



Rembolt | *Celebrating 40 years*
Ludtke

Groundwater Transfers and Related Transactions Under Nebraska Law

What Are We Transferring?

Who Can Do It?

Who (If Anyone) Must Approve It?

David J. A. Bargaen

skillful counsel | successful clients

We Find the Way[®]

Rembolt | Ludtke LLP

Fundamentals in Nebraska Groundwater Law



- Definitions
 - Groundwater: that water which occurs in or moves, seeps, filters, or percolates through ground under the surface of the land (Neb. Rev. Stat. § 46-706(2))
 - Beneficial use: that use by which water may be put to use to the benefit of humans or other species (Neb. Rev. Stat. § 46-706(19))

Fundamentals in Nebraska Groundwater Law



- Generally, groundwater and surface water in Nebraska governed under separate legal regimes
- Will focus on groundwater for purposes of this discussion

Celebrating 40 years

Fundamentals in Nebraska Groundwater Law



- All water is owned by the State of Nebraska “for the benefit of its citizens” (Neb. Rev. Stat. § 46-702)
 - Property owner has no private property interest in groundwater prior to capture (*Spear T Ranch, Inc. v. Knaub*, 269 Neb. 177 (2005))
 - “English Rule” (or “absolute ownership rule”): property owner had absolute ownership of the waters under his/her land, and could withdraw any quantity desired; focused on protecting property rights of landowners (*Spear T Ranch, Inc. v. Knaub*, 269 Neb. 177 (2005))
 - Not generally the rule in the United States

Fundamentals in Nebraska Groundwater Law



- Compare to surface water:
 - The water of every natural stream is declared to be the property of the public and is dedicated to the use of the people of the state, subject to appropriation (Neb. Rev. Stat. § 46-202)
 - “Water for the purposes of irrigation in the State of Nebraska is hereby declared to be a natural want.” (Neb. Rev. Stat. § 46-201)

Fundamentals in Nebraska Groundwater Law



- Landowners do not own the groundwater under their property, but under Nebraska common law, have a “limited private property right” to the **use** of that groundwater (*Sorenson v. Lower Niobrara Natural Resources District*, 221 Neb. 180 (1985))
- Such right to **use** of groundwater under one’s land is a derivative right immediately dependent upon ownership of the surface over a source of water; that is, the right to **use** of groundwater is “appurtenant” to the overlying land (*Sorenson v. Lower Niobrara Natural Resources District*, 221 Neb. 180 (1985))

Celebrating 40 years

Fundamentals in Nebraska Groundwater Law



- Common law of groundwater in Nebraska (California Rule of Correlative Rights): (*Bamford v. Upper Republican Natural Resources District*, 245 Neb. 299 (1994))
 - Owner of land is entitled to appropriate subterranean waters found under his/her land, but s/he cannot extract and appropriate them
 - >in excess of a **reasonable and beneficial use**
 - >**upon the land which s/he owns**,
 - (especially if such use is injurious to others who have substantial rights to the waters), and
 - >**if the natural underground supply is insufficient for all owners**,
 - >each is entitled to a **reasonable proportion of the whole**

Celebrating 40 years

Fundamentals in Nebraska Groundwater Law



- This is a modification of the “American Rule”
 - Landowner has no proprietary interest in the groundwater (*Prather v. Eisenmann*, 200 Neb. 1 (1978))
- Legislature has the power to determine public policy regarding groundwater and can alter the common law governing the use of groundwater (*Bamford v. Upper Republican Natural Resources District*, 245 Neb. 299 (1994))
 - “It is therefore declared to be the policy of the State of Nebraska to control, make use of and apply to beneficial use all available water of this state to a direct and supplemental use of such waters for domestic, manufacturing, irrigation, power and other beneficial uses.” (Neb. Rev. Stat. § 46-502)

Celebrating 40 years

Fundamentals in Nebraska Groundwater Law



- **> reasonable use**

- “reasonable use” relates to the manner in and purpose for which water is used upon the overlying land
- a use reasonably related to enjoyment of the overlying land (*Spear T Ranch, Inc. v. Knaub*, 269 Neb. 177 (2005); *Prather v. Eisenmann*, 200 Neb. 1 (1978))

- **> beneficial use**

- that use by which water may be put to use to the benefit of humans or other species (Neb. Rev. Stat. § 46-706(19))

Fundamentals in Nebraska Groundwater Law



- **> right to use on overlying land**
 - Common law only allowed the use of groundwater upon the overlying land
 - Legislature has since passed laws that altered the common law, allowing for use of groundwater on land other than the overlying land through physical “transfers” pursuant to various statutory provisions permitting transfers for municipal, domestic, agricultural, and groundwater remediation uses, pursuant to permitting process overseen by Dept. of Natural Resources and local NRD (Chapter 46, Art. 6)
 - *Physical* transfer of water relates to the “right to use on overlying land” element of common law rule

Celebrating 40 years

Fundamentals in Nebraska Groundwater Law



- **> if the natural underground supply is insufficient for all owners**
 - Preference statute: If supply is insufficient, preference given to domestic over all uses, agricultural over industrial and manufacturing uses, to fulfill reasonable and beneficial uses (Neb. Rev. Stat. § 46-613; *Prather v. Eisenmann*, 200 Neb. 1 (1978))
 - Similar rule for surface water: Between similar users, priority of appropriation governs (first in time, first in right); when waters of stream insufficient for all uses, domestic has priority over all other uses, agricultural use has priority over manufacturing use (Neb. Rev. Stat. § 46-204)
 - After preference, or as between same users, then reasonable proportion of the whole
 - Legislature has passed statutes regulating how the determination is made that groundwater supply is insufficient
 - Nebraska Groundwater Management and Protection Act (Neb. Rev. Stat. §§ 46-701 to 46-754 (LB 962))
 - Statutory authority for NRDs to develop Groundwater Management Areas based on reduced availability of groundwater
 - Statutory authority for DNR to declare river basins fully or over appropriated considering current and projected uses of hydrologically connected surface water and groundwater

Fundamentals in Nebraska Groundwater Law



- > each is entitled to a reasonable proportion of the whole
 - Legislature has passed statutes regulating what reasonable proportion of the available groundwater supply may be used
 - Nebraska Groundwater Management and Protection Act (Neb. Rev. Stat. §§ 46-701 to 46-754 (LB 962)
 - Authorizes NRDs and DNR to set regulations
 - *Right to use of reasonable proportion* transfer relates to “entitlement to reasonable proportion of the whole” element of common law rule

Legislature Authorizes NRDs To Regulate Groundwater in Nebraska



- NRDs established by Legislature to manage natural resources, including groundwater (Chapter 2, Art. 32)
- Duties (Neb. Rev. Stat. § 2-3229):
 - Develop and execute, pursuant to law, plans, facilities, works, and programs relating to
 - Water supply for any beneficial uses
 - Development, management, utilization, and conservation of groundwater and surface water

Celebrating 40 years

Legislature Authorizes NRDs To Regulate Groundwater in Nebraska



- Powers granted by Legislature to NRDs:
 - NRDs may purchase or lease groundwater rights from landowners pursuant to the GWMPA—Chapter 46, Art. 6, and surface water rights pursuant to Chapter 46, Art. 2 (Neb. Rev. Stat. § 2-3226.04)
 - Purchase accomplished through written agreement between NRD and landowner (Neb. Rev. Stat. § 2-3226.01(3))
 - NRDs may acquire and dispose of water rights pursuant to Chapter 46, Art. 2 (Neb. Rev. Stat. § 2-3233)
 - NRDs may list lands within the district susceptible of irrigation from district sources, and levy assessments against lands to which water service is furnished (Neb. Rev. Stat. § 2-3239)

Groundwater Management and Protection Act



- Intent: to regulate groundwater depletion (Neb. Rev. Stat. § 46-702)
- NRDs granted authority to: (Neb. Rev. Stat. § 46-707)
 - **Adopt rules and regulations necessary to discharge duties under the GWMPA**
 - Require well meters to collect data
 - Issue cease and desist orders to stop withdrawal of water from illegal wells
 - Issue moratoriums on drilling new wells
 - Establish Groundwater Management Areas to protect quantity, quality, and resolve conflicts between surface water and groundwater users (Neb. Rev. Stat. § 46-712)

Celebrating 40 years

Groundwater Management and Protection Act



- NRDs must adopt Groundwater Management Plan (Neb. Rev. Stat. § 46-709)
 - Available groundwater supplies in district
 - Past, present, potential groundwater uses in district
 - Set goals for life of aquifer
 - Boundaries of any proposed Groundwater Management Area
 - Management Plans must be adopted by DNR

Celebrating 40 years

Groundwater Management and Protection Act



- Neb. Rev. Stat. § 46-712: If NRD establishes Groundwater Management Area, must adopt one or more controls listed in Neb. Rev. Stat. § 46-739:
 - **Allocate amount of groundwater users may withdraw**
 - System of rotation for use
 - Well spacing requirements
 - Require meters on wells
 - Reduction of irrigated acres
 - Limit or prevent expansion of irrigated acres or beneficial use of water
 - May require NRD approval of transfer of groundwater off overlying land
 - **May require NRD approval of transfer of rights to use groundwater that result from NRD-imposed allocations or other NRD restrictions**
 - Ensure consistency with Management Area
 - Prevent adverse effects on other groundwater or surface water users
 - Prevent adverse effects on compliance with interstate compacts or agreements
 - Protect public interest
 - Wells constructed in a Management Area require permit from NRD (Neb. Rev. Stat. § 46-735)

Celebrating 40 years

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
- 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

Celebrating 40 years

Groundwater Allocations



- Allocations must specify total number of acre inches allowed per irrigated acre per year, or may allow allocation to be averaged over period of time (Neb. Rev. Stat. § 46-740(1))
- May use allocation on all or any part of irrigated acres to which allocation applies (Neb. Rev. Stat. § 46-740(1))
- Governed by NRD regulations (Neb. Rev. Stat. §§ 46-739, 740)

Groundwater Controls Vary By NRD



- Central Platte NRD: No allocations; restrictions on new irrigated acres—must have offset for any new irrigated acres
- North Platte NRD: Allocations per irrigated acre per year
- URNRD and MRNRD: Allocations per irrigated acre over five-year period
- Some allocations can be carried over; North Platte NRD caps carryover
- Overuse of allocations is penalized
- NRD regulations provide that further controls (i.e. allocation or amount of irrigated acres allowed) could be imposed

Celebrating 40 years

Transfer of Rights to Use Groundwater?



- Thus, landowners receive from the governing NRD certain rights to use of groundwater under their land
- What are those “rights?”
- Can those rights be “transferred” to another user?
- What does “transfer” mean?
- Can any “transfer” be accomplished without approval of the local NRD?
- What is the value of whatever is transferred?

Transfer of Rights to Use Groundwater?



- “Transfers” that are subject to NRD regulations
 - Neb. Rev. Stat. § 46-739: By statute, NRD may require approval of transfer of *rights to use groundwater that result from NRD-imposed allocations* or other NRD restrictions
 - Ensure consistency with Management Area
 - Prevent adverse effects on other groundwater or surface water users
 - Prevent adverse effects on compliance with interstate compacts or agreements
 - Protect public interest
 - NRD regulations differ by district as to specific standard applied for allowing transfers

Transfer of Rights to Use Groundwater?



- Types of “transfers” of right of use
 - Pooling of allocations
 - Allocations *among a group of irrigators, or among different tracts of same irrigator*, may be “divvied up” differently than how allocations were originally assigned, so long as overall consumptive use does not increase
 - Transfer of allocations (per NRD regulations)
 - Transfer of irrigated acres (retiring irrigated acres in favor of allowing irrigation on other acres not previously irrigated)

Transfer of Allocations Governed By Individual NRD Regulations



- NRD regulations (MRNRD, URNRD, NPNRD) contain limitations on transfer of allocations based on:
 - Whether proposed new use is a beneficial use (MRNRD)
 - Whether offsets are obtained (URNRD)
 - Whether new net depletions to the hydrologic system will occur (NPNRD)
 - CPNRD does not have allocations, but does not allow any new irrigated acres without offsets; uses a “water bank” (really an accounting of acres certified for irrigation but not being irrigated, and “deposited” for use as offsets later) to “store” offsets
 - Whether allocation transfer meets specific geographical limitations based on:
 - Effect on stream depletion (MRNRD)
 - Where allocation is being moved vis-à-vis a fully appropriated and over appropriated basins
 - Allocation transfer is extinguished if land from which transfer is taken ceases to be used for agricultural purposes

Celebrating 40 years

When We're Talking Transfers: What "Rights" Do Landowners Have in Use of Groundwater to Transfer?



- Common law of correlative rights modified by statute, such that landowners only have the right to pump underlying groundwater pursuant to governing NRD regulations (URNRD as example):
 - Allocations (URNRD Groundwater Control Rules 8-10)
 - NRD approves number of acres to be granted allocation of water
 - Base allocation (2008-2012): 65 acre- inches per certified irrigated acre over the 5-year period, 13 acre-inches on annualized basis
 - Carry forward unused balance
 - Can "bank" unused balances for use in subsequent allocation period
 - Certified irrigated acres in any land or irrigation retirement program (Conservation Reserve, EQIP, CREP) receive no allocation while enrolled
 - Full offset required for industrial use beyond base allocation (new use in Quick Response Area requires offset in Quick Response Area; otherwise, new use requires offset within same floating township or in Quick Response Area)
 - Allocations for all wells "may be amended, reduced, increased, or made subject to limitations or conditions by the Board upon notice and hearing"
 - *Additional reductions in allocations* may be made when needed in "water short years" to maintain compliance with Republican River Compact

Celebrating 40 years

When We're Talking Transfers: What "Rights" Do Landowners Have in Use of Groundwater to Transfer?



- Pooling (transfer) of allocations
 - For use within same floating township (contiguous 36 sections)
 - Pooling contracts regulated through NRD
- Irrigated acre certification and restriction
 - Annual report by landowners to NRD (URNRD)
 - No additional irrigated acres without Board approval
- Physical transport of water in/out of NRD subject to all affected NRD regulations

Celebrating 40 years

When We're Talking Transfers: Can Those "Rights" Be Transferred to Another User? Yes, BUT.....



- What does "transfer" mean?
 - URNRD Groundwater Control Rules 1.45: "Transfer shall mean any arrangement approved by the Board in which the point of withdrawal, the point of use, or the type of use of an allocation is altered"
- Neb. Rev. Stat. § 46-739: By statute, NRD may require approval of transfer of *rights to use groundwater that result from NRD-imposed allocations* or other NRD restrictions
 - Ensure consistency with Management Area
 - Prevent adverse effects on other groundwater or surface water users
 - Prevent adverse effects on compliance with interstate compacts or agreements
 - Protect public interest

Celebrating 40 years

When We're Talking Transfers: Can Those "Rights" Be Transferred to Another User? Yes, but...



- URNRD Groundwater Control Rule 11:
 - NRD must approve "transfer of all or a portion of any ground water allocation or acres to another tract or use"
 - Thus, another of the "rights" landowners have in their groundwater is to transfer allocations or certified acres to another tract or use *pursuant to NRD regulations* (i.e., prior approval)
 - Owners of all lands involved in transfer must consent
 - Transfers conditioned upon
 - Ensure consistency with Management Area
 - Prevent adverse effects on other groundwater or surface water users
 - Prevent adverse effects on compliance with interstate compacts or agreements
 - Protect public interest
 - NRD may require offsets or limit transfers to historical consumptive use of receiving well
 - Expedited transfer procedure if:
 - All acres transferred are within a township or floating township
 - Transfer does not result in net increase in certified or irrigated acres
 - Receiving tract must have been previously irrigated
 - Only existing wells can be used to irrigate resulting tracts

Celebrating 40 years

So, who, what, how, when, where of groundwater transfers...



- It is fundamental that transferor can only transfer what s/he has; transferee of right to use of groundwater (really, right, or “license,” to irrigate under NRD regulations) can obtain only that which the transferor has to give
 - Means transferee subject to same regulation by NRD to which transferor was subject
 - Regulations can change
- Transfer of right to use of groundwater (either through allocation or certification of irrigated acres) must be accomplished with involvement of URNRD

So, who, what, how, when, where of groundwater transfers...



- LB 477—Neb. Rev. Stat. §§ 46-739.01-.03: Notification/consent requirements for transfer of “certified water uses” or “certified acres”
 - Does not apply to transfers of allocations
 - NRD may not approve transfer unless information is submitted regarding lienholders of record on land from which transfer would be taken
 - “[W]ritten consent to such transfer . . . shall be obtained from each such lienholder.”
 - Approved instrument of “transfer of the right to use groundwater” filed by NRD with register of deeds “in the same manner as conveyances of real estate.”
 - Groundwater is not property
 - Right to use groundwater is a “usufructuary right” (right to its use and to the profits from its use); no property right in the water itself
 - Right to use of groundwater is not a mineral right (*Springer v. Kuhns*, 6 Neb. App. 115 (Neb. Ct. App. 1997))
 - Groundwater cannot under common law be severed from land and traded as a separate piece of the realty
 - All groundwater owned by the State
 - Yet, this requirement seems to treat groundwater as a mineral right or portion of the realty

So, who, what, how, when, where of groundwater transfers...



- To be legally consistent, these provisions should be understood as a notice provision to lienholders and potential purchasers regarding impact on value of land
 - Statute does not say transfer cannot be approved by NRD if lienholders do not consent
 - What if NRD does approve transfer where consent not given?
 - Statute says transfer of use of groundwater does not impact rights of lienholder not reflected in the title report and from whom required consent is not obtained; such lienholders may bring an action for any damages to value of lien caused by transfer
 - Thus, matter of protecting landowner from recourse by lienholders?

So, who, what, how, when, where of groundwater transfers...



- Easement/covenant
 - Contract whereby landowner gives up right to use groundwater in exchange for payment
 - If idea is that purchaser thereby obtains right to use groundwater on his/her property, such use would be subject to applicable NRD regulation, and thus would in effect be a transfer of allocation or irrigated acres, or offset
 - Transfers require approval by NRD (URNRD)
- Lease
 - A type of easement that has a specified duration
- Conservation easement
 - Requires governmental and/or nonprofit involvement with certain restrictions
- Easements are interests in land, so would have to be recorded
 - To be effective, likely must have NRD involvement
 - What if private parties come to easement agreement, but NRD does not approve use of groundwater (in amount, in geographic location, for purpose, etc.) that purchaser thought s/he was buying?
 - Could make “conditioned upon NRD approval,” but then easement rights are unclear

So, who, what, how, when, where of groundwater transfers...



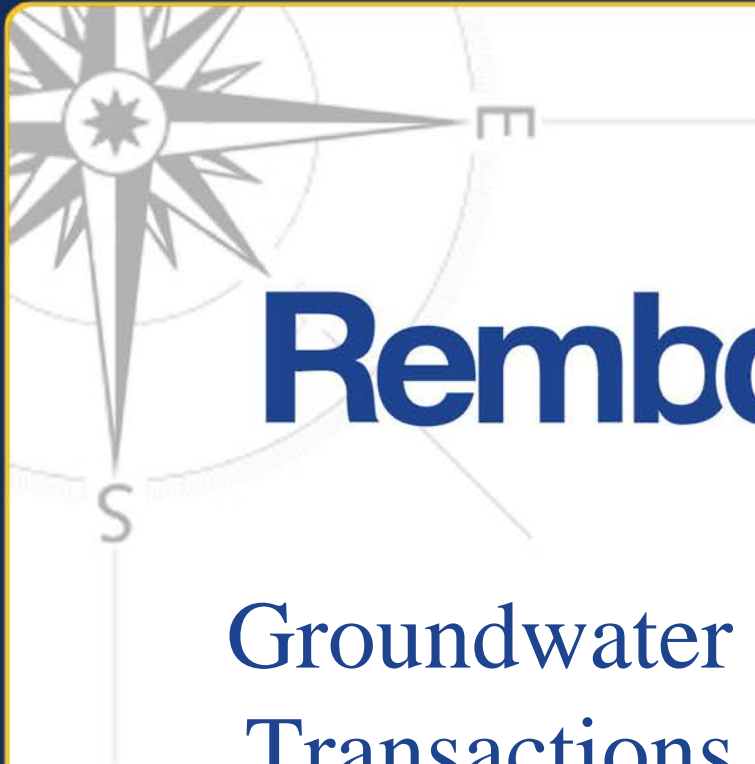
- Know the nature of the transaction
 - No ownership of groundwater
 - All groundwater belongs to the State of Nebraska for the benefit of its citizens
 - Groundwater is NOT a mineral right, and groundwater may not be “severed” from overlying land in the manner of a mineral right
 - Closest analogous action would be physical transport of groundwater off land, which requires permit from Department of Natural Resources

So, who, what, how, when, where of groundwater transfers...



- Only have that right to use of groundwater as established by statute, and particularly by NRD regulations
 - A form of “license” to use the State’s water
- Know the applicable statutes
- Know the particular NRD regulations
- Involve the NRD
- Involve lienholders
- Know that Nebraska does not have a true “water market” because of nature of statutory and regulatory regime
- Always ask, “What do I have to transfer” and “What am I getting in this transfer?”

Celebrating 40 years



Celebrating 40 years

Rembolt | Ludtke

Groundwater Transfers and Related Transactions Under Nebraska Law

David J. A. Bargaen
dbargaen@remboltludtke.com

skillful counsel | successful clients

We Find the Way[®]

Rembolt | Ludtke LLP