

LEGISLATURE OF NEBRASKA

ONE HUNDRED SECOND LEGISLATURE

FIRST SESSION

LEGISLATIVE BILL 526

Introduced by Carlson, 38.

Read first time January 18, 2011

Committee: Natural Resources

A BILL

- 1 FOR AN ACT relating to water; to amend section 46-294, Reissue
- 2 Revised Statutes of Nebraska; to change provisions
- 3 relating to water transfers; and to repeal the original
- 4 section.
- 5 Be it enacted by the people of the State of Nebraska,

1 Section 1. Section 46-294, Reissue Revised Statutes of
2 Nebraska, is amended to read:

3 46-294 (1) Except for applications approved in accordance
4 with subsection (1) of section 46-291, the Director of Natural
5 Resources shall approve an application filed pursuant to section
6 46-290 only if the application and the proposed transfer or change
7 meet the following requirements:

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

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

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

17 (d) Except as otherwise provided in subsection (4) of
18 this section, the proposed transfer or change, alone or when combined
19 with any new or increased use of any other source of water at the
20 original location or within the same irrigation district, reclamation
21 district, public power and irrigation district, or mutual irrigation
22 or canal company for the original or other purposes, will not
23 diminish the supply of water available for or otherwise adversely
24 affect any other water appropriator and will not significantly
25 adversely affect any riparian water user who files an objection in

1 writing pursuant to section 46-291;

2 (e) The quantity of water that is transferred for
3 diversion or other use at the new location will not exceed the
4 historic consumptive use under the appropriation or portion thereof
5 being transferred, except that this subdivision does not apply to (i)
6 a transfer in the location of use if both the current use and the
7 proposed use are for irrigation, the number of acres to be irrigated
8 will not increase after the transfer, and the location of the
9 diversion from the stream will not change or (ii) a transfer of the
10 entire amount of a surface water irrigation right for a
11 nonconsumptive use;

12 (f) The appropriation, prior to the transfer or change,
13 is not subject to termination or cancellation pursuant to sections
14 46-229 to 46-229.04;

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

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

1 (i) If the proposed transfer or change is to be
2 permanent, either (i) the purpose for which the water is to be used
3 before the transfer or change is in the same preference category
4 established by section 46-204 as the purpose for which the water is
5 to be used after the transfer or change or (ii) the purpose for which
6 the water is to be used before the transfer or change and the purpose
7 for which the water is to be used after the transfer or change are
8 both purposes for which no preferences are established by section
9 46-204;

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

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

18 (l) The proposed transfer or change is in the public
19 interest. The director's considerations relative to the public
20 interest shall include, but not be limited to, (i) the economic,
21 social, and environmental impacts of the proposed transfer or change
22 and (ii) whether and under what conditions other sources of water are
23 available for the uses to be made of the appropriation after the
24 proposed transfer or change. The Department of Natural Resources
25 shall adopt and promulgate rules and regulations to govern the

1 director's determination of whether a proposed transfer or change is
2 in the public interest.

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

14 (3) In approving an application, the director may impose
15 any reasonable conditions deemed necessary to protect the public
16 interest, to ensure consistency with any of the other criteria in
17 subsection (1) of this section, or to provide the department with
18 information needed to properly and efficiently administer the
19 appropriation while the transfer or change remains in effect. If
20 necessary to prevent diminution of supply for any other appropriator,
21 the conditions imposed by the director shall require that historic
22 return flows be maintained or replaced in quantity, timing, and
23 location. After approval of any such transfer or change, the
24 appropriation shall be subject to all water use restrictions and
25 requirements in effect at any new location of use and, if applicable,

1 at any new diversion location. An appropriation for which a transfer
2 or change has been approved shall retain the same priority date as
3 that of the original appropriation. If an approved transfer or change
4 is temporary, the location of use, purpose of use, or type of
5 appropriation shall revert to the location of use, purpose of use, or
6 type of appropriation prior to the transfer or change.

7 (4) In approving an application for a transfer, the
8 director may also authorize the overlying of water appropriations on
9 the same lands, except that if any such overlying of appropriations
10 would result in either the authorized diversion rate or the
11 authorized aggregate annual quantity that could be diverted to be
12 greater than is otherwise permitted by section 46-231, the director
13 shall limit the total diversion rate or aggregate annual quantity for
14 the appropriations overlain to the rate or quantity that he or she
15 determines is necessary, in the exercise of good husbandry, for the
16 production of crops on the land involved. The director may also
17 authorize a greater number of acres to be irrigated if the amount and
18 rate of water approved under the original appropriation is not
19 increased by the change of location. An increase in the number of
20 acres to be irrigated shall be approved only if (a) such an increase
21 will not diminish the supply of water available to or otherwise
22 adversely affect another water appropriator or (b) the transfer would
23 not adversely affect the water supply for any river basin, subbasin,
24 or reach that has been designated as overappropriated pursuant to
25 section 46-713 or determined to be fully appropriated pursuant to

1 section 46-714 and (i) the number of acres authorized under the
2 appropriation when originally approved has not been increased
3 previously, (ii) the increase in the number of acres irrigated will
4 not exceed five percent of the number of acres being irrigated under
5 the permit before the proposed transfer or a total of ten acres,
6 whichever acreage is less, and (iii) all the use will be either on
7 the quarter section to which the appropriation was appurtenant before
8 the transfer or on an adjacent quarter section.

9 Sec. 2. Original section 46-294, Reissue Revised Statutes
10 of Nebraska, is repealed.