

LEGISLATIVE BILL 789

Approved by the Governor April 22, 1993

Introduced by Natural Resources Committee: Beutler, 28, Chairperson;
Bromm, 23; Elmer, 38; Jones, 43; Preister, 5

AN ACT relating to water; to amend sections 46-231, 46-233, 46-288, 46-294, 46-677, 46-678, and 46-690, Reissue Revised Statutes of Nebraska, 1943, and section 46-657, Revised Statutes Supplement, 1992; to change provisions relating to the amount of and application for an appropriation of water; to provide for a temporary permit to appropriate water; to redefine terms; to change provisions relating to intrabasin transfers of water; to provide for and change provisions relating to applications for ground water for industrial purposes; to harmonize provisions; to repeal the original sections; and to declare an emergency.

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

Section 1. 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 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 may have has 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, and no allotment; 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 limitations shall not apply to storage waters.

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 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 for irrigation purposes 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 other rights, so long as 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.

Sec. 2. 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 such construction, enlargement, or extension, 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.

(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 may be estimated, (d) the location of any proposed work in connection therewith with the appropriation, (e) the estimated time required for its completion, which estimated time shall embrace include the period required for the construction of the ditches, thereon; (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, if for irrigation, a description of the land to be irrigated thereby by the water and the amount, thereof, and (h) any additional facts which may be required by the department.

(3) Upon receipt of the 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 the 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 days after its receipt. Thirty ,and thirty days shall be allowed for the resiling thereof of the application, and; in default of such resiling, the application shall stand dismissed. 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 an application or upon its approval, the department, upon proper authorization and request of the applicant, may assign the application a later priority date.

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

(5) 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. The requirement of filing a map or plans with the application may be waived at the discretion of the Director of Water Resources. 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 from the date the temporary permit was granted. 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.

Sec. 3. That section 46-288, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

46-288. For purposes of sections 46-288 and this section and section 46-289, unless the context otherwise requires: the following definitions shall be used:

(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, ~~an~~ 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, with delineations being those on the Nebraska river basin map officially adopted by the Nebraska Natural Resources Commission and on file in the commission's office on August 30, 1981 as shown on maps located in the Department of Water 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.

Sec. 4. That section 46-294, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

46-294. The Director of Water Resources shall approve an application filed pursuant to section 46-290 if:

(1) The requested change of location is within the same river basin, and will not adversely affect any other water appropriator, and will not significantly adversely affect any riparian water user who files an objection in writing prior to the hearing;

(2) The requested change will use water from the same source of supply as the current use;

(3) The change of location will not diminish the supply of water otherwise available;

(4) The water will be applied to a use in the same preference category as the current use, as provided in section 46-204; and

(5) The requested change is in the public interest.

The applicant shall have the burden of proving that the change of location will comply with subdivisions (1) to through (5) of this section, except that the burden shall be on the 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.

In approving an application, the director may impose any reasonable conditions deemed necessary to protect the public interest. An approved change of location shall retain the same priority date as that of the original water right. In approving an application, the director may 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.

Sec. 5. That section 46-657, Revised Statutes Supplement, 1992, be amended to read as follows:

46-657. As used in the Nebraska Ground Water Management and Protection Act and in sections 46-601 to 46-613.01 and 46-636 to 46-655, unless the context otherwise requires:

(1) Person shall mean a natural person, a partnership, an association, a corporation, a municipality, an irrigation district, or an agency or a political subdivision of the state, or a department, an agency, or a bureau of the United States;

(2) Ground water shall mean that water which occurs in or moves, seeps, filters, or percolates through ground under the surface of the land;

(3) Well shall mean any artificial opening or excavation in the ground through which ground water flows under natural pressure or is artificially withdrawn. A series of wells developed and pumped as a single unit shall be considered as one well. For purposes of the act, well shall not mean any artificial opening or excavation in which a pump of less than one hundred gallons per minute capacity is to be installed and which is to be used solely for supply of ground water for domestic purposes;

(4) Construction of a well shall mean boring, drilling, jetting, digging, or excavating and installing casing, pumps, and other devices for withdrawing or facilitating the withdrawal of ground water;

(5) Contamination or contamination of ground water shall mean nitrate nitrogen or other material which enters the ground water due to action of any person and causes degradation of the quality of ground water sufficient to make such ground water unsuitable for present or reasonably foreseeable beneficial uses;

(6) District shall mean a natural resources district operating pursuant to Chapter 2, article 32;

(7) Director shall mean the Director of Water Resources;

(8) Illegal well shall mean (a) any well operated or constructed without or in violation of a permit required by the act, (b) any well not in compliance with rules and regulations adopted and promulgated pursuant to the act, (c) any well not properly registered in accordance with sections 46-602 to 46-604, or (d) any well not in compliance with any other applicable laws of the State of Nebraska or with rules and regulations adopted and promulgated pursuant to such laws;

(9) Control area shall mean any area so designated by the director following a public hearing initiated and conducted pursuant to section 46-658;

(10) To commence construction of a well shall mean the beginning of the boring, drilling, jetting, digging, or excavating of the actual well from which ground water is to be withdrawn;

(11) Well driller shall mean any person who constructs, reconstructs, alters, or repairs a well. The term shall not include a person who performs labor or services for a well driller at his or her direction and under his or her supervision;

(12) Management area shall mean any area so designated by a district pursuant to sections 46-673.01 to 46-673.06;

(13) Ground water reservoir life goal shall mean the finite or infinite period of time which a district establishes as its goal for maintenance of the supply and quality of water in a ground water reservoir at the time a ground water management plan is adopted;

(14) Board shall mean the board of directors of a district;

(15) Irrigated acre shall mean any acre that is certified as such pursuant to rules and regulations of the district and that is actually capable of being supplied water through irrigation works, mechanisms, or facilities existing at the time of the allocation;

(16) Acre-inch shall mean the amount of water necessary to cover an acre of land one inch deep;

(17) Subirrigation or subirrigated land shall mean the natural occurrence of a ground water table within the root zone of agricultural vegetation, not exceeding ten feet below the surface of the ground;

(18) Best management practices shall mean schedules of activities, maintenance procedures, and other management practices

utilized to prevent or reduce present and future contamination of ground water which may include irrigation scheduling, proper timing of fertilizer and pesticide application, and other fertilizer and pesticide management programs;

(19) Special ground water quality protection area shall mean any area designated as such by the Director of Environmental Control Quality following a public hearing, with boundaries approved by the Director of Environmental Control Quality, in which contamination of ground water is occurring;

(20) Point source shall mean any discernible, confined, and discrete conveyance, including, but not limited to, any pipe, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, vessel, other floating craft, or other conveyance, over which the Department of Environmental Control Quality has regulatory authority and from which a substance which can cause or contribute to contamination of ground water is or may be discharged;

(21) Allocation shall mean the allotment of a specified total number of acre-inches of irrigation water per irrigated acre per year or an average number of acre-inches of irrigation water per irrigated acre over any reasonable period of time not to exceed five years; and

(22) Rotation shall mean a recurring series of use and nonuse of irrigation wells on an hourly, daily, weekly, or monthly basis or of irrigated acres on an annual basis.

Sec. 6. That section 46-677, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

46-677. After (1) Except as provided in section 8 of this act, (a) after August 30, 1981, any person who desires to withdraw and transfer a total of three thousand or more acre feet of ground water, per year, from aquifers located within the State of Nebraska for industrial purposes shall, prior to commencing construction of any wells, obtain from the director a permit to authorize the such withdrawal and any transfer of such ground water and (b) any person who prior to the effective date of this act has withdrawn ground water from aquifers located in the State of Nebraska for industrial purposes may file an application for a permit to authorize the transfer of such ground water within five years after such date. As used in

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

Sec. 7. That section 46-678, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

46-678. (1) Applications for permits required by section 46-677 shall be on forms provided by the director and shall contain:

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

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

site;

(c) A hydrologic evaluation of the impact of the proposed use on the surrounding area and on existing users;

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

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

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

Sec. 8. Any person who desires to withdraw and transfer a total of less than one hundred fifty acre-feet of ground water per year from aquifers located in the State of Nebraska for industrial purposes to other property within the state which is owned or leased by such person shall provide written notice to the Department of Water Resources and install a water meter or meters that meet the approval of the department. Such notice shall include the amount of the proposed transfer, the point of withdrawal, and the point of delivery and shall be published once each week for three consecutive weeks in a newspaper of general circulation in the county or counties in which the point of withdrawal is located. The withdrawal and transfer may be made without a permit so long as (1) the property which includes the point of withdrawal and the property which includes the point of delivery are owned or leased by the same person, (2) the water is used by such person, and (3) a total of less than one hundred fifty acre-feet of ground water per year is transferred from all sources to the property which includes the point of delivery.

Sec. 9. The director shall have jurisdiction over any ground water withdrawal and transfer made under section 8 of this act. Any person using ground water at the time a notice to transfer is filed under such section whose wells thereafter suffer an unanticipated decline in ground water levels may petition the director for a hearing. Such petition shall specifically set forth the cause and extent of the ground water decline as well as the nature and extent of any injury resulting from that decline. If at such hearing the injured party presents evidence showing that the ground water levels declined as a result of such transfer and shows the nature and extent of any resulting injury, the director may issue an order terminating or conditioning the transfer to eliminate any further injury. If the injured party prevails and an order is issued pursuant to this section, the order shall provide that the person filing the notice of transfer shall pay the costs of the Department of Water Resources and of the injured party, including reasonable attorney's fees. The injured party may maintain a civil action against the person filing the notice of transfer to recover the costs of a hydrologic evaluation. The order of the director may be appealed to the Court of Appeals.

Sec. 10. That section 46-690, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

46-690. Sections 46-675 to 46-690 and sections 8 and 9 of this act shall be known and may be cited as the Industrial Ground Water Regulatory Act. Any reference in such act to sections 46-675 to 46-690

and sections 8 and 9 of this act shall be construed to include section 46-683.01.

Sec. 11. That original sections 46-231, 46-233, 46-288, 46-294, 46-677, 46-678, and 46-690, Reissue Revised Statutes of Nebraska, 1943, and section 46-657, Revised Statutes Supplement, 1992, are repealed.

Sec. 12. Since an emergency exists, this act shall be in full force and take effect, from and after its passage and approval, according to law.