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Water Use Transfers: Current Procedures and Possible Measures for Improvement

Current Legal Requirements of Water Transfers

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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 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



- ***Compare to Ground Water***
- 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))

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

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
 - 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



- ***Compare to Ground Water***
- 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

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

Appropriation



- Application for appropriation approved if: (Neb. Rev. Stat. § 46-235)
 - there is unappropriated water in the source of supply named in the application,
 - 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.
- Priority of application/appropriation dates from date of filing of application with DNR

Appropriation



- "Public interest"
 - In context of *intrabasin* transfers: considerations "shall include" (Neb. Rev. Stat. § 46-294)
 - 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
 - In context of *interbasin* transfers: considerations "shall include" (Neb. Rev. Stat. § 46-289)
 - Variety of factors including economic, environmental, and other benefits of proposed transfer
 - Any adverse impacts
 - "Application shall be 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"

Appropriation



- 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)
- In context of instream appropriations, DNR must consider the follow factors:
 - 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

Appropriation



- Unused portion of diverted water to be returned to stream (Neb. Rev. Stat. § 46-294)

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.”

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

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 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 is 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))

Interbasin 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

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)
- 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

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)

Transfers Involving Irrigation Districts



- Irrigation district, reclamation district, public power and irrigation district, rural water district, or mutual irrigation or canal company shall hold all appropriations filed in its name *for the benefit of* the owners of land to which the appropriations are attached (46-2,121)
- District may file an application for transfer of appropriation
 - land served by district or within district may receive appropriation transferred from land under that appropriation IF
 - owner of land under current appropriation and owner of canal, etc. subject to transfer consent in writing to transfer
 - water allotment on receiving land will not exceed that which can be beneficially used
 - water will be used on receiving tract in same preference category as that of tract transferring
 - aggregate water use will not increase

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)

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

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

Groundwater Management and Protection Act



- 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)

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

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

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**

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

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

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 approved 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
 - 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 to NRD (URNRD)
 - No additional irrigated acres without Board approval
 - Physical transport of water in/out of NRD subject to all affected NRD regulations

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



- 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.....



- 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
 - Simply 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
 - 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?”

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
 - Reliance on “public interest” inquiry one way to avoid some impracticalities of hyper-precision in transfer considerations?
 - Greater flexibility/speed in adjudicating transfers?

Facilitating Transfers



- “Public Interest” Inquiry
 - Legal considerations
 - Limits of delegated legislative power
 - Limits of legislative power
 - Prohibition of unreasonable, arbitrary, discriminatory, confiscatory conditions
 - Lack of due process for vagueness
 - Arbitrary, capricious, unreasonable, not supported by the evidence
 - Constitutional/statutory factors as part of analysis
 - What factors may be considered?
 - In what order?
 - In what contexts?

Facilitating Transfers



- “Public Interest” Inquiry
 - Considerable discretionary authority
 - “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.”
 - *In re Application A 15738 of the Hitchcock and Red Willow Irr. Dist.*, 226 Neb. 146 (1987)



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Current Legal Requirements of Water Transfers

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