

## Mike Thompson

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**From:** Ann Bleed [ableed@dnr.ne.gov]  
**Sent:** Monday, April 17, 2006 8:34 AM  
**To:** John Erickson; Ann Diers; Brad Edgerton; Dan Smith; David Cookson; Jasper Fanning; John Thorburn; Justin Lavene; Michael Clements; Mike Thompson; Paul Koester; Tina Kurtz  
**Subject:** Materials for April 20 Meeting



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The meeting is for 10:00 at the Tri-Basin NRD in Holdrege. This meeting will not be noticed so make sure you do not bring a quorum of your board. The primary purpose of the meeting is to review how the RRCA ground water model treats the mound credit and to review options for interstate transfers.

In preparation for the meeting I, with help from Jim Cook, reviewed the transfer laws pertaining to surface water and ground water. The enclosed files are my initial thoughts after the review. These are produced as an aid to our discussion and should not be considered as in any way an official view of the DNR. I also tried to compile into one document all the various transfer laws. Again, if there are questions, please consult the law itself. Ann

**Mike Thompson**

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**From:** david.cookson@ago.ne.gov  
**Sent:** Monday, April 17, 2006 11:15 AM  
**To:** ableed@dnr.ne.gov  
**Cc:** Ann Diers; Dan Smith; John Erickson; Jasper Fanning; John Thorburn; Justin Lavene; Michael Clements; Mike Thompson; Brad Edgerton; Paul Koester; Tina Kurtz  
**Subject:** Re: Materials for April 20 Meeting

All -

We have received the memorandum from Director Bleed and have a few comments.

First, the legal analysis set out in the memo does not state the position of the Attorney General's Office or the official position of the State of Nebraska with regards to potential litigation on any of the issues discussed therein.

Second, given the absence of a "privileged and confidential attorney client communication" stamp, it appears that the Director considers this memo to be a public record. In our review of the memo and in consultation with our public records specialist, we believe the memo is a non-privileged public record that should be made available if requested.

Sincerely, David

David D. Cookson  
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04/17/2006 08:33  
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cc

Subject  
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To: Republican River Natural Resources Districts

From: Ann Bleed

Re: Issues to consider regarding an interbasin transfer of into the Republican River Basin

The Department was asked to provide information pertaining to a potential transfer of water into the Republican River Basin. Here, for your consideration and input is a very preliminary review of the issue. The initial items that need to be considered include legal issues, both state and federal; water supply issues; and economic issues.

### Legal Issues

Please see the attached document in which I have tried to collect all the water transfer laws into one place.

### Inter-basin Surface Water Transfers

Neb. Rev. Stat. 46-294 prevents the interbasin transfer of an existing surface water right. Thus the only time surface water could be transferred out of the basin of origin is if there is sufficient unappropriated water for a new a new water right. Under the interbasin transfer statute Neb. Rev. Stat 46-289 in granting a new right to transfer water the Department must consider:

1. Economic, environmental and other benefits of transfer;
2. Adverse impacts of the transfer;
3. Any reasonable foreseeable future beneficial uses in the basin of origin;
4. Economic, environmental and other benefits of leaving the water in the basin of origin for current or future beneficial uses in basin of origin;
5. Alternative sources of water available to applicant and in basin of origin.

For an interbasin transfer right to be granted, the overall benefit to the state and the applicant's basin must be greter than or equal to the adverse impacts to the state and the basin of origin.

### Ground Water Transfers

Common Law prohibits the transfer of ground water off the overlying land. However the statutes provide exceptions to this general principle. Which statute governs depends on the intended use of the transfer.

Under Neb. Rev. Stat. 46-691.01 no permit is required for the transfer of water for domestic use from wells with a capacity of less than 50 gpm and municipal uses do not require a permit under Neb. Rev. Stat 46-678.01???. However, while municipal transfer permits are not required, municipal transfers (unlike agricultural and domestic transfer) have no protection if permits are not obtained. Neb. Rev. Stat. 46-691.02 states water can be transferred for environmental or recreational benefits if such transfers are allowed and

permitted by the NRD in which the well is located. When granting a permit for environmental and recreational benefits the NRD shall consider whether: the use is beneficial and whether there are alternative sources of water available to the applicant, any negative impacts of the transfer on the availability of water for present or reasonable future demands for water (including compliance with compacts and interstate agreements) or any adverse environmental effects in the area of the proposed withdrawal. The transfer must also be in compliance with any IMP and GWMP of the NRD.

Under Neb. Rev. Stat 46-677 and 46-678 water can be transferred for industrial purposes but, unless withdrawal and transfer for industrial purposes is for less than 150 acre-feet of water and the transfer is from and to property owned or leased by the applicant, a transfer permit must be obtained from the Department. In determining whether to grant the permit, the Department must consider: the adverse effects on existing surface or ground water users, the effect on water supplies needed to meet reasonably anticipated domestic and agricultural demands in the area of the withdrawal, the availability of alternative sources of water reasonably accessible to the applicant, the economic benefit of the proposed use, the social and economic benefits of existing uses in the area of the applicants proposed use and the effects on interstate compacts, decrees or other contracts and other factors reasonably affecting the equity of granting the permit.

The primary use of water in the Republican Basin is for agricultural use. If the transfer into the Republican Basin were strictly for agricultural use within the state of Nebraska, according to Neb. Rev. Stat. 46-690 no permit would be required. Such a transfer could, for example, be used to provide water to a Nebraska Irrigation District. However, Neb. Rev. Stat 46-690 also states any affected party may file an objection with the NRD and the transfer can be stopped by the NRD or, when applicable, by the DNR.

If the transfer were to provide water to Kansas, under Neb. Rev. Stat. 46-613 an interstate ground water transfer permit would have to be obtained from the Department. In determining whether to grant or deny such permit the statute requires the Director to consider effects similar to those listed above for industrial transfers.

Thus depending on how the use of the ground water transfer was restricted, any or all of the above transfer statutes could apply. The environmental, recreational, industrial and interstate transfers would require a weighing of the benefits of the use of the water in the basin or origin against the use in the basin to which the water is being transferred. The agricultural transfer would not need a permit, but in determining the likelihood of being able to implement the transfer, one must consider the potential that there would be a successful objection to the transfer.

In addition, under Neb. Rev. Stat. 46-742, if the transfer is from the Platte River Basin to the Republican River Basin, no matter what the use of the transfer, both affected NRDs must approve the transfer. Neb. Rev. Stat. 46-742 states that whenever the drilling of new wells has been stayed or closed to new permits, ground water withdrawn outside the affected area shall not be transported for use inside such area unless:

1. Such withdrawal and transport began before the stay took effect,

2. The water is used solely for domestic purposes, or
3. Such withdrawal and transport is approved in advance by the district in which the stay or closure is in effect and, if the water is withdrawn in another natural resources district, by the other district.

Finally, if any federal or state agency action is involved, the transfer would need to comply with the federal and state laws, which in the case of the Platte River Basin include the endangered species acts.

In sum, if the proposal is to transfer water from the Platte River Basin, only ground water could be transferred because there is no unappropriated water for a new surface water right and ground water can only be transferred if both the NRD from which the water originates and the NRD to which the water will go approves the transfer. In addition, if the water will potentially be used for industrial purposes or would go across the state line into Kansas, industrial and interstate transfer permits would have to be obtained. Finally, in order to assure no harm to existing users and no impacts on endangered species, I am assuming that only ground water that previously was consumptively used could be transferred.

#### Compact Considerations

Any such augmentation plan would have to be approved by the RRCA if the resulting inflows are to be considered as imported water and not be considered as part of the virgin water supply to be split between Kansas and Nebraska. This water presumably could be accounted for by the RRCA accounting procedures using the RRCA ground water model using a "with and without" pumping scenario and a measured outflow from the well minus agreed upon carriage losses between the well and a compact gage. We would also want to try to get the imported water into the basins that might have sub-basin compliance problems during water-short years and make sure that the RRCA would recognize that this imported water offsets and sub-basin compliance problems.

If the augmentation was not approved by the RRCA, then any additional water would be treated as part of the virgin water supply and would have to be shared with the other two states in accordance with the percentages for the split in the Compact. This option would still help Nebraska and could be significant on those basins in which we are potentially out of compliance on the sub-basin level during water-short years.

#### Water Supply Issues

If one were to transfer ground water from the Platte, how much would the transfer provide to assist in Compact compliance? This depends in part on whether or not the transfer uses wells that cause depletions to the Republican River. If the transfer relies on wells that deplete the flow in the Republican Basin, the transfer would provide an immediate water supply to river flow, but eventually the pumping would result in a depletion to the basin. In other words, the only absolute increment of water to the basin

would be the savings resulting from a reduction in consumptive use because the well was no longer being used for irrigation. Otherwise, such a scenario would merely change the timing of the flows and depletions by putting water into the river during water short years, with the resulting depletion not occurring until later. A more beneficial scenario for the Republican Basin, although not the Platte Basin, would be to use wells that only cause depletions to the Platte River. In this case, there would be an absolute addition of water to the Republican Basin, not just a reduction in consumptive use in the Republican Basin and a change in the timing of the flows.

In either case, the saved water would have to be transported from the point of origin to the appropriated point in the Republican Basin. The water could be transferred to the Republican Basin through a pipeline with little loss but at a considerable expense, or could be transported using existing canals and river channels at a much lower expense but greater transportation losses to evaporation and seepage. Estimates of seepage loss in the CNPPID main canal system are 1 to 3 cfs per mile. The loss to seepage would, however, provide recharge to the ground water reservoir, which would still benefit the basin. The total loss to evaporation, which would be lost to the basin, will depend on the area of surface water involved and the amount of time it takes to transfer the water, but is roughly estimated to be about 10 % of the total transportation loss. The losses in a natural drainage way would be higher, particularly if the drainage is otherwise dry at the time of the transfer and if there are blockages in the drainage. At this time we do not have estimates of what these losses would be. However, the following estimates by Brad Edgerton will provide a rough idea of what we could be facing if the water were to be transferred through the Spring Creek drainage.

First, it is very difficult to estimate the transit loss of spring Creek without an extensive study. However if you look at the terrain on the upper end of spring Creek the first 7.5 miles are dry canyon with several small farm dams and pits. The majority of the flows would be lost in this stretch. After about 10 miles the channel has fairly good tree growth along the Creek which could extract a fair amount of flows.

The good news is; the creek drops about 20.5 feet per mile which means the flows would travel fairly fast down the creek. The bad news would be the amount of water needed to flow down this channel would cause extensive damage (irreversible damage) to the natural creek channel. Much work and money would need to be spent on stabilizing the channel so that this could be minimized. (Note: The Republican River drops about 7 feet per mile).

To divert 30,000 AF per year would require 41 cfs for 365 days per year, or 82 cfs for 6 months. Medicine Creek runs about 50 cfs on average; it is 30 feet wide and 1 foot deep. Spring Creek is less than 5 foot wide and less than ½ foot deep near the mouth of the creek.

From the top to the bottom end it's about 20.5 miles the way the bird flies. If you could get by with 1 cfs loss per mile you would need to divert 62 cfs to get 30,000 AF per year,

and you would need to divert all year long. If you did the 6 months diversion during the winter months the transit loss should be much less, however this means that a higher rate of diversion would be needed. Right now the actual creek channel may be 25 to 30 miles long with all of the meandering it does; with the amount of drop per mile it has it wouldn't take long for it to be a straight channel with no natural meandering to dissipate the energy.

Would the State be responsible for the damage that would occur?

### **Economic Issues**

The costs of the transfer would include the initial cost of buying the water from the landowner, pumping costs, and transportation costs, which could include pipeline costs or canal use costs. The initial purchase price will depend on whether the purchase resulted in a permanent retirement of the irrigated land or simply an annual lease. The difference between irrigated and dryland in Nebraska is on average \$1000 per acre, but it would probably be higher in the Platte Basin. Experience with the CREP tells us that an annual lease would cost more than \$125 per acre. Pumping costs are roughly \$45 per acre foot. Based on previous calculations, pipeline costs would be roughly \$200,000 per mile. The cost for the use of existing canals would have to be negotiated with the canal owner.

There would also be the cost of the studies and permit processing, not the least of which would be the studies necessary to assure compliance with the federal and or state endangered species act if the transfer would impact the Platte River.

There is also the question of who will pay for the transfers. If the state is expected to fund part or all of the transfers, the state is likely to ask where the water would best be used, in the Republican Basin to assist in Compact compliance, or in the Platte Basin to assist with endangered species issues and other in-basin water uses.

### **A Possible Alternative to Interbasin Transfers**

The existing imported water supply (IWS) credit that Nebraska now receives is the result of diversions from the Platte River for the NPPD and CNPPID canals that result in as much as 18,000 af of credit. Initial modeling results indicate that when these canals reduce their diversions, the IWS credit decreases dramatically. Perhaps, rather than doing a formal transbasin diversion of groundwater, we could cooperate with the districts in the Platte Basin in obtaining surface water supplies so that they can maintain a certain level of their diversions in dry years. We could perhaps stipulate how this water would be used, i.e. not for direct irrigation but for such uses as priming the canals and the refilling of Elwood Reservoir. This type of purchase would benefit the Platte canals because it would reduce their canal losses and increase the recreational and other benefits of the reservoirs during dry years and the Republican Basin would receive the resulting recharge and IWS credit benefits provided by the use of this water. However, in this area the Platte River Basin is both overappropriated and subject to Section 7 requirements of the Endangered Species Act so that any new uses of water could not increase the



consumptive use of water in the basin or adversely impact U. S. Fish and Wildlife target flows for endangered and threatened species.



# State of Nebraska Statutes Pertaining to Transfers

## Surface Water Statutes

Laws pertaining to a new permit to transfer water from one basin to another

46-288

For purposes of this section and section 46-289, unless the context otherwise requires:

(1) Basin of origin shall mean the river basin in which the point or proposed point of diversion of water is located;

(2) Beneficial use shall include, but not be limited to, reasonable and efficient use of water for domestic, municipal, agricultural, industrial, commercial, power production, subirrigation, fish and wildlife, ground water recharge, interstate compact, water quality maintenance, or recreational purposes. Nothing in this subdivision shall be construed to affect the preferences for use of surface water as provided in section 46-204;

(3) Interbasin transfer shall mean the diversion of water in one river basin and the transportation of such water to another river basin for storage or utilization for a beneficial use; and

(4) River basin shall mean any of the following natural hydrologic basins of the state as shown on maps located in the Department of Natural Resources: (a) The White River and Hat Creek basin; (b) the Niobrara River basin; (c) the Platte River basin, including the North Platte and South Platte River basins, except that for purposes of transfer between the North and South Platte River basins each shall be considered a separate river basin; (d) the Loup River basin; (e) the Elkhorn River basin; (f) the Republican River basin; (g) the Little Blue River basin; (h) the Big Blue River basin; (i) the Nemaha River basin; and (j) the Missouri tributaries basin.

## Section 46-289

The Legislature finds, recognizes, and declares that the transfer of water to outside the boundaries of a river basin may have impacts on the water and other resources in the basin and that such impacts differ from those caused by uses of water within the same basin in part because any unused water will not be returned to the stream from which it is

## State of Nebraska Statutes Pertaining to Transfers

taken for further use in that river basin. The Legislature therefor recognizes the need to delineate factors for consideration by the Director of Natural Resources when evaluating an application made pursuant to section 46-233 which involves an interbasin transfer of water in order to determine whether denial of such application is demanded by the public interest. Those considerations shall include, but not be limited to, the following factors:

(1) The economic, environmental, and other benefits of the proposed interbasin transfer and use;

(2) Any adverse impacts of the proposed interbasin transfer and use;

(3) Any current beneficial uses being made of the unappropriated water in the basin of origin;

(4) Any reasonably foreseeable future beneficial uses of the water in the basin of origin;

(5) The economic, environmental, and other benefits of leaving the water in the basin of origin for current or future beneficial uses;

(6) Alternative sources of water supply available to the applicant; and

(7) Alternative sources of water available to the basin of origin for future beneficial uses.

The application shall be deemed in the public interest if the overall benefits to the state and the applicant's basin are greater than or equal to the adverse impacts to the state and the basin of origin. The director's order granting or denying an application shall specify the reasons for such action, including a discussion of the required factors for consideration, and shall document such decision by reference to the hearing record, if any, and to any other sources used by the director in making the decision.

### Laws pertaining to transferring an existing permit

#### 46-294

Except for applications approved in accordance with subsection (1) of section 46-291, the Director of Natural Resources shall approve an application filed pursuant to section 46-290 only if the application and the proposed transfer or change meet the following requirements: [46-291 pertains to expedited transfers and would not be relevant in this case.]

## State of Nebraska Statutes Pertaining to Transfers

1)

(c) (i) Any requested transfer in the location of use is within the same river basin as defined in section 46-288 or (ii) the river basin from which the appropriation is to be transferred is tributary to the river basin to which the appropriation is to be transferred;

### Ground Water Statutes

#### Section 46-691

*Transfer off overlying land; when allowed; objection; procedure; natural resources district; powers and duties; Director of Natural Resources; duties.*

(1) Any person who withdraws ground water for agricultural purposes, or for any purpose pursuant to a ground water remediation plan as required under the Environmental Protection Act, including the providing of water for domestic purposes, from aquifers located within the State of Nebraska may transfer the use of the ground water off the overlying land if the ground water is put to a reasonable and beneficial use within the State of Nebraska and is used for an agricultural purpose, or for any purpose pursuant to a ground water remediation plan as required under the Environmental Protection Act, including the providing of water for domestic purposes, after transfer, and if such withdrawal, transfer, and use (a) will not significantly adversely affect any other water user, (b) is consistent with all applicable statutes and rules and regulations, and (c) is in the public interest. The determination made by a natural resources district under subsection (2) of this section or the Director of Natural Resources under subsection (3) of this section shall include consideration of the factors set forth in subdivisions (1) through (7) of section 46-613.01. For purposes of this section, domestic has the same meaning as in section 46-613.

(2) Any affected party may object to the transfer of ground water by filing written objections, specifically stating the grounds for such objection, in the office of the natural resources district containing the land from which the ground water is withdrawn. Upon the filing of such objections or on its own initiative, the natural resources district shall conduct a preliminary investigation to

## State of Nebraska Statutes Pertaining to Transfers

determine if the withdrawal, transfer, and use of ground water is consistent with the requirements of subsection (1) of this section. Following the preliminary investigation, if the district has reason to believe that the withdrawal, transfer, or use may not comply with any rule or regulation of the district, it may utilize its authority under the Nebraska Ground Water Management and Protection Act to prohibit such withdrawal, transfer, or use. If the district has reason to believe that the withdrawal, transfer, and use is consistent with all rules and regulations of the district but may not comply with one or more other requirements of subsection (1) of this section, the district shall request that the Department of Natural Resources hold a hearing on such transfer.

(3) At the hearing, all interested persons may appear and present testimony. Agencies or political subdivisions of this state and the appropriate natural resources districts shall offer as evidence any information in their possession which they deem relevant to the purposes of the hearing. After the hearing, if the Director of Natural Resources finds that the withdrawal, transfer, or use of ground water is contrary to the requirements of subsection (1) of this section, he or she shall issue a cease and desist order prohibiting the withdrawal and transfer.

(4) The director may adopt and promulgate rules and regulations to carry out this section.

### **Annotations:**

Only parties who are affected by the transfer of ground water off overlying land for agricultural purposes or pursuant to a water remediation plan, as required under the Environmental Protection Act, may object to such transfer by the procedures outlined in subsection (2) of this section. Upon an objection to the transfer of ground water pursuant to subsection (2) of this section, a natural resources district shall conduct an investigation to determine whether the transfer of water complained of by the objector, which objectionable transfer must be for agricultural purposes or pursuant to a water remediation plan as required under the Environmental Protection Act, is consistent with the requirements of subsection (1) of this section that the transfer (a) will not significantly adversely affect any other water user, (b) is consistent with all applicable statutes and rules and regulations, and (c) is in the public interest. In re Referral of Lower Platte South NRD, 261 Neb. 90, 621 N.W.2d 299 (2001).

The Legislature's purpose in enacting this section was to

## State of Nebraska Statutes Pertaining to Transfers

carve out two exceptions from Nebraska's common-law prohibition against transfers of water off overlying land: (1) for agricultural purposes and (2) pursuant to a remediation plan under the Environmental Protection Act. In re Referral of Lower Platte South NRD, 261 Neb. 90, 621 N.W.2d 299 (2001).

According to the legislative history of LB 251, later codified as this section, the Legislature manifested an intent to validate agreements made before the bill's passage to transfer ground water off overlying land for agricultural purposes by failing to void such preexisting transfers. Springer v. Kuhns, 6 Neb. App. 115, 571 N.W.2d 323 (1997).

~ Reissue Revised Statutes of Nebraska

### **Section 46-691.01**

*Transfer off overlying land for domestic use; limitations; liability.*

Any person other than a public water supplier as defined in section 46-638 may transfer ground water off the overlying land for the purpose of domestic use of ground water required for human needs as it relates to health, fire control, and sanitation if (1) the location and use of the water well and any pipeline or other means of conveyance are authorized by easement or other adequate property interest on all land on which such water well and pipeline or other means of conveyance are located and (2) the capacity of the water well or series of water wells connected together for such purposes does not exceed fifty gallons per minute. Such person may be liable for damages for interference with the use of ground water by another person only if the withdrawal of ground water for such domestic use unreasonably causes harm to another person through the lowering of the water table or by reducing artesian pressure.

### **Section 46-691.02**

*Transfer off overlying land for domestic use; applicability of section.*

Section 46-691.01 applies to all such transfers and uses of ground water before, on, and after September 1, 2001.

### **Section 46-691.03**

*Transfer off overlying land for environmental or recreational benefits; when allowed; application; fee; natural resources district; powers and duties.*

(1) Any person intending to withdraw ground water from any water well located in the State of Nebraska, transport that water off the overlying land, and use it to augment water supplies in any Nebraska wetland or natural stream for the purpose of benefiting fish or wildlife or producing other environmental or recreational benefits may do so only if the natural resources district in which the water well is or would be located allows withdrawals and transport for such

## State of Nebraska Statutes Pertaining to Transfers

purposes and only after applying for and obtaining a permit from such natural resources district. An application for any such permit shall be accompanied by a nonrefundable fee of fifty dollars payable to such district. Such permit shall be in addition to any permit required pursuant to section 46-735.

(2) Prior to taking action on an application pursuant to this section, the district shall provide an opportunity for public comment on such application at a regular or special board meeting for which advance published notice of the meeting and the agenda therefor have been given consistent with the Open Meetings Act.

(3) In determining whether to grant a permit under this section, the board of directors for the natural resources district shall consider:

(a) Whether the proposed use is a beneficial use of ground water;

(b) The availability to the applicant of alternative sources of surface water or ground water for the proposed withdrawal, transport, and use;

(c) Any negative effect of the proposed withdrawal, transport, and use on ground water supplies needed to meet present or reasonable future demands for water in the area of the proposed withdrawal, transport, and use, to comply with any interstate compact or decree, or to fulfill the provisions of any other formal state contract or agreement;

(d) Any negative effect of the proposed withdrawal, transport, and use on surface water supplies needed to meet present or reasonable future demands for water within the state, to comply with any interstate compact or decree, or to fulfill the provisions of any other formal state contract or agreement;

(e) Any adverse environmental effect of the proposed withdrawal, transport, and use of the ground water;

(f) The cumulative effects of the proposed withdrawal, transport, and use relative to the matters listed in subdivisions (3)(c) through (e) of this section when considered in conjunction with all other withdrawals, transports, and uses subject to this section;

(g) Whether the proposed withdrawal, transport, and use is consistent with the district's ground water quantity and quality management plan and with any integrated management

## State of Nebraska Statutes Pertaining to Transfers

plan previously adopted or being considered for adoption in accordance with sections 46-713 to 46-719; and

(h) Any other factors consistent with the purposes of this section which the board of directors deems relevant to protect the interests of the state and its citizens.

(4) Issuance of a permit shall be conditioned on the applicant's compliance with the rules and regulations of the natural resources district from which the water is to be withdrawn and, if the location where the water is to be used to produce the intended benefits is in a different natural resources district, with the rules and regulations of that natural resources district. The board of directors may include such reasonable conditions on the proposed withdrawal, transport, and use as it deems necessary to carry out the purposes of this section.

(5) The applicant shall be required to provide access to his or her property at reasonable times for purposes of inspection by officials of any district where the water is to be withdrawn or to be used.

### **Section 46-739**

#### ***Management area; controls authorized; procedure.***

(1) A district in which a management area has been designated shall by order adopt one or more of the following controls for the management area:

(k) It may require district approval of (i) transfers of ground water off the land where the water is withdrawn or (ii) transfers of rights to use ground water that result from district allocations imposed pursuant to subdivision (1)(a) of this section or from other restrictions on use that are imposed by the district in accordance with this section. Such approval may be required whether the transfer is within the management area, from inside to outside the management area, or from outside to inside the management area, except that transfers for which permits have been obtained from the Department of Natural Resources prior to July 16, 2004, or pursuant to the Municipal and Rural Domestic Ground Water Transfers Permit Act shall not be subject to district approval pursuant to this subdivision. If the district adopts rules and regulations pursuant to this subdivision, such regulations shall require that the district deny or condition the approval of any such transfer when and to the extent such action is necessary to (A)



## State of Nebraska Statutes Pertaining to Transfers

ensure the consistency of the transfer with the purpose or purposes for which the management area was designated, (B) prevent adverse effects on other ground water users or on surface water appropriators, (C) prevent adverse effects on the state's ability to comply with an interstate compact or decree or to fulfill the provisions of any other formal state contract or agreement, and (D) otherwise protect the public interest and prevent detriment to the public welfare;

(3) Upon request by the district or when any of the controls being proposed are for the purpose of integrated management of hydrologically connected ground water and surface water, the Director of Natural Resources shall review and comment on the adoption, amendment, or repeal of any authorized control in a management area. The director may hold a public hearing to consider testimony regarding the control prior to commenting on the adoption, amendment, or repeal of the control. The director shall consult with the district and fix a time, place, and date for such hearing. In reviewing and commenting on an authorized control in a management area, the director's considerations shall include, but not be limited to, those enumerated in subsection (2) of this section.

### **Section 46-742**

#### ***Transport of ground water; prohibited; when.***

(1) Whenever the drilling of new wells has been stayed pursuant to section 46-714, ground water withdrawn outside the affected area shall not be transported for use inside such area unless (a) such withdrawal and transport began before the stay took effect, (b) the water is used solely for domestic purposes, or (c) such withdrawal and transport is approved in advance by the district in which the stay is in effect and, if the water is withdrawn in another natural resources district, by the other district.

(2) Whenever a natural resources district pursuant to subdivision (1)(m) of section 46-739 has closed all or part of the district to the issuance of additional well permits, ground water withdrawn outside the affected area shall not be transported for use inside such area unless (a) such withdrawal and transport began before the affected area was closed to the issuance of additional well permits, (b) the water is used solely for domestic purposes, or (c) such withdrawal and transport is approved in advance by the district that closed the affected area to additional well permits and, if the water is withdrawn in another natural

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resources district, by the other district.

(3) If a proposed withdrawal and transport of water under subsection (1) or (2) of this section is intended for municipal purposes, the natural resources district shall approve the withdrawal and transport of ground water into the affected area when a public water supplier providing water for municipal purposes receives a permit from the Department of Natural Resources pursuant to the Municipal and Rural Domestic Ground Water Transfers Permit Act.

### **Section 46-613.01**

*Ground water; transfer to another state; permit; Department of Natural Resources; conditions.*

The Legislature recognizes and declares that the maintenance of an adequate source of ground water within this state is essential to the social stability of the state and the health, safety, and welfare of its citizens and that reasonable restrictions on the transportation of ground water from this state are a proper exercise of the police powers of the state. The need for such restrictions, which protect the health, safety, and general welfare of the citizens of this state, is hereby declared a matter of legislative determination.

Any person, firm, city, village, municipal corporation, or other entity intending to withdraw ground water from any water well located in the State of Nebraska and transport it for use in another state shall apply to the Department of Natural Resources for a permit to do so. In determining whether to grant or deny such permit, the Director of Natural Resources shall consider:

(1) The nature of the proposed use and whether it is a beneficial use of ground water;

(2) The availability to the applicant of alternative sources of surface or ground water;

(3) Any negative effect of the proposed withdrawal on ground water supplies needed to meet present or reasonable future demands for water in the area of the proposed withdrawal, to comply with any interstate compact or decree, or to fulfill the provisions of any other formal state contract or agreement;

(4) Any negative effect of the proposed withdrawal on

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surface water supplies needed to meet present or reasonable future demands within the state, to comply with any interstate compact or decree, or to fulfill the provisions of any other formal state contract or agreement;

(5) Any adverse environmental effect of the proposed withdrawal or transportation of ground water;

(6) The cumulative effect of the proposed withdrawal and transfer relative to the matters listed in subdivisions (3) through (6) of this section when considered in conjunction with all other transfers subject to this section; and

(7) Any other factors consistent with the purposes of this section that the director deems relevant to protect the health, safety, and welfare of the state and its citizens.

Issuance of a permit shall be conditioned on the applicant's compliance with the rules and regulations of the natural resources district from which the water is to be withdrawn. The applicant shall be required to provide access to his or her property at reasonable times for purposes of inspection by officials of the district or the department.

The director may include such reasonable conditions on the proposed use as he or she deems necessary to carry out the purposes of this section.

### Municipal Transfers

#### Section 46-638

*Terms, defined; permits to public water suppliers; director; powers.*

(1) The Director of Natural Resources may grant and administer permits to public water suppliers: (a) To locate, develop, and maintain ground water supplies through water wells or other means and to transport water into the area to be served; and (b) to continue existing use of ground water and the transportation of ground water into the area served.

(2) For purposes of the Municipal and Rural Domestic Ground Water Transfers Permit Act and sections 46-651 to 46-655, (a) public water supplier shall mean a city, village, municipal corporation, metropolitan utilities district, rural water district, natural resources district, irrigation district, reclamation district, or sanitary and improvement district which supplies or intends to supply water to .

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inhabitants of cities, villages, or rural areas for domestic or municipal purposes and (b) water well shall have the same meaning as in section 46-601.01.

### **Annotations:**

Permittees under the Municipal and Rural Domestic Ground Water Transfers Permit Act are exonerated from the common-law prohibition against transfer and transportation of ground water. *Sorensen v. Lower Niobrara Nat. Resources Dist.*, 221 Neb. 180, 376 N.W.2d 539 (1985).

Director of Water Resources is authorized to grant and administer permits to cities and villages to develop ground water supplies. *Metropolitan Utilities Dist. v. Merritt Beach Co.*, 179 Neb. 783, 140 N.W.2d 626 (1966).

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### **Section 46-639**

#### ***Application for permit; contents; fee.***

An applicant which desires to avail itself of the Municipal and Rural Domestic Ground Water Transfers Permit Act shall make application in writing to the Director of Natural Resources for a permit. The application shall include (1) a statement of the amount of water for which a permit is desired together with an exhibit of maps showing the location of all water wells and (2) such other information as the director deems necessary or desirable. The application shall be accompanied by a fee in the amount of fifty dollars for the first five million gallons per day and an additional twenty dollars for each additional increment of five million gallons per day requested. The fee shall be based on the amounts of water requested on a daily average basis.

### **Annotations:**

Preference in the use of ground water is given to domestic use. *Metropolitan Utilities Dist. v. Merritt Beach Co.*, 179 Neb. 783, 140 N.W.2d 626 (1966).

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## Section 46-640

### *Notice of application; publication; objections; hearing.*

Upon receipt of an application filed under section 46-639, the Director of Natural Resources shall cause a notice of such application to be published at the applicant's expense at least once a week for three consecutive weeks in a legal newspaper published or of general circulation in each county containing lands on which the water well field or any part of such water well field is or is proposed to be located. The notice shall contain a description of the lands upon which such water well field is or is proposed to be located, the amount of water requested, the number of water wells constructed or proposed, and any other relevant information. The notice shall state that any interested person may object to and request a hearing on the application by filing written objections specifically stating the grounds for each objection within two weeks after the date of final publication in the office of the director.

## Section 46-642

### *Granting of permit; conditions; priority date.*

(1) If the Director of Natural Resources finds that the withdrawal and transportation of ground water requested by the applicant are reasonable, are not contrary to the conservation and beneficial use of ground water, and are not otherwise detrimental to the public welfare, he or she shall grant a permit to the applicant to withdraw and transport water in the amount applied for or in a lesser amount. The permit so granted shall have a priority date as of the time when the application is filed with the director.

(2) In determining whether to grant or deny a permit under subsection (1) of this section, the director shall consider the factors set forth in subdivisions (1) through (7) of section 46-613.01.

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## Industrial Transfers

### Section 46-676.01

#### *Applicability of act.*

The Industrial Ground Water Regulatory Act does not apply to any public water supplier providing, or intending to provide, ground water for industrial purposes nor does the act apply to any person who is using, or intends to use, ground water for industrial purposes that is supplied by a public water supplier.

### Section 46-677

#### *Withdrawal of ground water for industrial purposes; permit required; when.*

(1) Except as provided in sections 46-676.01 and 46-678.01:

(a) Any person who desires to withdraw and transfer ground water from aquifers located within the State of Nebraska for industrial purposes shall, prior to commencing construction of any water wells, obtain from the director a permit to authorize such withdrawal and transfer of such ground water; and

(b) Any person who prior to April 23, 1993, has withdrawn ground water from aquifers located in the State of Nebraska for industrial purposes may file an application for a permit to authorize the transfer of such ground water at any time.

(2) For purposes of this section, industrial purposes includes manufacturing, commercial, and power generation uses of water and commercial use includes, but is not limited to, maintenance of the turf of a golf course.

### Section 46-678

#### *Permit; application; contents.*

**(1) Applications for permits required by section 46-677 shall be on forms provided by the director and shall contain:**

**(a) A statement of the amount of ground water which the applicant proposes to use;**

**(b) A statement of the proposed use and whether the ground water will be transferred for use at a location other than the well site;**

**(c) A hydrologic evaluation of the impact of the proposed use on**

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the surrounding area and on existing users;

(d) The date when the applicant expects to first use the ground water; and

(e) Such other relevant information as the director may deem necessary or desirable.

(2) Such applications shall be accompanied by an exhibit of maps showing the location, depth, and capacity of the proposed water wells.

Section 46-683.01

*Permit; application to amend; procedures; limitation.*

If during construction or operation a permit holder determines (1) that an additional amount of water is or will be required for the proposed use set forth in a permit issued pursuant to section 46-683 or (2) that there is a need to amend any condition set forth in the permit, the permit holder may file an application to amend the permit. Following a hearing conducted in the manner prescribed by section 46-680, the director shall issue a written order containing specific findings of fact either granting or denying the proposed amendment in accordance with the public interest considerations enumerated in section 46-683. An application to amend a permit shall not be approved if the amendment would increase the daily peak withdrawal or the annual volume by more than twenty-five percent from the amounts approved in the original permit.

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Section 46-683.01

*Permit; application to amend; procedures; limitation.*

If during construction or operation a permit holder determines (1) that an additional amount of water is or will be required for the proposed use set forth in a permit issued pursuant to section 46-683 or (2) that there is a need to amend any condition set forth in the permit, the permit holder may file an application to amend the permit. Following a hearing conducted in the manner prescribed by

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section 46-680, the director shall issue a written order containing specific findings of fact either granting or denying the proposed amendment in accordance with the public interest considerations enumerated in section 46-683. An application to amend a permit shall not be approved if the amendment would increase the daily peak withdrawal or the annual volume by more than twenty-five percent from the amounts approved in the original permit.

**Source:**

Laws 1986, LB 309, § 3

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