COMPILATION OF STATUTES
REGARDING THE

DEPARTMENT OF NATURAL RESOURCES

SURFACE WATER

Includes:
- I. Chapter 46, Article 2: Surface Water
- II. Chapter 46, Article 8: Natural Lakes
- III. *Neb. Rev. Stat.* § 76-2,124: Water Resources Update Notice
- IV. *Neb. Rev. Stat.* § 33-105: Fees
- V. *Neb. Rev. Stat.* §§ 46-636 & 46-637: Pumping from Wells Within 50 Feet of Stream
- VI. *Neb. Rev. Stat.* § 25-1062.01: Civil Procedure
  Neb. Rev. Stat. § 25-1064: Civil Procedure
  Neb. Rev. Stat. § 25-2159: Civil Procedure
  Neb. Rev. Stat. § 25-2160: Civil Procedure
- VII. *Neb. Rev. Stat.* § 56-101: Milldams
- VIII. *Neb. Rev. Stat.* § 37-807: Nongame & Endangered Species Act
- IX. *Neb. Rev. Stat.* § 2-3254: NRD Special Project
  Neb. Rev. Stat. § 2-32,115: Temporary Stay
- X. *Neb. Rev. Stat.* § 70-668: Streams, Water Rights Priority
  Neb. Rev. Stat. § 70-669: Streams, Inferior Rights Acquired by Superior Right
- XI. *Neb. Rev. Stat.* § 31-202: Watercourse, defined
- XII. *Neb. Rev. Stat.* § 28-106: Classification of Penalties

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ARTICLE 2

GENERAL PROVISIONS REGULATING IRRIGATION

(a) PUBLIC RIGHTS

46-201. Water for irrigation; declared natural want.

Water for the purposes of irrigation in the State of Nebraska is hereby declared to be a natural want.

Source: Laws 1895, c. 69, § 65, p. 268; R.S. 1913, § 3369; Laws 1919, c. 190, tit. VII, art. V, div. 1, § 1, p. 831; C.S. 1922, § 8406; C.S. 1929, § 46-501; R.S. 1943, § 46-201.

The right of appropriation for irrigation purposes is limited to the waters of natural streams of the state, and does not extend to waters in artificial drainage ditches. Drainage Dist. No. 1 v. Suburban Irr. Dist., 139 Neb. 460, 298 N.W. 131 (1941).

State, in exercise of police power, may supervise and control the appropriation, diversion, and distribution of public waters of state, and impose that duty on administrative officers. State ex rel. Cary v. Cochran, 138 Neb. 163, 292 N.W. 239 (1940).

Under irrigation act of 1889, a water right for purposes of irrigation need not have been attached to any particular tract of land. Vonburg v. Farmers Irr. Dist., 132 Neb. 12, 270 N.W. 835 (1937).

Under this and other sections, legislative intent is shown to limit the location and construction of irrigation canals and ditches, as well as the land irrigated by same, to the basin containing the source of the water used, and requiring that all unused waters shall be returned to the stream from which diverted. Osterman v. Central Nebraska Public Power & Irr. Dist., 131 Neb. 356, 268 N.W. 334 (1936).

It is the duty of the state to see that the waters of its streams used for irrigation purposes will not be wasted and that prior appropriators shall be protected as against subsequent appropriators. State ex rel. Sorensen v. Mitchell Irr. Dist., 129 Neb. 586, 262 N.W. 543 (1935).

Prior to existing statutes declaring water for irrigation to be natural want, and granting preference in use of water for agriculture, appropriation for power purposes was as favorably regarded as for irrigation. Kearney Water & E. P. Co. v. Alfalfa Irr. Dist., 97 Neb. 139, 149 N.W. 363 (1914).

In view of preference given by statute to use of water for agricultural purposes, irrigation companies will not be enjoined from diverting water from lower riparian mill owner, where petition fails to allege that appropriation was unlawful. Cline v. Stock, 71 Neb. 70, 98 N.W. 454 (1904), 102 N.W. 265 (1905).

Although use of water for irrigation is declared a natural want, right to so use it must be exercised reasonably under the circumstances of each case. Meng v. Coffee, 67 Neb. 500, 93 N.W. 713 (1903).

46-202. Natural streams; unappropriated water; dedication to public use; appropriated water; further appropriation.

(1) The water of every natural stream not heretofore appropriated within the State of Nebraska, including the Missouri River, is hereby declared to be the property of the public and is dedicated to the use of the people of the state, subject to appropriation.

(2) The water of every natural stream within the State of Nebraska, including the Missouri River, appropriated for storage in a surface reservoir or for underground water storage, is hereby declared to be subject to further appropriation for recovery and beneficial use.

Source: Laws 1895, c. 69, § 42, p. 260; R.S.1913, § 3370; Laws 1919, c. 190, tit. VII, art. V, div. 1, § 2, p. 831; C.S.1922, § 8407; C.S.1929, § 46-502; R.S.1943, § 46-202; Laws 1963, c. 277, § 1, p. 833; Laws 1965, c. 271, § 1, p. 773; Laws 1980, LB 802, § 1; Laws 1983, LB 198, § 4.

Under former law, the right to appropriate water for irrigation purposes was limited to waters of natural streams. Rogers v. Petsch, 174 Neb. 313, 117 N.W.2d 771 (1962).

The right of appropriation for irrigation purposes is limited to the waters of natural streams of the state, and does not extend to waters in artificial drainage ditches. Drainage Dist. No. 1 v. Suburban Irr. Dist., 139 Neb. 460, 298 N.W. 131 (1941).

This, and other sections, limit the location and construction of irrigation canals and ditches as well as the land irrigated by same to the basin containing the source of the water used, and require that all unused water shall be returned to the stream from which diverted. Osterman v. Central Nebraska Public Power & Irr. Dist., 131 Neb. 356, 268 N.W. 334 (1936).

It is the duty of the state to see that the waters of its streams used for irrigation purposes will not be wasted and that prior appropriators shall be protected as against subsequent appropriators. State ex rel. Sorensen v. Mitchell Irr. Dist., 129 Neb. 586, 262 N.W. 543 (1935).

Right to use of water of natural stream acquired prior to 1895 was a vested property right which could not be taken away by legislative action. City of Fairbury v. Fairbury Mill & Elevator Co., 123 Neb. 588, 243 N.W. 774 (1932).

Right to appropriate public waters of streams of state for generating electric energy is taxable as franchise. Northern Nebraska Power Co. v. Holt County, 120 Neb. 724, 235 N.W. 92 (1931).

Legislature did not intend by the act, of which this section is part, to interfere with prior acquired rights, but to ascertain extent of prior appropriations, and make record of them, in order to carry out law respecting subsequent appropriations. Black Bros. Flour Mills v. Umphenour, 111 Neb. 218, 196 N.W. 123 (1923).

Riparian owners cannot appropriate water of running streams without consent of state. Kirk v. State Board of Irrigation, 90 Neb. 627, 134 N.W. 167 (1912).

The establishment of an administrative system for the regulation and determination of water rights is a legitimate exercise of the police power of the state. California-Oregon Power Co. v. Beaver Portland Cement Co., 73 F.2d 555 (9th Cir. 1934).

46-202.01. Repealed. Laws 1965, c. 271, s. 3.

(b) FIRST APPROPRIATORS

46-203. First appropriators; declared first in right.

As between appropriators, the one first in time is first in right.

Source: Laws 1889, c. 68, § 7, p. 504; R.S.1913, § 3371; Laws 1919, c. 190, tit. VII, art. V, div. 1, § 3, p. 832; C.S. 1922, § 8408; C.S. 1929, § 46-503.

The right of appropriation for irrigation purposes is limited to the waters of natural streams of the state, and does not extend to waters in artificial drainage ditches. Drainage Dist. No. 1 v. Suburban Irr. Dist., 139 Neb. 460, 298 N.W. 131 (1941).

Senior appropriator is entitled to water as against an upstream junior appropriator, as long as water in usable quantities can be delivered to senior appropriator. State ex rel. Cary v. Cochran, 138 Neb. 163, 292 N.W. 239 (1940).

It is the duty of the state to see that the waters of its streams used for irrigation purposes will not be wasted and that prior appropriators shall be protected as against subsequent appropriators. State ex rel. Sorensen v. Mitchell Irr. Dist., 129 Neb. 586, 262 N.W. 543 (1935).

While Nebraska was originally a riparian doctrine state, legislation was enacted adopting the principle of prior appropriation. Nebraska v. Wyoming, 325 U.S. 589 (1945).

United States cannot claim assignment to it of excess waters under an appropriation, as excess would inure to benefit of other appropriators prior in time to United States. United States v. Tilley, 124 F.2d 850 (8th Cir. 1941).

46-204. Natural streams; priority of appropriations; first in time, first in right; preference from nature of use.

The right to divert unappropriated waters of every natural stream for beneficial use shall never be denied except when such denial is demanded by the public interest. Priority of appropriation shall give the better right as between those using the water for the same purposes, but when the waters of any natural stream are not sufficient for the use of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming it for any other purpose, and those using the water for agricultural purposes shall have the preference over those using the same for manufacturing purposes.

Source: Laws 1895, c. 69, § 43, p. 260; R.S. 1913, § 3372; Laws 1919, c. 190, tit. VII, art. V, div. 1, § 4, p. 832; C.S. 1922, § 8409; C.S. 1929, § 46-504; R.S. 1943, § 46-204; Laws 1963, c. 277, § 2, p. 833; Laws 1965, c. 271, § 2, p. 773; Laws 1981, LB 252, § 1.

1. Rights of riparian owners
2. Vested rights
3. Limitations on appropriation
4. Miscellaneous

1. Rights of riparian owners

Parties who have appropriated water for irrigation purposes, and continued such use for seven years, cannot be enjoined by lower riparian owner whose mill privilege may be injured thereby. He must sue for damages. Cline v. Stock, 71 Neb. 70, 98 N.W. 454 (1904), 102 N.W. 265 (1905).

Riparian owner, damaged by appropriation, may recover actual damages sustained. McCook Irr. & Water Power Co. v. Crews, 70 Neb. 109, 96 N.W. 996 (1903).

Common-law rule, in force except as modified by statute, only gives riparian owner right to water so far as consistent with like right of all other riparian owners. Civil law is not applicable. Crawford Co. v. Hathaway, 67 Neb. 325, 93 N.W. 781 (1903).

Riparian owners are entitled, in absence of grant, license, or prescription, to natural flow of water. Plattsmouth Water Co. v. Smith, 57 Neb. 579, 78 N.W. 275 (1899).

2. Vested rights

An appropriator of water for power purposes under act of 1877 acquired a vested right which was not affected by enactment of this section in 1895, giving preference for agricultural purposes. Kearney Water & Electric Powers Co. v. Alfalfa Irr. Dist., 97 Neb. 779, 151 N.W. 319 (1915), 97 Neb. 139, 149 N.W. 363 (1914).

Completed appropriation of water for power under law of 1877 is vested right, and priority, if unchallenged, is not lost by failure to demand adjudication under law of 1895. Gearhart & Benson v. Frenchman Valley Irr. Dist., 97 Neb. 764, 151 N.W. 323 (1915).

Under unrevoked permit from state board, applicant who thereafter applies public waters to beneficial use, acquires vested right. Rasmussen v. Blust, 85 Neb. 198, 122 N.W. 862 (1909).

Where appropriator of water has acquired a vested right to use of water, he may enjoin upper riparian owner on stream from diverting and using the water for purposes not theretofore exercised. McCook Irr. & Power Water Co. v. Crews, 70 Neb. 109, 96 N.W. 996 (1903).

Riparian's right to flow of stream is a vested right, and part and parcel of the land, which legislation cannot abolish. Crawford Co. v. Hathaway, 67 Neb. 325, 93 N.W. 781 (1903).

3. Limitations on appropriation

An appropriation of water, made prior to 1895, is not limited as to quantity except that it must be for some useful and beneficial purpose and within the limits of the capacity of the diversion works. Enterprise Irr. Dist. v. Willis, 135 Neb. 827, 284 N.W. 326 (1939).

This and other sections limit the location and construction of irrigation canals and ditches, as well as the land irrigated by same, to the basin containing the source of the water used, and require that all unused waters shall be returned to the stream from which diverted. Osterman v. Central Nebraska Public Power & Irr. Dist., 131 Neb. 356, 268 N.W. 334 (1936).

4. Miscellaneous

Under former law, the right to appropriate water for irrigation purposes was limited to waters of natural streams. Rogers v. Petsch, 174 Neb. 313, 117 N.W.2d 771 (1962).

Under former law, Department of Roads and Irrigation was neither a necessary nor a proper party to a proceeding on appeal from an order or decision made by it. Cozad Ditch Co. v. Central Nebraska Public Power & Irr. Dist., 132 Neb. 547, 272 N.W. 560 (1937).

It is the duty of the state to see that the waters of its streams, used for irrigation purposes, will not be wasted and that prior appropriators shall be protected as against subsequent appropriators. State ex rel. Sorensen v. Mitchell Irr. Dist., 129 Neb. 586, 262 N.W. 543 (1935).

Agreement to pay maintenance fees for water rights may be enforced. Farmers & Merchants Irr. Co. v. Brumbaugh, 81 Neb. 641, 116 N.W. 512 (1908).

Overflow waters of streams, which run in well-defined course and again unite with stream at lower point, are part of stream and not surface water. Brinegar v. Copass, 77 Neb. 241, 109 N.W. 173 (1906).

One seeking to acquire easement for ditch over another's land must maintain it continuously without material change of location for full statutory period. Dunn v. Thomas, 69 Neb. 683, 96 N.W. 142 (1903).

Reasonable use of water is largely question of fact, depending upon circumstances, but entire diversion, waste, or needless diminution is clearly unreasonable. Meng v. Coffee, 67 Neb. 500, 93 N.W. 713 (1903); Crawford Co. v. Hathaway, 67 Neb. 325, 93 N.W. 781 (1903).

Domestic purposes, as here used, has reference to use of water for domestic purposes permitted to riparian owner by common law, and does not contemplate diversion of large quantities of water in canals or pipe lines. Crawford Co. v. Hathaway, 67 Neb. 325, 93 N.W. 781 (1903).

46-205. First appropriators; date of priority.

The priority of an appropriation shall date from the filing of the application in the office of the Department of Natural Resources.

Source: Laws 1895, c. 69, § 31, p. 254; R.S.1913, § 3373; Laws 1919, c. 190, tit. VII, art. V, div. 1, § 5, p. 832; C.S. 1922, § 8410; C.S. 1929, § 46-505; R.S. 1943, § 46-205; Laws 2000, LB 900, § 94.

46-206. Appropriation; water to be returned to stream.

The water appropriated from a river or stream shall not be turned or permitted to run into the waters or channel of any other river or stream than that from which it is taken or appropriated, unless such stream exceeds in width one hundred feet, in which event not more than seventy-five percent of the regular flow shall be taken and any such taking shall be subject to the provisions of section 46-289.

Source: Laws 1889, c. 68, § 6, p. 504; Laws 1893, c. 40, § 3, p. 378; R.S. 1913, § 3376; Laws 1919, c. 190, tit. VII, art. V, div. 1, § 8, p. 832; C.S. 1922, § 8413; C.S. 1929, § 46-508; R.S.1943, § 46-206; Laws 1981, LB 252, § 2.

Diversion of water from one watershed to another is permissible under sections 46-206 and 46-265, R.R.S.1943, so long as the stream from which it is diverted is more than one hundred feet wide and the diversion is not contrary to the public interest. Little Blue N.R.D. v. Lower Platte North N.R.D., 206 Neb. 535, 294 N.W.2d 598 (1980).

This section deals primarily with the limitation of the amount of water that may be taken from a stream more than one hundred feet in width. Ainsworth Irr. Dist. v. Bejot, 170 Neb. 257, 102 N.W.2d 416 (1960).

This and other sections limit the location and construction of irrigation canals and ditches, as well as the land irrigated by same, to the basin containing the source of the water used, and require that all unused waters shall be returned to the stream from which diverted. Osterman v. Central Nebraska Public Power & Irr. Dist., 131 Neb. 356, 268 N.W. 334 (1936).

46-207. Appropriation; no land to be crossed by more than one ditch.

No tract of land shall be crossed by more than one ditch, canal or lateral without the written consent and agreement of the owners thereof, if the first ditch, canal or lateral can be made to answer the purpose for which the second is desired or intended.

Source: Laws 1889, c. 68, § 3, p. 504; R.S.1913, § 3377; Laws 1919, c. 190, tit. VII, art. V, div. 1, § 9, p. 832; C.S.1922, § 8414; C.S.1929, § 46-509.

No tract of land shall, without consent of owner, be burdened with two or more ditches for watering of same territory. Walker v. Anderson, 90 Neb. 119, 132 N.W. 937 (1911); Paxton & Hershey Irr. C. & L. Co. v. Farmers & Merchants Irr. & L. Co., 45 Neb. 884, 64 N.W. 343 (1895).

(c) DEPARTMENT OF NATURAL RESOURCES; GENERAL POWERS AND DUTIES

46-208. Transferred to section 61-205.
46-209. Transferred to section 61-206.
46-210. Transferred to section 61-207.
46-211. Repealed. Laws 1984, LB 897, § 5.
46-212. Transferred to section 61-208.
46-212.01. Transferred to section 61-209.
46-212.02. Repealed. Laws 2000, LB 900, § 256.
46-213. Transferred to section 61-211.
46-214. Repealed. Laws 1981, LB 545, § 52.

(d) WATER DIVISIONS

46-215. Transferred to section 61-212.
46-216. Transferred to section 61-213.
46-217. Transferred to section 61-214.
46-218. Transferred to section 61-215.
46-219. Transferred to section 61-216.
46-220 and 46-221. Repealed. Laws 1953, c. 157, § 3.
46-222 to 46-224. Repealed. Laws 1987, LB 140, § 15.
46-225. Repealed. Laws 1953, c. 157, § 3.

(e) ADJUDICATION OF WATER RIGHTS

46-226. Determination of priority and amount of appropriation; duty of department; certain court orders; department; powers.

(1) The department shall make proper arrangements for the determination of priorities of right to use the public waters of the state and determine the same. The method of determining the priority and amount of appropriation shall be fixed by the department.

(2)(a) The department is authorized to administer any riparian water right that has been validated and recognized in a court order from a court of lawful jurisdiction in the state.

(b) The only surface water appropriations that may be closed for a riparian water right are appropriations held by persons who were parties to the lawsuit validating the riparian water right or appropriations with a priority date subsequent to the date of the court order.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 2, § 7, p. 835; C.S. 1922, § 8426; C.S. 1929, § 81-6307; R.S.1943, § 46-226; Laws 2000, LB 900, § 95; Laws 2009, LB184, § 1.

The Department of Natural Resources regulates the appropriation of surface water and has statutory authority to determine the priority and amount of surface water appropriated. Koch v. Aupperle, 274 Neb. 52, 737 N.W.2d 869 (2007).

The Department of Natural Resources has no common-law or statutory duty to regulate the use of ground water in order to protect a party's surface water appropriations. In the absence of independent authority to regulate the use of ground water, the department has no legal duty to resolve conflicts between surface water appropriators and ground water users. Spear T Ranch v. Nebraska Dept. of Nat. Resources, 270 Neb. 130, 699 N.W.2d 379 (2005).

The Department of Natural Resources has no independent authority to regulate ground water users or administer ground water rights for the benefit of surface water appropriators. In re Complaint of Central Neb. Pub. Power, 270 Neb. 108, 699 N.W.2d 372 (2005).

Method of determining priority and amount of appropriation is vested in the exclusive original jurisdiction of the Department of Water Resources. Ainsworth Irr. Dist. v. Harms, 170 Neb. 228, 102 N.W.2d 429 (1960).

Department has authority to determine whether or not appropriation has been lost by nonuser. State v. Nielsen, 163 Neb. 372, 79 N.W.2d 721 (1956).

Under former law, Department of Roads and Irrigation could grant such appropriation for use of water of natural running stream as did not impair prior appropriations and rights to use water and could issue permits for improvements of streams, but could not determine damages or property rights involved. City of Fairbury v. Fairbury Mill & Elevator Co., 123 Neb. 588, 243 N.W. 774 (1932).

Powers of former State Board of Irrigation were quasi-judicial, and adjudications were final, unless appealed from. Enterprise Irr. Dist. v. Tri-State Land Co., 92 Neb. 121, 138 N.W. 171 (1912); Farmers Canal Co. v. Frank, 72 Neb. 136, 100 N.W. 286 (1904).

46-226.01. Application for recognition of incidental underground water storage; procedure.

Any person having an approved perfected appropriation may file with the department an application for recognition of incidental underground water storage associated with such appropriation on a form prescribed and furnished by the department without cost. Upon receipt of an application, the department shall proceed in accordance with rules and regulations adopted and promulgated by the department.

Source: Laws 1983, LB 198, § 5; Laws 1985, LB 488, § 2.

46-226.02. Application; director; approval; conditions.

(1) The director may approve an application filed pursuant to section 46-226.01 or 46-297 subject to the following conditions:

(a) The rate, quantity, or time of surface water diversion shall not be increased from that approved for the appropriation at the time the application is filed;

(b) If the water stored or to be stored underground will be used for irrigation purposes, the director may approve the service of additional amounts of land or different lands not identified to be served with facilities included under the original appropriation, if the director determines that

the change is in the public interest, and that any interference with the rights of senior appropriators as a result of such change is unavoidable and not material;

(c) The priority date shall remain the same as that of the original appropriation; and

(d) When the application is for recognition of incidental underground water storage, such stored water is being withdrawn or is otherwise being used for beneficial purposes.

(2) For an application filed pursuant to section 46-226.01, the burden shall be on the applicant to prove that underground water storage has occurred.

(3) The director may grant the application in a modified or reduced form, if required by the public interest, and may impose such other reasonable conditions as deemed appropriate to protect the public interest.

(4) The director's order of approval shall specify:

(a) The source of the water stored or to be stored underground;

(b) The underground water storage method; and

(c) A description of the area served or to be served by the water stored underground.

Source: Laws 1983, LB 198, § 6; Laws 1985, LB 488, § 3; Laws 1995, LB 350, § 2.

46-226.03. Terms, defined. For purposes of sections 46-226 to 46-243:

(1) Department means the Department of Natural Resources;

(2) Director means the Director of Natural Resources;

(3) Incidental underground water storage has the same meaning as in section 46-296;

(4) Induced ground water recharge means the process by which ground water withdrawn from wells near a natural stream is replaced by surface water flowing in the stream;

(5) Intentional underground water storage has the same meaning as in section 46-296;

(6) Public water supplier means 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 inhabitants of cities, villages, or rural areas for domestic or municipal purposes;

(7) Underground water storage has the same meaning as in section 46-296; and

(8) Well means a well, subsurface collector, or other artificial opening or excavation in the ground from which ground water flows under natural pressure or is artificially withdrawn.

Source: Laws 1993, LB 301, § 1; Laws 2000, LB 900, § 96; Laws 2004, LB 962, § 5.

46-227. Water in streams; measurement; duty of department.

The department shall measure or cause to be measured the quantity of water flowing in the several streams of the state, shall make a record thereof in the office of the department, and shall from time to time make such additional measurements as may be necessary, in considering applications for water appropriations and such controversies as may arise regarding the distribution of water.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 2, § 8, p. 835; C.S.1922, § 8427; C.S. 1929, § 81-6308; R.S.1943, § 46-227; Laws 2000, LB 900, § 97.

46-228. Flowing water; standards of measurement.

The standard of measurement for flowing water, both for determining the flow of water in natural streams and for the purpose of distributing it therefrom when appropriations have been made for direct flow, shall be one cubic foot per second of time. The standard of measurement of the volume of water shall be one acre-foot, equivalent to forty-three thousand five hundred sixty cubic feet, and when water is stored in any natural or artificial reservoir, this standard shall be used for determining the capacity of storage reservoirs, the amount stored, and the amount used therefrom, except that for public water supplier appropriations, the standard of measurement may be in terms of gallons.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 2, § 21, p. 843; C.S.1922, § 8440; C.S.1929, § 81-6321; R.S.1943, § 46-228; Laws 1993, LB 301, § 2.

46-229. Appropriations; beneficial or useful purpose required; termination; procedure.

All appropriations for water must be for a beneficial or useful purpose and, except as provided in sections 46-290 to 46-294 and 46-2,122 to 46-2,125, when the owner of an appropriation or his

or her successor in interest ceases to use it for such purpose for more than five consecutive years, the right may be terminated only by the director pursuant to sections 46-229.02 to 46-229.05.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 2, § 9, p. 835; C.S. 1922, § 8428; C.S. 1929, § 81-6309; R.S.1943, § 46-229; Laws 1947, c. 172, § 1(1), p. 520; Laws 1983, LB 380, § 1; Laws 1984, LB 818, § 1; Laws 1993, LB 302, § 2; Laws 1995, LB 99, § 14; Laws 2000, LB 900, § 98; Laws 2004, LB 962, § 6.

1. Beneficial use
2. Loss of appropriation
3. Miscellaneous

1. Beneficial use

Beneficial use requires, in the case of an appropriation for irrigation purposes, actual application of the water to the land for the purpose of irrigation. Hostetler v. State, 203 Neb. 776, 280 N.W.2d 75 (1979).

The diversion of some amount of water into the ditch a few days before suit is filed to cancel the water appropriation does not constitute a beneficial use within the meaning of this section. Hostetler v. State, 203 Neb. 776, 280 N.W.2d 75 (1979).

To constitute a beneficial use within the meaning of the appropriation statute the use must be one described in the appropriation. Hostetler v. State, 203 Neb. 776, 280 N.W.2d 75 (1979).

Under this section all appropriations for water must be for some beneficial or useful purpose, and when the appropriator or his successor in interest ceases to use it for such purpose the right ceases. Hostetler v. State, 203 Neb. 776, 280 N.W.2d 75 (1979).

2. Loss of appropriation

A completed appropriation of water for power purposes remains a valid appropriation to the full extent of its granted right unless restricted by a finding of abandonment or nonuser. Hickman v. Loup River P. P. Dist., 176 Neb. 416, 126 N.W.2d 404 (1964).

Appropriation may be lost either by abandonment or nonuser. State v. Nielsen, 163 Neb. 372, 79 N.W.2d 721 (1956).

Evidence, in proceeding to forfeit appropriation of water for nonuser, supported judgment for contestee. State v. Delaware-Hickman Ditch Co., 114 Neb. 806, 210 N.W. 279 (1926).

3. Miscellaneous

This section has become the fixed policy of the state. State v. Birdwood Irr. Dist., 154 Neb. 52, 46 N.W.2d 884 (1951).

Under former law, provision empowering Department of Roads and Irrigation to cancel water appropriation, where water was not put to beneficial use, was not unconstitutional as violative of due process, or as giving department judicial powers. Dawson County Irr. Co.v. McMullen, 120 Neb. 245, 231 N.W. 840 (1930).

Under former law, appeal from decree refusing to cancel water rights may be taken to district court instead of directly to Supreme Court. State v. Oliver Bros., 119 Neb. 302, 228 N.W. 864 (1930).

Under former law, dismissal of proceeding by Department of Roads and Irrigation to cancel water rights did not bind other appropriators not parties. Kinnan v. France, 113 Neb. 99, 202 N.W. 452 (1925).

In determining priorities, former state board could recognize and determine existing conditions and limitations, but could not impose new. Enterprise Irr. Dist. v. Tri-State Land Co., 92 Neb. 121, 138 N.W. 171 (1912).

46-229.01. Department; examine condition of ditches.

The department shall, as often as necessary, examine into the condition of all ditches constructed or partially constructed within the state and shall compile information concerning the condition of every water appropriation and all ditches and canals and other works constructed or partially constructed thereunder.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 2, § 9, p. 836; C.S. 1922, § 8428; C.S. 1929, § 81-6309; R.S.1943, § 46-229; Laws 1947, c. 172, § 1(2), p. 520; Laws 2000, LB 900, § 99.

46-229.02. Appropriations; preliminary determination of nonuse; notice; order of cancellation; procedure.

(1) If, based upon the results of a field investigation or upon information, however obtained, the department makes preliminary determinations (a) that an appropriation has not been used, in whole or in part, for a beneficial or useful purpose or having been so used at one time has ceased to be used, in whole or in part, for such purpose for more than five consecutive years and (b) that the department knows of no reason that constitutes sufficient cause, as provided in section 46-229.04, for such nonuse or that such nonuse has continued beyond the additional time permitted because of the existence of any applicable sufficient cause, the department shall serve notice of such preliminary determinations upon the owner or owners of such appropriation and upon any other person who is an owner of the land under such appropriation. Such notice shall contain the information required by section 46-229.03, shall be provided in the manner required by such section, and shall be posted on the department's web site. Each owner of the appropriation and any owner of the land under such appropriation shall have thirty days after the mailing or last publication, as applicable, of such notice to notify the department, on a form provided by the department, that he or she contests the department's preliminary determination of nonuse or the department's preliminary determination of the absence of sufficient cause for such nonuse. Such notification shall indicate the reason or reasons the owner is contesting the department's preliminary determination and include any information the owner believes is relevant to the issues of nonuse or sufficient cause for such nonuse.

(2) If no owner of the appropriation or of the land under the appropriation provides notification to the department in accordance with subsection (1) of this section, the director may issue an order canceling the appropriation in whole or in part. The extent of such cancellation shall not exceed the extent described in the department's notice to the owner or owners in accordance with subsection (1) of this section. A copy of the order canceling the appropriation, or part thereof, shall be posted on the department's web site and shall be provided to the owner or owners of the appropriation and to any other owner of the land under the appropriation in the same manner that notices are to be given in accordance with subsection (2), (3), or (4) of section 46-229.03, as applicable. No cancellation under this subsection shall prohibit an irrigation district, a reclamation district, a public power and irrigation district, or a mutual irrigation company or canal company from asserting the rights provided by subsections (5) and (6) of section 46-229.04.

(3) If an owner of the appropriation provides notification to the department in accordance with subsection (1) of this section, the department shall review the owner's stated reasons for contesting the department's preliminary determination and any other information provided with the owner's notice. If the department determines that the owner has provided sufficient information for the department to conclude that the appropriation should not be canceled, in whole or in part, it shall inform the owners of the appropriation, and any other owners of the land under the appropriation, of such determination.

(4) If the department determines that an owner has provided sufficient information to support the conclusion that the appropriation should be canceled only in part and if (a) the owner or owners filing the notice of contest agree in writing to such cancellation in part and (b) such owner or owners are the only known owners of the appropriation and of the land under the appropriation, the director may issue an order canceling the appropriation to the extent agreed to by the owner or owners and shall provide a copy of such order to such owner or owners.

(5) If the department determines that subsections (2), (3), and (4) of this section do not apply, it shall schedule and conduct a hearing on the cancellation of the appropriation in whole or in part. Notice of the hearing shall be provided to the owner or owners who filed notices with the department pursuant to subsection (1) of this section, to any other owner of the appropriation known to the department, and to any other owner of the land under the appropriation. The notice shall be posted on the department's web site and shall be served or published, as applicable, in the manner provided in subsection (2), (3), or (4) of section 46-229.03, as applicable.

(6) Following a hearing conducted in accordance with subsection (5) of this section and subsection (1) of section 46-229.04, the director shall render a decision by order. A copy of the order shall be provided to the owner or owners of the appropriation and to any other person who is an owner of the land under the appropriation. The copy of the order shall be posted on the department's web site and shall be served or published, as applicable, in the same manner that notices are to be given in accordance with subsection (2), (3), or (4) of section 46-229.03, as applicable, except that if publication is required, it shall be sufficient for the department to publish notice that an order has been issued. Any such published notice shall identify the land or lands involved and shall provide the address and telephone number that may be used to obtain a copy of the order.

(7) A water appropriation that has not been perfected pursuant to the terms of the permit may be canceled by the department without complying with sections 46-229.01 to 46-229.04 if the owner of such appropriation fails to comply with any of the conditions of approval in the permit,

except that this subsection does not apply to appropriations to which subsection (2) of section 46-237 applies.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 2, § 9, p. 836; C.S. 1922, § 8428; C.S. 1929, § 81-6309; R.S.1943, § 46-229; Laws 1947, c. 172, § 1(3), p. 521; Laws 1963, c. 278, § 1, p. 834; Laws 1983, LB 380, § 2; Laws 1984, LB 1000, § 1; Laws 2004, LB 962, § 7; Laws 2006, LB 1226, § 7.

Under former law, a notice of hearing on the adjudication of a water right that states the place and time of the hearing, names and describes the appropriation that is the subject of the hearing, states that the Department of Natural Resources' records indicate that the land approved for irrigation under the appropriation has not been irrigated for more than 3 consecutive years, states that the hearing will be held pursuant to sections 46-229 to 46-229.05, as amended, states that all interested persons shall appear at the hearing and show cause why the appropriation or part of the appropriation should not be canceled or annulled, states that the appropriation may be canceled if no one appears at the hearing, includes the address, post office box number, telephone number, and fax number of the Department of Natural Resources, and attaches copies of sections 46-229 to 46-229.05 provides adequate notice of the issues to be taken up at the hearing and contains the information required under this section. In re Water Appropriation A-4924, 267 Neb. 430, 674 N.W.2d 788 (2004).

Nonuse for over three years terminates the user's rights by statutory cancellation proceedings. Northport Irr. Dist. v. Jess, 215 Neb. 152, 337 N.W.2d 733 (1983).

The statutory forfeiture provisions of the section apply to vested rights in water appropriations established prior to April 4, 1895. In re Water Appropriation Nos. 442A, 461, 462, and 485, 210 Neb. 161, 313 N.W.2d 271 (1981).

An unexcused nonuse of water appropriation rights by a predecessor in title binds the successor in title. Hostetler v. State, 203 Neb. 776, 280 N.W.2d 75 (1979).

Procedure for cancellation of water rights is not exclusive. State v. Nielsen, 163 Neb. 372, 79 N.W.2d 721 (1956).

Under former law, Department of Roads and Irrigation could forfeit water right for nonuser for more than three years. State v. Birdwood Irr. Dist., 154 Neb. 52, 46 N.W.2d 884 (1951).

46-229.03. Appropriations; preliminary determination of nonuse; notice; contents; service.

(1) The notice provided by the department in accordance with subsection (1) or (5) of section 46-229.02 shall contain: (a) A description of the appropriation; (b) the number assigned to the appropriation by the department; (c) the date of priority; (d) the point of diversion; (e) if the notice is published, the section or sections of land which contain the lands located under such appropriation; (f) if the notice is served by personal service or by registered or certified mail, a description of the lands which are located under such appropriation, a description of the information used by the department to reach the preliminary determinations of nonuse, and a copy of section 46-229.04; (g) a description of the owner's options in response to the notice; (h) a department telephone number which any person may call during normal business hours for more information regarding the owner's rights and options, including what constitutes sufficient cause for nonuse; (i) a copy of the form that such owner may file to contest such determination, if notice is provided in accordance with subsection (1) of section 46-229.02 and is mailed; (j) the location where the owner may obtain a form to file to contest such determination, if notice is provided in accordance with subsection (1) of section 46-229.02 and is published; and (k) if the notice is provided in accordance with subsection (5) of section 46-229.02, the date, time, and location of the hearing.

(2) For any owner whose name and address are known to the department or can be reasonably obtained by the department, the notice shall be served by personal service or by registered mail or certified mail. Any landowner's name or address shall be considered reasonably obtainable if that

person is listed as an owner of the land involved, on the records of the county clerk or register of deeds for the county in which the land is located.

(3) For any owner whose name and address are not known to the department and cannot reasonably be obtained by the department, such notice shall be served by publication in a legal newspaper published or of general circulation in any county in which the place of diversion is located and in a legal newspaper published or of general circulation in each county containing land for which the right to use water under the appropriation is subject to cancellation. Each such publication shall be once each week for three consecutive weeks.

(4) Landowners whose property under such appropriation is located within the corporate limits of a city or village shall be served by the publication of such notice in a legal newspaper published or of general circulation in the county in which the city or village is located. The notice shall be published once each week for three consecutive weeks.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 2, § 9, p. 836; C.S. 1922, § 8428; C.S. 1929, § 81-6309; R.S.1943, § 46-229; Laws 1947, c. 172, § 1(4), p. 521; Laws 1957, c. 242, § 39, p. 852; Laws 1973, LB 186, § 5; Laws 1980, LB 648, § 1; Laws 1986, LB 960, § 32; Laws 1987, LB 140, § 3; Laws 2004, LB 962, § 8; Laws 2006, LB 1226, § 8.

Notice of hearing on cancellation of water rights must be given to the party appearing of record to be the owner. State v. Nielsen, 163 Neb. 372, 79 N.W.2d 721 (1956).

This section does not fix the time in which an appropriator must put water to a beneficial use. North Loup River P. P. & I. Dist. v. Loup River P. P. Dist., 162 Neb. 22, 74 N.W.2d 863 (1956).

46-229.04. Appropriations; hearing; decision; nonuse; considerations; consolidation of proceedings; when.

(1) At a hearing held pursuant to section 46-229.03, the verified field investigation report of an employee of the department, or such other report or information that is relied upon by the department to reach the preliminary determination of nonuse, 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:

(a) 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; or

(b) 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, state, or natural resources district program, or such land was previously 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 such land subsequent to when that land was last under such program.

(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; or

(f) Legal proceedings prevented or restricted use of the water.

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, a reclamation district, a public power and irrigation district, a mutual irrigation company or canal company, or the United States Bureau of Reclamation 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 or the area served by the company, to file an application for a transfer in accordance with section 46-290, or to transfer the right in accordance with sections 46-2,127 to 46-2,129. The department shall issue its order of cancellation within sixty days after receipt of the voluntary relinquishment unless the relinquishment is conditioned by the landowner upon an action of a governmental agency. If the relinquishment contains such a provision, the department shall issue its order of cancellation within sixty days after receipt of notification that such action has been completed. The department shall be notified of any such assignment within thirty days after such assignment. 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 reinitiate 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 reinitiated 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; Laws 2006, LB 1226, § 9; Laws 2007, LB701, § 15; Laws 2019, LB48, § 1.

In a determination of whether an appropriation should be canceled for nonuse, once it is established that the appropriation has not been used for more than 5 consecutive years, it is the burden of the interested party to present evidence that there was sufficient cause for nonuse. In re Appropriation A-7603, 291 Neb. 678, 868 N.W.2d 314 (2015).

Under former law, at a hearing pursuant to subsection (1) of this section, the presentation of prima facie evidence for the forfeiture and annulment of a water appropriation in the form of the verified field investigation report of an employee of the Department of Natural Resources shifts the burden to an interested party to present evidence that the water appropriation

has been put to a beneficial use during the prior 3 consecutive years. In re Water Appropriation A-4924, 267 Neb. 430, 674 N.W.2d 788 (2004).

Under former law, evidence of beneficial use of a water appropriation more than 3 years prior to the hearing on the adjudication of the water right does not sustain the burden of an interested party after presentation of prima facie evidence for the forfeiture and annulment of the water appropriation. In re Water Appropriation A-4924, 267 Neb. 430, 674 N.W.2d 788 (2004).

Under former law, once it has been established that a water appropriation has not been used for more than 3 consecutive years, it is the burden of the interested party to present evidence that there was sufficient cause for nonuse. In re Water Appropriation A-4924, 267 Neb. 430, 674 N.W.2d 788 (2004).

Under former law, use of a water appropriation only when another water source is inadequate and 3 years prior to the hearing on the adjudication of the water appropriation does not establish sufficient cause for nonuse pursuant to subdivision (3)(c) of this section. In re Water Appropriation A-4924, 267 Neb. 430, 674 N.W.2d 788 (2004).

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).

46-229.05. Adjudication of water rights; appeal.

An appeal may be taken from the decision of the department upon such hearing as provided by section 61-207.

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(6), p. 522; Laws 1991, LB 732, § 106; Laws 2000, LB 900, § 101.

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).

46-229.06. Appropriations; partial cancellation; rate of diversion; determination.

When a departmental proceeding that is conducted pursuant to sections 46-229 to 46-229.04 concerns the partial cancellation of an appropriation, the department may receive evidence on the question of whether, following such partial cancellation, a reduction in the rate of diversion to the maximum rate prescribed in section 46-231 would result in an authorized diversion rate less than the rate necessary, in the interests of good husbandry, for the production of crops on the lands that remain subject to the appropriation. If the director determines, based on a preponderance of the evidence, that such rate would be less than the rate necessary, in the interests of good husbandry, for the production of crops, he or she may approve a diversion rate for the remaining portion of the appropriation greater than the maximum rate authorized by section 46-231. Such increased rate can be no greater than the rate authorized for the appropriation prior to the partial cancellation and no greater than the rate determined by the director to be necessary, in the interests of good husbandry, for the production of crops on the lands that remain subject to the appropriation.

Source: Laws 2004, LB 962, § 10.

46-230. Adjudication of water rights; record; duty of appropriation owner to furnish information; notice.

(1) As the adjudication of a stream progresses and as each claim is finally adjudicated, the director shall make and cause to be entered of record in his or her office an order determining and establishing the priorities of right to use the water of such stream, the amount of the appropriation of the persons claiming water from such stream and the character of use for which each appropriation is found to have been made, and the address of the owner of each water appropriation.

(2) Whenever requested by the department, the owner of any appropriation not held by an irrigation district, reclamation district, public power and irrigation district, or mutual irrigation or canal company shall provide the department with the name, address, and telephone number of each then-current owner of the appropriation and with the name, address, and telephone number of any tenant or other person who is authorized by the owner to receive opening and closing notices and other departmental communications relating to the appropriation. Each appropriation owner shall also notify the department any time there is a change in any of such names, addresses, or telephone numbers. Notice of ownership changes may be provided to the department in the manner provided in section 76-2,124 or in any other manner authorized by the department. If notice of an ownership change is provided other than in accordance with such section, the notice shall include such evidence of ownership as the director may require. Notice of all other changes may be provided in any manner authorized by the department. Upon receipt of any new information, the department shall update its records. The department shall not collect a fee for the filing of any such information or for updating its records.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 2, § 10, p. 837; C.S. 1922, § 8429; C.S. 1929, § 81-6310; Laws 1941, c. 29, § 11, p. 137; C.S. Supp.,1941, § 81-6310; R.S.1943, § 46-230; Laws 1973, LB 186, § 7; Laws 1979, LB 204, § 1; Laws 2000, LB 900, § 102; Laws 2001, LB 667, § 2; Laws 2002, LB 458, § 1; Laws 2004, LB 962, § 11.

46-231. Amount and priority of appropriation; determination; limitation of amount; storage water.

Each appropriation shall be determined in its priority and amount by the time at which it is made and the amount of water which the works are constructed to carry. An appropriator shall at no time be entitled to the use of more than he or she can beneficially use for the purposes for which the appropriation has been made, and the amount of any appropriation made by means of enlargement of the distributing works shall be determined in like manner.

An allotment from the natural flow of streams for irrigation shall not exceed one cubic foot per second of time for each seventy acres of land and shall not exceed three acre-feet in the aggregate during one calendar year for each acre of land for which such appropriation has been made, and an allotment shall not exceed the least amount of water that experience may indicate is necessary, in the exercise of good husbandry, for the production of crops. Such limitations do not apply to

storage waters or to water appropriations transferred pursuant to sections 46-2,122 to 46-2,125 and 46-2,127 to 46-2,129.

When storage water is being used in addition to the natural flow, the person in charge of the ditch or canal shall, upon his or her request and within twenty-four hours thereof, be notified in writing by the user of such storage waters of the time of withdrawal from natural streams to be distributed according to law.

When an appropriation is for irrigation purposes and the amount is so small that a proper distribution and application is impractical, as much water as the applicant can use without waste may be allotted for a limited time so fixed by the department as to give each appropriator his or her just share without violating other rights, so long as (1) the volume of water used in a twenty-four-hour period does not exceed the amount of water that would otherwise have been allowed at the approved fixed continuous rate for a twenty-four-hour period or (2) the volume of water used in a seven-day, Monday-through-Sunday period does not exceed the amount of water that would otherwise have been allowed at the approved fixed continuous rate for a seven-day period. The department shall determine schedules among appropriators to assure that other rights are not violated.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 2, § 11, p. 837; C.S. 1922, § 8430; Laws 1929, c. 133, § 1, p. 486; C.S. 1929, § 81-6311; R.S.1943, § 46-231; Laws 1987, LB 140, § 5; Laws 1993, LB 789, § 1; Laws 1995, LB 99, § 15; Laws 2000, LB 900, § 103.

A user may not appropriate water without a valid permit specifically defining the source of the appropriation. Northport Irr. Dist. v. Jess, 215 Neb. 152, 337 N.W.2d 733 (1983).

Property rights in water for irrigation consist not alone in the amount of, but also in the priority of, the appropriation. Vonburg v. Farmers Irr. Dist., 132 Neb. 12, 270 N.W. 835 (1937).

Appropriator takes subject to rights of all prior appropriators, and cannot infringe upon their privileges. Farmers Canal Co. v. Frank, 72 Neb. 136, 100 N.W. 286 (1904); Crawford Co. v. Hathaway, 67 Neb. 325, 93 N.W. 781 (1903).

46-232. Repealed. Laws 1955, c. 183, s. 6.

(f) APPLICATION FOR WATER

46-233. Application to appropriate water; time of making; contents; procedure; priority date; notice; hearing; temporary permit; emergency use.

(1) The United States and every person intending to appropriate any of the public waters of the State of Nebraska shall, before (a) commencing the construction, enlargement, or extension of any works for such purpose, (b) performing any work in connection with such construction, enlargement, or extension, or (c) taking any water from any constructed works, make an application to the department for a permit to make such appropriation. A permit may be obtained to appropriate public waters for intentional underground water storage and recovery of such water. A public water supplier may make application to appropriate public waters for induced ground water recharge.

(2) The application shall be upon a form prescribed and furnished by the department without cost to an applicant. Such application shall set forth (a) the name and post office address of the applicant, (b) the source from which such appropriation shall be made, (c) the amount of the appropriation desired, as nearly as it may be estimated, (d) the location of any proposed work in connection with the appropriation, (e) the estimated time required for its completion, which estimated time shall include the period required for the construction of ditches, pumps, and other features or devices, (f) the time estimated at which the application of the water for the beneficial purposes shall be made, which time shall be limited to a reasonable time following the estimated time of completion of the work when prosecuted with diligence, (g) the purpose for which water is to be applied and (i) if for induced ground water recharge by a public water supplier, a statement of the times of the year when and location along a stream where flows for induced ground water recharge are proposed and (ii) if for irrigation, a description of the land to be irrigated by the water and the amount, and (h) such facts and supporting documentation as are required by the department which shall include, but not be limited to, the depth of all wells, the extent of the underlying aquifer, the expected rate of recharge, the minimum flow or flows necessary to sustain the well field throughout the reach identified, and the period of time that a well field would continue to meet minimal essential needs of the public water supplier when there is no flow as those factors relate to and are part of an evaluation of pertinent hydrologic relationships.

A public water supplier making application for induced ground water recharge may submit with its application a statement of the amount of induced ground water recharge water which the public water supplier presently uses as well as the amount of induced ground water recharge water it anticipates using in the next twenty-five-year period. Such statement shall also quantify the total amount of water the public water supplier presently uses from the well field as well as the total amount of water it anticipates using from the well field in the next twenty-five year period.

(3) Upon receipt of an application containing the information set forth in this section, the department shall (a) make a record of the receipt of the application, (b) cause the application to be recorded in its office, and (c) make a careful examination of the application to ascertain whether it sets forth all the facts necessary to enable the department to determine the nature and amount of the proposed appropriation. If such an examination shows the application in any way defective, it shall be returned to the applicant for correction, with a statement of the correction required, within ninety days after its receipt. Ninety days shall be allowed for the refiling of the application, and in default of such refiling, the application shall stand dismissed. Except as provided in subsection (4) of this section, if so filed and corrected as required within such time, the application shall, upon being accepted and allowed, take priority as of the date of the original filing, subject to compliance with the future provisions of the law and the rules and regulations thereunder. During the pendency of any application or upon its approval, the department, upon proper authorization and request of the applicant, may assign the application a later priority date.

(4) For public water supplier wells in existence on September 9, 1993, the priority date assigned to an application for induced ground water recharge made by a public water supplier shall be:

(a) June 27, 1963, for water supply wells and facilities constructed and placed in service on or before June 27, 1963;

(b) January 1, 1970, for water supply wells and facilities constructed and placed in service on or after June 28, 1963, and on or before December 31, 1969;

(c) January 1, 1980, for water supply wells and facilities constructed and placed in service on or after January 1, 1970, and on or before December 31, 1979;

(d) January 1, 1990, for water supply wells and facilities constructed and placed in service on or after January 1, 1980, and on or before December 31, 1989; and

(e) January 1, 1993, for water supply wells and facilities constructed and placed in service on or after January 1, 1990, and on or before September 9, 1993.

(5) Prior to taking action on an application for induced ground water recharge, the director shall publish notice of such application at the applicant's expense at least once each week for three consecutive weeks in a newspaper of general circulation in the area of the stream segment and also in a newspaper of statewide circulation. The notice shall state that any person having an interest may, in writing, object to the application. Any such objection shall be filed with the department within two weeks after the final publication of the notice.

(6) After the director has accepted the application made under subsection (2) of this section as a completed application and published notice as required under subsection (5) of this section, the director shall, if he or she determines that a hearing is necessary, set a time and place for a public hearing on the application. The hearing shall be held within reasonable proximity to the area in which the wells are or would be located. At the hearing the applicant shall present all hydrological data and other evidence supporting its application. All interested parties shall be allowed to testify and present evidence relative to the application.

(7) An unapproved application pending on August 26, 1983, may be amended to include appropriation for intentional underground water storage and recovery of such water.

(8) Application may be made to the department for a temporary permit to appropriate water. The same standards for granting a permanent appropriation shall apply for granting such temporary permit except when the temporary permit is for road construction or other public use construction and the amount of water requested is less than ten acre-feet in total volume. For temporary permits for public-use construction, the applicant shall include on the application the location of the diversion, the location of use, a description of the project, the amount of water requested, and the person to contact. Temporary permits for public-use construction and for less than ten acre-feet in total volume may be granted without any determination of unappropriated water and shall be considered to be in the public interest. The requirement of filing a map or plans with the application for a temporary permit may be waived at the discretion of the director. In granting a temporary permit, the director shall specify a date on which the right to appropriate water under the permit shall expire. Under no circumstances shall such date be longer than one calendar year after the date the temporary permit was granted. Temporary permits shall be administered during times of shortage based on priority. The right to appropriate water shall automatically terminate on the date specified by the director on the temporary permit without further action by the department.

(9) Water may be diverted from any stream, reservoir, or canal by any fire department or emergency response services for the purpose of extinguishing a fire in progress in an emergency without obtaining a permit from the department. The installation of a dry well for this purpose is allowed without the prior permission of the department, but the department shall be informed of any such installation, its location, and the party responsible for its installation and maintenance within thirty days after the installation.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 2, § 16, p. 841; C.S. 1922, § 8435; C.S. 1929, § 81-6316; R.S.1943, § 46-233; Laws 1955, c. 138, § 1, p. 513; Laws 1957, c. 198, § 1, p. 696; Laws 1983, LB 198, § 7; Laws 1993, LB 301, § 3; Laws 1993, LB 789, § 2; Laws 2000, LB 900, § 104; Laws 2001, LB 129, § 3.

This section does not supplant the common-law standard of standing. Metropolitan Utilities Dist. v. Twin Platte NRD, 250 Neb. 442, 550 N.W.2d 907 (1996).

An application to divert water is only a request for permission to appropriate public waters of the state. In re Applications A-16027 et al., 242 Neb. 315, 495 N.W.2d 23 (1993).

An application for a water permit under this section is not required until actual construction work at the site is commenced. Winter v. Lower Elkhorn Nat. Resources Dist., 206 Neb. 70, 291 N.W.2d 245 (1980).

Requirements for appropriation of water for power purposes are met when appropriator has constructed power facilities and is ready and willing to deliver hydroelectric energy to users upon demand. Hickman v. Loup River P. P. Dist., 176 Neb. 416, 126 N.W.2d 404 (1964).

Approval of organization of district does not determine right to appropriation of water. Ainsworth Irr. Dist. v. Harms, 170 Neb. 228, 102 N.W.2d 416 (1960); Ainsworth Irr. Dist. v. Bejot, 170 Neb. 257, 102 N.W.2d 429 (1960).

The federal government has a right to appropriate flood and unused waters in connection with any irrigation project constructed by the United States. Frenchman Valley Irr. Dist. v. Smith, 167 Neb. 78, 91 N.W.2d 415 (1958).

Appropriated waters should be measured at the point of diversion. Loup River Public Power District v. North Loup River Public Power & Irr. Dist., 142 Neb. 141, 5 N.W.2d 240 (1942).

Property rights for irrigation purposes consist not alone in the amount of, but also in the priority of, the appropriation. Vonburg v. Farmers Irr. Dist., 132 Neb. 12, 270 N.W. 835 (1937).

Under former law, Department of Roads and Irrigation was given discretionary power in acting upon applications to so limit the grant that it would not be detrimental to public welfare. Kirk v. State Board of Irrigation, 90 Neb. 627, 134 N.W. 167 (1912).

Under former law, judgment of Department of Roads and Irrigation on matters within its jurisdiction could not be collaterally attacked, and earlier section was not applicable to case where land was under ditch already constructed of sufficient capacity to water same. State v. Several Parcels of Land, 80 Neb. 424, 114 N.W. 283 (1907).

Application which does not contain description of land nor describe location of canal is not good. Farmers Canal Co. v. Frank, 72 Neb. 136, 100 N.W. 286 (1904).

46-233.01. Permit to appropriate water for use in another state; application; considerations; determination.

(1) Application may be made to the department for a permit to appropriate any of the public surface waters of the State of Nebraska to be diverted or stored in Nebraska for use in any other state.

(2) In determining whether to grant such application, the director shall consider the following factors:

(a) Whether unappropriated water exists in the source of supply named in the application;

(b) Whether such application and appropriation when perfected are not otherwise detrimental to the public welfare;

(c) Whether denial of the application is demanded by the public interest; and

(d) Whether the proposed use is a beneficial use of water.

(3) When determining whether denial of such application is demanded by the public interest, the director shall consider the following factors:

(a) The economic, environmental, and other benefits of the proposed use;

(b) Any adverse economic, environmental, and other impacts of the proposed use;

(c) Any current beneficial uses being made of the unappropriated water;

(d) The economic, environmental, and other benefits of not allowing the appropriation and preserving the water supply for beneficial uses within the state;

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

(f) Any other factors consistent with the purposes of this section that the director deems relevant to protecting the interests of the state and its citizens.

The application shall be deemed in the public interest if the overall benefits to Nebraska are greater than the adverse impacts to Nebraska. 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.

Source: Laws 1953, c. 161, § 1, p. 504; Laws 1987, LB 146, § 4; Laws 2000, LB 900, § 05.

46-233.02. Appropriation of water for use in another state; laws governing; rights of appropriators.

Such applications and all rights thereunder shall be governed by the provisions of the Constitution and statutes of Nebraska as now existing or hereafter amended. Appropriators under the provisions of sections 46-233.01 and 46-233.02 shall have no greater rights than those under appropriations for use within the State of Nebraska.

Source: Laws 1953, c. 161, § 2, p. 505.

46-234. Application for water; refusal; grounds; effect; necessity for consent; perfection of appropriation; time allowed.

If there is no unappropriated water in the source of supply or if a prior appropriation has been perfected to water the same land to be watered by the applicant, the department may refuse such application. An application may also be refused (1) if existing facilities other than those owned or operated by the applicant are to be utilized and the applicant fails to show, by documentary evidence, agreements with the owner and operator of the facilities to allow the applicant to use such facilities or (2) when denial is demanded by the public interest. The party making such application shall not prosecute such work so long as such refusal continues in force. An application for appropriation shall not be exclusive of any of the lands included therein until the owner or owners of such land give consent to the same in proper form duly acknowledged. No application made or canal constructed, prior to the application of the water and the perfection of an appropriation therefor or the filing of the consent, shall prevent other applications from being allowed and other canals from being constructed to irrigate the same lands or any of them. In case of an application for an appropriation of water for the development of water power, the department shall promptly act upon such application and limit the time within which such appropriation shall

be perfected to the period within which the proposed power project can be completed by uninterrupted and expeditious construction.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 2, § 18, p. 842; Laws 1921, c. 291, § 1, p. 941; C.S. 1922, § 8437; C.S. 1929, § 81-6318; R.S.1943, § 46-234; Laws 1981, LB 252, § 3; Laws 1984, LB 672, § 1; Laws 2000, LB 900, § 106.

46-235. Application for water; approval; date of priority; conditional or partial approval; hearing; director; powers and duties.

(1) For applications other than those to appropriate public waters for induced ground water recharge, if there is unappropriated water in the source of supply named in the application, if such application and appropriation when perfected are not otherwise detrimental to the public welfare, and if denial of the application is not demanded by the public interest, the department shall approve the application and shall make a record in its office and return the application to the applicant, who shall on receipt thereof be authorized to proceed with the work and to take such measures as may be necessary to perfect such application into an appropriation. The priority of such application and appropriation when perfected shall date from the filing of the application in the office of the department, and the date of filing shall be regarded as the priority number thereof. The department may, upon examination of such application, approve it for a shorter period of time for perfecting the proposed appropriation or for a smaller amount of water or of land than applied for. The department may also impose such other reasonable conditions as it deems appropriate to protect the public interest. An applicant aggrieved by the action of the department shall, upon proper showing, be granted a hearing before the department, which hearing shall be conducted in accordance with the rules of procedure adopted by the department, and a full and complete record shall be kept of all such proceedings. When a complete record of the case has been made up, the department shall render an opinion of facts and of law based upon the evidence before it.

(2)(a) An application for an induced ground water recharge appropriation for public water supplier wells constructed and placed in service before September 9, 1993, shall be approved by the director if he or she finds that:

(i) The appropriation is necessary to maintain the well or wells for the use or uses for which the appropriation has been requested;

(ii) The rate and timing of the flow is the amount reasonably necessary to maintain the well or wells for the uses for which the appropriation has been requested; and

(iii) The application is in the public interest and is not detrimental to the public welfare. There shall be a rebuttable presumption that wells which are the subject of an application pursuant to subdivision (2)(a) of this section are in the public interest and are not detrimental to the public welfare.

(b) The director may approve the application for a well or wells constructed before September 9, 1993, but may specifically deny the applicant the right to request regulation of junior appropriators if the director, at the time of approval, finds that the well or wells, at the time of their construction, were not located, designed, or constructed so as to take reasonable advantage of aquifer conditions in the area to minimize the frequency and amount of the demand for flows for induced ground water recharge. Thereafter a public water supplier holding an approved

application which has been denied the right to request regulation of junior appropriators may petition the director for a hearing to present evidence showing the director that the well or wells have been modified, relocated, or reconstructed to take reasonable advantage of the aquifer conditions in the area. If the director determines that the well or wells have been so modified, relocated, or reconstructed, the director shall cause to be modified the approval of the application to allow for the regulation of junior appropriators, subject to the restrictions or conditions applicable to public water suppliers.

(c) An application for an induced ground water recharge appropriation for public water supplier wells constructed and placed in service before September 9, 1993, shall not be subject to the requirements of sections 46-288 and 46-289.

(3) An application for an induced ground water recharge appropriation for public water supplier wells constructed or to be constructed on or after September 9, 1993, shall be approved by the director if he or she makes the findings required by subdivision (2)(a) of this section and further finds that:

(a) There is unappropriated water available for the appropriation; and

(b) The well or wells involved have been or will be located and constructed to take reasonable advantage of aquifer conditions in the area to minimize the frequency and amount of the demand for flows for induced ground water recharge.

(4)(a) The director may approve the application filed under subsection (2) or (3) of this section for a smaller amount of water than requested by the applicant. The director may also impose reasonable conditions on the manner and timing of the appropriation which the director deems necessary to protect the public interest. The director may grant an appropriation for specific months of the year if so demanded by the public interest. If the director approves the application, he or she shall issue a written order, which written order shall include the findings required by this section, the amount of the appropriation, and any conditions or limitations imposed under this section.

(b) In determining whether an application for an appropriation for induced ground water recharge is in the public interest, the director's considerations shall include, but not be limited to, the possible adverse effects on existing surface water or ground water users and the economic, social, and environmental value of such uses, including, but not limited to, irrigation, recreation, fish and wildlife, public water supply, induced ground water recharge for public water supply systems, and water quality maintenance.

(c) The stream segment and the determination of a reasonable and necessary amount of water required for induced ground water recharge purposes throughout the reach shall be defined specifically by the director in the order issued under this section.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 2, § 17, p. 842; C.S. 1922, § 8436; C.S. 1929, § 81-6317; R.S.1943, § 46-235; Laws 1981, LB 252, § 4; Laws 1987, LB 140, § 6; Laws 1993, LB 301, § 4; Laws 2000, LB 900, § 107.

Subsection (1) of this section does not require that the director engage in a particular sequential consideration of the issues presented by an application. Central Platte NRD v. City of Fremont, 250 Neb. 252, 549 N.W.2d 112 (1996).

Approval of an application merely authorizes the successful applicant to take other measures to perfect the application into an appropriation. In re Applications A-16027 et al., 242 Neb. 315, 495 N.W.2d 23 (1993).

Because the word "may" in a statute will be given its ordinary, permissive, and discretionary meaning unless it can be shown that the intent of the drafters would be defeated by the application of such a meaning, the Department of Water Resources may decline to approve an appropriation of water which is significantly less than the application requests and may also impose such other reasonable conditions as it deems appropriate to protect the public interest. In re Application A-15738, 226 Neb. 146, 410 N.W.2d 101 (1987).

Order approving application for appropriation may be made subject to limitations and conditions. Ainsworth Irr. Dist. v. Bejot, 170 Neb. 257, 102 N.W.2d 416 (1960).

Discretionary power of approval by department is conferred. Custer Public Power Dist. v. Loup River Public Power Dist., 162 Neb. 300, 75 N.W.2d 619 (1956).

Approval of application for an appropriation is an exercise of quasi-judicial power by the department. North Loup River P. P. & I. Dist. v. Loup River P. P. Dist., 162 Neb. 22, 74 N.W.2d 863 (1956).

An appropriation of public waters may be allowed in an amount less than that applied for, and if the applicant is dissatisfied, he must appeal. Loup River Public Power District v. North Loup River Public Power & Irr. Dist., 142 Neb. 141, 5 N.W.2d 240 (1942).

The irrigation act of 1889 prescribed no method of making a claim of appropriation of water, except the construction of works in which to divert the water and diverting it into such works. The extent of the appropriation was measured by the appropriation claimed, but within the limits of the capacity of the diversion works. Vonburg v. Farmers Irr. Dist., 132 Neb. 12, 270 N.W. 835 (1937).

46-235.01. Public water supplier; appropriation for induced ground water recharge; hearing; evidence of beneficial use; priority date; vesting.

A public water supplier which has received an appropriation for induced ground water recharge pursuant to section 46-235 may, from time to time and within twenty-five years after the priority assigned pursuant to section 46-233, petition the department for a hearing to present evidence showing that all or part of the original projection for additional water needs specified pursuant to subsection (2) of section 46-233 corresponds with the actual use. To the extent the public water supplier is making beneficial use of all or a portion of the water projected in the original application, the right to use such additional water shall vest and the priority date of such anticipated water use shall date back to the priority date assigned pursuant to section 46-233. A public water supplier may not request such a hearing at intervals of less than five years for each approved application.

Source: Laws 1993, LB 301, § 5.

46-235.02. Public water supplier; payment of compensation; when.

(1) Just compensation shall be required if a public water supplier exercises a preference to the injury of a senior appropriator.

(2) Just compensation shall be provided by a public water supplier to any injured junior appropriator whose appropriation was perfected prior to September 9, 1993, if and to the extent such injury resulted from regulation of junior appropriators requested by the public water supplier to provide water for any purpose other than domestic. Such compensation shall not be required to a junior appropriator if the regulation requested is to provide water for domestic purposes only. At the time any junior appropriator whose appropriation was perfected prior to September 9, 1993, is regulated at the request of a public water supplier, the department shall determine for each such appropriator the extent to which the regulation is for domestic purposes and the extent to which it is for other purposes.

(3) A cause of action for just compensation shall accrue at the time a junior appropriator is regulated by the department.

Source: Laws 1993, LB 301, § 6; Laws 2000, LB 900, § 108.

46-235.03. Public water suppliers; natural resources districts; powers.

Natural resources districts shall have the authority to impose restrictions or controls on public water suppliers as specified in the Nebraska Ground Water Management and Protection Act. Such restrictions or controls may limit the withdrawal of ground water to a greater degree or extent than is otherwise permitted or allowed by a permit issued by the department.

Source: Laws 1993, LB 301, § 7; Laws 2000, LB 900, § 109.

Cross Reference

Nebraska Ground Water Management and Protection Act, see section 46-701.

46-235.04. Induced ground water recharge appropriations; administration; transfer of priority dates; procedure.

(1) Induced ground water recharge appropriations shall be administered in the same manner as prescribed by Chapter 46, Article 2, for other appropriations. Appropriations for induced ground water recharge may be canceled and annulled as provided in sections 46-229.02 to 46-229.05.

(2) The department may approve the transfer of priority dates among water wells, including replacement water wells, located within a single well field that are subject to an induced recharge appropriation, or are part of an application for such an appropriation, to improve the well field's efficiency of operation with respect to river flow. The transfers shall be approved if the department finds that (a) the transfers would not increase the quantity of induced ground water recharge under the original priority date or application, (b) the amount of water withdrawn from water wells under the original priority date or application would not increase, (c) the quantity of streamflow needed to sustain well field operation under the original priority date would decrease, (d) the transfer would not impair the rights of other appropriators, and (e) the transfer is in the public interest in the same manner as provided in section 46-235. The department may assign multiple priority dates to a single water well that replaces two or more water wells which are abandoned. Replacement water wells installed pursuant to this subsection must be installed within the same well field as the abandoned water well. Notice shall be furnished and any hearing held as provided in sections 46-291 and 46-292. For purposes of this subsection, single well field means those contiguous tracts of land owned or leased by the applicant containing two or more water wells subject to induced recharge.

Source: Laws 1993, LB 301, § 8; Laws 1995, LB 871, § 2; Laws 1997, LB 30, § 1; Laws 2000, LB 900, § 110; Laws 2004, LB 962, § 12.

46-236. Application for water power; lease from state required; fee; renewal; cancellation; grounds.

An application for appropriation of water for water power shall meet the requirements of section 46-234 and subsection (1) of section 46-235 to be approved. Within six months after the approval of an application for water power and before placing water to any beneficial use, the applicant shall enter into a contract with the State of Nebraska, through the department, for leasing the use of all water so appropriated. Such lease shall be upon forms prepared by the department, and the time of such lease shall not run for a greater period than fifty years; and for the use of water for power purposes the applicant shall pay into the state treasury on or before January 1 each year fifteen dollars for each one hundred horsepower for all water so appropriated. Upon application of the lessee or its assigns, the department shall renew the lease so as to continue it and the water appropriation in full force and effect for an additional period of fifty years.

Upon the failure of the applicant to comply with any of the provisions of such lease and the failure to pay any of such fees, the department shall notify the lessee that the required fees have not been paid to the department or that the lessee is not otherwise in compliance with the provisions of the lease. If the lessee has not come into compliance with all provisions of the lease or has not paid to the department all required fees within fifteen calendar days after the date of such notice, the department shall issue an order denying the applicant the right to divert or otherwise use the water appropriation for power production. The department shall rescind the order denying use of the water appropriation at such time as the lessee has come into compliance with all provisions of the lease and has paid all required fees to the department. If after forty-five calendar days from the date of issuance of the order the lessee is not in compliance with all provisions of the lease or required fees have not been paid to the department, such lease and water appropriation shall be canceled by the department.

Source: Laws 1921, c. 291, § 1, p. 942; C.S.1922, § 8437; C.S.1929, § 81-6318; R.S.1943, § 46-236; Laws 1972, LB 1306, § 1; Laws 1987, LB 140, § 7; Laws 2000, LB 900, § 111; Laws 2011, LB27, § 1.

State may lease use of public waters for power purposes. Hickman v. Loup River P. P. Dist., 176 Neb. 416, 126 N.W.2d 404 (1964).

Applicant for use of water for power purposes may make lease with state. Hickman v. Loup River P. P. Dist., 173 Neb. 428, 113 N.W.2d 617 (1962).

46-237. Map or plat; requirements; failure to furnish; effect.

(1) Within six months after approval and allowance of an application other than an application to appropriate public waters for induced ground water recharge, the applicant shall file in the office of the department a map or plat which shall conform to the rules and regulations of the department as to material, size, coloring, and scale. Such map or plat shall show the source from which the proposed appropriation is to be taken and all proposed dams, dikes, reservoirs, canals, powerhouses, and other structures for the purpose of storing, conveying, or using water for any purpose whatsoever and their true courses or positions in connection with the boundary lines and corners of lands which they occupy. The lands to be irrigated shall be identified in the manner prescribed by the department. No rights shall be deemed to have been acquired until the provisions

of this section have been complied with. Except as provided in subsection (2) of this section, failure to so comply shall work a forfeiture of the appropriation and all rights thereunder.

(2) For any appropriation with a priority date earlier than 1958 but for which either the appropriator has failed to comply with the requirements of subsection (1) of this section or a map or plat required by such subsection has been lost or destroyed through no fault of the appropriator, the lack of such compliance or of such map or plat shall not be the basis for a departmental adjudication or cancellation of the appropriation and the appropriation shall not be subject to legal challenge by any party on that basis.

(3) The department may notify any appropriator subject to subsection (2) of this section of the need to file a map or plat of lands under such appropriation. Unless the department grants an extension for good cause shown, the appropriator shall file the required map within three years after that notification and such map shall conform to the rules and regulations of the department as to material, size, coloring, and scale. If the appropriator fails to comply, the department may deny the appropriator the right to divert or withdraw water subject to the appropriation until compliance has been achieved.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 2, § 19, p. 843; C.S. 1922, § 8438; C.S. 1929, § 81-6319; R.S.1943, § 46-237; Laws 1993, LB 301, § 9; Laws 2000, LB 900, § 112; Laws 2004, LB 962, § 13.

Filing of map was required as a step in completing appropriation of water. Ainsworth Irr. Dist. v. Bejot, 170 Neb. 257, 102 N.W.2d 416 (1960).

Under former law, where application for appropriation was approved by Department of Roads and Irrigation, and filing of map, etc., was made within six months thereafter pursuant to earlier section, department had discretion to extend time to complete work, owing to abnormal conditions. In re Application of Babson, 105 Neb. 317, 180 N.W. 562 (1920).

46-238. Construction of project; time restrictions; failure to comply; forfeiture; extension of time for completion of work; appeal.

(1) Within twelve months after the approval of any application for water for irrigation, power, or other useful purpose by the department, the person making such application shall commence the excavation or construction of the works in which it is intended to divert the water and the actual construction of any water power plant and reservoir or reservoirs for storage in connection therewith and shall vigorously, diligently, and uninterruptedly prosecute such work to completion unless temporarily interrupted by some unavoidable and natural cause. A failure to comply with this section shall work a forfeiture of the appropriation and all rights under the appropriation. The cost of promotion and engineering work shall not be considered a part of the cost of construction, and the progress of the construction work shall be such that one-tenth of the total work shall be completed within one year from the date of approval of the application. The construction of all work required in connection with the proposed project shall be prosecuted in the manner described in this section and with such a force as shall assure the average rate of constructional progress necessary to complete such work or works within the time stipulated in the approval of such application, notwithstanding the ordinary delays and casualties that must be expected and provided against. A failure to carry on the construction of either an irrigation project or a water power project as outlined in this section shall work a forfeiture of the appropriation and all rights under the

appropriation, and the department shall cancel such appropriation. The department shall have free access to all records, books, and papers of any irrigation or water power company, shall have the right to go upon the right-of-way and land of any such company, shall inspect the work to see that it is being done according to plans and specifications approved by the department, and shall also keep a record of the cost of construction work when deemed advisable for physical valuation purposes.

(2) The department may extend, for reasonable lengths of time, the time for commencing excavation or construction, completion of works, the application of water to a beneficial use, or any of the other requirements for completing or perfecting an application for flow or storage rights as fixed in the approval of an application or otherwise for the appropriation of water. Such extension may be granted upon a petition to the department and the showing of reasonable cause. The department shall cause a notice of each petition received to be published at the petitioner's expense in at least one newspaper of general circulation in the county or counties of the appropriation once a week for three consecutive weeks. The department shall hold a hearing on the issue of extension on its own motion or if requested by any interested person. If a hearing is held, notice shall be given by certified mail to the applicant, to any person who requested a hearing, and to any person who requests notification of the hearing. The department may grant the extension in the absence of a hearing if no requests for a hearing are received. Any interested person may be made a party to such action. Any party affected by the decision on the petition may appeal directly to the Court of Appeals. Subsequent extensions may be made in the same manner.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 2, § 13, p. 838; C.S. 1922, § 8432; C.S. 929, § 81-6313; R.S.1943, § 46-238; Laws 1957, c. 198, § 2, p. 698; Laws 1979, LB 545, § 1; Laws 1980, LB 649, § 1; Laws 1987, LB 140, § 8; Laws 1991, LB 278, § 1; Laws 1991, LB 732, § 107; Laws 2000, LB 900, § 113; Laws 2009, LB 209, § 1.

Extension of completion date for construction of irrigation works was authorized when such extension was made necessary by some unavoidable and natural cause. Hickman v. Loup River P. P. Dist., 176 Neb. 416, 126 N.W.2d 404 (1964).

Where one appropriator was not barred by one-year time limitation and brought action, subsequent appropriators could appear and contest by petition in intervention. Hickman v. Loup River P. P. Dist., 173 Neb. 428, 113 N.W.2d 617 (1962).

Extension of time to complete appropriation was ratified by legislative act. Ainsworth Irr. Dist. v. Harms, 170 Neb. 228, 102 N.W.2d 416 (1960); Ainsworth Irr. Dist. v. Bejot, 170 Neb. 257, 102 N.W.2d 429 (1960).

Time for construction of a project could be extended where temporarily interrupted by unavoidable cause. North Loup River P. P. & I. Dist. v. Loup River P. P. Dist., 162 Neb. 22, 74 N.W.2d 863 (1956).

Property rights in water for irrigation consist not alone in the amount of, but also in the priority of, the appropriation. Vonburg v. Farmers Irr. Dist., 132 Neb. 12, 270 N.W. 835 (1937).

Under former law, adjudication of Department of Roads and Irrigation in proceeding to cancel water right, ordering that work be carried on under this section, was not binding upon other appropriators not parties. Kinnan v. France, 113 Neb. 99, 202 N.W. 452 (1925).

46-239. Repealed. Laws 1955, c. 183, s. 6.

46-240. Additional appropriation; conditions; application procedure.

Whenever any person shall desire to divert any of the unappropriated waters of any natural lake or reservoir, or any person shall desire to recover any unappropriated water intentionally

stored underground, for irrigation or any other beneficial purpose, for which water has already been appropriated, but for which in times of scarcity no water can be obtained from the appropriation already made therefor, such person may make application therefor and proceed as in cases of original application for appropriation. An application for recovery of water intentionally stored underground may be made only by an appropriator of record who shows, by documentary evidence, sufficient interest in the underground water storage facility to entitle the applicant to the water requested.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 2, § 28, p. 845; C.S. 1922, § 8447; C.S. 1929, § 81-6328; R.S.1943, § 46-240; Laws 1983, LB 198, § 8; Laws 1985, LB 488, § 4.

46-240.01. Supplemental additional appropriations; agricultural appropriators; application.

All appropriators of water for agricultural purposes of less than the statutory limit of direct flow from the public waters of this state within the drainage basin of the stream from which such waters originate shall be entitled to such additional appropriation or appropriations from the direct flow of such stream, within the statutory limits provided by law, as may be necessary and required for the production of crops in the practice of good husbandry. Applications for such supplemental additional appropriations from the direct flow, upon the approval or granting thereof, shall have priority within the drainage basin as of the date such applications are filed in the office of the department.

Source: Laws 1953, c. 160, § 1, p. 503; Laws 2000, LB 900, § 114; Laws 2011, LB31, § 1.

46-241. Application for water; storage reservoirs; facility for underground water storage; eminent domain; procedure; duties and liabilities of owner.

(1) Every person intending to construct and operate a storage reservoir for irrigation or any other beneficial purpose or intending to construct and operate a facility for intentional underground water storage and recovery shall, except as provided in subsections (2) and (3) of this section and section 46-243, make an application to the department upon the prescribed form and provide such plans, drawings, and specifications as are necessary to comply with the Safety of Dams and Reservoirs Act. Such application shall be filed and proceedings had thereunder in the same manner and under the same rules and regulations as other applications. Upon the approval of such application under this section and any approval required by the act, the applicant shall have the right to construct and impound in such reservoir, or store in and recover from such underground water storage facility, all water not otherwise appropriated and any appropriated water not needed for immediate use, to construct and operate necessary ditches for the purpose of conducting water to such storage reservoir or facility, and to condemn land for such reservoir, ditches, or other facility. The procedure to condemn property shall be exercised in the manner set forth in sections 76-704 to 76-724.

(2) Any person intending to construct an on-channel reservoir with a water storage impounding capacity of less than fifteen acre-feet measured below the crest of the lowest open outlet or overflow shall be exempt from subsection (1) of this section as long as there will be (a) no diversion or withdrawal of water from the reservoir for any purpose other than for watering range livestock and (b) no release from the reservoir to provide water for a downstream diversion or withdrawal for any purpose other than for watering range livestock. This subsection does not exempt any person from the requirements of the Safety of Dams and Reservoirs Act or section 54-2425.

(3) Any person intending to construct a reservoir, holding pond, or lagoon for the sole purpose of holding, managing, or disposing of animal or human waste shall be exempt from subsection (1) of this section. This subsection does not exempt any person from any requirements of the Safety of Dams and Reservoirs Act or section 46-233 or 54-2425.

(4) Every person intending to modify or rehabilitate an existing storage reservoir so that its impounding capacity is to be increased shall comply with subsection (1) of this section.

(5) The owner of a storage reservoir or facility shall be liable for all damages arising from leakage or overflow of the water therefrom or from the breaking of the embankment of such reservoir. The owner or possessor of a reservoir or intentional underground water storage facility does not have the right to store water in such reservoir or facility during the time that such water is required downstream in ditches for direct irrigation or for any reservoir or facility holding a senior right. Every person who owns, controls, or operates a reservoir or intentional underground water storage facility, except political subdivisions of this state, shall be required to pass through the outlets of such reservoir or facility, whether presently existing or hereafter constructed, a portion of the measured inflows to furnish water for livestock in such amounts and at such times as directed by the department to meet the requirements for such purposes as determined by the department, except that a reservoir or facility owner shall not be required to release water for this purpose which has been legally stored. Any dam shall be constructed in accordance with the Safety of Dams and Reservoirs Act, and the outlet works shall be installed so that water may be released in compliance with this section. The requirement for outlet works may be waived by the department upon a showing of good cause. Whenever any person diverts water from a public stream and returns it into the same stream, he or she may take out the same amount of water, less a reasonable deduction for losses in transit, to be determined by the department, if no prior appropriator for beneficial use is prejudiced by such diversion.

(6) An application for storage and recovery of water intentionally stored underground may be made only by an appropriator of record who shows, by documentary evidence, sufficient interest in the underground water storage facility to entitle the applicant to the water requested.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 3, § 17, p. 852; C.S. 1922, § 8467; C.S. 1929, § 46-617; R.S.1943, § 46-241; Laws 1951, c. 101, § 91, p. 487; Laws 1955, c. 183, § 2, p. 515; Laws 1971, LB 823, § 1; Laws 1973, LB 186, § 8; Laws 1983, LB 198, § 9; Laws 1985, LB 103, § 2; Laws 1985, LB 488, § 5; Laws 1995, LB 309, § 1; Laws 2000, LB 900, § 115; Laws 2003, LB 619, § 4; Laws 2004, LB 916, § 2; Laws 2004, LB 962, § 14; Laws 2005, LB 335, § 74. Laws 2014, LB 1098, § 12.

Cross Reference

Safety of Dams and Reservoirs Act, see section 46-1601.

There is no statutory or regulatory requirement that the design of a dam exempt from the permit requirement of subsection (1) of this section by virtue of its impoundment capacity must include a passthrough device. Koch v. Aupperle, 274 Neb. 52, 737 N.W.2d 869 (2007).

Pondage, captured by reservoir during nonirrigation season, or from waters during irrigation season which are not subject to appropriation, is entitled to be held by a public power district for use in operation and maintenance of its power works. Platte Valley Irr. Dist. v. Tilley, 142 Neb. 122, 5 N.W.2d 252 (1942).

Damages recoverable in a condemnation proceeding must be based upon the value of the land in the condition it was at the time of the condemnation. In re Platte Valley Public Power & Irr. Dist., 137 Neb. 313, 289 N.W. 383 (1939).

Legislature contemplated the payment for, and not abatement of, damage from seepage arising from construction of permanent reserves. Applegate v. Platte Valley Public Power & Irr. Dist., 136 Neb. 280, 285 N.W. 585 (1939).

Defendant district was entitled to condemn right-of-way for transmission lines across plaintiffs' lands irrespective of boundary lines. Johnson v. Platte Valley Public Power & Irr. Dist., 133 Neb. 97, 274 N.W. 386 (1937).

Public power and irrigation districts are not authorized to take private property for public use without just compensation. State ex rel. Loseke v. Fricke, 126 Neb. 736, 254 N.W. 409 (1934).

Right of eminent domain, provided for in this section, cannot be exercised where purpose of proposed condemnation is to take part of one person's land, against his will, as site for reservoir from which to irrigate land of another, for his sole benefit. Vetter v. Broadhurst, 100 Neb. 356, 160 N.W. 109 (1916)

46-242. Use of stored water; permit; application; conditions; limitations; procedure.

(1) After the completion to the satisfaction of the department of a storage reservoir for which a permit has been obtained pursuant to section 46-241, any person proposing to apply to beneficial use the water stored shall file with the department an application for a permit particularly describing the use to which the water is to be applied and, if for irrigation, describing the land to be irrigated.

(2) Application may be made for a permit to appropriate water for the irrigation of land lying both upstream and downstream from a storage reservoir or intentional underground water storage facility. Under an approved application for a permit to appropriate water stored in a reservoir or facility for use on land upstream from such reservoir or facility, water may be diverted from the stream by the applicant and a compensating amount of water shall be released from the reservoir or facility for the use of downstream appropriators, but the rights of prior appropriators shall not be adversely affected by such exchange of water.

(3) The owner of a storage reservoir shall have a preferred right to make such application for a period of six months from the time limited for the completion of such reservoir. The date of the expiration of such period shall be endorsed upon the application when allowed. If an application is made by a person other than the owner of a reservoir at any time, the application shall not be approved by the department until the applicant shows, by documentary evidence, sufficient interest in such storage reservoir to entitle the applicant to enough water for the purpose set forth in the application.

(4) Application may be made for a permit to appropriate water from a storage reservoir, subject to subsection (3) of this section, or an intentional underground water storage facility, subject to subsection (6) of section 46-241, for instream use of water for recreation or fish and wildlife if the appropriation will not prejudice the rights of any prior appropriator for a beneficial use.

(5) An unapproved application for a permit pursuant to this section which is pending on August 26, 1983, may be amended to include use of stored water for intentional underground water storage.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 3, § 17, p. 852; C.S. 1922, § 8467; C.S. 1929, § 46-617; R.S.1943, § 46-242; Laws 1955, c. 183, § 3, p. 516; Laws 1965, c. 272, § 1, p. 774; Laws 1983, LB 198, § 10; Laws 1991, LB 277, § 1; Laws 2000, LB 900, § 116; Laws 2003, LB 619, § 5.

46-242.01 and 46-242.02. Repealed. Laws 1996, LB 890, s. 1.

46-243. Application for water; reservoir intended for raising water level.

A reservoir constructed for the purpose of holding water back and raising it in order that it may be applied to lands of a higher level or given a greater head for power, shall not be considered a storage reservoir, but such reservoir together with the diverting or impounding dam, must be described in an application for flowing water when water is to be raised, in order to perfect the appropriation.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 3, § 17, p. 853; C.S. 1922, § 8467; C.S. 1929, § 46-617; R.S.1943, § 46-243.

(g) IRRIGATION WORKS; CONSTRUCTION, OPERATION, AND REGULATION

46-244. Canals; declared works of internal improvement; laws applicable.

Canals and other works constructed for irrigation or water power purposes, or both, are hereby declared to be works of internal improvement; and all laws applicable to works of internal improvement are hereby declared to be applicable to such canal and irrigation works.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 3, § 1, p. 846; C.S. 1922, § 8451; C.S. 1929, § 46-601; R.S.1943, § 46-244.

Cross Reference

Drover of livestock, duty to prevent damages, see section 54-305.

It is implied that all damages for taking or damaging of land must first be paid, and the fact that land is taken without institution of condemnation proceedings does not deprive owner of right to compensation. Dawson County Irr. Co. v. Stuart, 142 Neb. 428, 6 N.W.2d 602 (1942).

Defendant district was authorized to condemn right-of-way for transmission lines across plaintiffs' lands, irrespective of boundary lines. Johnson v. Platte Valley Public Power & Irr. Dist., 133 Neb. 97, 274 N.W. 386 (1937).

Individual does not have right of eminent domain for irrigation of his own land only. Onstott v. Airdale Ranch & Cattle Co., 129 Neb. 54, 260 N.W. 556 (1935).

Irrigation canals are works of internal improvement and persons constructing same have power of eminent domain. Crawford Co. v. Hathaway, 67 Neb. 325, 93 N.W. 781 (1903).

46-245. Irrigation canal, defined; laws applicable.

Any canal constructed for the purpose of developing water power, or any other useful purpose, and from which water can be taken for irrigation, is hereby declared to be an irrigation canal and all laws relating to irrigation canals shall be deemed applicable thereto.

Source: Laws 1893, c. 40, § 2, p. 378; R.S. 1913, § 3375; Laws 1919, c. 190, tit. VII, art. V, div. 1, § 7, p. 832; C.S. 1922, § 8412; C.S. 1929, § 46-507; R.S.1943, § 46-245.

This and other sections limit the location and construction of irrigation canals and ditches, as well as the land irrigated by same, to the basin containing the source of the water used, and require that all unused waters shall be returned to the stream from which diverted. Osterman v. Central Nebraska Public Power & Irr. Dist., 131 Neb. 356, 268 N.W. 334 (1936).

46-246. Ditches, dams, or similar works; construction; right of eminent domain.

All persons desirous of constructing a ditch, building a dam or dams for the purpose of storing water for irrigation, evaporation, and water power purposes, or conveying water to be applied to domestic, agricultural or any other beneficial use, or any dam, dike, reservoir, wasteway, subterranean gallery, filtering wells or other works for collecting, cleansing, filtering, retaining or storing water for any such use, or to enlarge any such ditch, conduit or waterworks, or to change the course thereof in any place, or to relocate the headgate or to change the point at which the water is to be taken into such canal or other waterworks, or to enlarge any ditch, canal or other works, or to construct any ditch, or to lay pipes or conduits for conveying or distributing water so collected or stored to the place of using the same, or to set, place or construct a wheel, pump,

machine or apparatus for raising water out of any stream, lake, pond or well so that the same may flow or be conveyed to the place of using or storing the same, and who shall be unable to agree with the owner or claimant of any lands necessary to be taken for the site of any such works or any part thereof, touching the compensation and damages, shall be entitled to condemn the right-of-way over or through the lands of others, for any and all such purposes.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 3, § 2, p. 846; C.S. 1922, § 8452; C.S. 1929, § 46-602; R.S.1943, § 46-246.

A public power and irrigation district is given the power of condemnation by procedure in the county where the lands are situated if the owners of land object to construction. State ex rel. Johnson v. Central Nebraska Public Power & Irr. Dist., 140 Neb. 471, 300 N.W. 379 (1941).

Damages recoverable in a condemnation proceeding must be based upon the value of the land in the condition it was at the time of the condemnation. In re Platte Valley Public Power & Irr. Dist., 137 Neb. 313, 289 N.W. 383 (1939).

Defendant district was authorized to condemn right-of-way for transmission lines across plaintiffs' lands irrespective of boundary lines. Johnson v. Platte Valley Public Power & Irr. Dist., 133 Neb. 97, 274 N.W. 386 (1937).

Individual does not have right of eminent domain for irrigation of his own land. Onstott v. Airdale Ranch & Cattle Co., 129 Neb. 54, 260 N.W. 556 (1935).

Public power and irrigation districts are not authorized to take private property for public purposes without just compensation. State ex rel. Loseke v. Fricke, 126 Neb. 736, 254 N.W. 409 (1934).

Right of eminent domain conferred on corporations generating electrical energy by appropriation of public waters is valuable franchise right which may be taxed. Northern Nebraska Power Co. v. Holt County, 120 Neb. 724, 235 N.W. 92 (1931).

Condemnation proceedings are maintainable for rights-of-way for irrigation or water power purposes. Blue River Power Co. v. Hronik, 112 Neb. 500, 199 N.W. 788 (1924).

General rule as to damages in condemnation proceedings applies to taking of land for right-of-way by irrigation district. Farmers Irr. Dist. v. Calkins, 104 Neb. 196, 176 N.W. 367 (1920).

46-247. Ditches, dams, or similar works; construction; eminent domain; procedure.

In case of the refusal of the owner or claimant of any lands through which such ditch, canal, or other works are proposed to be made or constructed, to allow the passage thereof, the person desiring the right-of-way may acquire same through the exercise of the power of eminent domain. The procedure to condemn property shall be exercised in the manner set forth in sections 76-704 to 76-724.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 3, § 3, p. 847; C.S. 1922, § 8453; C.S. 1929, § 46-603; R.S. 1943, § 46-247; Laws 1951, c. 101, § 92, p. 487.

Requirements of petition stated. Little v. Loup River Public Power Dist., 150 Neb. 864, 36 N.W.2d 261 (1949).

A public power and irrigation district is given the power of condemnation by procedure in the county where the lands are situated if the owners of land object to construction. State ex rel. Johnson v. Central Nebraska Public Power & Irr. Dist., 140 Neb. 471, 300 N.W. 379 (1941).

Damages recoverable in a condemnation proceeding must be based upon the value of the land in the condition it was at the time of the condemnation. In re Platte Valley Public Power & Irr. Dist., 137 Neb. 313, 289 N.W. 383 (1939).

When defect of misjoinder of parties appears on face of petition, it must be raised by special demurrer. Johnson v. Platte Valley Public Power & Irr. Dist., 133 Neb. 97, 274 N.W. 386 (1937).

To confer jurisdiction, the petition in a condemnation proceeding must describe the lands to be crossed, the size of the ditch, canal, or works to be constructed, the quantity of the land to be taken, and the names of the parties interested. Platte Valley Public Power & Irr. Dist. v. Feltz, 132 Neb. 227, 271 N.W. 787 (1937).

Individual does not have right of eminent domain for irrigation of his own land. Onstott v. Airdale Ranch & Cattle Co., 129 Neb. 54, 260 N.W. 556 (1935).

Petition must, with substantial accuracy, describe lands to be crossed, size of works to be constructed, and quantity of land to be taken. Blue River Power Co. v. Hronik, 112 Neb. 500, 199 N.W. 788 (1924).

Right of eminent domain cannot be exercised for purely private purpose. Vetter v. Broadhurst, 100 Neb. 356, 160 N.W. 109 (1916).

46-248. Right-of-way for irrigation laterals; condemnation; procedure.

Whenever any person has acquired any rights to water for any lands owned by him, where, prior to the building of the laterals and the application of the water, any intervening canal, ditch, or lateral has been constructed, he shall have the right to construct laterals from such irrigation canal to the lands owned by him and to have such irrigation laterals across the lands and intervening canals to the land owned by him. If such intervening owner shall refuse to sell the right-of-way for such irrigation lateral, the owner shall have the right of eminent domain to condemn such right-of-way. The procedure to condemn property shall be exercised in the manner set forth in sections 76-704 to 76-724.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 3, § 4, p. 847; C.S. 1922, § 8454; C.S. 1929, § 46-604; R.S. 1943, § 46-248; Laws 1951, c. 101, § 93, p. 488.

46-249. Irrigation works constructed by authority of United States; right-of-way over public lands; grant; school lands excepted.

There is hereby granted, over all the lands now or hereafter belonging to the State of Nebraska, except school lands held in trust by the Board of Educational Lands and Funds, a right-of-way for ditches, tunnels and telephone and transmission lines necessary to the construction and operation of any irrigation works constructed by authority of the United States; and in all conveyances such right-of-way shall be reserved.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 3, § 5, p. 847; C.S.1922, § 8455; C.S. 1929, § 46-605; R.S. 1943, § 46-249; Laws 1965, c. 273, § 1, p. 775.

Cross Reference

School lands, defined, see section 79-1035.03.

State could not grant to anyone, including the United States, a right-of-way over school lands without compensation. United States v. 78.61 Acres of Land in Dawes and Sioux Cos., 265 F.Supp. 564 (D. Neb. 1967).

46-250. Places of diversion; storage sites; changes; procedure.

The owner of any ditch, storage reservoir, storage capacity, or other device for appropriating water may, upon petition to the Department of Natural Resources, and upon its approval, change the point at which the water under any water appropriation of record is diverted from a natural stream or reservoir, change the line of any flume, ditch, or aqueduct, or change a storage site. No reclamation district or power appropriator may change the established return flow point without the approval of the department.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 3, § 6, p. 848; C.S. 1922, § 8456; C.S. 1929, § 46-606; Laws 1941, c. 91, § 1, p. 361; C.S. Supp., 1941, § 46-606; R.S. 1943, § 46-250; Laws 1951, c. 150, § 1, p. 598; Laws 1953, c. 158, § 1, p. 496; Laws 2000, LB 900, § 117.

Appropriator cannot change place of use of water, or extend ditch without permission of and subject to control of department. Farmers & Merchants Irr. Co. v. Gothenburg Water Power & Irr. Co., 73 Neb. 223, 102 N.W. 487 (1905).

46-251. Irrigation works; use of state lands and highways; grant; right-of-way; condemnation.

All persons desirous of constructing any of the works provided for in sections 46-244 to 46-250 shall have the right to occupy state lands and obtain right-of-way over and across any highway in this state for such purpose without compensation, except public school lands. All bridges or crossings over such ditches, laterals, and canals shall be constructed under the supervision of the Department of Transportation, if on a state highway, and under the supervision of the county board or governing body of a municipality, if on a highway under the jurisdiction of such board or governing body. All such persons may obtain a right-of-way not to exceed sixteen feet in width, for a like purpose along, parallel to, and upon one side of any highway by condemnation proceedings where the same does not interfere with the proper drainage of such highway. In such cases the abutting landowner and the county may grant such right-of-way, or in case of their refusal notice shall be served upon them and proceedings had as in other cases. Not more than one such ditch or lateral shall be permitted along the side of the same highway.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 3, § 7, p. 848; C.S. 1922, § 8457; C.S. 1929, § 46-607; R.S. 1943, § 46-251; Laws 1961, c. 227, § 2, p. 672; Laws 2017, LB 339, § 175.

Cross Reference

Bridge over drainage or irrigation ditch, construction, maintenance, and payment of costs, see section 39-805.

Amendment of 1911 providing for acquisition of limited easement by irrigation district upon and along highway is not unconstitutional because of alleged defects in passage of act. County of Dawson v. South Side Irr. Co., 146 Neb. 512, 20 N.W.2d 387 (1945).

Damages recoverable in a condemnation proceeding must be based upon the value of the land in the condition it was at the time of the condemnation. In re Platte Valley Public Power & Irr. Dist., 137 Neb. 313, 289 N.W. 383 (1939).

Defendant district was authorized to condemn right-of-way for transmission lines across plaintiffs' lands irrespective of boundary lines. Johnson v. Platte Valley Public Power & Irr. Dist., 133 Neb. 97, 274 N.W. 386 (1937).

Slight temporary deviations from year to year in the course of a lateral irrigation ditch across a field do not affect an easement therein where the lateral has followed substantially the same course for more than the statutory period of ten years. Clark v. Meeker Ditch Co., 131 Neb. 506, 268 N.W. 344 (1936).

46-252. Conducting of water into or along natural channels; withdrawal; permit, when required; liability.

(1) Any person may conduct, either from outside the state or from sources located in the state, quantities of water over and above those already present into or along any of the natural streams or channels of this state, for purposes of instream beneficial uses or withdrawal of some or all of such water for out-of-stream beneficial uses, at any point without regard to any prior appropriation of water from such stream, due allowance being made for losses in transit to be determined by the Department of Natural Resources. The department shall monitor movement of the water by measurements or other means and shall be responsible for assuring that such quantities are not

subsequently diverted or withdrawn by others unless they are authorized to do so by the person conducting the water.

(2) Except as provided in subsections (3) and (4) of this section, before any person may conduct water into or along any of the natural streams or channels of the state, he or she shall first obtain a permit from the department. Application for the permit shall be made on forms provided by the department. Applications shall include plans and specifications detailing the intended times, amounts, and streamreach locations and such other information as required by the department. The water subject to such a permit shall be deemed appropriated for the use specified in the permit. Permitholders shall be liable for any damages resulting from the overflow of such stream or channel when water so conducted contributed to such overflow.

(3) Any person actually engaged in the construction or operation of any water power plant may, without filing with the department and upon payment of all damages, use any such stream or channel for a tailrace or canal and may, whenever necessary, widen, deepen, or straighten the bed of any such stream. All damages resulting therefrom shall be determined in the manner set forth in sections 76-704 to 76-724.

(4) Any person holding a storage use permit pursuant to section 46-242 shall not be required to obtain the permit required by this section.

(5) Nothing in this section shall be construed to exempt a person from obtaining any other permits required by law.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 3, § 8, p. 848; C.S. 1922, § 8458; C.S. 1929, § 46-608; R.S. 1943, § 46-252; Laws 1951, c. 101, § 94, p. 488; Laws 1955, c. 183, § 4, p. 516; Laws 1992, LB 49, § 1; Laws 2000, LB 900, § 118.

Diversion of water through lands of others without their consent may be enjoined. Kuhlmann v. Platte Valley Irr. Dist., 166 Neb. 493, 89 N.W.2d 768 (1958).

Damages recoverable in a condemnation proceeding must be based upon the value of the land in the condition it was at the time of the condemnation. In re Platte Valley Public Power & Irr. Dist., 137 Neb. 313, 289 N.W. 383 (1939).

Natural stream can be used to conduct irrigation water, but user is liable for damages arising from such use, and, if damage is likely to continue, use may be enjoined. Hagadone v. Dawson County Irr. Co., 136 Neb. 258, 285 N.W. 600 (1939).

Defendant district was authorized to condemn right-of-way for transmission lines across plaintiffs' lands irrespective of boundary lines. Johnson v. Platte Valley Public Power & Irr. Dist., 133 Neb. 97, 274 N.W. 386 (1937).

Diversion of waters across lands of another without compliance with statute was enjoined, though permission was granted by board of public works. Harris v. Steele, 110 Neb. 213, 193 N.W. 268 (1923).

In interest of good husbandry, flow of surface waters along natural depressions or drainways through farm lands may be accelerated and incidentally increased by artificial means. Steiner v. Steiner, 97 Neb. 449, 150 N.W. 205 (1914).

46-253. Ditches; changing line; flow maintained; liability.

No owner of any ditch or canal shall change the line of the ditch or canal so as to interfere with the use of water by anyone, who, prior to the proposed change, had used water for irrigation purposes from such ditch or canal, and the owner of such ditch or canal shall keep the same in good repair so as to permit the water to flow in a quantity sufficient to furnish the statutory amount to the lands entitled thereto at all reasonable times. The majority of the water users under any

ditch may designate such reasonable time for the use of water as such majority may determine upon, upon a written notice signed by such majority to the persons in control of such ditch or canal. The owners, or those in control, may limit the flow of water in the canal in accordance with such notice, between April 1 and May 1, and October 1 and November 15. No ditch shall be closed between May 1 and October 1. For a failure to cause the water to flow as aforesaid, the owners, or those in control, of any such ditch or canal shall be liable to anyone for any damage resulting from such failure, unavoidable accidents and shortage in the source of supply excepted.

Source: Laws 1895, c. 69, § 46, p. 261; R.S. 1913, § 3436; Laws 1915, c. 65, § 1, p. 164; Laws 1919, c. 190, tit. VII, art. V, div. 3, § 9, p. 849; C.S. 1922, § 8459; Laws 1925, c. 132, § 1, p. 347; Laws 1927, c. 143, § 1, p. 387; C.S. 1929, § 46-609; Laws 1937, c. 104, § 1, p. 363; C.S. Supp., 1941, § 46-609; R.S.1943, § 46-253.

Action to enjoin district from using waters of stream, brought after close of irrigation season, in county other than that where principal place of business of district is located, making parties defendant certain public officers whose terms expire before beginning of next irrigation season in order to confer jurisdiction in court, will be dismissed for want of jurisdiction. Platte Valley Irr. Dist. v. Bryan, 130 Neb. 657, 266 N.W. 73 (1936).

46-254. Interfering with waterworks; taking water without authority; penalty.

Any person owning or in control of any ditch, reservoir, or other device for appropriating or using water who willfully opens, closes, changes, or interferes with any headgate or controlling gate, or by any method or means takes any water from any natural stream, reservoir, or other source, through any ditch or canal to any land or lands, or allows the same to be done, or uses or allows to be used any water upon any land or lands, or for any other purpose whatsoever, without authority from the Department of Natural Resources, or who stores water in or releases water from a reservoir other than in compliance with orders of the Director of Natural Resources or his or her representative, shall be guilty of a Class II misdemeanor. Each day that the water is allowed to run without authority from the department shall constitute a separate offense.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 3, § 10, p. 849; C.S.1922, § 8460; C.S.1929, § 46-610; R.S.1943, § 46-254; Laws 1973, LB 186, § 9; Laws 1977, LB 40, § 257; Laws 2000, LB 900, § 119.

Cross Reference

Drover of livestock, duty to prevent damages, see section 54-305.

46-255. Ditches; construction through private property; bridges and gates.

Any person, constructing a ditch or canal through the lands of another, having no interest in such ditch or canal, shall build such ditch or canal in a substantial manner so as to prevent damage to such land. In all cases where necessary for the free and convenient use of lands on both sides of the ditch or canal by the owner or owners of such lands, the owner or those in control of such

ditch shall erect substantial and convenient bridges across such canal or ditch, and they shall erect and keep in order suitable gates at the point of entrance and exit of such ditch through any enclosed field.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 3, § 11, p. 850; C.S.1922, § 8461; C.S. 1929, § 46-611; R.S.1943, § 46-255.

Mandamus is proper remedy to compel construction of bridge over canal where title to the canal remains in the United States, but the canal is controlled by the defendant. Nuss v. Pathfinder Irr. Dist., 214 Neb. 888, 336 N.W.2d 584 (1983).

Mandamus is proper remedy to compel construction of bridges over irrigation canal. Crawford v. Central Nebraska P. P. & I. Dist., 154 Neb. 832, 49 N.W.2d 682 (1951).

Mandamus will lie in county where land is located to compel public power and irrigation district to construct bridge across one of its canals. State ex rel. Johnson v. Central Nebraska Public Power & Irr. Dist., 140 Neb. 471, 300 N.W. 379 (1941).

Mandamus lies to compel owner of irrigation canal to erect bridge across canal whenever necessary for free and convenient use by owner of lands on both sides. State ex rel. Strever v. Dawson County Irr. Co., 102 Neb. 67, 165 N.W. 882 (1917).

Section applies whether owner owned property at time ditch or canal was built or subsequently acquired same by purchase. State ex rel. O'Shea v. Farmers Irr. Dist., 98 Neb. 239, 152 N.W. 372 (1915), affirmed by Farmers Irr. Dist. v. O'Shea, 244 U.S. 325 (1917).

Injunction is proper remedy for preventing one, without authority, from crossing canal with lateral for purpose of carrying water from another canal to his land. Castle Rock Irr. Canal & Water Power Co. v. Jurisch, 67 Neb. 377, 93 N.W. 690 (1903); Park v. Ackerman, 60 Neb. 405, 83 N.W. 173 (1900).

46-256. Persons controlling canals or reservoirs; headgates and measuring devices; failure to construct; construction by Department of Natural Resources.

Persons owning or controlling any ditch, canal, or reservoir for the purpose of storing or using water for any purpose shall, upon thirty days' notice by the Department of Natural Resources, construct and maintain at the point of diversion a substantial headgate, of a design approved by the department, so built that it may be closed, or partially closed and fastened at any stage with lock or seal. They shall also construct a device for measuring and apportioning the water appropriated, which device shall be of a design approved by the department and built at the most practical point to be selected and fixed by it. If they neglect or refuse, for a period of ten days, to construct such headgate and measuring device, the department shall refuse to allow any water to be delivered to or used by or through any such ditch, canal, or reservoir or any other contrivance or device for appropriating, using, or storing water, and the department may construct bars, dams, or other obstructions to prevent such delivery or use.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 2, § 26, p. 844; C.S.1922, § 8445; C.S.1929, § 81-6326; R.S.1943, § 46-256; Laws 2000, LB 900, § 120.

Installation of measuring device was properly required as a condition to allowance of appropriation of water. Ainsworth Irr. Dist. v. Bejot, 170 Neb. 257, 102 N.W.2d 416 (1960).

Appropriated waters should be measured at the point of diversion. Loup River Public Power Dist. v. North Loup River Public Power & Irr. Dist., 142 Neb. 141, 5 N.W.2d 240 (1942).

46-257. Repealed. Laws 2005, LB 335, § 83.

46-258. Ditches; maintenance; outlets; headgates; duties of owner.

Any owner or person in control of any ditch for irrigation purposes shall have the ditch in order to receive water from the source of supply on or before April 15 of each year, shall construct

necessary outlets in the banks for the delivery of water to all persons who are entitled to the same, and shall maintain a substantial headgate and measuring box or weir at the head of each lateral, which shall be constructed in accordance with plans and specifications approved by the Department of Natural Resources. A multiplicity of outlets shall be avoided. The outlet shall be at the most convenient and practicable point consistent with the protection and safety of the ditch and the efficient distribution of water among the various claimants thereof.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 3, § 12, p. 850; C.S.1922, § 8462; C.S.1929, § 46-612; R.S.1943, § 46-258; Laws 2000, LB 900, § 122.

This section does not affect the duty of irrigation district to furnish water, but only prescribes upon whom duty to construct outlets rests. State ex rel. Clarke v. Gering Irr. Dist., 109 Neb. 642, 192 N.W. 212 (1923).

46-259. Running water in rivers and ravines; right to use.

The right to the use of running water flowing in any river or stream or down any canyon or ravine may be acquired by appropriation by any person.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 3, § 13, p. 850; C.S. 1922, § 8463; C.S. 1929, § 46-613; R.S.1943, § 46-259.

The right to appropriate water for irrigation purposes is limited to waters of natural streams. Rogers v. Petsch, 174 Neb. 313, 117 N.W.2d 771 (1962).

Under the irrigation act of 1889, a water right for purposes of irrigation need not have been attached to any particular tract of land. Vonburg v. Farmers Irr. Dist., 132 Neb. 12, 270 N.W. 835 (1937).

46-260. Repealed. Laws 1987, LB 140, s. 15.

46-261. Lands to be irrigated; appropriations transferred; information filed with Department of Natural Resources; recording gauges; failure to install; effect.

(1) The Department of Natural Resources may require an appropriator or his or her agent to furnish the department, by April 1 in any year, a list or map of all lands to be irrigated, the acreage of each tract, and the names of the owners, controllers, or officers for every ditch, reservoir, or other device for appropriating, diverting, carrying, or distributing water to be used as a basis for the distribution of water until April 1 of the following year, and if so ordered such a list or map shall be furnished by the appropriator or his or her agent to the department.

(2) By April 1, any district or company which has transferred an appropriation pursuant to sections 46-2,127 to 46-2,129 in the previous calendar year shall provide the department:

(a) A legal description and list or map of the tracts of land receiving and transferring an appropriation of water, or portion thereof, within the district or company;

(b) The water appropriation permit number under sections 46-233 to 46-235 and the priority date of the water appropriation;

(c) A statement on whether objections were filed, whether a hearing was held, and how consent was given;

(d) The effective date of the transfer of the appropriation; and

(e) A statement summarizing the water use on the receiving and transferring tracts of land.

(3) The department may require the owner or controller of any canal or ditch to install an approved recording gauge at one or more specific locations to record the amount of water used.

(4) For any appropriation not held by an irrigation district, a reclamation district, a public power and irrigation district, or a mutual irrigation or canal company, the department may require the owner of an appropriation for irrigation purposes to provide the department with any or all of the following information relative to the use of water under the appropriation during the previous irrigation season: (a) A list or map of all lands irrigated; (b) the acreage of each tract irrigated; (c) the rate at which water was diverted; (d) the amount diverted; (e) for any lands under the appropriation that were not irrigated, any sufficient cause, as described in section 46-229.04, which the appropriator claims was the reason for such nonuse; and (f) any other information needed by the department to properly monitor and administer use of water under the appropriation. If the appropriator claims sufficient cause for nonuse, he or she shall also provide the department with any evidence the department requires as a condition for accepting such claimed cause as sufficient cause to excuse nonuse.

(5) The department may deny an appropriator the right to any water to be delivered to or used by or through any ditch, reservoir, or other contrivance for the appropriation, use, or storage of water if the appropriator is not in compliance with this section, with subsection (2) of section 46-230, or with any conditions of any permit, notice, or order of the department concerning the appropriation. The department may construct bars or dams or may install such other devices as are necessary to prevent such delivery or use.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 3, § 15, p. 851; C.S. 1922, § 8465; C.S. 1929, § 46-615; R.S.1943, § 46-261; Laws 1979, LB 245, § 1; Laws 1981, LB 114, § 1; Laws 1995, LB 94, § 1; Laws 1995, LB 99, § 16; Laws 2000, LB 900, § 123; Laws 2004, LB 962, § 15.

Filing of acreage reports did not establish use of water for irrigation purposes. Rogers v. Petsch, 174 Neb. 313, 117 N.W.2d 771 (1962).

It is the duty of the state to see that the waters of its streams used for irrigation purposes will not be wasted, and that prior appropriators will be protected as against subsequent appropriators. State ex rel. Sorensen v. Mitchell Irr. Dist., 129 Neb. 586, 262 N.W. 543 (1935)

46-262. Duties of persons taking water; noncompliance; liability.

No person shall accept more water from any ditch, canal or reservoir than he is justly entitled to. On finding that he is receiving more water either through his headgates or by means of leaks, or by any other means, than he is entitled to receive he shall immediately take steps to prevent the same. If he knowingly permits such excess water to come upon his land, and fails to promptly notify the owner of such ditch, canal or reservoir, he shall be liable in damages to any person who shall be injured thereby.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 3, § 16, p. 851; C.S. 1922, § 8466; C.S. 1929, § 46-616; R.S.1943, § 46-262.

46-263. Water; neglecting and preventing delivery; penalty.

Any person having charge of a ditch or canal used for irrigation purposes, who shall neglect or refuse to deliver water as herein provided, or any person or persons who shall prevent or interfere with the proper delivery of water to the person or persons having the right thereto, shall be guilty of a Class III misdemeanor.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 3, § 18, p. 853; C.S. 1922, § 8468; C.S. 1929, § 46-618; R.S. 1943, § 46-263; Laws 1977, LB 40, § 259; Laws 1987, LB 140, § 9.

This section does not apply to persons who neglect or refuse to deliver water to those who have no right to the water. Weber v. North Loup River Pub. Power, 288 Neb. 959, 854 N.W.2d 263 (2014).

46-263.01. Water; molesting or damaging measuring device; penalty.

Any person, or persons, who shall molest, tamper with, break into or damage in any way any device used for the measuring and recording of the water flowing in any stream, canal or reservoir in this state shall be guilty of a Class II misdemeanor.

Source: Laws 1947, c. 172, § 3, p. 522; Laws 1969, c. 385, § 1, p. 1353; Laws 1977, LB 40, § 260.

46-263.02. Water; molesting or damaging measuring device; apprehension and conviction; reward.

The Department of Natural Resources is hereby authorized and empowered to offer and pay out of the fees collected by the department rewards of not to exceed twenty-five dollars in any case for the apprehension and conviction of any person or persons violating the provisions of section 46-263.01.

Source: Laws 1947, c. 172, § 4, p. 522; Laws 2000, LB 900, § 124.

46-264. Repealed. Laws 1973, LB 88, s. 1.

46-265. Embankments; maintenance; return of unused water; duties of owner.

The owner or owners of any irrigation ditch or canal shall carefully maintain the embankments thereof so as to prevent waste therefrom, and shall return the unused water from such ditch or canal

with as little waste thereof as possible to the stream from which such water was taken, or to the Missouri River.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 3, § 20, p. 854; C.S. 1922, § 8470; C.S. 1929, § 46-620; R.S.1943, § 46-265.

Diversion of water from one watershed to another is permissible under sections 46-206 and 46-265, R.R.S.1943, so long as the stream from which it is diverted is more than one hundred feet wide and the diversion is not contrary to the public interest. Little Blue N.R.D. v. Lower Platte North N.R.D., 206 Neb. 535, 294 N.W.2d 598 (1980).

This section deals with the return to stream of unused water transported in irrigation ditches to prevent waste. Ainsworth Irr. Dist. v. Bejot, 170 Neb. 257, 102 N.W.2d 416 (1960).

Unused irrigation water must be returned to natural stream. Kuhlmann v. Platte Valley Irr. Dist., 166 Neb. 493, 89 N.W.2d 768 (1958).

This and other sections limit the location and construction of irrigation canals and ditches, as well as the land irrigated by same, to the basin containing the source of the water used, and require that all unused waters shall be returned to the stream from which diverted. Osterman v. Central Nebraska Public Power & Irr. Dist., 131 Neb. 356, 268 N.W. 334 (1936).

The right of an appropriator to recapture seepage waters is not impliedly denied by this section. United States v. Tilley, 124 F.2d 850 (8th Cir. 1941).

46-266. Irrigation water; overflow on roads; duty of owner to prevent; violation; penalty.

No owner of any water power or irrigation ditch, canal or lateral shall so construct, maintain or operate the same as to permit any water to escape therefrom upon any public road or highway. No person in the application of water in the irrigation of lands shall permit the same to escape from such lands and to flow upon any public road or highway. Any person violating any of the provisions of this section shall be guilty of a Class V misdemeanor. Each day water is permitted to flow or escape upon any public road or highway in violation of the foregoing prohibitions shall be deemed a separate and distinct offense. The overseer of highways or other officer in charge of road work in the area in which a violation occurs shall make complaint therefor, but no other person shall be precluded from making complaint.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 3, § 21, p. 854; C.S. 1922, § 8471; C.S. 1929, § 46-621; R.S. 1943, § 46-266; Laws 1959, c. 181, § 14, p. 660; Laws 1977, LB 40, § 261.

46-267. Repealed. Laws 2001, LB 170, s. 30; Laws 2001, LB 173, s. 22.

46-268. Contract for use of water; record; rights of grantee unimpaired by foreclosure of liens.

Whenever any person, association or corporation owning any irrigation ditch or canal enters into a contract with a landowner to carry water to any tract of land having a water appropriation, such carriage contract shall be recorded in the county where such land is situated in the same manner and under the same conditions as deeds for real estate. Such contract, from the date of the recording thereof, shall be binding upon the grantor, his, their or its successors or assigns, and all persons claiming any interest in such ditch or canal. No foreclosure or other proceedings to subject the property of the owner of such ditch or canal to the satisfaction of any lien or claim shall in any

manner impair the right of such grantee, his heirs, administrators or assigns, to the use of the water from such ditch or canal in the quantity and manner provided in his deed or contract.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 3, § 23, p. 855; C.S.1922, § 8473; C.S. 1929, § 46-623; R.S. 1943, § 46-268; Laws 1947, c. 172, § 2, p. 522.

Purchaser of land is not personally liable for annual maintenance charge imposed by contract between his grantor and irrigation company. Faught v. Platte Valley P. P. & I. Dist., 155 Neb. 141, 51 N.W.2d 253 (1952).

46-269. Mutual irrigation companies; recognized; bylaws; when lawful.

Any corporation or association organized under the laws of this state for the purpose of constructing and operating canals, reservoirs, and other works for irrigation purposes, and deriving no revenue from their operation, shall be termed a mutual irrigation company, and any bylaws adopted by such company, not in conflict herewith, shall be deemed lawful and so recognized by the courts of this state; PROVIDED, such bylaws do not impair the rights of one shareholder over another.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 3, § 24, p. 855; C.S. 1922, § 8474; C.S. 1929, § 46-624; R.S.1943, § 46-269.

Mutual canal company possesses only those powers expressly or impliedly granted. Thirty Mile Canal Co. v. Carskadon, 160 Neb. 496, 70 N.W.2d 432 (1955).

Stockholder in mutual irrigation company cannot compel company to furnish him water without payment of his share of maintenance fund. Swanger v. Porter, 87 Neb. 764, 128 N.W. 516 (1910).

Duty of those in charge to operate so as to obtain profit applies to mutual irrigation company. Robbins v. Winters Creek Canal Co., 109 F.2d 849 (8th Cir. 1940).

46-270. Irrigation projects; how financed.

Any corporation or association organized under the law of this state for the purpose of constructing and operating canals, reservoirs, and other works for irrigation and water power purposes shall have power to borrow money, to issue bonds, and to mortgage its property and franchises in the same manner as railroad corporations.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 3, § 25, p. 855; Laws 1921, c. 271, § 1, p. 900; C.S. 1922, § 8475; C.S. 1929, § 46-625; R.S.1943, § 46-270; Laws 2000, LB 900, § 125; Laws 2001, LB 420, § 31.

Landowner held not liable for increase in annual maintenance charge. Faught v. Platte Valley P. P. & I. Dist., 155 Neb. 141, 51 N.W.2d 253 (1952).

Irrigation companies have right to mortgage property, and mortgage can be foreclosed without making water users parties to action. Almeria Irr. Canal Co. v. Tzschuck Canal Co., 67 Neb. 290, 93 N.W. 174 (1903).

46-271. Corporations or associations; construction or operation of canals or reservoirs; assessments of stock; when authorized; how enforced.

Any corporation or association organized under the laws of this state for the purpose of constructing or operating canals, reservoirs or other works for irrigation purposes may, through its

board of directors or trustees, assess the shares, stock, or interest of the stockholders thereof for the purpose of obtaining funds to defray the necessary running expenses. Any assessments levied under this section shall become and be a lien upon the stock or interest so assessed. Such assessments shall, if not paid, become delinquent at the expiration of sixty days, and the stock or interest may be sold at public sale to satisfy such lien. Notice of such sale shall be published for three consecutive weeks prior thereto, in some newspaper published and of general circulation in the county where the office of the company is located. Upon the date mentioned in the advertisement, or upon the date to which the sale may have been adjourned, such stock or interest, or so much thereof as may be necessary to satisfy such lien and costs, shall be sold to the highest bidder for cash.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 3, § 26, p. 855; C.S. 1922, § 8476; C.S. 1929, § 46-626; R.S. 1943, § 46-271; Laws 1996, LB 299, § 23.

Sale of stock is only method of collection of delinquent assessments. Thirty Mile Canal Co. v. Carskadon, 160 Neb. 496, 70 N.W.2d 432 (1955).

This section does not apply to annual maintenance charge against party not claiming any interest in canal or ditch. Faught v. Platte Valley P. P. & I. Dist., 155 Neb. 141, 51 N.W.2d 253 (1952).

Legislature cannot amend or change the law so as to make stock bought and fully paid for assessable. Enterprise Ditch Co. v. Moffitt, 58 Neb. 642, 79 N.W. 560 (1899).

46-272. Water users' associations organized under reclamation act of the United States; stock subscriptions; how recorded; fees.

The county clerk is hereby authorized to accept from water users' associations, organized in conformity with the requirements of the United States under the reclamation act, books containing printed copies of their articles of incorporation and forms of subscription to stock, and to use such books for recording the stock subscriptions of such associations. The charges for the recording thereof shall be made on the basis of the number of words actually written therein.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 3, § 29, p. 857; C.S. 1922, § 8479; C.S. 1929, § 46-629; R.S.1943, § 46-272.

46-273. Water; United States may furnish to individuals; conditions and requirements.

The United States of America is hereby authorized, in conformity to the laws of the State of Nebraska, to appropriate, develop, and store any unappropriated flood or unused waters, in connection with any project constructed by the United States pursuant to the provisions of an Act of Congress approved June 17, 1902, being An Act providing for the reclamation of arid lands (32 Stat. L. 388), and all acts amendatory thereof and supplemental thereto. When the officers of the United States Bureau of Reclamation determine that any water so developed or stored is in excess of the needs of the project as then completed or is flood or unused water, the United States may contract to furnish such developed, stored, flood, or unused water, under the terms and conditions imposed by Act of Congress and the rules and regulations of the United States, to any person who may have theretofore been granted a permit to appropriate a portion of the normal flow of any stream, if the water so appropriated shall, during some portion of the year, be found insufficient for the needs of the land to which it is appurtenant. The United States and every person entering into a contract as herein provided shall have the right to conduct such water into and along any of

the natural streams of the state, but not so as to raise the waters thereof above the ordinary high water mark, and may take out the same again at any point desired, without regard to the prior rights of others to water from the same stream; but due allowance shall be made for losses in transit, the amount of such allowance to be determined by the Department of Natural Resources. The department shall supervise and enforce the distribution of such water so delivered with like authority and under the same provisions as in the case of general appropriators.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 3, § 28, p. 856; C.S. 1922, § 8478; C.S. 1929, § 46-628; R.S.1943, § 46-273; Laws 1955, c. 183, § 5, p. 517; Laws 1987, LB 140, § 10; Laws 2000, LB 900, § 126.

Contract restricting use of storage water by any one landowner to an amount sufficient to irrigate one hundred sixty acres was valid. Frenchman Valley Irr. Dist. v. Smith, 167 Neb. 78, 91 N.W.2d 415 (1958).

The scope of the appropriative rights in connection with a federal reclamation project are the same as those in connection with any irrigation canal, and includes the right to collect seepage waters from any parts of the lands and to reapply them upon any other lands within the project and under the appropriation. United States v. Tilley, 124 F.2d 850 (8th Cir. 1941).

Injury to reclamation service, by taking seepage water which the United States had a contract to sell, may be enjoined. Ramshorn Ditch Co. v. United States, 269 F. 80 (8th Cir. 1920).

46-274 to 46-276. Repealed. Laws 1963, c. 425, art. VIII, s. 2.
46-277. Repealed. Laws 2005, LB 335, § 83.
46-278. Repealed. Laws 2005, LB 335, § 83.

(h) HOGS RUNNING IN LATERALS

46-279 and 46-280. Repealed. Laws 1987, LB 140, s. 15.

(i) ARTESIAN WATER

46-281. Artesian water; waste prohibited.

It shall be unlawful for any owner or owners, lessee or lessees, occupier or occupiers, foreman or superintendent of any farm, town lot or other real estate in the State of Nebraska, where artesian water has been found or may be found hereafter, to allow the water from wells or other borings or drillings on any farm, town lot, or other real estate in Nebraska to flow out and run to waste in any manner to exceed what will flow or run through a pipe one-half of one inch in diameter, except where the water is first used for irrigation, or to create power for milling or other mechanical purposes.

Source: Laws 1897, c. 84, § 1, p. 358; R.S. 1913, § 3527; C.S. 1922, § 2927; C.S. 1929, § 46-172; R.S.1943, § 46-281.

46-282. Artesian water; waste; penalty.

Any person or persons who own, occupy or have control of any farm, town lot or other real estate in the State of Nebraska, who fail or refuse to close or shut off any wastage of artesian water

to the amount that section 46-281 allows on any farm, town lot or other real estate which they own, occupy or have control of, after being notified in writing by any person having the benefit of such mutual artesian water supply, within forty-eight hours after such notification, shall be subject to arrest, and shall be guilty of a Class V misdemeanor; and if such wastage be not abated within twenty-four hours after such arrest and conviction, it shall be a second offense against the provisions of section 46-281 and be subject to the same fine as for the first offense. Every like offense or neglect of each twenty-four hours thereafter shall be considered an additional offense against the provisions of section 46-281.

Source: Laws 1897, c. 84, § 2, p. 358; R.S.1913, § 3528; C.S.1922, § 2928; C.S.1929, § 46-173; R.S.1943, § 46-282; Laws 1977, LB 40, § 264.

(j) WATER REUSE PIT

46-283. Legislative findings.

The Legislature hereby finds and declares that the practice of reusing ground water from irrigation water reuse pits on irrigated land contributes to the efficient use and conservation of the state's water resources and that such reuse may be more feasible when done from irrigation water reuse pits located within ephemeral natural streams.

Source: Laws 1980, LB 908, § 1; Laws 2008, LB798, § 1.

46-284. Definitions, sections found.

For purposes of sections 46-283 to 46-287, unless the context otherwise requires, the definitions found in sections 46-285 and 46-286 shall be used.

Source: Laws 1980, LB 908, § 2.

46-285. Irrigation water reuse pit, defined.

Irrigation water reuse pit shall mean an excavation constructed to capture, for reuse, runoff resulting from ground water irrigation or a structure designed for the purpose of water impoundment which is used for this same purpose so long as the capacity of the facility does not exceed fifteen acre-feet.

Source: Laws 1980, LB 908, § 3.

46-286. Ephemeral natural stream, defined.

An ephemeral natural stream shall mean that portion of a natural stream in which water flows only after a precipitation event or when augmented by surface water runoff caused by the pumping of ground water for irrigation. The portion of a natural stream that is shown as an intermittent stream on the most recent United States Geological Survey topographic quadrangle map published

prior to July 18, 2008, shall be considered an ephemeral natural stream unless the Department of Natural Resources has investigated the stream and determined that the stream or a reach of the stream is perennial or intermittent and subject to Chapter 46, Article 2. The department's determination for the purposes of this section shall be adopted and promulgated in rule or regulation.

Source: Laws 1980, LB 908, § 4; Laws 2006, LB 508, § 1; Laws 2008, LB798, § 2.

46-287. Irrigation water reuse pit; reusing ground water; exempt from certain provisions.

Notwithstanding any other provision of law, any person intending to or in the process of reusing ground water from an irrigation water reuse pit located within an ephemeral natural stream shall be exempt from the provisions of Chapter 46, Article 2, which would otherwise apply to such pits, and from the provisions of section 46-637.

Source: Laws 1980, LB 908, § 5; Laws 2008, LB798, § 3.

(k) INTERBASIN TRANSFERS

46-288. Interbasin transfers; terms, defined.

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.

Source: Laws 1981, LB 252, § 5; Laws 1993, LB 789, § 3; Laws 2000, LB 900, § 129.

46-289. Legislative findings; interbasin transfers; application for water; factors considered; order issued.

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 taken for further use in that river basin. The Legislature therefore 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.

Source: Laws 1981, LB 252, § 6; Laws 1986, LB 309, § 2; Laws 2000, LB 900, § 130.

The provisions of this section are not applicable to instream flow applications. Central Platte NRD v. State of Wyoming, 245 Neb. 439, 513 N.W.2d 847 (1994).

This statute establishes a procedure to be followed in determining whether an appropriation application must be denied. Little Blue N.R.D. v. Lower Platte North N.R.D., 210 Neb. 862, 317 N.W.2d 726 (1982).

(l) INTRABASIN TRANSFERS

46-290. Appropriation; application to transfer or change; contents; approval.

(1)(a) Except as provided in this section and sections 46-2,120 to 46-2,130, any person having a permit to appropriate water for beneficial purposes issued pursuant to sections 46-233 to 46-235, 46-240.01, 46-241, 46-242, or 46-637 and who desires (i) to transfer the use of such appropriation to a location other than the location specified in the permit, (ii) to change that appropriation to a different type of appropriation as provided in subsection (3) of this section, or (iii) to change the purpose for which the water is to be used under a natural-flow, storage, or storage-use appropriation to a purpose not at that time permitted under the appropriation shall apply for approval of such transfer or change to the Department of Natural Resources.

(b) The application for such approval shall contain (i) the number assigned to such appropriation by the department, (ii) the name and address of the present holder of the appropriation, (iii) if applicable, the name and address of the person or entity to whom the appropriation would be transferred or who will be the user of record after a change in the location of use, type of appropriation, or purpose of use under the appropriation, (iv) the legal description of the land to which the appropriation is now appurtenant, (v) the name and address of each holder of a mortgage, trust deed, or other equivalent consensual security interest against the tract or tracts of land to which the appropriation is now appurtenant, (vi) if applicable, the legal description of the land to which the appropriation is proposed to be transferred, (vii) if a transfer is proposed, whether other sources of water are available at the original location of use and whether any provisions have been made to prevent either use of a new source of water at the original location or increased use of water from any existing source at that location, (viii) if applicable, the legal descriptions of the beginning and end of the stream reach to which the appropriation is proposed to be transferred for the purpose of augmenting the flows in that stream reach, (ix) if a proposed transfer is for the purpose of increasing the quantity of water available for use pursuant to another appropriation, the number assigned to such other appropriation by the department, (x) the purpose of the current use, (xi) if a change in purpose of use is proposed, the proposed purpose of use, (xii) if a change in the type of appropriation is proposed, the type of appropriation to which a change is desired, (xiii) if a proposed transfer or change is to be temporary in nature, the duration of the proposed transfer or change, and (xiv) such other information as the department by rule and regulation requires.

(2) If a proposed transfer or change is to be temporary in nature, a copy of the proposed agreement between the current appropriator and the person who is to be responsible for use of water under the appropriation while the transfer or change is in effect shall be submitted at the same time as the application.

(3) Regardless of whether a transfer or a change in the purpose of use is involved, the following changes in type of appropriation, if found by the Director of Natural Resources to be consistent with section 46-294, may be approved subject to the following:

(a) A natural-flow appropriation for direct out-of-stream use may be changed to a natural-flow appropriation for aboveground reservoir storage or for intentional underground water storage;

(b) A natural-flow appropriation for intentional underground water storage may be changed to a natural-flow appropriation for direct out-of-stream use or for aboveground reservoir storage;

(c) A natural-flow appropriation for direct out-of-stream use, for aboveground reservoir storage, or for intentional underground water storage may be changed to an instream appropriation subject to sections 46-2,107 to 46-2,119 if the director determines that the resulting instream appropriation would be consistent with subdivisions (2), (3), and (4) of section 46-2,115;

(d) A natural-flow appropriation for direct out-of-stream use, for aboveground reservoir storage, or for intentional underground water storage may be changed to an appropriation for induced ground water recharge if the director determines that the resulting appropriation for induced ground water recharge would be consistent with subdivisions (2)(a)(i) and (ii) of section 46-235;

(e) An appropriation for the manufacturing of hydropower at a facility located on a natural stream channel may be permanently changed in full to an instream basin-management appropriation to be held jointly by the Game and Parks Commission and any natural resources district or combination of natural resources districts. The beneficial use of such change is to maintain the streamflow for fish, wildlife, and recreation that was available from the manufacturing of hydropower prior to the change. Such changed appropriation may also be utilized by the owners of the appropriation to assist in the implementation of an approved integrated management plan or plans developed pursuant to sections 46-714 to 46-718 for each natural resources district within the river basin. Any such change under this section shall be subject to review under sections 46-229 to 46-229.06 to ensure that the beneficial uses of the change of use are still being achieved; and

(f) The incidental underground water storage portion, whether or not previously quantified, of a natural-flow or storage-use appropriation may be separated from the direct-use portion of the appropriation and may be changed to a natural-flow or storage-use appropriation for intentional underground water storage at the same location if the historic consumptive use of the direct-use portion of the appropriation is transferred to another location or is terminated, but such a separation and change may be approved only if, after the separation and change, (i) the total permissible diversion under the appropriation will not increase, (ii) the projected consequences of the separation and change are consistent with the provisions of any integrated management plan adopted in accordance with section 46-718 or 46-719 for the geographic area involved, and (iii) if the location of the proposed intentional underground water storage is in a river basin, subbasin, or reach designated as overappropriated in accordance with section 46-713, the integrated management plan for that river basin, subbasin, or reach has gone into effect, and that plan requires that the amount of the intentionally stored water that is consumed after the change will be no greater than the amount of the incidentally stored water that was consumed prior to the change. Approval of a separation and change pursuant to this subdivision (f) shall not exempt any consumptive use associated with the incidental recharge right from any reduction in water use required by an integrated management plan for a river basin, subbasin, or reach designated as overappropriated in accordance with section 46-713.

Whenever any change in type of appropriation is approved pursuant to this subsection and as long as that change remains in effect, the appropriation shall be subject to the statutes, rules, and regulations that apply to the type of appropriation to which the change has been made.

(4) The Legislature finds that induced ground water recharge appropriations issued pursuant to sections 46-233 and 46-235 and instream appropriations issued pursuant to section 46-2,115 are specific to the location identified in the appropriation. Neither type of appropriation shall be transferred to a different location, changed to a different type of appropriation, or changed to permit a different purpose of use.

(5) In addition to any other purposes for which transfers and changes may be approved, such transfers and changes may be approved if the purpose is (a) to maintain or augment the flow in a specific stream reach for any instream use that the department has determined, through rules and regulations, to be a beneficial use or (b) to increase the frequency that a diversion rate or rate of flow specified in another valid appropriation is achieved.

For any transfer or change approved pursuant to subdivision (a) of this subsection, the department shall be provided with a report at least every five years while such transfer or change is in effect. The purpose of such report shall be to indicate whether the beneficial instream use for which the flow is maintained or augmented continues to exist. If the report indicates that it does not or if no report is filed within sixty days after the department's notice to the appropriator that the deadline for filing the report has passed, the department may cancel its approval of the transfer or change and such appropriation shall revert to the same location of use, type of appropriation, and purpose of use as prior to such approval.

(6) A quantified or unquantified appropriation for incidental underground water storage may be transferred to a new location along with the direct-use appropriation with which it is recognized if the director finds such transfer to be consistent with section 46-294 and determines that the geologic and other relevant conditions at the new location are such that incidental underground water storage will occur at the new location. The director may request such information from the applicant as is needed to make such determination and may modify any such quantified appropriation for incidental underground water storage, if necessary, to reflect the geologic and other conditions at the new location.

(7) Unless an incidental underground water storage appropriation is changed as authorized by subdivision (3)(f) of this section or is transferred as authorized by subsection (6) of this section or subsection (1) of section 46-291, such appropriation shall be canceled or modified, as appropriate, by the director to reflect any reduction in water that will be stored underground as the result of a transfer or change of the direct-use appropriation with which the incidental underground water storage was recognized prior to the transfer or change.

(8) Any appropriation for manufacturing of hydropower changed under subdivision (3)(e) of this section shall maintain the priority date and preference category of the original manufacturing appropriation and shall be subject to condemnation and subordination pursuant to sections 70-668 and 70-669. Any person holding a subordination agreement that was established prior to such change of appropriation shall be entitled to enter into a new subordination agreement for terms consistent with the original subordination agreement at no additional cost. Any person having obtained a condemnation award that was established prior to such change of appropriation shall

be entitled to the same benefits created by such award, and any obligations created by such award shall become the obligations of the new owner of the appropriation changed under this section.

Source: Laws 1983, LB 21, § 2; Laws 1995, LB 99, § 17; Laws 2000, LB 900, § 131; Laws 2004, LB 962, § 16; Laws 2006, LB 1226, § 10; Laws 2009, LB 477, § 1; Laws 2016, LB 1038, § 12.

46-291. Application; review; notice; contents; comments.

(1) Upon receipt of an application filed under section 46-290 for a transfer in the location of use of an appropriation, the Department of Natural Resources shall review it for compliance with this subsection. The Director of Natural Resources may approve the application without notice or hearing if he or she determines that: (a) The appropriation is used and will continue to be used exclusively for irrigation purposes; (b) the only lands involved in the proposed transfer are (i) lands within the quarter section of land to which the appropriation is appurtenant, (ii) 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, or (iii) 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; (c) 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; (d) 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; (e) the transfer will not result in a change in the point of diversion or the point of diversion will be changed but the change meets the following requirements: (i) The new point of diversion is on the same named stream, the same tributary, or the same river or creek as the approved point of diversion; (ii) the proposed point of diversion will not move above or below an existing diversion point owned by another appropriator; and (iii) the proposed point of diversion will not move above or below a tributary stream or a constructed river return or a constructed drain; and (f) the transfer will not diminish the water supply available for or otherwise adversely affect any other surface water appropriator. If transfer of an appropriation with associated incidental underground water storage is approved in accordance with this subsection, the associated incidental underground water storage also may be transferred pursuant to this subsection as long as such transfer would continue to be consistent with the requirements of this subsection. If necessary, the boundaries of the incidental underground water storage area may be modified to reflect any change in the location of that storage consistent with such a transfer. Transfers shall not be approved pursuant to this subsection until the department has adopted and promulgated rules and regulations establishing the criteria it will use to determine whether proposed transfers are consistent with subdivision (1)(f) of this section.

(2) If after reviewing an application filed under section 46-290 the director determines that it cannot be approved pursuant to subsection (1) of this section, he or she shall cause a notice of such application to be posted on the department's web site, to be sent by certified mail to each holder of a mortgage, trust deed, or other equivalent consensual security interest that is identified by the applicant pursuant to subdivision (1)(b)(v) of section 46-290 and to any entity owning facilities

currently used or proposed to be used for purposes of diversion or delivery of water under the appropriation, and to be published at the applicant's expense at least once each week for three consecutive weeks in at least one newspaper of general circulation in each county containing lands to which the appropriation is appurtenant and, if applicable, in at least one newspaper of general circulation in each county containing lands to which the appropriation is proposed to be transferred.

(3) The notice shall contain: (a) A description of the appropriation; (b) the number assigned to such appropriation in the records of the department; (c) the date of priority; (d) if applicable, a description of the land or stream reach to which such water appropriation is proposed to be transferred; (e) if applicable, the type of appropriation to which the appropriation is proposed to be changed; (f) if applicable, the proposed change in the purpose of use; (g) whether the proposed transfer or change is to be permanent or temporary and, if temporary, the duration of the proposed transfer or change; and (h) any other information the director deems relevant and essential to provide the interested public with adequate notice of the proposed transfer or change.

(4) The notice shall state (a) that any interested person may object to and request a hearing on the application by filing such objections in writing specifically stating the grounds for each objection and (b) that any such objection and request shall be filed in the office of the department within two weeks after the date of final publication of the notice.

(5) Within the time period allowed by this section for the filing of objections and requests for hearings, the county board of any county containing land to which the appropriation is appurtenant and, if applicable, the county board of any county containing land to which the appropriation is proposed to be transferred may provide the department with comments about the potential economic impacts of the proposed transfer or change in such county. The filing of any such comments by a county board shall not make the county a party in the application process, but such comments shall be considered by the director in determining pursuant to section 46-294 whether the proposed transfer or change is in the public interest.

Source: Laws 1983, LB 21, § 3; Laws 2000, LB 900, § 132; Laws 2004, LB 962, § 17; Laws 2006, LB 1226, § 11; Laws 2008, LB 798, § 4; Laws 2009, LB 477, § 2.

46-292. Application; hearing.

The Department of Natural Resources may hold a hearing on an application filed under section 46-290 on its own motion and shall hold a hearing if a timely request therefore is filed by any interested person in accordance with section 46-291. Any such hearing shall be subject to section 61-206.

Source: Laws 1983, LB 21, § 4; Laws 2000, LB 900, § 133; Laws 2004, LB 962, § 18.

46-293. Application; review; Director of Natural Resources; powers.

(1) The Director of Natural Resources shall independently review each application subject to subsection (2) of section 46-291 to determine whether the requirements of section 46-294 will be met if the transfer or change is approved. The requirement of this subsection is not altered when there are objectors who have become parties to the proposed transfer or change, but if a hearing is called by the Department of Natural Resources on its own motion or as the result of a request therefor filed in accordance with subsection (4) of section 46-291, any evidence considered by the director in making such determinations shall be made a part of the record of the hearing as provided in section 84-914.

(2) Either on his or her own motion or in response to objections or comments received pursuant to subsection (4) or (5) of section 46-291, the director may require the applicant to provide additional information before a hearing will be scheduled or, if no hearing is to be held, before the application will receive further consideration. The information requested may include economic, social, or environmental impact analyses of the proposed transfer or change, information about the amount of water historically consumed under the appropriation, copies of any plans for mitigation of any anticipated adverse impacts that would result from the proposed transfer or change, and such other information as the director deems necessary in order to determine whether the proposed transfer or change is consistent with section 46-294.

Source: Laws 1983, LB 21, § 5; Laws 2000, LB 900, § 134; Laws 2004, LB 962, § 9.

46-294. Applications; approval; requirements; conditions; burden of proof.

(1) 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:

(a) The application is complete and all other information requested pursuant to section 46-293 has been provided;

(b) The proposed use of water after the transfer or change will be a beneficial use of water;

(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;

(d) Except as otherwise provided in subsection (4) of this section, the proposed transfer or change, alone or when combined with any new or increased use of any other source of water at the original location or within the same irrigation district, reclamation district, public power and irrigation district, or mutual irrigation or canal company for the original or other purposes, will not diminish the supply of water available for or otherwise adversely affect any other water appropriator and will not significantly adversely affect any riparian water user who files an objection in writing pursuant to section 46-291;

(e) The quantity of water that is transferred for diversion or other use at the new location will not exceed the historic consumptive use under the appropriation or portion thereof being transferred, except that this subdivision does not apply to (i) a transfer in the location of use if both the current use and the proposed use are for irrigation, the number of acres to be irrigated will not

increase after the transfer, and the location of the diversion from the stream will not change or (ii) a transfer or change in the purpose of use of a surface water irrigation appropriation as provided for in subsection (3), (5), or (6) of section 46-290 if the transfer or change in purpose will not diminish the supply of water available or otherwise adversely affect any other water appropriator, adversely affect Nebraska's ability to meet its obligations under a multistate agreement, or result in administration of the prior appropriation system by the Department of Natural Resources, which would not have otherwise occurred;

(f) The appropriation, prior to the transfer or change, is not subject to termination or cancellation pursuant to sections 46-229 to 46-229.04;

(g) If a proposed transfer or change is of an appropriation that has been used for irrigation and is in the name of an irrigation district, reclamation district, public power and irrigation district, or mutual irrigation or canal company or is dependent upon any such district's or company's facilities for water delivery, such district or company has approved the transfer or change;

(h) If the proposed transfer or change is of a storage-use appropriation and if the owner of that appropriation is different from the owner of the associated storage appropriation, the owner of the storage appropriation has approved the transfer or change;

(i) If the proposed transfer or change is to be permanent, either (i) the purpose for which the water is to be used before the transfer or change is in the same preference category established by section 46-204 as the purpose for which the water is to be used after the transfer or change or (ii) the purpose for which the water is to be used before the transfer or change and the purpose for which the water is to be used after the transfer or change are both purposes for which no preferences are established by section 46-204;

(j) If the proposed transfer or change is to be temporary, it will be for a duration of no less than one year and, except as provided in section 46-294.02, no more than thirty years;

(k) The transfer or change will not be inconsistent with any applicable state or federal law and will not jeopardize the state's compliance with any applicable interstate water compact or decree or cause difficulty in fulfilling the provisions of any other formal state contract or agreement; and

(l) The proposed transfer or change is in the public interest. The director's considerations relative to the public interest shall include, but not be limited to, (i) the economic, social, and environmental impacts of the proposed transfer or change and (ii) 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. The Department of Natural Resources shall adopt and promulgate rules and regulations to govern the director's determination of whether a proposed transfer or change is in the public interest.

(2) The applicant has the burden of proving that the proposed transfer or change will comply with subdivisions (1)(a) through (l) of this section, except that (a) the burden is on a riparian user to demonstrate his or her riparian status and to demonstrate a significant adverse effect on his or her use in order to prevent approval of an application and (b) if both the current use and the proposed use after a transfer are for irrigation, the number of acres to be irrigated will not increase after the transfer, and the location of the diversion from the stream will not change, there is a rebuttable presumption that the transfer will be consistent with subdivision (1)(d) of this section.

(3) In approving an application, the director may impose any reasonable conditions deemed necessary to protect the public interest, to ensure consistency with any of the other criteria in

subsection (1) of this section, or to provide the department with information needed to properly and efficiently administer the appropriation while the transfer or change remains in effect. If necessary to prevent diminution of supply for any other appropriator, the conditions imposed by the director shall require that historic return flows be maintained or replaced in quantity, timing, and location. After approval of any such transfer or change, the appropriation shall be subject to all water use restrictions and requirements in effect at any new location of use and, if applicable, at any new diversion location. An appropriation for which a transfer or change has been approved shall retain the same priority date as that of the original appropriation. If an approved transfer or change is temporary, the location of use, purpose of use, or type of appropriation shall revert to the location of use, purpose of use, or type of appropriation prior to the transfer or change.

(4) In approving an application for a transfer, the director may also authorize the overlying of water appropriations on the same lands, except that if any such overlying of appropriations would result in either the authorized diversion rate or the authorized aggregate annual quantity that could be diverted to be greater than is otherwise permitted by section 46-231, the director shall limit the total diversion rate or aggregate annual quantity for the appropriations overlain to the rate or quantity that he or she determines is necessary, in the exercise of good husbandry, for the production of crops on the land involved. The director may also authorize a greater number of acres to be irrigated if the amount and rate of water approved under the original appropriation is not increased by the change of location. An increase in the number of acres to be irrigated shall be approved only if (a) such an increase will not diminish the supply of water available to or otherwise adversely affect another water appropriator or (b) the transfer would not adversely affect the water supply for any river basin, subbasin, or reach that has been designated as overappropriated pursuant to section 46-713 or determined to be fully appropriated pursuant to section 46-714 and (i) the number of acres authorized under the appropriation when originally approved has not been increased previously, (ii) the increase in the number of acres irrigated will not exceed five percent of the number of acres being irrigated under the permit before the proposed transfer or a total of ten acres, whichever acreage is less, and (iii) all the use will be either on the quarter section to which the appropriation was appurtenant before the transfer or on an adjacent quarter section.

Source: Laws 1983, LB 21, § 6; Laws 1984, LB 818, § 2; Laws 1993, LB 789, § 4; Laws 2000, LB 900, § 135; Laws 2004, LB 962, § 20; Laws 2012, LB 526, § 1.

46-294.01. Appropriation; temporary transfer; filings required.

Whenever a temporary transfer is approved in accordance with sections 46-290 to 46-294, the applicant shall, within sixty days after the order of approval of the Department of Natural Resources, cause copies of the following to be filed with the county clerk or register of deeds of the county in which the land subject to the appropriation prior to the transfer is located: (1) The permit by which the appropriation was established; (2) the agreement by which the temporary transfer is to be effected; and (3) the order of the Director of Natural Resources approving the temporary transfer. Whenever renewal of a temporary transfer is approved pursuant to section 46-294.02, the applicant shall, within sixty days after such approval, cause a copy of the order of the director approving such renewal to be filed with the county clerk or register of deeds of such county. Such documents shall be indexed to the land subject to the appropriation prior to the

transfer. The applicant shall file with the department, within ninety days after the department's order of approval, proof of filing with the county clerk or register of deeds. Failure to file such proof of filing within such ninety-day time period shall be grounds for the director to negate any prior approval of the transfer or renewal.

Source: Laws 2004, LB 962, § 21; Laws 2006, LB 1226, § 12.

46-294.02. Appropriation; temporary transfer or change; renewal or extension.

A temporary transfer or a change in the type or purpose of use of an appropriation may be renewed or otherwise extended by the parties thereto at any time following the midpoint of the transfer or change term, but any such renewal or extension is subject to review and approval pursuant to sections 46-290 to 46-294. No renewal or extension shall cause the term of any such temporary transfer or change to exceed thirty years in duration from the date the renewal or extension is approved by the Director of Natural Resources.

Source: Laws 2004, LB 962, § 22.

46-294.03. Appropriation; temporary transfer or change; effect on classification and valuation.

For purposes of assessment pursuant to sections 77-1343 to 77-1363, neither the temporary transfer or change of an appropriation nor any resulting land-use changes on the land to which the appropriation was appurtenant prior to the transfer or change shall cause the land to be reclassified to a lower value use or the valuation of the land to be reduced, but the land may be reclassified to a higher value use and its valuation may be increased if a higher value use is made of the land while the temporary transfer or change is in effect. Land from which an appropriation has been permanently transferred shall be classified and valued for tax purposes in accordance with the use of the land after the transfer.

Source: Laws 2004, LB 962, § 23.

46-294.04. Appropriation; temporary transfer or change; effect on rights of condemnation.

During the time within which a temporary transfer or change in purpose of use of an appropriation is in effect, the appropriation may not be used to invoke any rights of condemnation that are based on preference of use, but such appropriation shall be subject to the exercise of such rights by owners of other appropriations that are for water uses superior to the pretransfer or prechange use of the water under the transferred or changed appropriation.

Source: Laws 2004, LB 962, § 24.

46-294.05. Rules and regulations.

The Director of Natural Resources may adopt and promulgate rules and regulations to carry out sections 46-290 to 46-294.04.

Source: Laws 2004, LB 962, § 25.

(m) UNDERGROUND WATER STORAGE

46-295. Legislative findings.

The Legislature recognizes that, as a result of water project operations, surface water in some areas of the state has been, is, and will be in the future intentionally and incidentally stored in and withdrawn from underground strata. The Legislature acknowledges that rights to water intentionally or incidentally stored underground and rights to withdrawal of such water should be formally recognized and quantified and recognizes the propriety of all beneficiaries proportionately sharing, to the extent of potential benefit from intentional underground water storage, in the financial obligations necessary for construction, operation, and maintenance of water projects which cause intentional underground water storage.

The Legislature finds that uses of water for incidental and intentional underground water storage are beneficial uses of water which contribute to the recharge of Nebraska's aquifers and that comprehensive, conjunctive management of surface water and intentional or incidental underground water storage is essential for the continued economic prosperity and well-being of the state, serves the public interest by providing an element of certainty essential for investment in water resources development, and will improve Nebraska's standing in the event of interstate dispute.

To facilitate optimum beneficial use of water by the people of Nebraska, the Legislature recognizes the need for authorizing the recognition of incidental underground water storage, for authorizing intentional underground water storage, and for authorizing the levying and collection of fees and assessments on persons who withdraw or otherwise use or benefit from intentional underground water storage as provided in sections 46-299 to 46-2,106.

Nothing in sections 46-202, 46-226.01, 46-226.02, 46-233, 46-240, 46-241, 46-242, 46-295 to 46-2,106, 46-544, and 46-712 shall be construed to alter existing statutes regarding the relationship between naturally occurring surface and ground water.

Source: Laws 1983, LB 198, § 1; Laws 1985, LB 488, § 6; Laws 1989, LB 45, § 2; Laws 1996, LB 108, § 4; Laws 2000, LB 900, § 136; Laws 2004, LB 962, § 26.

46-296. Terms, defined.

For purposes of sections 33-105, 46-202, and 46-295 to 46-2,106, unless the context otherwise requires:

(1) Department means the Department of Natural Resources;

(2) Director means the Director of Natural Resources;

(3) Person means a natural person, partnership, limited liability company, association, corporation, municipality, or agency or political subdivision of the state or of the federal government;

(4) Underground water storage means the act of storing or recharging water in underground strata. Such water shall be known as water stored underground but does not include ground water as defined in section 46-706 which occurs naturally;

(5) Intentional underground water storage means underground water storage which is an intended purpose or result of a water project or use. Such storage may be accomplished by any lawful means such as injection wells, infiltration basins, canals, reservoirs, and other reasonable methods; and

(6) Incidental underground water storage means underground water storage which occurs as an indirect result, rather than an intended or planned purpose, of a water project or use and includes, but is not limited to, seepage from reservoirs, canals, and laterals, and deep percolation from irrigated lands.

Source: Laws 1983, LB 198, § 2; Laws 1985, LB 488, § 7; Laws 1993, LB 121, § 277; Laws 1996, LB 108, § 5; Laws 2000, LB 900, § 137; Laws 2004, LB 962, § 27.

46-297. Permit to appropriate water; modification to include underground water storage; procedure.

Any person who has an approved, unperfected appropriation pursuant to Chapter 46, article 2, may apply to the department for a modification of such permit to include intentional underground water storage associated with the appropriation. The application shall be made on a form prescribed and furnished by the department without cost to the applicant. Upon receipt of such an application, the department shall proceed in accordance with rules and regulations adopted and promulgated by the department, subject to section 46-226.02.

Source: Laws 1983, LB 198, § 11; Laws 1997, LB 752, § 120; Laws 2013, LB 102, § 1.

46-298. Repealed. Laws 1989, LB 45, § 6.

46-299. Permittee; authorized to levy a fee or assessment; limitation.

Any person who has obtained a permit for intentional underground water storage and recovery of such water pursuant to section 46-233, 46-240, 46-241, 46-242, or 46-297 may, subject to section 46-2,101, levy a fee or assessment against any person for the right or probable right to

withdraw or otherwise use such stored water. Such fee or assessment may be levied against any land in connection with which such underground water storage has occurred or probably will occur, and may be varied based on the degree to which underground water storage has occurred or will occur. No fee or assessment shall represent more than the fair market value of such recharge, except that a fee or assessment may include a sum sufficient to amortize the operation, maintenance, repair, and capital costs of the project, apportioned on the degree to which recharge has occurred or is likely to occur, and on the degree to which any surface water is delivered.

Source: Laws 1983, LB 198, § 13; Laws 2008, LB 798, § 5.

46-2,100. Fee or assessment; limitation.

No fee or assessment may be levied pursuant to section 46-299 for withdrawals from wells with a capacity of less than one hundred gallons per minute which are solely for domestic purposes as defined in section 46-613.

Source: Laws 1983, LB 198, § 14; Laws 1989, LB 45, § 3.

46-2,101. Fee or assessment; application for approval; contents; fee schedule.

(1) Any person intending to levy fees or assessments in accordance with section 46-299 or to modify such fees or assessments shall, prior to levying such fees, assessments, modified fees, or modified assessments, file with the department an application for approval of authority to levy such fees on a form prescribed and furnished by the department.

(2) Such an application shall include a fee schedule and the following information:
(a) The source of the water stored or to be stored underground;
(b) The underground water storage method;
(c) The relative amounts of water stored or to be stored underground and naturally occurring ground water;
(d) The data or reference studies used by the applicant to determine the underground water storage;
(e) A description of the areas served or to be served by the water stored underground;
(f) The amount of surface water, if any, for which the applicant has an appropriation; and
(g) The manner, use, and location of any such surface water appropriation.
The application shall be processed under the applicable rules and regulations of the department adopted and promulgated pursuant to section 61-206.

(3) An application shall be approved if the fees, assessments, modified fees, or modified assessments appear reasonable and comply with the requirements of section 46-299.

(4) The department shall review approved fee schedules every five years after approval to determine whether the fees should be increased, decreased, or eliminated, except that if the adopted schedules have been pledged to repayment of financing for the project, the department shall only review after repayment is completed.

Source: Laws 1983, LB 198, § 15; Laws 1985, LB 488, § 9; Laws 1989, LB 45, § 4; Laws 2000, LB 900, § 138.

46-2,102. Fee or assessment; lien.

A fee or assessment levied pursuant to section 46-299 shall become a lien on the property benefited, or to be benefited, thirty days after the due date of such fee or assessment. The person levying the fee or assessment may collect such fee or assessment if it remains unpaid after thirty days after the due date by commencing an action in district court against the owner of the land benefited or to be benefited to foreclose the lien or to recover the amount due, except that no lien shall become effective until notice thereof is filed with the register of deeds in the county in which the benefited property is located and such lien shall relate back only to the date of filing.

Source: Laws 1983, LB 198, § 16; Laws 1989, LB 45, § 5.

46-2,103. Injunction; when issued.

Any person who has obtained approval of fees or assessments pursuant to section 46-2,101, may commence an action to enjoin any person from withdrawing or otherwise using the stored water if the person has not entered into an agreement to pay fees or assessments for such stored water, or has failed and refused to pay a fee or assessment for a period of thirty days from and after the due date of the fee or assessment. No injunction may be obtained against withdrawals from wells with a capacity of less than one hundred gallons per minute which are solely for domestic uses as defined in section 46-613.

Source: Laws 1983, LB 198, § 17.

46-2,104. Director's order; not subject to collateral attack.

If an action is commenced pursuant to section 46-2,102 or 46-2,103, an order of the director identifying water stored or to be stored underground, or approving fees or assessments, may not be collaterally attacked.

Source: Laws 1983, LB 198, § 18.

46-2,105. Appeal.

Any person aggrieved by a decision made or an order issued by the director pursuant to section 46-226.02, 46-233, 46-240, 46-241, 46-242, 46-297, or 46-2,101 may appeal as provided in section 61-207.

Source: Laws 1983, LB 198, § 19; Laws 2000, LB 900, § 139.

46-2,106. Use of underground stored water; authorized.

Any person may use water stored incidentally or intentionally underground for which the appropriate permits have not been obtained or for which approval of fees has not been obtained pursuant to section 46-2,101.

Source: Laws 1983, LB 198, § 20.

(n) INSTREAM APPROPRIATIONS

46-2,107. Legislative findings.

The Legislature finds that the maintenance, conservation, management, storage, and timely release of the waters of the natural streams within the State of Nebraska are in the public interest and are practices essential to the well-being of present and future generations. In furtherance of these practices, the public interest demands the recognition of instream uses for fish, recreation, and wildlife. The Legislature also finds that proposals for future water development should fully consider multiple uses, including instream flows whether from natural flow or from reservoir releases, and recognizes the positive impact of impoundments which can provide significant instream flow benefits.

Source: Laws 1984, LB 1106, § 23.

Sections 46-2,107 through 46-2,119, permitting instream flow appropriations, do not offend this provision or Neb. Const. art. XV, section 4, 5, or 6. In re Application A-16642, 236 Neb. 671, 463 N.W.2d 591 (1990).

46-2,108. Appropriation of water for instream flows; terms, defined.

(1) For purposes of sections 46-2,107 to 46-2,119, unless the context otherwise requires:
(a) Department means the Department of Natural Resources;
(b) Director means the Director of Natural Resources; and
(c) Instream appropriation means the undiverted application of the waters of a natural stream within or bordering upon the state for recreation or fish and wildlife purposes.

(2) An instream appropriation may be obtained only by the Game and Parks Commission or a natural resources district and only for that amount of water necessary for recreation or fish and wildlife. The instream use of water for recreation or fish and wildlife shall be considered a beneficial use of water.

Source: Laws 1984, LB 1106, § 24; Laws 1985, LB 102, § 13; Laws 1997, LB 877, § 1; Laws 2000, LB 900, § 140.

46-2,109. Streams with need for instream flows; identification; study.

Each natural resources district and the Game and Parks Commission shall conduct studies to identify specific stream segments which the district or commission considers to have a critical need for instream flows. Such studies shall quantify the instream flow needs in the identified stream segments. Any district or the Game and Parks Commission may request the assistance of the Conservation and Survey Division of the University of Nebraska, the Game and Parks Commission, the Department of Environment and Energy, the Department of Natural Resources, or any other state agency in order to comply with this section.

Source: Laws 1984, LB 1106, § 25; Laws 1985, LB 102, § 14; Laws 1993, LB 3, § 6; Laws 2000, LB 900, § 141; Laws 2019, LB302, § 20.

46-2,110. Permit to appropriate water for instream flows; application; requirements.

Following notice and a public hearing, any natural resources district or the Game and Parks Commission may file with the director an application for a permit to appropriate water for instream flows in each stream segment identified pursuant to section 46-2,109. The application shall include the locations on the stream at which the need for instream flows begins and ends and the time of year when instream flows are most critical. The application shall also provide a detailed description of the amount of water necessary to provide adequate instream flows.

Source: Laws 1984, LB 1106, § 26; Laws 1985, LB 102, § 15; Laws 2000, LB 900, § 142.

46-2,111. Permit to appropriate water for instream flows; director; powers and duties.

(1) The Legislature finds that instream appropriations for recreation, fish, and wildlife should consider preferences among different uses and that all appropriations should consider the possible legal relationship between surface water and ground water. Thus the Legislature finds that, since such issues have not been fully considered, the director shall not grant any permit to appropriate water, except as specified in subsection (2) of this section, before January 1, 1997, for any application pending on or filed after June 2, 1995.

(2) The director may grant applications for (a) appropriations for flood control or sediment control structures which will not make or cause to be made any consumptive use of the impounded water, (b) applications for temporary appropriations for public construction that are five cubic feet

per second or less, or (c) applications by public water suppliers for induced ground water recharge appropriations pursuant to sections 46-233 to 46-238.

Source: Laws 1995, LB 871, § 5; Laws 2000, LB 900, § 143.

46-2,112. Permit to appropriate water for instream flows; hearing; when; notice; director; powers.

A permit to appropriate water for instream flows shall be subject to review every fifteen years after it is granted. Notice of a pending review shall be published in a newspaper published or of general circulation in the area involved at least once each week for three consecutive weeks, the last publication to be not later than fourteen years and ten months after the permit was granted or after the date of the director's action following the last such review, whichever is later, and such notice shall be mailed to the appropriator of record and posted on the department's web site. The notice shall state that any interested person may file comments relating to the review of the instream appropriation or may request a hearing to present evidence relevant to such review. Any such comments or request for hearing shall be filed in the headquarters office of the department within six weeks after the date of final publication of the notice. The appropriator of record shall, within the six-week period, file written documentation of the continued use of the appropriation. If no requests for hearing are received and if the director is satisfied with the information provided by the appropriator of record that the appropriation continues to be beneficially used and is in the public interest, the director shall issue an order stating such findings. If requested by any interested person, or on his or her own motion based on the comments and information filed, the director shall schedule a hearing. If a hearing is held, the purpose of the hearing shall be to receive evidence regarding whether the water appropriated under the permit still provides the beneficial uses for which the permit was granted and whether the permit is still in the public interest. The hearing shall proceed under the rebuttable presumption that the appropriation continues to provide the beneficial uses for which the permit was granted and that the appropriation is in the public interest. After the hearing, the director may by order modify or cancel, in whole or in part, the instream appropriation.

Source: Laws 1997, LB 877, § 2; Laws 2000, LB 900, § 144; Laws 2004, LB 962, § 28; Laws 2006, LB 1226, § 13.

46-2,113. Director; modify appropriation or application; when.

It is in the state's and the public interest that the filing of the following classes of applications before the department demand that the director shall appropriately modify any existing or pending instream appropriation or application to not interfere with such application or the granting of such appropriation:

(1) Applications for induced recharge to public water supply wells;

(2) Applications for storage rights necessary for flood and sediment control projects which are dry or will not result in a net consumption of water exceeding two hundred acre-feet on an average annual basis;

(3) Applications for transfer permits associated with natural flow, storage use, power generation, or hydropower;

(4) Applications for de minimis uses; or

(5) Applications for industrial or manufacturing de minimis consumptive uses.

Source: Laws 1997, LB 877, § 3; Laws 2000, LB 900, § 145.

46-2,114. Proposed instream appropriation; additional studies; notice of application.

Prior to taking action on an application for an instream appropriation, the director shall conduct any studies he or she deems necessary to evaluate the application and shall publish notice of such application at the applicant's expense at least once a week for three consecutive weeks in a newspaper of general circulation in the area of the stream segment and also in a newspaper of statewide circulation. The notice shall state that any person having an interest may in writing object to and request a hearing on the application. Any such objection and request for hearing shall be filed with the department within two weeks of final publication of the notice.

Source: Laws 1984, LB 1106, § 30; Laws 1985, LB 102, § 16; Laws 1987, LB 140, § 11; Laws 1991, LB 278, § 2; Laws 2000, LB 900, § 146.

46-2,115. Application for instream appropriation; approval; when.

An application for an instream appropriation which is pending on or filed after January 1, 1997, shall be approved by the director if he or she finds that:

(1) In order to allow for future beneficial uses, there is unappropriated water available to provide the approved instream flow rate at least twenty percent of the time during the period requested;

(2) The appropriation is necessary to maintain the existing recreational uses or needs of existing fish and wildlife species;

(3) The appropriation will not interfere with any senior surface water appropriation;

(4) The rate and timing of the flow is the minimum necessary to maintain the existing recreational uses or needs of existing fish and wildlife species; and

(5) The application is in the public interest. The application may be granted for a rate of flow that is less than that requested by the applicant or for a shorter period of time than requested by the applicant.

Source: Laws 1984, LB 1106, § 31; Laws 1985, LB 102, § 17; Laws 1997, LB 877, § 4; Laws 2000, LB 900, § 147.

To find that there is sufficient unappropriated water available under subsection (1) of this section, the director is not required to consider future ground water depletion. To find that there is sufficient unappropriated water available under subsection (1) of this section, the director must account for water which may be diverted by pending senior applications and approved-but-unconstructed senior applications. To find that there is sufficient unappropriated water available under subsection (1) of this section, the director must find that there is enough water that is not subject to beneficial use elsewhere. The director is permitted to base this finding on historical flow data. For a water supply to be "available" within the meaning of subsection (1) of this section, the water supply must be fairly dependable and continuous. In the context of an instream flow application to maintain existing wildlife habitats, "fairly dependable and continuous" means the flow regime which the species can bear. A party can show noninterference, under subsection (3) of this section, by showing that the sought-after appropriation will be (1) an undiverted application (2) of the waters of a natural stream within or bordering upon the state (3) for recreation or fish and wildlife purposes. In order to provide a clear basis for an order granting or denying an instream flow application, the Director of Water Resources is required to discuss each of the elements listed in this section. However, the director is not required to include, as part of his public interest analysis, a discussion of forgone uses. Central Platte NRD v. State of Wyoming, 245 Neb. 439, 513 N.W.2d 847 (1994).

Subsection (2) of this section does not require a showing of an imminent threat to the use for which protection is sought, but requires a finding of a sufficient causal link between maintaining the flow and maintaining the use for which the flow is requested. In re Application A-16642, 236 Neb. 671, 463 N.W.2d 591 (1990).

When an instream flow application requests different flow rates at different locations along a single stream segment, the denial of the application as one location is to be viewed as a reduction in the requested rate of flow as authorized by this section. Any reduction in the length of the stream segment occasioned by such denial is but incidental to the flow reduction, and the director may define the stream segment under section 46-2,118(1) in such a way as to reflect the appropriations as granted. In re Application A-16642, 236 Neb. 671, 463 N.W.2d 591 (1990).

46-2,116. Application for instream appropriation; public interest determination; factors.

In determining whether an application for an instream appropriation is in the public interest, the director shall consider the following factors:

(1) The economic, social, and environmental value of the instream use or uses including, but not limited to, recreation, fish and wildlife, induced recharge for municipal water systems, and water quality maintenance; and

(2) The economic, social, and environmental value of reasonably foreseeable alternative out-of-stream uses of water that will be foregone or accorded junior status if the appropriation is granted.

Source: Laws 1984, LB 1106, § 32; Laws 1985, LB 102, § 18; Laws 1991, LB 772, § 5.

Subsection (1) of this section does not require that all the factors considered be reduced to economic terms. In re Application A-16642, 236 Neb. 671, 463 N.W.2d 591 (1990).

This section does not require the director to document his decision to the hearing record in determining whether an application for an instream appropriation is in the public interest. In re Applications A-17004 et al., 1 Neb. App. 974, 512 N.W.2d 392 (1993).

46-2,116.01. Application for instream appropriation; use of stored water; study.

If the director determines that there is insufficient unappropriated natural flow available for an application for an instream appropriation and if the applicant consents, the department may conduct a study to determine whether the instream flow needs can be met through the use of stored water in new storage facilities. The study shall address the availability of storage sites, the estimated cost of providing any required storage, and such other findings and conclusions as the department deems appropriate.

Source: Laws 1985, LB 102, § 19; Laws 1991, LB 772, § 6; Laws 2000, LB 900, § 148.

46-2,116.02. Instream appropriation; use of stored water; funding.

If the department determines that instream flow needs can be met through the use of stored water in new storage facilities after a study conducted under section 46-2,116.01, the applicant may request financial assistance for the construction of necessary storage facilities from the Nebraska Resources Development Fund. The cost of the project may be shared with any other users of the stored water.

Source: Laws 1985, LB 102, § 20; Laws 1991, LB 772, § 7; Laws 2000, LB 900, § 149.

46-2,117. Contested case hearing; mediation or nonbinding arbitration required; when; costs.

The director shall not conduct a contested case hearing on an instream appropriation application filed after January 1, 1997, other than a hearing to address procedural matters, until such time as the parties have completed mediation or nonbinding arbitration. Mediation or nonbinding arbitration shall be deemed completed when the person retained to conduct the mediation or nonbinding arbitration has concluded further efforts would probably not result in resolution of major issues. The costs of mediation or nonbinding arbitration shall be shared by the parties.

Source: Laws 1997, LB 877, § 5; Laws 2000, LB 900, § 150.

46-2,118. Instream appropriation; limited to defined stream segment.

(1) All water used to provide instream flows shall be applied only to that segment of the stream for which the appropriation is granted. The stream segment and the determination of a reasonable and necessary amount of water required for instream flow purposes shall be defined specifically by the director in the permit.

(2) After the water allowed for instream flows has passed through the defined stream segment, all rights to such water shall be deemed relinquished and the water shall be available for appropriation.

Source: Laws 1984, LB 1106, § 34; Laws 2000, LB 900, § 151.

When an instream flow application requests different flow rates at different locations along a single stream segment, the denial of the application as to one location is to be viewed as a reduction in the requested rate of flow as authorized by section 46-2,115. Any reduction in the length of the stream segment occasioned by such denial is but incidental to the flow reduction, and the director may define the stream segment under subsection (1) of this section in such a way as to reflect the appropriations as granted. In re Application A-16642, 236 Neb. 671, 463 N.W.2d 591 (1990).

46-2,119. Instream appropriations; manner of administration.

Instream appropriations shall be administered in the same manner as prescribed by Chapter 46, Article 2, for other appropriations. Reservoirs shall not be required by the director to release, for the benefit of an instream appropriation, water previously impounded in accordance with section 46-241 or 46-243. Reservoirs with storage rights senior to an instream appropriation shall not be required to pass, for the benefit of that instream appropriation, inflows that could be stored by such reservoir if the instream appropriation were not in effect. Notwithstanding subsection (5) of section 46-241, a reservoir with storage rights senior to an instream appropriation also shall not be required to pass inflows for downstream direct irrigation if the appropriation for direct irrigation is junior to and would be denied water because of that instream appropriation. Instream appropriations may be canceled as provided in sections 46-229.02 to 46-229.05.

Source: Laws 1984, LB 1106, § 35; Laws 1988, LB 953, § 1; Laws 2000, LB 900, § 152; Laws 2004, LB 962, § 29.

(o) TRANSFER OF APPROPRIATIONS

46-2,120. District or company; notice to landowner; when required; terms, defined.

(1) Any irrigation district, reclamation district, public power and irrigation district, rural water district, or mutual irrigation or canal company using the procedure described in sections 46-2,121 to 46-2,129 and which is exempt from the Open Meetings Act shall provide notice by mail to each owner of land in the district or served by the company not less than seven days before any meeting or hearing under sections 46-2,121 to 46-2,129.

(2) For purposes of sections 46-2,120 to 46-2,130:
(a) Department means the Department of Natural Resources; and
(b) Director means the Director of Natural Resources.

Source: Laws 1995, LB 99, § 1; Laws 2000, LB 900, § 153; Laws 2004, LB 821, § 12.

Cross Reference

Open Meetings Act, see section 84-1407.

46-2,121. District or company; hold appropriation; sections; how construed.

Any irrigation district, reclamation district, public power and irrigation district, rural water district, or mutual irrigation or canal company shall hold all water appropriations filed in the district's or company's name for the benefit of the owners of land to which the water appropriations are attached. Sections 46-2,120 to 46-2,129 shall not be construed to modify the rights of landowners to any water appropriation.

Source: Laws 1995, LB 99, § 2.

46-2,122. District or company; application for transfer and map; filing requirements; approval; conditions.

(1) Any irrigation district, reclamation district, public power and irrigation district, rural water district, or mutual irrigation or canal company may file an application for transfer and a map with the department identifying all tracts of lands that have received water delivered by the district or company and beneficially applied to the tract in at least one of the preceding ten consecutive years. The application for transfer and map shall be prepared and filed in accordance with the rules and regulations of the department.

(2) Any tract of land within the boundaries of the district or served by the company may receive a water appropriation, or portion thereof, transferred from a tract or tracts of land currently under the appropriation on file with the department. The director shall grant the transfer if:

(a) The owner of the land to which the water appropriation is attached and the owner of the ditch, canal, or other diverting works subject to transfer consent in writing to the department to the transfer of the appropriation from the tract of land;

(b) The water allotment on the receiving tract of land will not exceed the amount that can be beneficially used for the purposes for which the appropriation was made and will not exceed the least amount of water that experience may indicate is necessary, in the exercise of good husbandry, for the production of crops;

(c) The water will be applied on the receiving tract to a use in the same preference category as the use on the transferring tract; and

(d) The aggregate water use within the district or company after transfer will not exceed the aggregate water appropriation held by the district or company for the benefit of the owners of land to which the water appropriations are attached.

Source: Laws 1995, LB 99, § 3; Laws 2000, LB 900, § 154.

46-2,123. Hearing on application and map.

The department may hold a hearing on the application for transfer and map under section 46-2,122 if the department determines that a hearing is necessary to determine whether the application for transfer and map are in compliance with such section. The department shall hold a hearing on the application if requested by any owner of land within the district or served by the

company. The hearing shall be conducted in accordance with section 61-206 and the rules and regulations of the department.

Source: Laws 1995, LB 99, § 4; Laws 2000, LB 900, § 155.

46-2,124. District or company; notice prior to meeting; requirements.

Any irrigation district, reclamation district, public power and irrigation district, rural water district, or mutual irrigation or canal company intending to file an application for transfer and a map with the department under section 46-2,122 shall give notice prior to the meeting at which the application and map will be approved for filing. Notice shall be given in the manner provided in section 46 2,128.

Source: Laws 1995, LB 99, § 5; Laws 2000, LB 900, § 156.

46-2,125. Order granting application and map; contents; appeal.

After an investigation and hearing, if applicable, the director shall issue an order granting or denying the application for transfer and map under section 46-2,122. The director shall deny the application if the conditions in subsection (2) of such section are not met. An order granting or denying an application for transfer and map shall be in writing and shall specify the following:

(1) The tracts of land retaining an appropriation;

(2) The tracts of land receiving an appropriation; and

(3) The tracts of land transferring an appropriation.

An appeal may be taken from the decision of the department on the application for transfer and map as provided in section 61-207.

Source: Laws 1995, LB 99, § 6; Laws 2000, LB 900, § 157.

46-2,126. Priority date.

Any water appropriation transferred to a tract of land under sections 46-2,122 to 46-2,125 shall retain the original priority date for the water appropriation.

Source: Laws 1995, LB 99, § 7.

46-2,127. District or company; transfer of appropriation for agricultural purposes; when.

After obtaining approval of an application for transfer and map pursuant to sections 46-2,122 to 46-2,126, the board of directors of any irrigation district, reclamation district, public power and irrigation district, rural water district, or mutual irrigation or canal company may transfer an

appropriation of water distributed for agricultural purposes from a tract or tracts of land within the district or served by the company to another tract or tracts of land within the boundaries of the district or served by the company if:

(1) The district or company finds that the transferring tract of land has received and had water, delivered by the district or company pursuant to a valid appropriation, beneficially applied in at least one of the preceding five consecutive years or that there has been sufficient cause for nonuse in the same manner as provided in section 46-229.04;

(2) The owner of the land to which the water appropriation is attached consents in writing to the transfer of the appropriation from his or her tract of land;

(3) The water appropriation, or portion thereof, proposed to be transferred has not been transferred by the board of directors of the district or company in the previous four years;

(4) The water allotment on the receiving tract of land will not exceed the amount that can be beneficially used for the purposes for which the appropriation was made and will not exceed the least amount of water that experience may indicate is necessary, in the exercise of good husbandry, for the production of crops; and

(5) After the transfer, the aggregate water use within the district or company will not exceed the aggregate water appropriation held by the district or company for the benefit of owners of land to which the water appropriations are attached.

Source: Laws 1995, LB 99, § 8; Laws 2004, LB 962, § 30.

46-2,128. District or company; transfer of appropriation for agricultural purposes; published notice; contents.

Commencing at least six weeks but not more than twelve weeks before transferring any water appropriations under section 46-2,127, the district or company shall cause notice of the proposed transfer to be published at least once a week for three consecutive weeks in at least one newspaper of general circulation in each county containing lands on which the water appropriation is or is proposed to be applied. The district or company shall also provide the notice to the department. The notice shall contain:

(1) A description of the water appropriation to be transferred;

(2) The number assigned the water appropriation permit in the records of the department under sections 46-233 to 46-235;

(3) The priority date of the water appropriation;

(4) A description of the land to which the water appropriation is proposed to be applied;

(5) A statement that any owner of land within the district or served by the canal company may object to and request a hearing on the proposed transfer within seven calendar days after final publication; and

(6) Any other relevant information.

Source: Laws 1995, LB 99, § 9; Laws 2000, LB 900, § 158.

46-2,129. District or company; transfer of appropriation for agricultural purposes; hearing; notice; powers and duties; priority date.

(1) The board of directors of the district or company, or the board's designee, may hold a hearing on a proposed transfer under section 46-2,127 and shall hold a hearing if requested by any owner of land within the district or served by the canal company. Notice of a hearing under this subsection shall be published at least seven calendar days prior to the hearing in at least one newspaper of general circulation in each county containing lands upon which the water appropriation is or is proposed to be applied. If the hearing is held by the board's designee, the board's designee shall make a written recommendation to the board within fifteen calendar days after the hearing. The board shall act upon the proposed transfer at the board's next regular or special meeting following receipt of the designee's recommendation.

(2) The board of directors may transfer the water appropriation at a regular or special meeting.

(3) Any water appropriation transferred to a tract of land under section 46-2,127 shall retain the original priority date for the water appropriation.

(4) All transfers shall be reported annually to the department pursuant to section 46-261.

Source: Laws 1995, LB 99, § 10.

46-2,130. Sections; how construed.

Nothing in sections 46-2,120 to 46-2,129 shall be construed to limit or restrict the powers of the department with respect to adjudication of water rights.

Source: Laws 1995, LB 99, § 11; Laws 2000, LB 900, § 159.

46-2,131. Repealed. Laws 2011, LB 2, § 8.
46-2,132. Repealed. Laws 2011, LB 2, § 8.
46-2,133. Repealed. Laws 2011, LB 2, § 8.
46-2,134. Repealed. Laws 2011, LB 2, § 8.
46-2,135. Repealed. Laws 2011, LB 2, § 8.
46-2,136. Repealed. Laws 2011, LB 2, § 8.
46-2,137. Repealed. Laws 2011, LB 2, § 8.
46-2,138. Repealed. Laws 2011, LB 2, § 8.

46-2,139. Storm Water Management Plan Program; created; assistance to cities and counties; grants; Department of Environmental Quality; duties.

The Storm Water Management Plan Program is created. The purpose of the program is to facilitate and fund the duties of cities and counties under the federal Clean Water Act, 33 U.S.C. 1251 et seq., as such act existed on January 1, 2006, regarding storm water runoff under the National Pollutant Discharge Elimination System requirements. The Storm Water Management Plan Program shall function as a grant program administered by the Department of Environment and Energy, using funds appropriated for the program. The department shall deduct from funds appropriated amounts sufficient to reimburse itself for its costs of administration of the grant program. Any city or county when applying for a grant under the program shall have a storm water management plan approved by the department which meets the requirements of the National Pollutant Discharge Elimination System. Grant applications shall be made to the department on forms prescribed by the department. Grant funds shall be distributed by the department as follows:

(1) Not less than eighty percent of the funds available for grants under this section shall be provided to cities and counties in urbanized areas, as identified in 77 Federal Register 18652-18669, that apply for grants and meet the requirements of this section. Grants made pursuant to this subdivision shall be distributed proportionately based on the population of applicants within such category, as determined by the most recent federal census update or recount certified by the United States Department of Commerce, Bureau of the Census. For the purpose of distributing grant funds to a county pursuant to this subdivision, the proportion shall be based on the county population, less the population of city applicants within that county. Any funds available for grants under this subdivision and not awarded by the end of a calendar year shall be available for grants in the following year; and

(2) Not more than twenty percent of the funds available for grants under this section shall be provided to cities and counties outside of urbanized areas, as identified in 77 Federal Register 18652-18669, with populations greater than ten thousand inhabitants as determined by the most recent federal census update or recount certified by the United States Department of Commerce, Bureau of the Census, that apply for grants and meet the requirements of this section. Grants under this subdivision shall be distributed proportionately based on the population of applicants within this category as determined by the most recent federal census update or recount certified by the United States Department of Commerce, Bureau of the Census. For the purpose of distributing grant funds to a county pursuant to this subdivision, the proportion shall be based on the county population, less the population of city applicants within that county. Any funds available for grants pursuant to this subdivision which have not been awarded at the end of each calendar year shall be available for awarding grants pursuant to subdivision (1) of this section.

Any city or county receiving a grant under subdivision (1) or (2) of this section shall contribute matching funds equal to twenty percent of the grant amount.

Source: Laws 2006, LB 1226, § 6; Laws 2007, LB 530, § 1; Laws 2019, LB302, § 21.

46-2,140. Repealed. Laws 2015, LB 9, § 1.

46-2,141. Repealed. Laws 2015, LB 9, § 1.

CHAPTER 46

ARTICLE 8

NATURAL LAKES

46-801. Natural lakes; drainage; diversion; application.

No person shall drain, lower, or in any manner reduce or divert the water supply of any natural or perennial lake, if the area exceeds twenty acres at low water stage or if the lake is of such depth and character as to have more economic importance for aquaculture, hunting, or other purpose than the bed of such lake would have for agricultural purposes. Any person intending to drain, lower, divert, or in any way reduce the waters or water supply of any natural or perennial lake shall, before commencing the construction of any such work for drainage or diversion, make application to the Department of Natural Resources for a permit to do so.

Source: Laws 1919, c. 190, tit. VII, art. V, § 1, p. 857; C.S.1922, § 8480; C.S.1929, § 81-6401; R.S.1943, § 81-702; Laws 1957, c. 365, § 14, p. 1239; Laws 1994, LB 1165, § 21; Laws 2000, LB 900, § 225.

Drainage of natural lake may be enjoined. Lackaff v. Bogue, 158 Neb. 174, 62 N.W.2d 889 (1954).

Drainage of natural lakes covering an area in excess of twenty acres is governed by this section. Lackaff v. Department of Roads & Irrigation, 153 Neb. 217, 43 N.W.2d 576 (1950).

Whether water constitutes natural or perennial lake, requiring permit under this section before attempting to drain same, is question of fact to be determined from evidence. Beem v. Davis, 111 Neb. 96, 195 N.W. 948 (1923).

46-802. Application; recording; investigation.

On the receipt of such application in the form prescribed by the Department of Natural Resources, the department shall cause the same to be recorded in its office. The department shall make a careful examination to ascertain whether it sets forth all the facts necessary to enable the department to determine the nature and extent of the proposed work of drainage and diversion. If such an examination shows the application to be in any way defective, it shall return the same to the applicant for correction.

Source: Laws 1919, c. 190, tit. VII, art. V, § 2, p. 858; C.S. 1922, § 8481; C.S. 1929, § 81-6402; R.S. 1943, § 81-703; Laws 1957, c. 365, § 15, p. 1239; Laws 2000, LB 900, § 226.

46-803. Application; approval; when authorized.

If the proposed work of drainage or diversion will not result in injury or damage to any person and will not be otherwise detrimental to the public welfare but will result in economic benefit to the state, the Department of Natural Resources shall approve the same by endorsement thereon. It shall make a record of such endorsement thereon in some proper manner in its office. It shall also

return the same so endorsed to the applicant. Such applicant shall, upon receipt thereof, be authorized to proceed with the work and to take such measures as may be necessary to its completion.

Source: Laws 1919, c. 190, tit. VII, art. V, § 3, p. 858; C.S.1922, § 8482; C.S.1929, § 81-6403; R.S.1943, § 81-704; Laws 1957, c. 365, § 16, p. 240; Laws 2000, LB 900, § 227.

46-804. Application; rejection; when authorized.

If it appears to the Department of Natural Resources that the proposed works of drainage or diversion will result in injury or damage to any person or will be detrimental to the public welfare and not result in economic benefit to the state, the department shall refuse to approve the application. The party making such application shall not prosecute such work so long as such refusal shall continue in force.

Source: Laws 1919, c. 190, tit. VII, art. V, § 4, p. 858; C.S.1922, § 8483; C.S.1929, § 81-6404; R.S.1943, § 81-705; Laws 1957, c. 365, § 17, p. 1240; Laws 2000, LB 900, § 228.

Permit to drain natural lake should not be granted where it will result in damage to another person. Lackaff v. Department of Roads & Irrigation, 153 Neb. 217, 43 N.W.2d 576 (1950).

46-805. Appeal; procedure.

An applicant, feeling himself or herself aggrieved by the endorsement made upon his or her application, may take an appeal therefrom to the district court of the county in which the proposed works may be situated. Such appeal shall otherwise be governed by the Administrative Procedure Act.

Source: Laws 1919, c. 190, tit. VII, art. V, § 5, p. 858; C.S.1922, § 8484; C.S.1929, § 81-6405; R.S.1943, § 81-706; Laws 1957, c. 365, § 18, p. 1240; Laws 1988, LB 352, § 81.

Cross Reference

Administrative Procedure Act, see section 84-920.

On appeal to the district court, trial is de novo. Lackaff v. Department of Roads & Irrigation, 153 Neb. 217, 43 N.W.2d 576 (1950).

46-806. Sections; when inapplicable.

In the event that the ownership of all the land used for drainage construction and of all the land forming the shoreline and the bed of said lake or lakes is vested in the person performing said work of drainage or diversion, the provisions of sections 46-801 to 46-807 do not apply.

Source: Laws 1919, c. 190, tit. VII, art. V, § 6, p. 859; C.S.1922, § 8485; C.S.1929, § 81-6406; R.S.1943, § 81-707.

46-807. Violations; penalty.

Any person violating the provisions of sections 46-801 to 46-807 shall be guilty of a Class II misdemeanor.

Source: Laws 1919, c. 190, tit. VII, art. V, § 7, p. 859; C.S.1922, § 8486; C.S.1929, § 81-6407; R.S.1943, § 81-708; Laws 1977, LB 40, § 268.

CHAPTER 76

ARTICLE 2

WATER RESOURCES UPDATE NOTICE

76-2,124. Water resources update notice; Department of Natural Resources; powers and duties.

(1) Any person transferring ownership of real property not inside the corporate limits of a municipality shall complete and provide to the transferee, at or before the closing of the transfer, a water resources update notice acknowledging (a) whether any surface water rights issued pursuant to Chapter 46, Article 2, and in the name of any party other than an irrigation district, public power and irrigation district, or mutual irrigation company are attached to the real property, ownership of which is being transferred, and (b) whether there are any water wells, except water wells used solely for domestic purposes and constructed prior to September 9, 1993, on the real property, ownership of which is being transferred. If the water resources update notice discloses the existence of such surface water rights or such water wells, the transferee shall complete the water resources update notice and shall file it with the Department of Natural Resources within sixty days after recording the deed or other instrument by which the transfer of ownership of real property is made. The department shall use such notice to update ownership of surface water rights and water well registrations as required by sections 46-230 and 46-602.

(2) The department shall prescribe the form and content of the water resources update notice and shall make such forms available to title insurance companies and other persons as deemed appropriate by the department. The requirement that a water resources update notice be filed with the department or the failure to file such a notice does not affect the recording, legality, or sufficiency of a deed or other instrument evidencing the transfer of ownership of real property.

(3) The department shall not collect a fee for the filing of the water resources update notices.

Source: Laws 2001, LB 667, § 27; Laws 2002, LB 458, § 9.

CHAPTER 33

ARTICLE 1

FEES

33-105. Repealed. Laws 2024, LB1368, § 11.

CHAPTER 46

ARTICLE 6

PUMPING FROM WELL WITHIN 50 FEET OF STREAM

46-636. Pumping for irrigation purposes; Legislature; finding.

The Legislature finds that the pumping of water for irrigation purposes from water wells located within fifty feet of the bank of a channel of any natural stream may have a direct effect on the surface flow of such stream.

Source: Laws 1963, c. 275, § 1, p. 828; Laws 1993, LB 131, § 16; Laws 2001, LB 667, § 7.

Cross Reference

For additional definitions, see section 46-706.

46-637. Pumping for irrigation purposes; permit; application; approval by Director of Natural Resources.

The use of water described in section 46-636 may only be made after securing a permit from the Department of Natural Resources for such use. In approving or disapproving applications for such permits, the Director of Natural Resources shall take into account the effect that such pumping may have on the amount of water in the stream and its ability to meet the requirements of appropriators from the stream. This section does not apply to (1) water wells located within fifty feet of the bank of a channel of any natural stream which were in existence on July 1, 2000, and (2) replacement water wells as defined in section 46-602 that are located within fifty feet of the banks of a channel of a stream if the water wells being replaced were originally constructed prior to July 1, 2000, and were located within fifty feet of the bank of a channel of any natural stream.

Source: Laws 1963, c. 275, § 2, p. 828; Laws 1993, LB 131, § 17; Laws 1997, LB 30, § 3; Laws 1997, LB 752, § 121; Laws 2000, LB 900, § 176; Laws 2001, LB 667, § 8; Laws 2013, LB102, § 2.

Cross References

Exemption for reusing ground water from reuse pit, see section 46-287.
For additional definitions, see section 46-706.

CHAPTER 25

ARTICLE 10

CIVIL PROCEDURE

25-1062.01. Director of Natural Resources, defined; notice to appropriator; how given.

(1) The words Director of Natural Resources as used in this section and in sections 25-1064, 25-2159, and 25-2160 mean the Director of Natural Resources, State of Nebraska, his or her successor in office, or any agent, servant, employee, or officer of the State of Nebraska, now or hereafter exercising any powers or duties with respect to the administration of the irrigation water in the state, who may be a party in any court of the state in an action when the relief demanded involves the delivery of irrigation water.

(2) Whenever notice by either registered or certified letter to an appropriator is required in such sections, the address of the appropriator shall be that recorded in the office of the Department of Natural Resources under section 46-230.

Source: Laws 1941, c. 29, § 1, p. 133; C.S.Supp.,1941, § 20-10,111; R.S.1943, § 25-1062.01; Laws 1957, c. 242, § 14, p. 828; Laws 1957, c. 365, § 1, p. 1232; Laws 1986, LB 516, § 10; Laws 2000, LB 900, § 65.

25-1064. Temporary injunctions and restraining orders; courts and judges empowered to issue; conditions; temporary restraining order granted without notice; requirements; actions involving irrigation water; notice, how given.

(1) The injunction may be granted at the time of commencing the action or at any time afterward before judgment by the Court of Appeals or the Supreme Court or any judge thereof. No restraining order or temporary injunction should be granted at the time of the commencement of the action if the relief demanded involves the delivery of irrigation water and the Director of Natural Resources, as defined in section 25-1062.01, is a party except in accordance with the procedure prescribed in subsection (5) of this section.

(2) No temporary injunction may be granted without notice to the adverse party.

(3) Any judge of the district court, except when the relief demanded involves the delivery of irrigation water and the director is a party, may grant a temporary restraining order without notice to the adverse party or his or her attorney only if (a) it clearly appears from specific facts shown by affidavit that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his or her attorney can be heard in opposition and (b) the applicant or his or her attorney certifies to the court in writing the efforts, if any, which have been made to give such notice and the reasons supporting the applicant's claim that such notice shall not be required.

Every temporary restraining order granted without notice shall: (i) Be endorsed with the date and hour of issuance; (ii) be filed immediately in the office of the clerk of the district court and

entered of record; (iii) define the injury and state why the injury is irreparable and why the order was granted without notice; and (iv) expire by its terms within such time after entry, not to exceed ten days, as the court fixes unless within such fixed time period the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents to an extension for a longer period. The reasons for the extension shall be entered of record. If a temporary restraining order is granted without notice, the motion for a temporary injunction shall be heard at the earliest possible time in the district court and shall take precedence over all matters except older matters of the same character. When the motion for a temporary injunction comes up for hearing, the party who obtained the temporary restraining order shall proceed with the application for a temporary injunction, and if he or she does not do so, the district court shall dissolve the temporary restraining order. On two days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to such party as the district court may prescribe, the adverse party may appear and move for the dissolution or modification of the order, and in that event, the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(4) In the absence from the county of the district judges, any judge of the county court, except when the relief demanded involves the delivery of irrigation water and the director is a party, may grant a temporary restraining order without notice to the adverse party or his or her attorney only if (a) it clearly appears from specific facts shown by affidavit that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his or her attorney can be heard in opposition and (b) the applicant or his or her attorney certifies to the court in writing the efforts, if any, which have been made to give such notice and the reasons supporting the applicant's claim that such notice shall not be required. The judge of the county court shall direct that reasonable notice be given to the party against whom the temporary restraining order is issued to attend at a specified time or place before the district court or any judge thereof to show cause why a temporary injunction should not be issued.

Every temporary restraining order granted without notice shall: (i) Be endorsed with the date and hour of issuance; (ii) be filed immediately in the office of the clerk of the district court and entered of record; (iii) define the injury and state why the injury is irreparable and why the order was granted without notice; and (iv) expire by its terms within such time after entry, not to exceed ten days, as the judge of the county court fixes unless within such fixed time period the order, for good cause shown, is extended by the district court for a like period or unless the party against whom the order is directed consents to an extension for a longer period. The reasons for the extension shall be entered of record.

(5) The Supreme Court or any judge thereof, the Court of Appeals or any judge thereof, the district court or any judge thereof, or a judge of the county court, if and when he or she has jurisdiction, shall have no power, when the relief demanded involves the delivery of irrigation water and the director is a party, to grant a restraining order or temporary injunction at the time of the commencement of the action, except when notice by either registered or certified letter has been mailed seventy-two hours prior to the time of hearing to the director and the division supervisor in the water division created by section 61-212 in which the action is brought and, in the manner provided in section 25-1062.01, to all appropriators whose rights to the delivery of

irrigation water might in any manner be affected, of the time and place of the hearing. At the hearing on the restraining order or temporary injunction, the director, appropriators, or riparian owners shall be entitled to be heard, in person or by their attorney or attorneys, on the question of whether the restraining order should be granted and, if so, in what amount the bond or undertaking is to be fixed.

(6) Any person, natural or artificial, injured or likely to be injured by the granting of a restraining order may intervene in the action at any stage of the proceedings and become a party to the litigation if it involves the delivery of irrigation water and the director is a party.

Source: R.S.1867, Code § 252, p. 435; Laws 1913, c. 65, § 1, p. 198; R.S.1913, § 7793; C.S. 1922, § 8737; C.S. 1929, § 20-1064; Laws 1941, c. 29, § 4, p. 134; C.S.Supp.,1941, § 20-1064; R.S.1943, § 25-1064; Laws 1955, c. 87, § 1, p. 260; Laws 1957, c. 242, § 15, p. 828; Laws 1957, c. 365, § 2, p. 1232; Laws 1986, LB 516, § 11; Laws 1991, LB 732, § 44; Laws 2000, LB 900, § 66.

Notwithstanding section 24-517(5), the district court has jurisdiction in injunctive actions to enforce zoning ordinances. Village of Springfield v. Hevelone, 195 Neb. 37, 236 N.W.2d 811 (1975).

Supreme Court may grant a temporary injunction in proceedings by state under Installment Loan Act. State ex rel. Beck v. Associates Discount Corp., 162 Neb. 683, 77 N.W.2d 215 (1956).

District judge has power to allow temporary injunction, notwithstanding provisions of this section. State ex rel. Hahler v. Grimes, 96 Neb. 719, 148 N.W. 942 (1914).

Affidavit not stating Supreme Judges were absent is sufficient to allow county judge to act, latter cannot issue perpetual injunction. State ex rel. Minden-Edison Light & Power Co. v. Dungan, 89 Neb. 738, 132 N.W. 305 (1911).

County judge may grant temporary restraining order if district judge is absent. State ex rel. Downing v. Greene, 48 Neb. 327, 67 N.W. 162 (1896).

Violation of injunction allowed by county judge is contempt for district court. Wilber v. Woolley, 44 Neb. 739, 62 N.W. 1095 (1895).

County judge cannot punish for contempt of violation of restraining order. Johnson v. Bouton, 35 Neb. 898, 53 N.W. 995 (1892).

Judge of Supreme Court may grant temporary injunction. Calvert v. State, 34 Neb. 616, 52 N.W. 687 (1892).

District judge cannot grant injunction out of district unless judge therein is absent or unable to act; injunction void. Ellis v. Karl, 7 Neb. 381 (1878).

Order granted by county judge before petition filed is valid, where both filed forthwith. Commercial State Bank of Crawford v. Ketcham, 3 Neb. Unof. 839, 92 N.W. 998 (1902).

25-2159. Peremptory writ; when allowed in first instance.

When the right to require the performance of the act is clear and it is apparent that no valid excuse can be given for not performing it, a peremptory mandamus may be allowed in the first instance. In all other cases, the alternative writ must be first issued, except that a peremptory mandamus in the first instance shall not be given in any case involving the delivery of irrigation water if the Director of Natural Resources as defined in section 25-1062.01 is a party.

Source: R.S.1867, Code § 648, p. 508; R.S.1913, § 8274; C.S. 1922, § 9227; C.S. 1929, § 20-2159; Laws 1941, c. 29, § 9, p. 137; C.S. Supp., 1941, § 20-2159; R.S. 1943, § 25-2159; Laws 1957, c. 365, § 5, p. 1234; Laws 2000, LB 900, § 68.

When right to writ is clear and no excuse can be given for failure to perform duty, peremptory writ may be issued. State ex rel. Krieger v. Board of Supervisors of Clay County, 171 Neb. 117, 105 N.W.2d 721 (1960).

Peremptory writ may be issued without notice only where court can take judicial notice that a valid excuse is impossible. State ex rel. Beck v. Chicago, St. P., M. & O. Ry. Co., 164 Neb. 60, 81 N.W.2d 584 (1957).

Peremptory writ without notice should be issued only where legal right to it is clearly shown. Summit Fidelity & Surety Co. v. Nimtz, 158 Neb. 762, 64 N.W.2d 803 (1954).

A peremptory writ of mandamus may issue without notice only where there is no room for controversy as to the right of the applicant thereto, and where judicial notice can be taken that a valid excuse for failure to act cannot be given. State ex rel. Platte Valley Irr. Dist. v. Cochran, 139 Neb. 324, 297 N.W. 587 (1941).

Peremptory writ cannot issue without notice unless court can take judicial notice that defense is impossible. State ex rel. Chicago & N. W. Ry. Co. v. Harrington, 78 Neb. 395, 110 N.W. 1016 (1907).

Relator's right and respondent's duty must clearly appear. State ex rel. Niles v. Weston, 67 Neb. 175, 93 N.W. 182 (1903).

Peremptory writ may issue against public officer without notice but not against officer of private corporation. Horton v. State ex rel. Hayden, 60 Neb. 701, 84 N.W. 87 (1900).

Court may grant peremptory writ at chambers only when right is clear. Mayer v. State ex rel. Wilkinson, 52 Neb. 764, 73 N.W. 214 (1897).

When facts are disputed on hearing to show cause, alternative writ should issue. American Waterworks Co. v. State ex rel. O'Connor, 31 Neb. 445, 48 N.W. 64 (1891).

25-2160. Peremptory writ; motion; affidavit required; notice; order to show cause; actions involving irrigation water.

The motion for the writ must be made upon affidavit. The court may require a notice of the application to be given to the adverse party, may grant an order to show cause why it should not be allowed, or may grant the writ without notice. No peremptory writ of mandamus shall be allowed in any case involving the delivery of irrigation water if the Director of Natural Resources, as defined in section 25-1062.01, is a party unless notice by either registered or certified mail has been given, as provided therein, seventy-two hours prior to the time of hearing to the director and division supervisor in the water division created by section 61-212 in which the action is brought and to all appropriators whose rights to the delivery of water might in any manner be affected, of

the time and place of the hearing. In such case, any person, natural or artificial, injured or likely to be injured by the granting of such writ, may intervene in such action at any stage of the proceedings and become a party to such litigation.

Source: R.S.1867, Code § 649, p. 508; R.S.1913, § 8275; C.S. 1922, § 9228; C.S. 1929, § 20-2160; Laws 1941, c. 29, § 10, p. 137; C.S. Supp., 1941, § 20-2160; R.S. 1943, § 25-2160; Laws 1957, c. 242, § 20, p. 831; Laws 1957, c. 365, § 6, p. 1235; Laws 2000, LB 900, § 69.

A verification which is a part of an affidavit upon which a writ of mandamus is sought must be positively verified, and a verification based upon mere belief is inadequate. State ex rel. Van Cleave v. City of No. Platte, 213 Neb. 426, 329 N.W.2d 358 (1983).

To sustain an application for mandamus, motion for the writ must be made upon affidavit. Little v. Board of County Commissioners of Cherry County, 179 Neb. 655, 140 N.W.2d 1 (1966).

If no alternative writ has been granted, case may be heard on petition and response thereto. State ex rel. Krieger v. Board of Supervisors of Clay County, 171 Neb. 117, 105 N.W.2d 721 (1960).

Petition must be filed, and writ allowed by judge. State ex rel. Hansen v. Carrico, 86 Neb. 448, 125 N.W. 1110 (1910).

Action is not begun until motion and affidavit, or petition verified positively, filed. State ex rel. Chicago & N. W. Ry. Co. v. Harrington, 78 Neb. 395, 110 N.W. 1016 (1907).

Affidavit upon information and belief is insufficient but is amendable. Steidl v. State ex rel. School Dist. of the City of Crete, 63 Neb. 695, 88 N.W. 853 (1902).

Writ issues upon motion supported by affidavit. State ex rel. Otto v. County Commissioners of Lancaster County, 49 Neb. 51, 68 N.W. 336 (1896).

Application must show prior demand and refusal, and facts showing legal duty of respondent. Kemerer v. State ex rel. Garber, 7 Neb. 130 (1878).

CHAPTER 56

ARTICLE 1

MILLDAMS

56-101. Repealed. Laws 2017, LB 176, § 1.

CHAPTER 37

ARTICLE 8

NONGAME AND ENDANGERED SPECIES ACT

37-807. Commission; establish conservation programs; agreements authorized; Governor and state agencies; duties; public meeting; when required.

(1) The commission shall establish such programs, including acquisition of land or aquatic habitat or interests therein, as are necessary for the conservation of nongame, threatened, or endangered species of wildlife or wild plants. Acquisition for the purposes of this subsection shall not include the power to obtain by eminent domain.

(2) In carrying out programs authorized by this section, the commission shall consult with other states having a common interest in particular species of nongame, endangered, or threatened species of wildlife or wild plants and may enter into agreements with federal agencies, other states, political subdivisions of this state, or private persons with respect to programs designed to conserve such species including, when appropriate, agreements for administration and management of any area established under this section or utilized for conservation of such species.

(3) The Governor shall review other programs administered by him or her and utilize such programs in furtherance of the purposes of the Nongame and Endangered Species Conservation Act. All other state agencies shall, in consultation with and with the assistance of the commission, utilize their authorities in furtherance of the purposes of the act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 37-806 and by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered or threatened species or result in the destruction or modification of habitat of such species which is determined by the commission to be critical. For purposes of this subsection, state agency means any department, agency, board, bureau, or commission of the state or any corporation whose primary function is to act as, and while acting as, an instrumentality or agency of the state, except that state agency shall not include a natural resources district or any other political subdivision.

(4) The commission shall provide notice and hold a public meeting prior to the implementation of conservation programs designed to reestablish threatened, endangered, or extirpated species of wildlife or wild plants through the release of animals or plants to the wild. The purpose of holding such a public meeting shall be to inform the public of programs requiring the release to the wild of such wildlife or wild plants and to solicit public input and opinion. The commission shall set a date and time for the public meeting to be held at a site convenient to the proposed release area and shall publish a notice of such meeting in a legal newspaper published in or of general circulation in the county or counties where the proposed release is to take place. The notice shall

be published at least twenty days prior to the meeting and shall set forth the purpose, date, time, and place of the meeting.

Source: Laws 1975, LB 145, § 6; Laws 1984, LB 1106, § 22; Laws 1987, LB 150, § 3; Laws 1991, LB 772, § 3; R.S. 1943, (1993), § 37-435; Laws 1998, LB 922, § 357.

As the Department of Water Resources is a state agency within the meaning of the Nongame and Endangered Species Act, the issuance of a permit through its director would qualify as an "action" taken by a state agency. Therefore, the director may not issue permits which would jeopardize the continued existence of an endangered or threatened species, or result in the destruction or modification of their habitat. Central Platte NRD v. City of Fremont, 250 Neb. 252, 549 N.W.2d 112 (1996).

Before authorizing a diversion project, the Department of Water Resources must consult with the Game and Parks Commission and must obtain an opinion as to whether the project will jeopardize threatened or endangered species. However, the opinion, merely by being issued, does not impose affirmative requirements upon an application. Central Platte NRD v. State of Wyoming, 245 Neb. 439, 513 N.W.2d 847 (1994).

If the director of the state Department of Water Resources, pursuant to subsection (3) of this section, considers and relies on the opinion of the state Game and Parks Commission in making his or her decision about diversion of unappropriated waters, the applicant is affected by the statute and thus is entitled to challenge its constitutionality. This section does not violate the provisions of Article XV, sections 4, 5, and 6, of the Constitution of Nebraska. In re Applications A-10627 et al., 243 Neb. 419, 499 N.W.2d 548 (1993).

This section places two separate and distinct duties upon state departments and agencies, that of consultation with the Game and Parks Commission and, once done, an independent duty to insure that the actions they take or authorize do not jeopardize the continued existence of an endangered species or its habitat. Both the Department of Water Resources and the various natural resources districts are state departments or agencies within the meaning of this act. Little Blue N.R.D. v. Lower Platte North N.R.D., 210 Neb. 862, 317 N.W.2d 726 (1982).

CHAPTER 2

ARTICLE 32

NRD SPECIAL PROJECT

2-3254. Improvement project areas; petition; hearing; notice; findings of board; apportionment of benefits; lien.

(1) The board shall hold a hearing upon the question of the desirability and necessity, in the interest of the public health, safety, and welfare, of the establishment of or altering the boundaries of an existing improvement project area and the undertaking of such a project, upon the question of the appropriate boundaries describing affected land, upon the propriety of the petition, and upon all relevant questions regarding such inquiries. When a hearing has been initiated by petition, such hearing shall be held within one hundred twenty days of the filing of such petition. Notice of such hearing shall be published prior thereto once each week for three consecutive weeks in a legal newspaper published or of general circulation in the district. Landowners within the limits of the territory described in the petition and all other interested parties, including any appropriate agencies of state or federal government, shall have the right to be heard. If the board finds, after consultation with such appropriate agencies of state and federal government and after the hearing, that the project conforms with all applicable law and with the district's goals, criteria, and policies, it shall enter its findings in the board's official records and shall, with the aid of such engineers, surveyors, and other assistants as it may have chosen, establish an improvement project area or alter the boundaries of an existing improvement project area, proceed to make detailed plans and cost estimates, determine the total benefits, and carry out the project as provided in subsections (2) and (3) of this section. If the board finds that the project does not so conform, the findings shall be entered in the board's records and copies of such findings shall be furnished to the petitioners and the commission.

(2) When any such special project would result in the provision of revenue-producing continuing services, the board shall, prior to commencement of construction of such project, determine, by circulation of petitions or by some other appropriate method, if such project can be reasonably expected to generate sufficient revenue to recover the reimbursable costs thereof. If it is determined that the project cannot be reasonably expected to generate sufficient revenue, the project and all work in connection therewith shall be suspended. If it is determined that the project can be reasonably expected to generate sufficient revenue, the board shall divide the total benefits of the project as provided in sections 2-3252 to 2-3254. If the proposed project involves the supply of water for any beneficial use, all plans and specifications for the project shall be filed with the secretary of the district and the Director of Natural Resources, except that if such project involves a public water system as defined in section 71-5301, the filing of the information shall be with the Department of Environment and Energy rather than the Director of Natural Resources. No construction of any such special project shall begin until the plans and specifications for such improvement have been approved by the Director of Natural Resources and the Department of Environment and Energy, if applicable, except that if such special project involves a public water system as defined in section 71-5301, only the Department of Environment and Energy shall be

required to review such plans and specifications and approve the same if in compliance with the Nebraska Safe Drinking Water Act and departmental rules and regulations adopted and promulgated under the act. All prescribed conditions having been complied with, each landowner within the improvement project area shall, within any limits otherwise prescribed by law, subscribe to a number of benefit units in proportion to the extent he or she desires to participate in the benefits of the special project. As long as the capacity of the district's facilities permit, participating landowners may subscribe to additional units, within any limits otherwise prescribed by law, upon payment of a unit fee for each such unit. The unit fees made and charged pursuant to this section shall be levied and fixed by rules and regulations of the district. The service provided may be withheld during the time such charges levied upon such parcel of land are delinquent and unpaid. Such charges shall be cumulative, and the service provided by the project may be withheld until all delinquent charges for the operation and maintenance of such works of improvement are paid for past years as well as for the current year. All such charges, due and delinquent according to the rules and regulations of such district and unpaid on June 1 after becoming due and delinquent, may be certified by the governing authority of such district to the county clerk of such county in which are situated the lands against which such charges have been levied, and when so certified such charges shall be entered upon the tax list and spread upon the tax roll the same as other special assessment taxes are levied and assessed upon real estate, shall become a lien upon such real estate along with other real estate taxes, and shall be collectible at the same time, in the same manner, and in the same proceeding as other real estate taxes are levied.

(3) When the special project would not result in the provision of revenue-producing continuing services, the board shall apportion the benefits thereof accruing to the several tracts of land within the district which will be benefited thereby, on a system of units. The land least benefited shall be apportioned one unit of assessment, and each tract receiving a greater benefit shall be apportioned a greater number of units or fraction thereof, according to the benefits received. Nothing contained in this section shall prevent the district from establishing separate areas within the improvement project area so as to permit future allocation of costs for particular portions of the work to specific subareas. This subarea method of allocation shall not be used in any improvement project area which has heretofore made a final apportionment of units of benefits and shall not thereafter be changed except by compliance with the procedure prescribed in this section.

(4) A notice shall be inserted for at least one week in a newspaper published or of general circulation in the improvement project area stating the time when and the place where the directors shall meet for the purpose of hearing all parties interested in the apportionment of benefits by reason of the improvement, at which time and place such parties may appear in person or by counsel or may file written objections thereto. The directors shall then proceed to hear and consider the same and shall make the apportionments fair and just according to benefits received from the improvement. The directors, having completed the apportionment of benefits, shall make a detailed report of the same and file such report with the county clerk. The board of directors shall include in such report a statement of the actual expenses incurred by the district to that time which relate to the proposed project and the actual cost per benefit unit thereof. Thereupon the board of directors shall cause to be published, once each week for three consecutive weeks in a newspaper published or of general circulation in the improvement project area, a notice that the report required in this subsection has been filed and notice shall also be sent to each party appearing to have a direct legal

interest in such apportionment, which notice shall include the description of the lands in which each party notified appears to have such interest, the units of benefit assigned to such lands, the amount of actual costs assessable to date to such lands, and the estimated total costs of the project assessable to such lands upon completion thereof, as provided by sections 25-520.01 to 25-520.03. If the owners of record title representing more than fifty percent of the estimated total assessments file with the board within thirty days of the final publication of such notice written objections to the project proposed, such project and work in connection therewith shall be suspended, such project shall not be done in such project area, and all expenses relating to such project incurred by and accrued to the district may, at the direction of the board of directors, be assessed upon the lands which were to have been benefited by the completion of such improvement project in accordance with the apportionment of benefits determined and procedures established in this section. Upon completing the establishment of an improvement project area or altering the boundaries of an existing improvement project area as provided in this subsection and upon determining the reimbursable cost of the project and the period of time over which such cost shall be assessed, the board of directors shall determine the amount of money necessary to raise each year by special assessment within such improvement project area and apportion the same in dollars and cents to each tract benefited according to the apportionment of benefits as determined by this section. The board of directors shall also, from time to time as it deems necessary, order an additional assessment upon the lands and property benefited by the project, using the original apportionment of benefits as a basis to ascertain the assessment to each tract of land benefited, to carry out a reasonable program of operation and maintenance upon the construction or capital improvements involved in such project. The chairperson and secretary shall thereupon return lists of such tracts with the amounts chargeable to each of the county clerks of each county in which assessed lands are located, who shall place the same on duplicate tax lists against the lands and lots so assessed. Such assessments shall be collected and accounted for by the county treasurer at the same time as general real estate taxes, and such assessments shall be and remain a perpetual lien against such real estate until paid. All provisions of law for the sale, redemption, and foreclosure in ordinary tax matters shall apply to such special assessments.

Source: Laws 1969, c. 9, § 54, p. 131; Laws 1972, LB 543, § 14; Laws 1973, LB 206, § 6; Laws 1981, LB 326, § 10; Laws 1994, LB 480, § 15; Laws 1996, LB 1044, § 39; Laws 1999, LB 436, § 10; Laws 2000, LB 900, § 58; Laws 2001, LB 136, § 3; Laws 2001, LB 667, § 1; Laws 2007, LB 296, § 18; Laws 2021, LB148, § 40.

Cross Reference

Nebraska Safe Drinking Water Act, see section 71-5313.

2-32,115. Immediate temporary stay imposed by natural resources district; department; powers and duties.

(1) Whenever a natural resources district imposes an immediate temporary stay for one hundred eighty days in accordance with subsection (2) of section 46-707, the department may place an immediate temporary stay without prior notice or hearing on the issuance of new surface water natural-flow appropriations for one hundred eighty days in the area, river basin, subbasin, or reach of the same area included in the natural resources district's temporary stay, except that the

department shall not place a temporary stay on new surface water natural-flow appropriations that are necessary to alleviate an emergency situation involving the provision of water for human consumption or public health or safety.

(2) The department shall hold at least one public hearing on the matter within the affected area within the period of the one-hundred-eighty-day temporary stay, with the notice of hearing given as provided in section 46-743, prior to making a determination as to imposing a stay or conditions in accordance with section 46-234 and subsection (11) of section 46-714. The department may hold the public hearing in conjunction with the natural resources district's hearing.

(3) Within forty-five days after a hearing pursuant to this section, the department shall decide whether to exempt from the immediate temporary stay the issuance of appropriations for which applications were pending prior to the declaration commencing the stay but for which the application was not approved prior to such date, to continue the stay, or to allow the issuance of new surface water appropriations.

Source: Laws 2007, LB 701, § 16; Laws 2009, LB 483, § 1.

CHAPTER 70

ARTICLE 6

PRIORITY

70-668. Streams; water rights; priority.

In applying the provisions of law relating to the appropriation of water, priority of appropriation shall give the better right as between those using the water for the same purpose, but when the waters of any natural stream are not sufficient for the use of all those desiring to use the same, those using the water for domestic purposes shall have preference over those claiming it for any other purpose. Those using the water for agricultural purposes shall have the preference over those using the same for manufacturing purposes, and those using the water for agricultural purposes shall have the preference over those using the same for power purposes, where turbine or impulse water wheels are installed, or for instream-basin-management purposes.

Source: Laws 1933, c. 86, § 7, p. 349; Laws 1941, c. 138, § 1, p. 545; C.S. Supp., 1941, § 70-707 ; R.S.1943, § 70-668; Laws 2016, LB1038, § 13.

A preferential use is given to waters used for irrigation purposes over waters used for power purposes. Hickman v. Loup River P. P. Dist., 173 Neb. 428, 113 N.W.2d 617 (1962).

70-669. Streams; inferior rights; acquired by superior right; how compensated.

No inferior right to the use of the waters of this state shall be acquired by a superior right without just compensation therefor to the inferior user. The just compensation paid to those using water for power purposes shall not be greater than the cost of replacing the power which would be generated in the plant or plants of the power user by the water so acquired. The just compensation to be paid to a holder of an instream-basin-management appropriation that has been changed from a manufacturing of hydropower appropriation pursuant to section 46-290 shall be the cost per acre-foot of water subordinated for the hydropower appropriation at the time of approval of the change. The amount of compensation may be adjusted annually, except that any increase shall not exceed the annual change in the Consumer Price Index from the time of approval of the change. If publication of such index is discontinued, a comparable index selected by the Director of Natural Resources shall be used.

Source: Laws 1933, c. 86, § 7, p. 349; Laws 1941, c. 138, § 1, p. 545; C.S. Supp.,1941, § 70-707; R.S.1943, § 70-669; Laws 2016, LB1038, § 14.

Right to use of waters for power purposes cannot be acquired by a superior right for irrigation purposes without payment of just compensation. Hickman v. Loup River P. P. Dist., 173 Neb. 428, 113 N.W.2d 617 (1962).

CHAPTER 31

ARTICLE 2

WATERCOURSE DEFINITION

31-202. Watercourse, defined.

Any depression or draw two feet below the surrounding lands and having a continuous outlet to a stream of water, or river or brook shall be deemed a watercourse.

Source: Laws 1911, c. 142, § 2, p. 466; R.S. 1913, § 1772; C.S. 1922, § 1719; C.S. 1929, § 31-302.

1. Watercourse
2. Not a watercourse
3. Miscellaneous

1. Watercourse

A watercourse need not flow continuously, but it must have a well-defined and substantial existence. Northport Irr. Dist. v. Jess, 215 Neb. 152, 337 N.W.2d 733 (1983).

Under facts in this case, defendant obstructed waters that ran in the equivalent of a natural watercourse and plaintiff was entitled to injunction and consideration of issue relating to damages. Paasch v. Brown, 190 Neb. 421, 208 N.W.2d 695 (1973).

Where springs are source of definite watercourse, owner of land does not have exclusive right to control and use. Brummund v. Vogel, 184 Neb. 415, 168 N.W.2d 24 (1969).

Regardless of depth, flow of surface water in well-defined course cannot be arrested. Town of Everett v. Teigeler, 162 Neb. 769, 77 N.W.2d 467 (1956).

Watercourse must be stream in fact as distinguished from mere surface drainage. Reed v. Jacobson, 160 Neb. 245, 69 N.W.2d 881 (1955); Mader v. Mettenbrink, 159 Neb. 118, 65 N.W.2d 334 (1954); McGill v. Card-Adams Co., 154 Neb. 332, 47 N.W.2d 912 (1951).

Watercourse is defined, but a depression or draw is not. Bussell v. McClellan, 155 Neb. 875, 54 N.W.2d 81 (1952).

Watercourse is defined by statute, and may not be obstructed. Courter v. Maloley, 152 Neb. 476, 41 N.W.2d 732 (1950).

Artificial ditch may be a watercourse. Jack v. Teegarden, 151 Neb. 309, 37 N.W.2d 387 (1949).

A watercourse is a stream of water with a well-defined existence which makes it valuable to riparian owners along its course. Cooper v. Sanitary Dist. No. 1, 146 Neb. 412, 19 N.W.2d 619 (1945).

Ravine with well-defined banks of some fifteen feet in depth draining off surface water from tributary gullies is a watercourse within statutory definition. Faiman v. City of Omaha, 131 Neb. 870, 270 N.W. 484 (1936).

Drainage ditch fulfilled statutory requirements of a watercourse. Barthel v. Liermann, 2 Neb. App. 347, 509 N.W.2d 660 (1993).

2. Not a watercourse

To constitute a watercourse depression must have an outlet into a stream. Skolil v. Kokes, 151 Neb. 392, 37 N.W.2d 616 (1949).

Cutting a channel through a natural embankment to drain lake into a basin does not bring case under this section. Yocum v. Labertew, 145 Neb. 120, 15 N.W.2d 384 (1944).

A draw, although more than two feet deep where it enters land, does not continue to be a watercourse, where it flattens out and water runs wherever gravity will take it. Hengelfelt v. Ehrmann, 141 Neb. 322, 3 N.W.2d 576 (1942).

Where water collecting in basin was not drained into any natural watercourse, natural depression or draw draining into natural watercourse, did not bring case under above section. Warner v. Berggren, 122 Neb. 86, 239 N.W. 473 (1931).

Flow of water involved in action to enjoin maintenance of dam was diffused surface water and not a watercourse. Muhleisen v. Krueger, 120 Neb. 380, 232 N.W. 735 (1930).

Watercourse must be a stream in fact as distinguished from mere temporary surface drainage. Miksch v. Tassler, 108 Neb. 208, 187 N.W. 796 (1922).

3. Miscellaneous

Surface water is defined as water which appears upon the surface of the ground in a diffused state, with no permanent source of supply or regular course, which ordinarily results from rainfall or melting snow. In order to constitute an exception to the general rule that surface water may be repelled, at least some of the distinctive attributes of a watercourse must be demonstrated. Shotkoski v. Prososki, 219 Neb. 213, 362 N.W.2d 59 (1985).

In order to constitute an exception to the general rule that surface water may be repelled, at least some of the distinctive attributes of a watercourse must be demonstrated. Grint v. Hart, 216 Neb. 406, 343 N.W.2d 921 (1984).

The flow of surface water in any well-defined course, whether it be a ditch, swale, or draw in its primitive condition, and whether or not it is two feet below the surrounding land, cannot be arrested or interfered with to the injury of neighboring proprietors. Barry v. Wittmersehouse, 212 Neb. 909, 327 N.W.2d 33 (1982).

City discharging water from its sewage disposal plant into a gully or creek for a period of over ten years, in open, notorious, peaceful, uninterrupted, and adverse manner, may acquire an easement for that purpose. Hall v. City of Friend, 134 Neb. 652, 279 N.W. 346 (1938).

Owner of drainage ditch in continuous use for more than ten years acquires an easement for the purpose of drainage and damages are not recoverable by owner of servient estate against owner of easement unless latter was negligent in use. Bures v. Stephens, 122 Neb. 751, 241 N.W. 542 (1932).

CHAPTER 28

CLASSIFICATION OF PENALTIES

28-106. Misdemeanors; classification of penalties; sentences; where served.

(1) For purposes of the Nebraska Criminal Code and any statute passed by the Legislature after the date of passage of the code, misdemeanors are divided into seven classes which are distinguished from one another by the following penalties which are authorized upon conviction:

Class I misdemeanor.....	Maximum — not more than one year imprisonment, or one thousand dollars fine, or both Minimum — none
Class II misdemeanor.....	Maximum — six months imprisonment, or one thousand dollars fine, or both Minimum — none
Class III misdemeanor.....	Maximum — three months imprisonment, or five hundred dollars fine, or both Minimum — none
Class IIIA misdemeanor.....	Maximum — seven days imprisonment, five hundred dollars fine, or both Minimum — none
Class IV misdemeanor.....	Maximum — no imprisonment, five hundred dollars fine Minimum — none
Class V misdemeanor.....	Maximum — no imprisonment, one hundred dollars fine Minimum — none
Class W misdemeanor.....	Driving under the influence or implied consent First conviction Maximum — sixty days imprisonment and five hundred dollars fine Mandatory minimum — seven days imprisonment and five hundred dollars fine Second conviction Maximum — six months imprisonment and five hundred dollars fine Mandatory minimum — thirty days imprisonment and five hundred dollars fine Third conviction Maximum — one year imprisonment and one thousand dollars fine Mandatory minimum — ninety days imprisonment and one thousand dollars fine

(2) Sentences of imprisonment in misdemeanor cases shall be served in the county jail, except that such sentences may be served in institutions under the jurisdiction of the Department of Correctional Services if the sentence is to be served concurrently or consecutively with a term for conviction of a felony and the combined sentences total a term of one year or more. A determinate sentence shall be imposed for a misdemeanor if the sentence is to be served concurrently or consecutively with a determinate sentence for a Class III, IIIA, or IV felony.

Source: Laws 1977, LB 38, § 6; Laws 1982, LB 568, § 1; Laws 1986, LB 153, § 1; Laws 1992, LB 291, § 1; Laws 1998, LB 309, § 1; Laws 2002, LB 82, § 3; Laws 2005, LB 594, § 1; Laws 2011, LB 675, § 1; Laws 2015, LB 605, § 7; Laws 2016, LB 1094, § 3.

The proper determination of punishment for fourth offense driving under the influence of an alcoholic liquor or drug is governed by subsection (1) of this section and not by section 28-107(3). State v. Schultz, 252 Neb. 746, 566 N.W.2d 739 (1997).

For a Class III misdemeanor, a sentence of five days in jail with a fine of three hundred dollars is within the statutory maximum and will not be disturbed on appeal absent an abuse of discretion. State v. Rosenberry, 209 Neb. 383, 307 N.W.2d 823 (1981).