

Water Policy Task Force

Surface Water Transfers Subcommittee Conference Call

August 4, 2003

Attendees: Al Schmidt, Jim Nelson, Brian Barel, Steve Huggenberger, Don Kraus, Dave Sands, Jim Cook, Steve Gaul, Susan France, Ann Bleed.

The subcommittee reviewed the subcommittee's proposed draft legislation based on LB 621 (see July 21 memo by Ann) as well as a memo sent out by Jim Cook with some draft legislation developed by Jim Cook. Jim's draft basically combined LB621 into existing transfer statutes so that the criteria of approval etc. are the same for both except where there is reason for there to be a distinction between a permanent transfer and a lease. Unfortunately due to e-mail problems at DNR, Jim's draft was not received by everyone on the subcommittee, therefore the subcommittee did not review the actual language in the draft. Nevertheless, the subcommittee proceeded to discuss the basic concepts using the July 21 memo, Jim's new draft and the minutes from the Executive Committee as guidelines.

Recommendations of the Subcommittee (See Cook 8-5 Draft:

1. Combine leasing and permanent transfers into one section of the law (46-290-294) with the same criteria for both, except where there needs to be a distinction between a permanent transfer and a lease.
2. Jim suggested that a separate definitions section was not needed, especially if the leasing language and transfer section are combined.
3. After discussing the issue, the subcommittee agreed with concerns of the Executive Committee that counties should not be allowed to appeal a decision by the Director and therefore that counties should not be given full standing in transfer and leasing proceedings. Instead the subcommittee recommends that the counties from which and into which a transfer or lease is being made should be notified by DNR and should be allowed to provide written testimony to the Director. At this point the subcommittee's concern was that any discussion concerning the county's testimony should be open and rebuttable by all parties. The subcommittee therefore recommends that the testimony be provided to all the parties and if there is a contested hearing, the county can be called to the hearing as a witness by any party.
4. If the applicant also wants to change the point of diversion, there would have to be a separate application to change the diversion as already covered in existing law (46-250) and DNR rules and regulations which only allow the change if there is no harm to another appropriator.
5. To avoid undue work for a minimum use, the subcommittee agreed that there should be a minimum of one year for water leases. There already is a provision in the law that allows the DNR to approve a temporary water right.

6. There was considerable discussion over how to handle transfers within an irrigation district. The subcommittee decided to maintain the existing map transfer law (46-120-46-129) but amend it to also include leases.
7. The subcommittee also discussed how to handle the termination of a leased water right for nonuse. Jim proposed that if the lease is not used, the right should be lost. This was generally accepted by the committee, as long as it was clear in the law that this would happen so that the lessor could make sure that the lease contract would satisfactorily cover such a contingency. It was also agreed that the lease itself should be part of the application to lease water.
8. If the lease is for land being served by an irrigation district, the irrigation district holds the water right. The subcommittee agreed that the irrigation district must approve any lease or transfer and that the right should go back to the irrigation district, not the landowner at the termination of the lease or if the lease is not used.
9. The subcommittee talked about allowing irrigation districts a 5-year grace for to put a permit that had been lost through the adjudication process back into use, whether or not it was a leased permit. The subcommittee agreed this should be discussed as part of the adjudication statutes, not the leasing/transfer statute.
10. Regarding land valuation and taxation, the subcommittee agreed that the land should continue to be taxed as irrigated for the duration of the lease.

Issues that still need to be discussed:

1. The subcommittee very briefly discussed a proposal by Jim in which Jim said appropriations for storage, induced ground water or instream flow appropriations would not be transferable to another location. The subcommittee did not agree these should be exempt from transfers; further discussion of this issue is needed before any recommendation can be made.
2. The subcommittee had a lot of discussion over Jim's suggested changes to sections 6 and 7 that would eliminate the explicit language stating that only the amount of water consumed may be leased (or transferred) except if the transfer was from ag to ag, in which case there would be a presumption of no harm as long as the number of irrigated acres did not increase as a result of the lease or transfer. Jim's alternative language picks up the existing transfer language in 46-294 stating that except as otherwise provided (see below) the proposed transfer will not diminish the supply of water available for or adversely affect any other water appropriator or significantly affect a riparian user who files an objection. As Jim explained, if only the consumptive use is being transferred, this test would be met as long as there was no change in the location of the return flows that would adversely impact another appropriator. Also, if the transfer was from ag to ag and there was no increase in acres, this would also meet the test as long as there was no significant change in the location of the return flows. It would be possible, however, for an objector to protest this assumption. Thus, Jim's language captures the original concepts of only allowing the consumptive use to be transferred unless it is from ag to ag without stating the concepts explicitly.

3. Conservation was a big issue of task force. Jim's proposal allows person to reuse any water that was saved if savings is an actual reduction in consumptive use (see Jim's proposed 46-294 3b(1), which would encourage conservation. However, the word conservation is not explicit in the legislation – perhaps this concept could be more fully explained in some intent language.
4. The concept of allowing a minimal amount of spreading (up to 5% of the existing permit or 5 acres, whichever is less) only in basins that are not fully appropriated was also discussed. The basic question is whether to allow a minimal amount of spread in non-fully appropriated basins or not to allow any spreading at all. There is still no agreement on this issue.
5. Jim's draft does not explicitly discuss lease renewal because all renewals are treated the same as new applications and no lease can be more than 30 years. The subcommittee did not discuss this issue. One question with this wording is whether one could renew the lease at any time or would have to wait until the 30 year period was over. If one could renew anytime, would this be a problem? The concept discussed in the executive committee was that one could renew any time after the mid-point of the lease.
6. In the July 21 memo (p.6) Ann proposed allowing a map transfer for individuals, which would allow a person to change the configuration of their as follows:

Each individual holding a surface water right is responsible for maintaining accurate records of the current land owner to which the water right pertains, the owner's current address and phone number, the current address and phone number of the operator actually using the water right and an accurate map showing the acres irrigated under the right in accordance with 46-233(2)? If the existing irrigated acres map on file with the Department of Natural resources is incorrect, the owner may submit an ammended map. The director shall accept the map as the current water rights map if (1) the ammended map accurately portrays the number of acres currently being irrigated and the new map (2) does not show a greater number of acres being irrigated than were shown as being irrigated by the map previously on file with the department; (3) the newly irrigated areas shown on the ammended map are contiguous with the irrigated area on the map on file with the department and (4) all the land irrigated under the permit is still owned by the owners of record on the map filed with the department, and (5) the change in location does not adversely impact another water right.

In reviewing the minutes from the executive committee I think we captured all the comments of the executive committee except for 1)making leasing within an irrigation district simpler than transfers and 2) the leasing and protecting water for instream flows. Some issues, such as allowing a well to replace a leased water right in an overappropriated basin, involve more than the surface water subcommittee.

Changes to the Adjudication Law

Recommendation of Subcommittee:

1. Change period of nonuse from three to five years.

Items Still Need to Discuss

- 1) Allow continued diversion rate for fewer acres if doesn't exceed that which can be beneficially used

Add: If a portion of the water right is cancelled through an adjudication process, the appropriator may provide information describing the amount of water required to maintain the remaining beneficial use and the director may allow that diversion rate to be maintained at a rate up to but no greater than the original permitted diversion rate, for a reduced number of acres being irrigated, not exceed the amount of water that can be beneficially used on the land being irrigated under the permit. If the water right is subsequently leased or transferred, only the consumptive use or if the lease is from agricultural uses to agricultural uses, only the actual number of acres being irrigated can be transferred.

Comment by Kraus

May need some limitations (i.e. don't know that we want a canal continuing to divert 100 cfs to cover losses, even if is only serving 100 acres). One cfs per 70 acres establishes a beneficial use standard. If there is to be a new definition, then the process should establish standards. Why should they continue to increase their per acre diversion rate ratio because customers are signing off without implementing efficiency standards. Don's concern is echoed by the concern of the Executive Committee that we need to encourage water conservation. On the other side of the coin is the concern, also expressed in the Executive Committee meeting that we have to be careful to determine whether the water is conserved for the individual or the system. If the return flows from the diversion are essential for a downstream water right, we may want to see these return flows continue. Perhaps we should state the diversion should be the minimum amount needed for good husbandry unless the continuation of the existing return flows are necessary to maintain the water supply of a downstream appropriator, in which case an incidental underground permit may be granted.

- 2) If the water right held by an irrigation district is adjudicated and water rights would be cancelled under current adjudication statutes because of nonuse by the land owner, the water right shall revert to the irrigation district. The district shall have up to five years to reassign the water right through and put it to another beneficial use. During the up to five years that the water right is in limbo, the

water right cannot be used until another beneficial use has been assigned through leasing, transfers etc.