

LEGISLATIVE BILL 301

Approved by the Governor June 8, 1993

Introduced by Beutler, 28; Preister, 5

AN ACT relating to water; to amend sections 46-228, 46-233, 46-235, and 46-237, Reissue Revised Statutes of Nebraska, 1943; to define terms; to change provisions relating to the standard of measurement for flowing water; to authorize appropriations of public waters for induced ground water recharge by public water suppliers; to change and provide application procedures for appropriations; to assign priority dates; to provide for notice and hearings; to require just compensation in certain cases; to provide powers for natural resources districts; to harmonize provisions; to provide severability; and to repeal the original sections.

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

Section 1. For purposes of sections 46-226 to 46-238 and sections 5 to 8 of this act:

(1) Induced ground water recharge shall mean the process by which ground water withdrawn from wells near a natural stream is replaced by surface water flowing in the stream;

(2) Public water supplier shall mean a city, village, municipal corporation, metropolitan utilities district, rural water district, natural resources district, irrigation district, reclamation district, or sanitary and improvement district which supplies or intends to supply water to inhabitants of cities, villages, or rural areas for domestic or municipal purposes; and

(3) Well shall mean 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artificial opening or excavation in the ground from which ground water flows under natural pressure or is artificially withdrawn.

Sec. 2. That section 46-228, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

46-228. 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 shall 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 ~~and~~ 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. One miner's inch shall be one fiftieth of one cubic foot per second.

Sec. 3. That section 46-233, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

46-233. (1) The United States ~~of America~~ and every person ~~hereafter~~ 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 the same, or (c) taking any water from any constructed works, make an application to the Department of Water Resources 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, ~~required by subsection (1) of this section,~~ 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 ~~the same~~ it may be estimated, (d) the location of any proposed work in connection therewith, (e) the estimated time required for its completion, which shall embrace the period required for the construction of ~~the ditches thereon~~ 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 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 thereby and the amount thereof, and (h) ~~any additional facts which may be~~ 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 ~~the an~~ application ~~required by subsection (1) of this section and~~ containing the information set forth in subsection (2) of this section, the department shall (a) make a record of the receipt of such application, (b) cause the ~~same~~ 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 ~~thirty~~ ninety days after its receipt. Ninety ; and thirty days shall be allowed for the refiling thereof, and; in default of such refiling, the application shall stand dismissed. If 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 regulations thereunder. During the pendency of ~~an~~ 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 the effective date of this act, 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 the effective date of this act.

(5) Prior to taking action on an application for induced ground water recharge, the Director of Water Resources 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 of Water Resources 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.

Sec. 4. That section 46-235, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

46-235. § (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 of Water Resources shall approve the same application and shall make a record in its office and return the same 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 less shorter period of time for perfecting the proposed appropriation; or for a less smaller 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.

(2)(a) An application for an induced ground water recharge appropriation for public water supplier wells constructed and placed in service before the effective date of this act shall be approved by the Director of Water Resources 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 the effective date of this act 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 the effective date of this act 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 the effective date of this act 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.

Sec. 5. 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.

Sec. 6. (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 the effective date of this act 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 the effective date of this act is regulated at the request of a public water supplier, the Department of Water Resources 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 of Water Resources.

Sec. 7. 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 of Water Resources.

Sec. 8. 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 section 46-229.04.

Sec. 9. That section 46-237, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

46-237. ~~Upon~~ 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 of Water Resources, ~~within six months thereafter,~~ a map or plat; which shall conform to the rules and regulations of the department as to material, size, and coloring; and be upon a scale of not less than two inches to the mile. 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. Land listed for irrigation shall be shown in government subdivisions or fractions thereof, as the case may be; and no rights shall be deemed to have been acquired until the provisions of this section ~~shall~~ have been complied with. Failure ~~and a failure~~ to so comply shall work a forfeiture of the appropriation and all rights thereunder.

Sec. 10. If any section in this act or any part of any section shall be declared invalid or unconstitutional, such declaration shall not affect the validity or constitutionality of the remaining portions thereof.

Sec. 11. That original sections 46-228, 46-233, 46-235, and 46-237, Reissue Revised Statutes of Nebraska, 1943, are repealed.