the applicant shall file proof of the county filing with the Department. Failure to provide proof of filing shall cause the prior approval to be negated.

~~01-07001.07~~ Appeal. If the decision was issued at the conclusion of a hearing, parties to the hearing may request a rehearing as described in the Department Rule Title 454, Chapter 11 or may appeal to the Nebraska Court of Appeals as described in 61-207 R.R.S. 1943, as amended. Parties should not assume that filing a request for rehearing extends the deadline for appeal to the Court of Appeals. If the decision was based on the application, without a hearing, interested persons may request a hearing as described in the Department's Rules of Practice and Procedure, Title 454, Chapter 9.

~~02002~~ NONEXPEDITED CHANGES

002.01 For purposes of 46-290(5) R.R.S. 1943, as amended, beneficial use for instream uses shall include:

- a. Water Quality Maintenance
- b. Water necessary for compliance with compacts, decrees or other state contracts.

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002.02 To make a public interest determination as required in 46-294(1)(k)(1) R.R.S. 1943, as amended, the Director shall determine whether the benefits of the proposed transfer outweigh any adverse impacts that might occur giving consideration to the economic, social and environmental impacts and whether and under what conditions other sources of water are available for the uses to be made of the appropriation after the proposed transfer or change.

EFFECTIVE DATE: APRIL 30, 2005