

12/2/05 Mtg.**Ann Diers**

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**From:** Ann Bleed [ableed@dnr.state.ne.us]  
**Sent:** Thursday, December 01, 2005 10:59 AM  
**To:** Ann Diers; Brian Barels; Dennis Strauch; Don Kraus; Dave Sands; Frank Albrecht; James Nelson; Larry Hutchinson; Steven Huggenberger; Steve Gaul; Susan France; Tom Schwarz  
**Subject:** WPTF Surface Water subcommittee Meeting 9:00 CPNRD large conference room, Grand Island

In preparation for the meeting tomorrow, please review the surface water rules and Dennis's suggested changes.

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

**From:** Dennis Strauch [mailto:dstrauch@earthlink.net]  
**Sent:** Thursday, December 01, 2005 10:46 AM  
**To:** Brian Barels; Ann Bleed; Don Kraus  
**Subject:** DNR Rules

<<...>> <<...>>

Ann, Brian and Don,

According to my calendar we have a meeting in Grand Island tomorrow to discuss DNR's rules for transfers. I have been working on some changes to the rules and would like to share them before the meeting. Attached are two documents one contains my changes to the rules and the other is some cleanup language to 46-229.04. Look them over if you have time and we can discuss them tomorrow. If you need to talk to me before the meeting, please call my cell phone 308-631-0031.

See you tomorrow,  
Dennis

12/1/2005

DNR 014410

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 Proposed transfer is not temporary. } *Delete*

001.01BA 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.

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

*Report DS's D* ~~001.01D All the lands from which the appropriation will be transferred have been irrigated in at least one of the preceding five (5) years, or sufficient cause for nonuse exists under §46-229.04. An affidavit of the landowner identifying the use of the appropriation on the lands from which the appropriation will be transferred is required to accompany the application for an expedited transfer.~~ *has*

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

001.01EC1 Lands within the quarter section of land to which the appropriation is appurtenant, or

001.01EC2 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

001.01EC3 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

(X)

*Report DS's D*  
*00/01K*  
*P.D.*

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001.01F~~D~~ 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.

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

001.01H~~F~~ 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.

001.01I~~G~~ 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.

(\*)  
Keep

M.A.A.

~~\_\_\_\_\_~~  
~~\_\_\_\_\_~~

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01.01 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 expedited and non-expedited transfers, when the transfer is from irrigation to irrigation and it results in no increase in acres and no change in the point of diversion you would substitute the landowner affidavit found in 001.01C above (§46-294 (1)(c)). ~~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.~~ If the appropriation has not been used during

*delete*  
*⊕*  
*Certify →*  
*had*  
*irrig.*  
*in*  
*last 5*  
*years.*  
*? → [add 2 provisions]*

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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 district, 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 ~~Return flows from the irrigated fields at the proposed location of use (both surface flows and those that occur below the surface of the ground) will not be changed by the transfer such that they would adversely affect another appropriator. The proposed transfer is within the same irrigation district, reclamation district, public power and irrigation district, or mutual irrigation or canal company.~~ *Delete*

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.

*Delete* 001.03E ~~The appropriations that will exist at the proposed location of use if the transfer is approved will not exceed the previously permitted rates and volumes. For overlying appropriations §46-294 (4) shall govern. The total rate of all natural flow appropriations that will exist at the proposed location of use if the transfer is approved will not exceed a rate of one seventieth of a cubic foot per second of water for each acre irrigated, nor will it exceed an annual volume of three acre-feet per acre.~~ *OK Be sure diversion is all out of Exp*  
*F1 except as provided in 001.01.D1*  
*Does not apply to approx quantity of water by rate in volume.*

*Delete* 001.03F If the land currently under appropriation is located in an area determined to be fully or over appropriated, whether and to what extent the land currently under appropriation will be irrigated by ground water after the transfer shall be addressed in the Integrated Management Plan of the affected Natural Resource District. ~~the land currently~~

under the appropriation will not be irrigated with ground water after the proposed transfer.

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01.02 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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01.06 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.

01.07 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.

02 NON EXPEDITED 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.

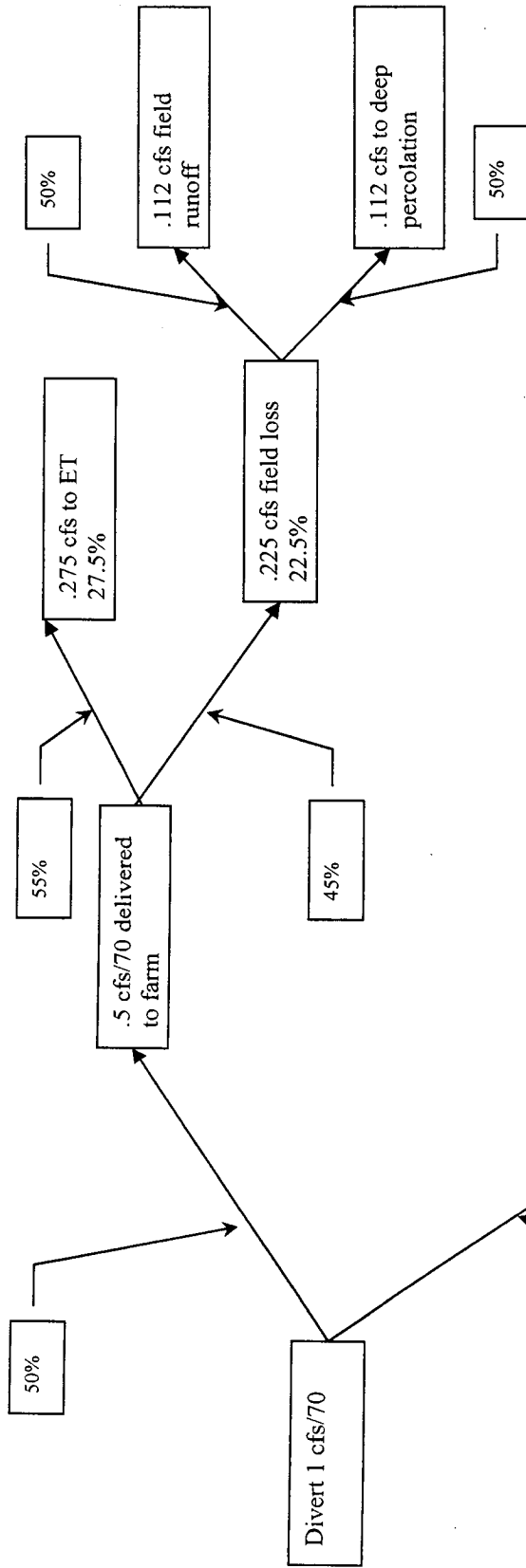
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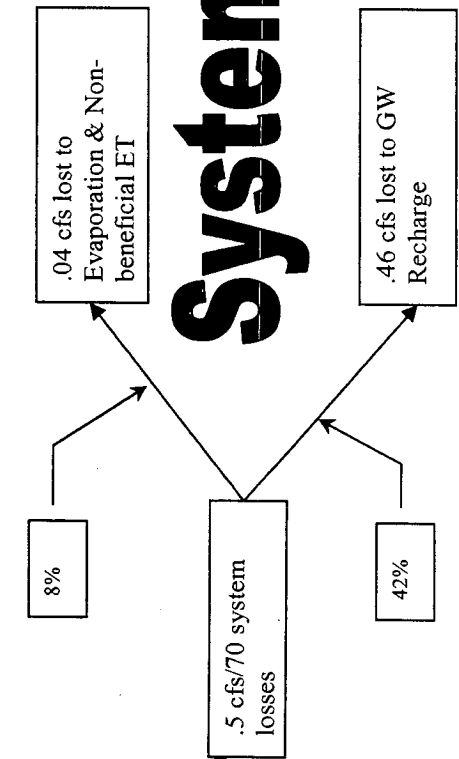
002.02 To make a public interest determination as required in 46-294(1)(k)(1) R.R.S. 1943, as amended, the Director shall determine whether the benefits of the proposed transfer outweigh any adverse impacts that might occur giving consideration to the economic, social and environmental impacts and whether 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

# Application Losses



# System Losses



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. 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 reinstate 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 reinstated 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