

LEGISLATIVE BILL 140

Approved by the Governor February 27, 1987

Introduced by Moore, 24

AN ACT relating to water resources; to amend sections 46-158, 46-218, 46-229.04, 46-231, 46-235, 46-236, 46-238, 46-263, 46-273, 46-641, and 46-642, Reissue Revised Statutes of Nebraska, 1943, and sections 46-229.03, 46-2,114, and 46-640, Revised Statutes Supplement, 1986; to eliminate a provision relating to the appointment of a superintendent of a ditch or canal; to eliminate certain provisions relating to the creation of certain water district subdivisions and water districts; to change provisions relating to water appropriations as prescribed; to change provisions relating to permits to withdraw ground water; to eliminate certain obsolete provisions; to harmonize provisions; to eliminate provisions relating to hogs in irrigation ditches; and to repeal the original sections, and also sections 46-222 to 46-224, 46-260, 46-279, 46-280, and 46-643, Reissue Revised Statutes of Nebraska, 1943.

Be it enacted by the people of the State of Nebraska,

Section 1. That section 46-158, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

46-158. It shall be the duty of the board of directors to keep the water flowing through the ditches and canals under its control to the full capacity of such ditches and canals in times of high water when the same can be beneficially applied to the lands thereunder and does not interfere with the rights of other appropriators, except ; ~~PROVIDED~~; that upon the filing of a petition in the office of the board of directors of any irrigation district, signed by a majority of the landowners who are electors therein, requesting that rules and regulations be adopted by the board permitting and providing for any of the following specific orders or changes in the method of operating its canal, it shall become the duty of such board to immediately provide for the adoption and enforcement of the same, namely, (1) that an automatic measuring device be placed

in or near the headgate or any main diverting gate of the main canal, in order that a continuous record shall be kept by such district of the amount of water received into the canal for the use of the lands in such district, ; (2) that automatic measuring devices be placed in the headgates or all main laterals and distributing laterals within the district from and by which water is diverted to tracts or units of twenty acres or more, for the purpose of determining at all times the amount of water going to or being received upon any and all such tracts of land, and ~~making it the duty of the superintendent that the person having charge~~ of the canal ~~to~~ shall keep a separate and correct record of the amount of water delivered through each of such headgates at all times, and shall file the same in the office of the board of directors for public inspection, ; and (3) that a system be provided for the interchange of water from one tract of land to another at the option of the owner or lessee of any lands within such district at any time, and further provide that rules made by the board or ~~superintendent~~ the person having charge of such canals for delivering water in alternate sections of a canal or ditch shall not interfere with this right.

Sec. 2. That section 46-218, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

46-218. There shall be one or more division engineers acting for the Department of Water Resources to administer the public water of the state in the water divisions created by section 46-215. Such a division engineer, acting for the Department of Water Resources, shall have the immediate direction and control of the ~~acts of the water commissioners and of~~ the distribution of water in such manner as shall be directed by the department.

Sec. 3. That section 46-229.03, Revised Statutes Supplement, 1986, be amended to read as follows:

46-229.03. (1) The notice shall contain the date and place of hearing, a description of the water appropriation, the number thereof upon the books and records of the department, the date of priority, the point of diversion, and a description of the lands which are located under such water appropriation. It shall call upon all persons interested in such water appropriation to show cause why all or part of the same should not be canceled and annulled. The notice shall be served personally or by registered or certified mail at least thirty days before the date of hearing upon

those owning or controlling the water appropriation and the ditch, canal, or reservoir for the purpose of using or storing water for any purpose if they are known to the department to be the owners thereof and maintain an office within the State of Nebraska.

(2) If the persons named in subsection (1) of this section do not maintain an office within the State of Nebraska, then such notice shall be served by the publication in some legal newspaper published or of general circulation in the county in which the place of diversion of such water appropriation is located, ~~for~~ once a week for three consecutive weeks prior to the date of hearing.

(3) Except as provided in subsection (4) of this section, and a copy of such notice shall further be personally served or sent by either registered or certified mail to all other persons appearing from the records of the county clerk or register of deeds to be landowners under such appropriation.

(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 a week for three consecutive weeks prior to the date of hearing.

Sec. 4. That section 46-229.04, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

46-229.04. At such hearing the verified field investigation report of an employee ~~the water commissioner or engineers~~ of the department shall be prima facie evidence for the forfeiture and annulment of such water appropriation. If no one appears at the hearing, such water appropriation or unused part thereof shall be declared forfeited and annulled. If someone interested 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 three consecutive years, the same shall be declared canceled and annulled unless the department finds that there has been sufficient cause for such nonuse. Sufficient cause shall be deemed to exist if during the period of nonuse:

(1) The land subject to the appropriation was placed under an acreage reserve or production quota program or otherwise withdrawn from use as required for participation in any federal or state program;

(2) Federal, state, or local laws, rules, or regulations temporarily prevented or restricted such use;

(3) The available water supply was inadequate to enable the owner to use the water for a beneficial or useful purpose;

(4) Use of the water was unnecessary because of climatic conditions;

(5) Circumstances were such that a prudent person, following the dictates of good husbandry, would not have been expected to use the water;

(6) The works, diversions, or other facilities essential to use of 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;

(7) 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

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

The department may specify by rule and regulation other circumstances which shall be deemed to constitute sufficient cause.

Sec. 5. That section 46-231, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

46-231. Each appropriation shall be determined in its priority and amount, by the time at which it shall have been 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 may have been made, and the amount of any appropriation made by means of enlargement of the distributing works heretofore shall be determined in like manner. No allotment from the natural flow of streams for irrigation shall exceed one cubic foot per second of time for each seventy acres of land, nor three acre-feet in the aggregate during one calendar year for each acre of land for which such appropriation shall have been made; neither shall it exceed the least amount of water that experience may hereafter indicate is necessary, in the exercise of good husbandry, for the production of crops. Such ~~PROVIDED, that these limitations do~~ shall not apply to storage waters. When ~~AND PROVIDED FURTHER, that where~~

storage water is being used in addition to the natural flow, ~~the person in charge of the ditch or canal that~~ the water superintendent 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. ~~Where~~ When an appropriation is to irrigate an area of forty acres or less under an allotment of one-seventieth of one cubic foot or less per second continuous flow for each acre, and the amount is so small that a proper distribution and application is impossible, as much water as the applicant can use without waste may be allotted for a limited time so fixed as to give each appropriator his or her just share without violating prior rights.

Sec. 6. That section 46-235, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

46-235. If there is unappropriated water in the source of supply named in the application, if such application and appropriation when perfected ~~is are~~ not otherwise detrimental to the public welfare, and if denial of the application is not demanded by the public interest, the Department of Water Resources shall approve the same, ~~by endorsement thereon,~~ and shall make a record ~~of such endorsement in some proper manner~~ in its office and return the same ~~so endorsed~~ 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~~ ~~endorse~~ it ~~approved~~ for a less period of time for perfecting the proposed appropriation, or for a less amount of water, or for a less amount 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 feeling himself or herself 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.

Sec. 7. That section 46-236, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

46-236. Within six months after the approval of an application for water power, as provided for in section 46-234 and before placing water to any beneficial use, the applicant shall enter into a contract with the State of Nebraska, through the Department of Water Resources, 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 of Water Resources 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 the fees herein specified, the department shall ~~cancel such lease and appropriation~~ 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 of 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. Upon the expiration of any lease under this section, or if the lease is renewed then upon the expiration of the renewal, the value of improvements made thereunder by any lessee shall be appraised by the department. From such appraisement the lessee shall have the right of appeal to the district court. The value of such

improvements as finally determined shall be paid to the lessee owning them by any subsequent lessee.

Sec. 8. That section 46-238, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

46-238. (1) Within six months after the approval of any application for water for irrigation, power, or other useful purpose by the Department of Water Resources, 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 the provisions of this section shall work a forfeiture of the appropriation and all rights thereunder. 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 have been completed within one year from the date of approval of the application. The applicant shall, when required by the department, furnish to the department a detailed report of the total amount of work necessary to complete the project, which report shall conform to the requirements of the department, and satisfactory evidence that the work of construction has been begun. The construction of all work required in connection with the proposed project shall be prosecuted in the manner above 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. In the case of an applicant for an appropriation granted for the development of water power, the appropriator shall, when required by the department, report, under oath, to the department, the actual amount of money expended upon such power development for right-of-way and land, labor, salaries, material, and machinery, not including construction or equipment delivered upon the ground, and such report shall be made in form, detail, and manner prescribed by the department. A failure to carry on the construction of either an irrigation or water power project, as outlined in this section above, or in the case of a

water power development, a failure to file the above reports when required, shall work a forfeiture of the appropriation and all rights thereunder, and the department shall cancel such appropriation within thirty days of such failure. The department shall have free access to all records, books, and papers of any irrigation or water power company, and shall have the right to go upon the right-of-way and land of any such company, and 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 the same is deemed advisable for physical valuation purposes.

(2) The department may extend, for reasonable lengths of time, the time for 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, or all of them, 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 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, and, in addition, shall be published in at least one newspaper of general circulation in the county or counties of the appropriation. 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 Supreme Court. Subsequent extensions may be made in the same manner. Any extension so granted shall be endorsed by the department on the application filed in its records. Any person directly affected adversely by the granting of any such extension may appeal direct to the Supreme Court.

(3) Any order heretofore made by the department granting an extension of time for the completion of works, the application of water to beneficial use, or for the performance of any other

requirements, which has not been vacated or otherwise abrogated, is hereby ratified, validated, and confirmed. Any application for an appropriative right which is deficient by reason of past failure to comply with any of the requirements of sections 46-233 and 46-238 for the perfection of an appropriative right, which application has not been dismissed or denied, is also hereby ratified and confirmed, unless, within one year from September 20, 1957, a petition to vacate such an order granting an extension of time, or a petition to forfeit, cancel, or otherwise invalidate such an application for an appropriative right, shall have been filed with the department by a person affected adversely thereby. All rights and defenses which heretofore shall have accrued in favor of the grantee of such an extension shall be preserved. Such ratification and confirmation shall not extend to or be operative as to extensions of time which the courts have held to be void and as to such extensions no proceeding for cancellation need be commenced. Any person directly affected adversely may appeal from the decision of the department direct to the Supreme Court.

Sec. 9. That section 46-263, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

46-263. Any superintendent or other 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.

Sec. 10. That section 46-273, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

46-273. 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 shall 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 Water 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. A certified copy of all such contracts for the furnishing of water by the United States, as herein provided, shall immediately upon their execution be furnished to the department, and the water superintendent and water commissioner of the district shall be notified of the time when such water shall be delivered.

Sec. 11. That section 46-2,114, Revised Statutes Supplement, 1986, be amended to read as follows:

46-2,114. Prior to taking action on an application for an instream appropriation, the Director of Water Resources shall conduct any studies he or she deems necessary to evaluate the application and shall publish notice of such application 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 of Water Resources within two weeks of final publication of the notice.

Sec. 12. That section 46-640, Revised Statutes Supplement, 1986, be amended to read as follows:

46-640. Upon receipt of an application filed under section 46-639, the Director of Water Resources shall prepare cause a notice of such application his or

her intent to proceed to make a determination whether a permit should be granted. The notice shall set forth a place and time, which shall not be less than thirty days after the date of the last publication of notice, when the director or his or her authorized assistant shall begin the taking of testimony in support of the application to withdraw ground water and transport it into the area to be served and the amount of the water withdrawal applied for. The director shall cause such notice to be published at least once a week for three consecutive weeks in a legal newspaper published or of general circulation in each county in containing lands on which the well field or any part thereof is or will be located, three successive weeks prior to the date of hearing. Publication may be proved by affidavit of any person having knowledge of the fact, specifying the time when and the paper in which the publication was made and that such newspaper is a legal newspaper under the statutes of the State of Nebraska. The notice shall contain a description of the lands upon which such well field is or is proposed to be located, the amount of water requested, the number of wells constructed or proposed, and any other relevant information. The notice shall state that any interested person may object to and request a hearing on the application by filing written objections specifically stating the grounds for each objection within two weeks after the date of final publication in the office of the Director of Water Resources.

Sec. 13. That section 46-641, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

46-641. Any person who claims that his interest is adversely affected may, not less than ten days prior to the hearing date specified in the notice referred to in section 46-640, file in the office of the Director of Water Resources written objections to the granting of the permit and appear before the director in opposition thereto at the time and place specified for the hearing. Every objection filed shall specify particularly the grounds of the objection. The department may hold a hearing on an application filed under section 46-639 on its own motion and shall hold a hearing on such an application if requested by any person pursuant to section 46-640.

Sec. 14. That section 46-642, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

46-642. If the Director of Water Resources,

after the hearing, finds that the withdrawal and transportation of ground water requested by the applicant is are reasonable, is are not contrary to the conservation and beneficial use of ground water, and is are not otherwise detrimental to the public welfare, he or she shall grant a permit to the applicant to withdraw and transport water in the amount applied for or in a lesser amount. ~~PROVIDED, any permit granted under the provisions of sections 46-638 to 46-650 prior to October 23, 1967, shall be and remain valid notwithstanding any lack of findings by the director of the conditions set forth in this section.~~ The permit so granted shall have a priority date as of the time when the application is filed with the director.

Sec. 15. That original sections 46-158, 46-218, 46-229.04, 46-231, 46-235, 46-236, 46-238, 46-263, 46-273, 46-641, and 46-642, Reissue Revised Statutes of Nebraska, 1943, and sections 46-229.03, 46-2, 114, and 46-640, Revised Statutes Supplement, 1986, and also sections 46-222 to 46-224, 46-260, 46-279, 46-280, and 46-643, Reissue Revised Statutes of Nebraska, 1943, are repealed.