

DNR MEMO

~~January 14~~ March 1, 2005

TO: Water Policy Task Force Members
FROM: Ann D. Diers
SUBJECT: LB 962 Legislation ("Fixes")

LB 962, which became effective on July 16, 2004, made comprehensive changes to Nebraska's water law. In the process of beginning to administer the law as it has been revised, the Department has found several matters that need to be corrected or revised going forward. As was reported at the November 30, 2004 meeting, the Department decided not to pursue these corrections and amendments in the 2005 legislative session, but we promised to provide you with the list we have developed to date.

At some point in the future, perhaps the 2006 legislative session, the Department likely will propose that some or all of these issues be addressed and it is probable that additional needs will be identified before then. The Water Policy Task Force will be given the opportunity to review and comment on all suggestions at that time.

The issues identified thus far are listed by topic below. Some of the issues identified are not directly related to decisions made by the WPTF, but involve sections of law amended by LB962. Issues of a more substantive nature have been identified with asterisks (*).

GENERAL

1. Reference in the Resources Development Fund law to a specific cost index which has now been discontinued should be revised to be a more general reference to a cost index, so that the Department has some latitude in the future, as such resource publications change. (§ 2-1588(2)).

CANCELLATION OF WATER RIGHTS

2. *Clarify that in the case of an uncontested cancellation for non-use of a surface water right on a specific parcel served by an irrigation district, etc., that district is not prohibited from asserting its new statutory rights to reassign the rights to some other user within five years. (§ 46-229.02).

3. *Provide that a water appropriation may be canceled without complying with all the provisions of the adjudication sections (§ 46-229.01 to § 46-229.04) if the owner fails to comply with the conditions of approval in a permit. (§ 46-229.02)).
4. *Amend § 46-229.03(1)(i) to clarify that the form to file to contest the Department's determination shall accompany the notice. Currently, the statute provides that the form needed to request a Department hearing will be sent with the notice. However, pursuant to § 46-229.02, there are several options the Department and owner can pursue short of a hearing. If the Department determines that those options do not apply, a hearing is automatically required (so the owner would not need to request a hearing). (§ 46-229.03).
5. *Similarly, amend § 46-229.03(1)(j) to clarify the location from which the form to file to contest the Department's determination may be obtained. (§ 46-229.03).
- 4.6. *Provide that, in addition to a verified field investigation report, the Department may rely upon other reports, e.g. reports submitted by the water user, as prima facie evidence for the forfeiture and annulment of a water appropriation. (§ 46-229.04).

TRANSFERS

5.7. Amend Section 46-290 to (a) add references to additional sections of the statutes pursuant to which permits may be issued (i.e. permits for "supplemental appropriations" and for wells within 50' of a stream) and for which transfers may be sought, (b) require the application for approval to include the name and address of the new user of record at any new location of use, (c) to add storage appropriations to the listed types of water rights for which changes in the purpose of use may be approved. (§46-290).

*Many made trans. of water
 Prov. of water = trans. of water?
 AB - Not necessary
 Inter Basin States
 based on injury test*

6.8. *Amend Section 46-294 to delete the requirement that the locations of use of the water right before and after any requested transfer must be within the same river basin or that the original use be from a tributary to the river basin to which the appropriation is to be transferred. (§46-294).

9. *Amend § 46-294(1)(g) to change the current requirement that a district or company approve a transfer or change of an appropriation in such district or company's name, and replace it with a requirement that the person proposing the transfer has notified such district or company of the proposed transfer. (§ 46-294).

DK Language

7.10. *Clarify that the applicant, rather than the Department, must file certain documents with the county clerk or register of deeds whenever a temporary transfer is approved; also, the applicant would need to file proof

*Agenda
 next day
 PAC - 0.34
 funds*

of such filing with the Department. A provision was also proposed to be added to provide that failure to file the proof of filing would be grounds for the director to negate a prior approval. (§46-294.01).

IN-STREAM FLOW PERMITS

- ~~8.11.~~ *Revise the instream flows appropriation statute relative to the 15 year reviews of such appropriations to (a) require notice to be mailed to the appropriator of record, (b) require the appropriator to file documentation of continued use, and (c) provide for a hearing on the director's motion even if no other requests for hearing are received. (§46-2,112).

WATER WELLS

- ~~9.12.~~ *Revise the water well registration statute to (a) require the water well contractor or pump installation contractor to provide notice to the Department within sixty days of pump installation, well modification, or pump modification for a well previously registered, and (b) require the well owners to notify the Department of other changes within sixty days. (§46-602).
- ~~13.~~ *Amend § 46-638(1) to make mandatory a requirement that the Department grant and administer permits to public water suppliers. The current requirement in the statute is permissive only, and states as follows: "The Director of Natural resources may grant and administer permits to public water suppliers..." The change would replace the word "may" with "shall."
(§ 46-638).
- ~~10.14.~~ Revise the 1000' water well spacing statute to add to the exception from compliance a requirement that the water well being replaced was in compliance with any applicable spacing statute when it was registered. (§46-651).

PUBLIC WATER SUPPLIERS

- ~~11.15.~~ *Revise the statute relating to protection of public water suppliers' proposed well fields to (a) change a reference to "contiguous tract" to "undivided parcel" for purposes of identifying the land that may be protected under a single notice of intent, (b) require a copy of the notice of intent to be sent to the owners of all land falling within the spacing protection limits provided for in the notice of intent, and (c) require the public water supplier to notify the applicable NRD of its determination that land described in a particular notice of intent is not suitable for its intended purpose. (§46-655.01).

ADMINISTRATIVE PROCEDURES

12.16. _____ Revise Section 46-683 of the Industrial Ground Water Regulatory Act to delete a requirement that the director issue a written order within ninety days of a hearing [because the requirement of a hearing was deleted by LB 962]. (§ 46-683).

GROUND WATER MANAGEMENT AND PROTECTION ACT

13.17. _____ *Modify the provision that natural resources districts cannot be required to regulate ground water uses in place when a basin is preliminarily determined to be fully appropriated so that it clearly applies only to basins declared fully appropriated as a result of a DNR annual report (first one due on or before 1-1-06), and not to basins declared fully appropriated by operation of law when LB962 took effect. (§ 46-715).

14.18. _____ Change an erroneous reference to "integrated management plan" to "integrated management area." (§46-719).

15.19. _____ Modify section 46-743 to provide that DNR and DEQ do not have to testify at every hearing held pursuant to the Ground Water Management and Protection Act. (~~§46-743~~).

J. Turner - F/A

*Non B -
Broader area
All of CP.?
Non-platte + Reg. B.
Platte = O/A area -
subj. to reg.
- Back-up for Co. grant
RA - thought
Future - 1st Report*