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Water Use Transfers: Current Procedures and Possible Measures for Improvement

Current Legal Requirements of Water Transfers

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Nature of Water and Scarcity Drive Water Appropriation and Transfers



- Water is not “property” in the usual sense
 - Basic human need
 - Not stationary; always moving; quantities always changing
 - Not able to “own” to the exclusion of all others
 - No individual “owns” water; individuals can obtain usufructuary rights in water (right to the use of a commonly owned item)
- “Public trust” doctrine (the state retains oversight)
 - Riparian rights: owners of land bordering water courses have right to use of the water, subject to remedies to downstream users who are harmed by the use
 - Riparian use subject to “reasonable use” as it relates to downstream users

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Nature of Water and Scarcity Drive Water Appropriation and Transfers



- Scarcity in western states gave rise to prior appropriation doctrine (*In re Application A-16642*, 236 Neb. 671 (1990))
 - “first in time, first in right”
 - System of permitting governed by the state
 - All water owned by the state; individuals may obtain a “license” to use the water—a permit—that governs amount, type, and time of use
 - Gives permit holder certain rights to use water *for a beneficial use*
 - Prior appropriation system shapes what kind of economic/water development occurs, how it occurs, how quickly/in what manner it can change
- Prior appropriation incorporates “public interest” aspect (somewhat similar to public trust doctrine)

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Fundamentals In Nebraska Surface Water Law



- Declaration of Water Policy and Ownership of Surface Water in Nebraska
 - Water for irrigation is a “natural want” (Neb. Rev. Stat. § 46-201)
 - Water of every natural stream not previously appropriated (prior to The Act of 1895) is property of the public and dedicated to the use of the people, subject to appropriation (Neb. Rev. Stat. § 46-202)

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Fundamentals In Nebraska Surface Water Law



- Priority
 - *Encourage development by maintaining priority and protecting existing uses*
 - Predictability of investment
 - Know and manage costs of development and operation
 - As between appropriators, first in time, first in right (Neb. Rev. Stat. § 46-203)
- Preference (Neb. Rev. Stat. § 46-204; Neb. Const. art. XV, § 6)
 - *Policy choice as to preferential right to water in times of shortage*
 - Right to divert unappropriated waters denied only when public interest demands it
 - As between same-use appropriators, subject to priority
 - as between different uses, FIRST domestic, SECOND agriculture, THIRD manufacturing and industrial

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Fundamentals In Nebraska Surface Water Law



- Beneficial Use Requirement (Neb. Rev. Stat. § 46-229 to 229.06)
 - *Avoid waste, keep waters usefully employed, avoid water speculation or tying up of rights*
 - All appropriations of water must be for a beneficial or useful purpose
 - “An appropriation right extends only as far as the beneficial use requirement will allow.” *Central Platte NRD v. Wyoming*, 245 Neb. 439 (1994).
 - Right subject to termination
 - when owner of appropriation or successor stops using appropriation for that purpose for more than 5 consecutive years, subject to termination by DNR
 - “beneficial use”: (in context of irrigation water) application of water to land for irrigation purposes; use must be one described in the appropriation
 - adjudication of non-use of appropriation

Appropriation



- “Beneficial Use”
 - *In re Water Appropriation of Hostetler*, 203 Neb. 776 (1979)
 - Authorities in Nebraska have not “precisely defined beneficial use”
 - For irrigation purposes, “beneficial use” requires actual application of the water to the land for the purpose of irrigation
 - For other uses, “beneficial use” includes actual application of water to the land or other beneficial use within the ambit of the appropriation

Appropriation



- Types of appropriations
 - Natural flow (Neb. Rev. Stat. § 46-233)
 - Storage (Neb. Rev. Stat. § 46-241)
 - Storage use (Neb. Rev. Stat. § 46-242)
 - Instream flow (Neb. Rev. Stat. §§ 46-2,107 to 2,119)
- Underground Water Storage
 - Recognition of intentional and incidental water storage associated with an appropriation (Neb. Rev. Stat. §§ 46-295 to 2,106)

Appropriation



- Appropriation Types In Terms of “Rights”:
 - Right to divert natural flow for out of stream use
 - Right to intentionally store natural flow in a surface water reservoir (either on or off the channel) or in an underground reservoir
 - Right to protect natural flow in the stream for fish, wildlife, and recreation
 - Storage use right: right to use water that has already been stored in either a surface water reservoir or intentionally stored in underground reservoir
 - Along with this right comes the right to protect this water from diversion by other users if it is put into a stream for transport to the location of use
 - Incidental underground storage appropriation
 - Recognizes that some water diverted for a direct out of stream use seeps into the ground and is now relied upon by others
 - Directly tied to original appropriation
 - Municipal induced appropriation
 - Recognizes that municipalities have wells that depend on surface water

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Appropriation



- Application for appropriation approved if: (Neb. Rev. Stat. § 46-235)
 - there is unappropriated water in the source of supply named in the application,
 - *In re Application A 15738 of the Hitchcock and Red Willow Irr. Dist.*, 226 Neb. 146 (1987) (holding that “unappropriated” may be measured by whether sufficient water exists for the successful operation of the applicant—the “fairly continuous and dependable” standard)
 - *Central Platte NRD v. Wyoming*, 245 Neb. 439 (1994) (holding, for purposes of instream flow permit, that “unappropriated” is measured by the beneficial use limit of current appropriators on a stream)
 - such application and appropriation when perfected are not otherwise detrimental to the public welfare, and
 - denial of application is not demanded by the public interest (varying but similar factors for different appropriations).
- Priority of application/appropriation dates from date of filing of application with DNR

Appropriation



- Public interest
 - In context of granting appropriation: DNR may “impose such other reasonable conditions as it deems appropriate to protect the public interest” (Neb. Rev. Stat. § 46-235)
- Unused portion of diverted water to be returned to stream (Neb. Rev. Stat. § 46-294)
 - *Northport Irr. Dist. v. Jess*, 215 Neb. 152 (1983)
 - Irrigation district could not pump water from creek that constituted return flows from its irrigation project without permit to appropriate what had become public waters again

Underground Water Storage



- Any approved, unperfected appropriation may apply for modification to include *intentional* underground water storage associated with the appropriation (Neb. Rev. Stat. § 46-297)
 - *Central Nebraska Pub. Power and Irr. Dist. v. Abrahamson*, 226 Neb. 594 (1987): Incidentally stored underground water distinct from groundwater
- Holder of permit for *intentional* underground storage may levy a fee and assess it to land benefited by underground storage that will pump the water for use, except that no fee or assessment can be levied for domestic wells withdrawing the stored water (Neb. Rev. Stat. § 46-2,100)

Instream Appropriations



- Are only for recreation and wildlife purposes (Neb. Rev. Stat. § 46-2,108)
- May be obtained only by Game and Parks or a Natural Resources District (Neb. Rev. Stat. § 46-2,108)
- Subject to review every 15 years after granted (Neb. Rev. Stat. § 46-2,112)

Instream Appropriations



- Shall be approved when DNR finds that:
(Neb. Rev. Stat. § 46-2,108)
 - there is sufficient water to allow for instream appropriation at least 20 percent of time during period requested
 - is necessary to maintain existing recreational uses
 - will not interfere with any senior appropriation

Instream Appropriations



- rate and timing of flow minimum necessary to maintain species
- application is in public interest (Neb. Rev. Stat. § 46-2,116)
 - economic, social, and environmental value of the instream flow for recreational uses, induced recharge for municipal water systems, and water quality maintenance, and
 - economic, social, environmental value of reasonably foreseeable alternative out-of-stream uses of water that will be foregone or accorded junior status if appropriation is granted

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Instream Appropriations



- mediation required before any contested case hearing on an instream appropriation application (Neb. Rev. Stat. § 46-2,117)
- water used for instream appropriation shall be applied only to segment of river identified in permit, and all water passing through segment is available for appropriation thereafter (Neb. Rev. Stat. § 46-2,119)
- *In re Application A-16642*, 236 Neb. 671 (1990) (holding that an appropriation need not be for *diversion* of water from a stream, but may also be for keeping water in a stream)

Groundwater Management and Protection Act



- Neb. Rev. Stat. § 46-714: By Jan. 1 of each year, DNR determines if any river basin is fully appropriated based on long-term use data of existing surface water and groundwater uses
 - Designation of fully appropriated status triggers stays on surface water permits and groundwater well permits, as well as on increases in irrigated acres

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Groundwater Management and Protection Act



- Neb. Rev. Stat. § 46-715: Determination triggers requirement for NRD and DNR to develop Integrated Management Plan; Plan shall include:
 - Goals for sustaining balance between surface water and groundwater uses
 - One or more groundwater controls available in Neb. Rev. Stat. § 46-739
 - One or more surface water controls in Neb. Rev. Stat. § 46-716
- In over appropriated basins, NRD and DNR must adopt IMP to roll back water use to pre-July 1, 1997 levels

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Groundwater Management and Protection Act



- Integrated Management Plan (Neb. Rev. Stat. § 46-715 (4)(c))
 - Ground water and surface water controls adopted shall “protect the ground water users whose water wells are dependent on recharge from the river or stream involved and the surface water appropriators on such river or stream from stream flow depletion caused by surface water uses and ground water uses begun, in the case of a river basin, subbasin, or reach designated as overappropriated or preliminarily determined to be fully appropriated in accordance with section 46-713, after the date of such designation or preliminary determination.”
 - Critical part of IMP, especially for surface water appropriators

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Interbasin Transfers



- Interbasin transfers present unique potential problems because unused return flow will be diverted to other basins instead of used in source basin
- DNR must consider certain public interest factors to approve such transfer (Neb. Rev. Stat. § 46-289)
 - Economic, environmental, other benefits of proposed transfer
 - Any adverse impacts of proposed transfer
 - Current beneficial uses being made of the unappropriated water in the basin of origin
 - Any reasonably foreseeable future beneficial uses of the water in the basin of origin
 - Economic, environmental, other benefits of leaving the water in the basin of origin for current or future beneficial uses
 - Alternative sources of water supply available to the applicant, AND
 - Alternative sources of water available to the basin of origin for future beneficial uses
- Application is 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.”

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Intrabasin Transfers



- Holder of an appropriation may petition DNR for a transfer/change of: (Neb. Rev. Stat. § 46-290)
 - use of the appropriation to a **different location** than that specified in the appropriation
 - appropriation to a **different type of appropriation**
 - Neb. Rev. Stat. § 46-290 lists types of changes in appropriation that can be made
 - the **purpose** for which water is used

Intrabasin Transfers



- induced ground water recharge appropriations and instream appropriations cannot be transferred to a new location, changed to different type, or changed to different purpose (Neb. Rev. Stat. § 46-290(4))
- Instream Flows: appropriation transfers/changes can be made to augment stream flows (Neb. Rev. Stat. § 46-290(5))
 - 457 NAC 6 § 001: beneficial use for instream uses include
 - water quality maintenance
 - water necessary for compliance with compacts, decrees, or other state contracts

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Intrabasin Transfers



- incidental underground water storage appropriation connected to a direct-use appropriation may be transferred upon approval by DNR upon determination that given geologic conditions at the new location, underground storage will occur;
- if incidental underground storage is not approved with a transfer, existing underground storage appropriation may be cancelled or modified in original location
- (Neb. Rev. Stat. § 46-290(6)-(7))

Intrabasin Transfers



- criteria for approving transfers: (Neb. Rev. Stat. § 46-294)
 - new use is a beneficial use
 - new location is in same river basin
 - change or transfer will not adversely affect other appropriators
 - transfer will not result in increase in consumptive use
 - if the appropriation is held by irrigation district, irrigation district must approve
 - if transfer/change is permanent:
 - water use before transfer/change must be in same preference category as water use after transfer/change, OR
 - no preferences are established for the original and changed uses

Intrabasin Transfers



- criteria for approving transfers (continued): (Neb. Rev. Stat. § 46-294)
 - transfer/change will not impair ability of state to comply with a compact or interstate agreement
 - transfer or change is in public interest, considerations to include
 - economic, social, environmental impacts
 - whether other sources of water are available for the uses to be made of transferred appropriation
 - 457 NAC 9 § 002: to determine public interest, DNR shall determine whether benefits of proposed transfer outweigh any adverse impacts, giving consideration to economic, social, and environmental impacts, and whether other sources of water are available for the uses to be made of transferred appropriation
- **Appropriation successfully changed/transferred retains same priority as original appropriation** (Neb. Rev. Stat. § 46-294(3))

Intrabasin Transfers



- applicant has burden of proving criteria for approval, except that if current and new use are for irrigation, acres will not increase, and location of diversion will not change, then presumption that criteria are met (Neb. Rev. Stat. § 46-294(2))
- DNR may impose any reasonable conditions necessary to protect public interest, to ensure criteria are met, or to administer appropriation
 - If necessary to avoid harm to other appropriators, DNR shall require that historic return flows be maintained/replaced in
 - Quantity,
 - Timing, AND
 - Location

Facilitating Transfers



- Science vs. Law
 - Science side of transfers uses precision as its guidepost
 - Legal considerations of transfers may not require absolute precision, but are bounded by legal notions such as reasonableness, not arbitrary or capricious, supported by the evidence
 - Consequences impact facilitation of transfers

Facilitating Transfers



- “Public Interest” Inquiry
 - *In re Application A-16642*, 236 Neb. 671 (1990)
 - “Nebraska’s constitutional right to appropriate can and must be limited by the demands of the public interest.”
 - Neb. Const. art. XV, section 6 “does not prescribe the manner by which the public interest is to be determined nor the mechanisms by which it may be accomplished”
 - All factors in the public interest inquiry need not be reduced to economic terms
 - *In re Applications A-16028, et al.*, 242 Neb. 315 (1993)
 - Constitution’s provision regarding the public interest is not self-executing; it is left to the Legislature to determine when appropriation of waters may be curtailed for reasons of the public interest
 - Various factors provided in the statutes for determining the public interest are the means by which the Legislature has executed the public interest inquiry
 - Is reliance on “public interest” inquiry one way to avoid some impracticalities of hyper-precision in transfer considerations?
 - Might it foster greater flexibility/speed in adjudicating transfers?
 - *In re Application A 15738 of the Hitchcock and Red willow Irr. Dist.*, 226 Neb. 146 (1987) (recognizing complexity and time required in individualized study of appropriation requests)
 - Over 30 days of hearings
 - 5,600 pages of direct testimony
 - 3,000 pages of exhibits
 - 400 technical exhibits
 - Books and treatises exceeding 400 pages in length

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Facilitating Transfers



- “Public Interest” Inquiry
 - Legal considerations
 - Limits of delegated legislative power
 - *Central Nebraska Pub. Power and Irr. Dist.*, 226 Neb. 594 (1987)
 - » “Delegation of legislative power is most commonly indicated where the relations to be regulated are highly technical or where regulation requires a course of continuous decision.”
 - » “This court has recognized the difficulties inherent in requiring the Legislature to spell out each standard in complex fields in areas where expanding technology and complex theories daily change.”
 - Limits of legislative power
 - Prohibition of unreasonable, arbitrary, discriminatory, confiscatory conditions
 - *In re Applications A-16027*, 243 Neb. 419 (1993)
 - » “It is for the Legislature to decide in the first instance what is and what is not a public purpose, but its determination is not conclusive on the courts.”
 - » “Whether or not legislation is in the public interest is generally a question for legislative determination; however, under the guise of regulation in the public interest, the Legislature may not impose conditions which are on their face unreasonable, arbitrary, discriminatory, or confiscatory.”

Facilitating Transfers



- “Public Interest” Inquiry
 - Legal considerations (continued)
 - Lack of due process for vagueness
 - Whether judgment conforms to law, arbitrary, capricious, unreasonable, supported by competent and relevant evidence
 - *In re Application A 15738 of the Hitchcock and Red Willow Irr. Dist.*, 226 Neb. 146 (1987) (setting standard of review following contested hearing regarding surface water appropriation by DNR)
 - Constitutional/statutory factors as part of analysis
 - What factors may be considered?
 - In what order?
 - » *Central Platte NRD v. City of Fremont*, 250 Neb. 252 (1996) (holding that the Constitution does not require a particular sequence of findings regarding the public interest).
 - In what contexts?

Facilitating Transfers



- “Public Interest” Inquiry
 - Considerable discretionary authority recognized by the Nebraska Supreme Court
 - “The predecessor to the Department of Water Resources was viewed as having been made the guardian of the public welfare in the appropriation of the public waters of the state, necessarily devolving upon it a large discretion in such matters [of approving an appropriation on the basis of the public interest].”
 - *In re Application A 15738 of the Hitchcock and Red Willow Irr. Dist.*, 226 Neb. 146 (1987)



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