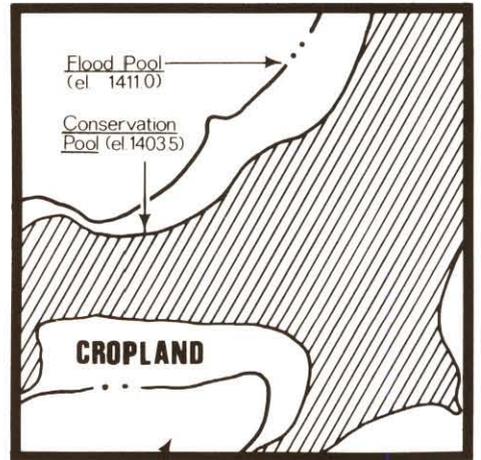
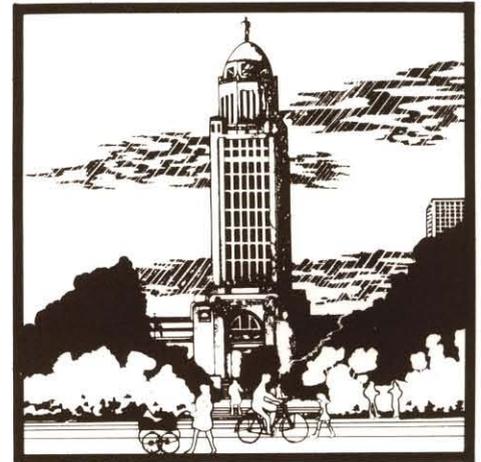


Report # Seven
 POLICY ISSUE STUDY
 ON SELECTED
 WATER RIGHTS ISSUES

TRANSFERABILITY OF SURFACE WATER RIGHTS

State Water Planning and Review Process
 Nebraska Natural Resources Commission

May 1983



UPDATE

The content of this report, including the recommendations section, was approved by the Natural Resources Commission in October of 1982. "Interim Final" copies of it were made available in November. Early in the 1983 session of the Nebraska Legislature, Senator Loran Schmit introduced Legislative Bill 21, a bill dealing with the issue addressed in this report. That bill has been adopted by the Legislature and has been signed by Governor Robert Kerrey. While the provisions of LB 21 do not correspond in every detail with the Commission's recommendations, the basic conclusion arrived at by the Commission — that Nebraska water law ought to allow some forms of voluntary transfer of surface water rights — has already been accepted.

Since enactment of LB 21 occurred before this report could be printed in final form, consideration was given to not completing the printing process. However, it was felt that the information contained herein will be of value in the future as refinements and additions to LB 21 may be considered. The report has therefore been printed just as approved in October of 1982. As a result, the portions relating to or affected by the status of Nebraska policy will no longer be current when LB 21 becomes effective three months after the 1983 Legislature adjourns in late May.

THE READER IS CAUTIONED TO KEEP THE PROVISION OF LB 21 IN MIND AS THIS REPORT IS BEING REVIEWED. A COPY OF THE BILL AS ENACTED INTO LAW HAS BEEN PRINTED IN THE BACK OF THIS REPORT AS APPENDIX C.

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**POLICY ISSUE STUDY
ON
SELECTED WATER RIGHTS ISSUES**

STATE WATER PLANNING AND REVIEW PROCESS

REPORT # 7 TRANSFERABILITY OF SURFACE WATER RIGHTS

**REPORT
OF THE
NATURAL RESOURCES COMMISSION
TO
GOVERNOR ROBERT KERREY
AND
THE MEMBERS OF THE NEBRASKA LEGISLATURE**

MAY 1983

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PROGRAMS:

SOIL & WATER CONSERVATION
WATERSHED PROTECTION
COMPREHENSIVE PLANNING
FLOOD PLAIN MANAGEMENT
DATA BANK
WATER CONSERVATION FUND
DEVELOPMENT FUND



STATE OF NEBRASKA
NATURAL RESOURCES COMMISSION

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The Honorable Robert Kerrey
Governor, State of Nebraska
State Capitol, 2nd Floor
Lincoln, Nebraska 68509

Members of the Nebraska Legislature
Eighty-eighth Nebraska Legislature, First Session
State Capitol
Lincoln, Nebraska 68509

Governor Kerrey and Members of the Legislature:

This report entitled "Transferability of Surface Water Rights" has been reviewed and approved by the Natural Resources Commission. It is the seventh report of the Selected Water Rights Issues policy study.

Three policy alternatives are analyzed in this report. They relate to whether Nebraska law ought to be modified to allow water rights to be transferred from one place to another and from one type of use to another. The Commission's recommended course of action is also provided and can be found on the blue pages immediately following the Table of Contents.

It is the hope of the Natural Resources Commission that this report will be helpful in making policy decisions, and, if necessary, statutory changes. The Natural Resources Commission is prepared to answer any further questions you may have.

Sincerely,

A handwritten signature in cursive script that reads "Clinton VonLoggen".

Chairman
Natural Resources Commission

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Foreword

This is report number seven of the Selected Water Rights Issues Policy Study. Several water policy issue studies are being conducted by the Natural Resources Commission under the Nebraska State Water Planning and Review Process. This report addresses the issue of whether rights to use surface water should be transferable apart from the land to which they are attached.

The base document for this report was prepared primarily by Norman Thorson, Professor of Law, University of Nebraska College of Law, with the assistance of an interagency task force. Members of the task force and the agencies represented are as follows:

James R. Cook Natural Resources Commission (*Leader*)
Richard Hansen Department of Environmental Control
J. Michael Jess Department of Water Resources
William Lee Department of Health
Darryll Pederson Conservation & Survey Division, UNL
J. David Aiken Water Resources Center, UNL
Karen E. Langland Policy Research Office
Gerald Chaffin Game & Parks Commission
John Alloway Department of Agriculture

Three members of the Commission were assigned the responsibility for considering comments on the report received at public hearings, in writing, and from the Public Advisory Board and for suggesting changes in and recommendations on the report. The committee members are:

Henry P. Reifschneider, Chairman
Robert W. Bell
Rudolf C. Kokes

Other reports prepared as part of the Selected Water Rights Issues Policy Study include:

Preferences in the Use of Water
Drainage of Diffused Surface Water
Water Rights Adjudications
Property Rights in Groundwater
Riparian Rights
Interstate Water Uses and Conflicts

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INTRODUCTION AND PURPOSE

The responsibility of the Natural Resources Commission in preparing policy issue study reports is twofold. First, the Commission is responsible for presenting policy alternatives which are both representative in scope and objective in substance. It is hoped that this report accomplishes that purpose. Second, the Commission is responsible for providing its opinion and recommendations on the various alternatives presented in each report to the general public, the Legislature, and the Governor.

The Commission arrived at the following recommendations after a review of the report and consideration of comments generated from public hearings and from the Public Advisory Board.

RECOMMENDATIONS

While the Commission does not believe that a market system allowing complete transferability of water rights from one location to another and from one use to another is needed or desired in Nebraska at this time, we are of the opinion that transfers ought to be allowed in three limited situations as follows:

- (1) Voluntary transfers of water rights to municipalities ought to be authorized. These transfers can involve a change in the type of use, in the place of use, and the point of diversion.
- (2) Voluntary transfers of water rights for irrigation purposes ought to be authorized within the boundaries of irrigation districts, mutual irrigation companies, reclamation districts, public power and irrigation districts, and irrigation project areas of natural resources districts. However, except as noted in (1) above, such transfers should involve only exchanges in the land being irrigated and should not include changes from agricultural uses to any other type of use.

- (3) Except as noted in (1) above voluntary transfers of water rights for irrigation purposes should be authorized other than in project irrigation areas if they are between adjoining lands under the same ownership and if no change in type of use is involved.

Our recommendation that transferability of surface water rights be made available to municipalities is an attempt to better prepare the State of Nebraska for the future. According to the report on *Municipal Water Needs* (released in March, 1983), 81% of Nebraska's population lives in areas served by a municipal water system, yet the total demand of those municipal systems for all municipal use is only three to five percent of all the water used in this state. At present, only a small portion of that three to five per cent is derived directly from surface water sources, but greater reliance on surface supplies can be expected in the future if present trends in declining groundwater levels continue. Because surface water supplies are already extensively committed in many areas, that source will not be available to municipalities unless they have some capability to convert water rights presently utilized for other purposes to those for municipal use. Voluntary sales of water rights by existing users to municipalities is one desirable way to achieve the intended objective.

Our recommendation that irrigation water rights also be transferable to the extent noted in situations (2) and (3) is an effort to recognize land use changes and to improve water use efficiency. Transfers in these limited situations would not alter the amount of water diverted from the natural stream. Impacts on other users should be nonexistent or extremely minimal. Whether authority for transfer of water rights from one agricultural use to another should be further extended should not be decided until the restricted transfer policy recommended here has been adopted and has been subjected to the test of time.

In essence, what the Commission is recommending in this report is a modified and limited implementation of *Alternative #2*. For all three types of transfers recommended, the Commission believes that a number of the

options discussed as a part of *Alternative #2* ought to be adopted. Transfers should not be authorized without state oversight. Approval should be obtained from the Department of Water Resources before any transfers are implemented. The approval procedure should include the following elements, all of which are derived from the options identified under *Alternative #2*:

- (1) All interested parties should be given notice and an opportunity to be heard. (Option (a).
- (2) Transfers should be approved only if adversely affected users are fully and fairly compensated. (Option c) **NOTE:** Since our recommendation is to allow only voluntary transfers between willing sellers and willing buyers, this element should be implemented in a way which is consistent with that philosophy. If a particular transfer would adversely affect other users and such users are unwilling to accept the compensation offered by the proponents of the transfer, the transfer ought to be disapproved. To provide otherwise would be to create what would essentially be an eminent domain authority over those adversely affected users, a result we believe inconsistent with the intent of voluntary transfers.
- (3) The amount of water subject to transfer should not exceed the amount of water consumed in the original use. (Option (d).
- (4) Transfers should not be approved if they do not appear to be in the public interest. (Option (e).

- (5) Transfers should be disapproved if the transfer would cause an unreasonable adverse effect on the habitat of fish or wildlife, or on the recreational or aesthetic value of the stream. (Option (f). **NOTE:** Implementation of this option should be in accordance with the Commission recommendations on the *Policy Issue Study on Instream Flows*. The condition imposed by this element should apply only on those stream segments which the Natural Resources Districts have designated as protected stream reaches. Where transfers were being considered on other streams, this element should not apply.
- (6) The burden of sustaining the desirability of any transfer should be on the proponent of the transfer (Option (j).

Even with the changes proposed by these recommendations, Nebraska's laws regarding transfers of surface water rights would be more restrictive than those of most of the other western states. The Commission believes that it is advisable to proceed cautiously regarding the sale of water rights. Short term economics could perhaps be better served by a free market system for water rights, but we are not convinced that over the long term Nebraska would benefit from that type of system. In addition, social and political values cannot and should not be ignored. The current prohibitions on transfer of surface water rights are part of those values and should not be suddenly overturned without a clear showing of need.

Introduction

This report was prepared to provide policy decision-makers with information relevant to voluntary transfers of surface water rights in Nebraska, and whether current policy should be changed to encourage such transfers.

Surface water rights in Nebraska are either riparian or appropriative. The most significant rights clearly are those established by prior appropriation. Consequently, the issue of surface water right transfers is confined largely to the transfer of appropriation rights. Although riparian rights are discussed briefly, they are likely not a proper subject for transfer absent quantification. The issue of quantifying riparian rights and integrating them into a prior appropriation system is the subject of a separate policy issue study.

With some possible exceptions, surface water rights in Nebraska are not transferable under current law. The inability to transfer water rights results from holding that such rights are appurtenant to the land where used and incapable of severance from the land. One consequence of a no transfer rule is that water use patterns are fixed over time by the order in which appropriation permits are acquired. Water cannot be transferred to more efficient uses or users even if no one objects to the transfer.

Chapter One of this report summarizes current Nebraska law by tracing the history of the appurtenancy rule. A distinction is made between riparian rights, appropriation rights that vested prior to April 4, 1895, and appropriation rights that vested subsequent to April 3, 1895. It is concluded that either as a matter of law or practicality, voluntary surface water transfers are prohibited in Nebraska.

Chapter Two discusses voluntary surface water transfers in other western states. Nebraska stands alone in prohibiting such transfer. The general requirements of transfer systems used by other states are discussed and the chapter concludes with an overview of transfer policies in each of the other sixteen western states.

The major reason for permitting voluntary surface water right transfers is to facilitate an economically efficient allocation of water. The economic justifications for, and consequences of, voluntary surface water right

transfers are discussed in **Chapter Three**. **Chapter Three** also discusses legal consequences of voluntary transfers.

Chapter Four responds to the analysis developed in the earlier three chapters by developing three policy alternatives. One alternative is accompanied by ten options to be considered in implementing the alternative. Each alternative and option is described in detail and indications of how it could be enacted are provided. To the extent they can be determined, the external impacts of adopting each alternative or option are discussed.

The final chapter, **Chapter Five**, is devoted to explaining the relationship between this report and all other policy issue reports produced or to be produced as part of the State Water Planning and Review Process. Relationships are developed for many of the studies being conducted. The value of **Chapter Five** to the decision-maker is to alert him or her to how other issues can be affected by decisions relating to the transferability of surface water rights.

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Summary

CURRENT SITUATION

The Transferability Issue

For all practical purposes, surface water rights in Nebraska cannot be transferred voluntarily. The consequences of a no transfer rule have caused the rule to be questioned. These consequences are illustrated by the following examples:

- 1) A Nebraska farmer owns land with an attached irrigation appropriation right. If he purchases an adjacent tract of land that lacks an appropriation but that is better suited for irrigation, he cannot choose to irrigate the new tract of land and retain his appropriation.
- 2) If the same farmer decides to increase his acreage of wheat and decrease his acreage of corn or if he reduces his acreage of row crops to participate in a federal farm program, he cannot lease a portion of his water right to a neighbor.
- 3) If the same farmer wants to use a portion of his water right to water livestock or operate a cannery he will be unable to do so.
- 4) The same farmer will be unable to sell or lease his water right to upstream or downstream users, even if such users are willing and able to pay more for the right than the farmer could earn from using the right himself.
- 5) A potential industrial user that would employ five hundred workers cannot purchase even a modest portion of the farmer's water right, no matter how much money they offered and no matter how badly the farmer wanted to sell. New industrial users must exploit dwindling supplies of groundwater or locate their plants in other states.

This policy issue study analyzes whether this non-transfer policy should be changed to one that would encourage voluntary transfers.

Nebraska Law

Surface water rights in Nebraska can be grouped into three categories: 1) riparian rights; 2) appropriative

rights vesting prior to April 4, 1895; and 3) appropriative rights vesting subsequent to April 3, 1895. Under Nebraska case law, riparian rights clearly are non-transferable from place to place; however, the use made of the water can change. Since passage of the Irrigation Act of 1895, Nebraska appropriation statutes have required that an application to appropriate water for irrigation must include a description of lands to be irrigated. Case law interpreting these statutes holds that post-1895 surface water appropriation rights are tied inseparably to the land. The only Nebraska surface water rights that arguably are transferable are those appropriations that vested prior to passage of the Irrigation Act on April 4, 1895. Currently, however, no administrative framework exists to facilitate transfers of pre- 1895 appropriative rights.

Law of Other States

Nebraska is the only one of the seventeen western states to prohibit voluntary transfers of surface rights. While other states permit or encourage such transfers, the transfers are subject to various limitations. The most significant and universal limitation is that transfers may not injure other appropriators. Other limitations found in some states include special rules governing inter-basin transfers, limits designed to protect the public interest, rules restricting transfers to preferred uses only, and rules that make water rights appurtenant to the land absent formal severance of the right.

Need to Examine Policy Alternatives

In a market economy voluntary transfers allow the movement of resources to their highest and best uses, a necessary condition if resources are to be used most efficiently. If transfers of water rights effectively are barred, inefficient allocations of water are institutionalized. Any resulting problems become more severe as increasing scarcity makes water more valuable.

Allowing voluntary transfers of water rights, however, would not result automatically in economically efficient use of water. Injury to third parties caused by transfers might offset the economic gains of the transfer. Such transfers would not be efficient. Mechanisms to protect third party rights, while necessary, increase the cost

of transfers and make it likely that some efficient transfers will not occur. The existence of voluntary surface water rights transfers in all western states but Nebraska, however, offers persuasive evidence of the need to examine the alternatives in Nebraska.

ALTERNATIVE LEGISLATIVE POLICY ACTIONS

The ultimate policy issue addressed by this report is a very simple one: shall voluntary transfers of water and water rights be permitted or shall they continue to be prohibited. Consequently, only three major alternatives are presented below.

Alternative #1: Make no change in existing law respecting the transferability of surface water rights.

Alternative #2: Provide that surface water rights may be freely severed from the land and transferred to a new use or a new location of use without loss of priority, provided that such transfers are approved in accordance with law.

Option a): Establish an administrative mechanism to consider approval of water transfers, assuring interested parties of notice and an opportunity to be heard.

Option b): Provide that existing transfers will be approved only if it can be demonstrated that existing appropriators are in no way injured by the transfer.

Option c): Provide that transfers will be approved only if adversely affected users are fully and fairly compensated.

Option d): Provide that the amount of a transfer shall not exceed the amount of water consumed in the original use.

Option e): Provide that transfers may not be approved if the transfer does not appear to be in the public interest.

Option f): Provide that transfers will be disapproved if they would cause an unreasonable adverse effect on the habitat of fish or wildlife, or on the recreational or aesthetic value of the stream.

Option g): Provide that transfers of water rights will only be permitted from one use to a similar use.

Option h): Provide that surface water rights can only be transferred to a preferred use.

Option i): Provide that surface water rights can only be transferred within the boundaries of an irrigation district, mutual irrigation company, reclamation district, public power and irrigation district, or irrigation project area of a natural resources district.

Option j): Provide that the burden of sustaining the desirability of any transfer is on the proponent of the transfer.

Alternative #3: Institute a water banking system to facilitate a market in surface water rights.

Alternative #1 would preserve the current prohibition against voluntary transfers. Inefficient water use patterns would continue to be institutionalized. On the other hand, third parties would be given maximum protection in the enjoyment of their rights.

Alternative #2: would permit voluntary transfers by providing for the severance of water rights from the land. Transfers would be subject to administrative approval. Option a) would guarantee third parties notice of proposed transfers and an opportunity to be heard. Options b) and c) would incorporate alternative formulations of the no injury rule to protect third party rights. Option d) would limit the amount of water that would be transferred to the amount consumed in the original use. Option e) and f) would incorporate general and specific protections for the public interest. Options g) and h) would limit the types of use changes that could be approved. Option i) would limit the type of locational changes that could be approved. Finally, Option j) would place the burden of complying with statutory or administrative requirements on the transferor.

Alternative #3 would go beyond *Alternative #2* and institute a water banking system to facilitate a market in water rights. All transfers would be funneled through a "bank" that would bring willing buyers and sellers together. A high degree of hydrologic sophistication would be required, and only available at great cost.

RELATIONSHIP TO OTHER STUDIES

Water policy issues cannot be decided in a vacuum. One water policy issue can affect or be affected by other water policy issues. Significant relationships were found to exist between this study and the *Instream Flow Study*, the *Water Quality Study*, the *Groundwater Reservoir Management Study*, the *Water Use Efficiency Study*, the *Municipal Water Needs Study*, the *Supplemental Water Supplies Study*, and several of the reports issued in conjunction with the *Selected Water Rights Issues Study*.

CHAPTER 1

TRANSFER OF SURFACE WATER RIGHTS IN NEBRASKA

INTRODUCTION

This policy issue study is concerned with whether, and if so under what conditions, surface water rights can or should be marketed or otherwise transferred in Nebraska. Transferability is considered generally to be an essential element of an efficient system of property rights.¹ If property rights cannot be transferred, voluntary exchanges cannot be used to shift resources from less valuable to more valuable uses. Given the central role of transferability in a market economy, most states today permit voluntary transfers of surface water rights provided the changes cause no injury to the rights of others.² Nebraska law, however, is generally construed as prohibiting voluntary transfers of surface water rights.³

The purported prohibition on transfers of water rights in Nebraska is not as simple or absolute as it might appear at first glance. As the following material indicates, some surface water rights in Nebraska can be transferred, but only at great expense and inconvenience. Clearly, current policy discourages voluntary transfers. The purpose of this study is to analyze whether this non-transfer policy should be changed to one that would encourage voluntary transfers.

The degree to which surface water rights can be transferred in Nebraska depends on the nature of the right held. In this chapter Nebraska law relating to the transfer of riparian rights, the transfer of pre- 1895 appropriation rights, and the transfer of post- 1895 appropriation rights is discussed.

Riparian Rights

Historically, water was not viewed by the law as a marketable resource. Running water was treated as common property,⁴ consequently rivers were not susceptible of ownership.⁵ Rather, water rights were limited to rights of flow and restricted rights to consume for domestic purposes.⁶ These common property rights, known as riparian rights, became part of the common law of Nebraska.⁷ The nature of the riparian right was discussed at length in the landmark case of *Crawford Co. v. Hathaway*.⁸ In *Crawford*, the riparian right was

described as part and parcel of the land.⁹ In *Wasserbarger v. Coffee*¹⁰ riparian land was defined as land that was riparian on April 4, 1895 and that had not since lost its riparian status by severance.¹¹ Taken together, the two cases stand clearly for the proposition that riparian rights in Nebraska cannot be transferred apart from the riparian land.

A corollary question is whether the **water** represented by a riparian right could be transferred to a non-riparian user. Again, the answer seems clearly not. In Nebraska, the extent of a riparian right is determined by the reasonableness of use on riparian land as correlated to the similar rights of all other riparians reasonably to use water on their riparian lands.¹² Thus, a riparian right must be distinguished from an unqualified right to use a reasonable share of the flow. Consequently, if a riparian purported to transfer water to a non-riparian, the transfer would at best be enforceable only between the parties. Other riparians or appropriators would be free to object to the transfer.¹³

APPROPRIATION RIGHTS ACQUIRED PRIOR TO APRIL 4, 1895

Current appropriation law in Nebraska is based on the Appropriation and Irrigation Law of 1895,¹⁴ an act that became effective on April 4, 1895. Prior to April 4, 1895, water rights in flowing waters could be acquired either by purchasing or patenting riparian land [riparian rights] or by appropriating water and applying it to beneficial use [prior appropriation]. *Crawford Co. v. Hathaway*¹⁵ made it clear that Nebraska recognized common law prior appropriation rights in addition to common law riparian rights.¹⁶ Furthermore, beginning in 1877, Nebraska legislatively recognized prior appropriation.¹⁷

Prior to passage of the 1895 Act, however, appropriative rights were not specifically attached to a particular tract of land.¹⁸ Consequently, pre- 1895 appropriations theoretically are transferable. Since 1895, however, any such transfers have been subject to the administrative control of the state.¹⁹ A transfer of a pre-1895 appropriation right to a new location can be approved provided that others are not injured by the

transfer.²⁰ While it is not likely that a court would find an absolute right to transfer pre- 1895 appropriation rights, such transfers are not precluded by existing law.

APPROPRIATION RIGHTS ACQUIRED SUBSEQUENT TO APRIL 3, 1895

Since passage of the Act of 1895, Nebraska appropriation statutes have required that an application for a permit to appropriate water for irrigation must include a description of the land to be irrigated and the amount of land to be irrigated. The current version of the statute reads as follows:

46-233. Application for water; time of making; contents; procedure. (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 but that in connection with projects undertaken or completed September 20, 1957, such application for a permit to make such appropriation may be made, filed, accepted, and allowed at a time subsequent to the happening of any of the conditions described in subdivisions (a), (b), or (c) of this subsection of this section.

(2) **The application, required by the provisions of subsection (1) of this section shall be upon a form prescribed by the Department of Water Resources and furnished by such 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, (e) the estimated time required for its completion, which shall embrace 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 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 and the amount thereof,** and (h) any additional facts which may be required by the department.

(3)²¹

This section has been interpreted as making water

rights appurtenant to the described lands.²² To the extent that a water right remains appurtenant to the land, the water right cannot be transferred apart from the land and conversely, when the land is sold the right to use water is sold with it. Thus, the general rule in Nebraska seems to be that post- 1895 surface water rights cannot be severed from the land and sold.

Subsection (g) of section 46-233 also requires that the application for water identify “the purpose for which water is to be applied. . . .” Except for the preferences provisions discussed later in this chapter, no authority is granted in Nebraska law to change this purpose of use once the appropriation is granted. Therefore, if the right to use is to be maintained, the water must not only be used on the land to which it is attached—it must be used for the purpose stated in the appropriation.

While the right to use water is appurtenant to the land, Nebraska statutes do provide for changes in the point of diversion, provided that approval is given by the Department of Water Resources.²³ Presumably, any such changes would be subject to a provision that others would not be injured by the change.²⁴ Although it can be argued that authority to change the point of diversion includes authority to change the place of use, such an interpretation is belied by the legislative history of the section.²⁵

Although **water rights** themselves do not appear to be transferable under current law, a provision in the general irrigation statutes does authorize a limited exchange of **water** contained in a storage reservoir for water that constitutes the natural flow of a stream.²⁶ The purpose of the provision is to facilitate irrigation of lands located upstream from a storage reservoir with storage water. The rights of prior appropriators specifically are protected by the statute, however.²⁷

One other section of the Nebraska statutes appears to authorize limited transfers of water. This section relates to the operation of irrigation districts. **Neb. Rev. Stat. § 46-158²⁸** provides that landowners within an irrigation district can request that rules and regulations be promulgated by the board such “that a system be provided for the **interchange of water** from one tract of land to another at the option of the owner or lessee of any lands within such district at any time,” This section must be read in conjunction with **Neb. Rev. Stat. § 46-122,²⁹** which provides: “[i]t is hereby expressly provided that all water distributed for irrigation purposes shall attach to and follow the tract of land to which it is applied,” Section 46-122 repeats a requirement that surface **water rights** are appurtenant to the land. Section 46-158(3), however, evidently authorizes limited transfer of **water** from one tract to another. Although the language of § 46-158(3) leaves considerable room for doubt, it would appear that the section applies only to a single owner who owns multiple tracts of land within an irrigation district³⁰ and then only if each tract in question carries with it an appurtenant water right.³¹ If appropriate rules were promulgated, however, a qualifying landowner presumably

could pool his water rights and, at his sole discretion, allocate the sum total of his water allocations among his separate tracts of land. Again, the limited transfer right is subject to a requirement that rights of other appropriators be protected.³²

In addition to the limited ability to transfer **water** from one tract to another as discussed above, two theoretical means exist to transfer the **water right** itself. The first means of transferring a water right is by exercising a constitutional preference.³³ If water is in short supply, the holder of a higher preference right may acquire the right of a lower preference user through voluntary transfer³⁴ or by condemnation if the higher preference user possesses the power of eminent domain.³⁵ Although not free from doubt, exercise of a preference probably results only in a right to interfere with a prior use, not in a complete transfer of the right itself.³⁶

A second means of acquiring a water right from prior appropriators relies on a landowner's ability to abandon a vested right rather than on the exercise of preferences. Surface water rights in Nebraska are in the nature of incorporeal hereditaments. Consequently, they can be abandoned.³⁷ In addition, surface water rights are subject to statutory forfeiture if they are not put to beneficial use for a period of more than three consecutive years.³⁸ Consequently, water rights can be indirectly transferred by paying a prior appropriator to abandon his claim or forego water use for the statutory forfeiture period. The effect of such a move, however, is not to transfer water to another party but merely to free up additional quantities of water in a stream. A potential purchaser of a water right, therefore, may have to pay for the cancellation or abandonment of several prior rights if he is to improve his priority position enough to meet his water needs. Thus, all water rights in Nebraska potentially are subject to transfer, but only at great cost.

SUMMARY

Despite some limited exceptions to the general rule, surface water rights in Nebraska currently cannot be economically transferred apart from the land. Consequently, water is allocated to those who first made use of the water, not to those who can currently make the best use of the water. Voluntary transfers that could facilitate the highest and best use of water are not available.

FOOTNOTES

- 1 See, e.g., R. Posner, *Economic Analysis of the Law* 29-31, (2d ed. 1977).
- 2 See generally, Gould, "Conversion of Agricultural Water Rights to Industrial Use," 27 *Rocky Mt. Min. L. Inst.* 1791 (1982).

- 3 See generally, Fischer, Harnsberger, & Oeltjen, "Rights to Nebraska Stream Flows: An Historical Overview with Recommendations", 52 *Neb. L. Rev.* 313, 370-71 (1973).
- 4 According to Chancellor Kent, "[e]very proprietor of lands on the banks of a river, has naturally an equal right to use of the water which flows in the stream adjacent to his lands, as it was want to run . . . without diminution or alteration." J. Kent, *Commentaries on American Law* § 439.
- 5 See generally, 2 W. Blackstone, *Commentaries* § 395.
- 6 5 Powell, *Law of Real Property* § 712 (1949).
- 7 *Clark v. Cambridge & Arapahoe Irrigation & Implementation Co.*, 45 *Neb.* 798, 64 *N.W.* 239 (1895).
- 8 67 *Neb.* 325, 93 *N.W.* 781 (1903).
- 9 *Id.* at 340, 93 *N.W.* 786.
- 10 180 *Neb.* 149, 141 *N.W.2d* 738 (1966).
- 11 *Id.* at 158, 141 *N.W.2d* at 745.
- 12 See generally, Fischer, Harnsberger, & Oeltjen, *supra* note 3, at 327-27.
- 13 See generally, *Restatement (Second) of Torts* § 856, Comment d, (1977).
- 14 1895 *Neb. Laws* ch. 69.
- 15 67 *Neb.* 325, 93 *N.W.* 781 (1903).
- 16 *Id.* at 364, 93 *N.W.* at 794.
- 17 1877 *Neb. Laws* 168.
- 18 *Farmers Canal Co. v. Frank*, 72 *Neb.* 136, 138, 100 *N.W.* 286, 286-87 (1904).
- 19 *Farmers & Merchants Irrigation Co. v. Gothenburg Water Power & Irrigation Co.*, 73 *Neb.* 223, 102 *N.W.* 487 (1905).
- 20 Although no explicit authority exists for imposition of a no injury rule, it is likely that such a restriction would be applied especially since controlling statutes in the pre- 1895 era contained no injury language. See generally 3 Hutchins, *Water Rights Laws in the Nineteen Western States* 341 (1977).
- 21 *Neb. Rev. Stat.* § 46-233 (Reissue 1978) (emphasis added).
- 22 *Farmers Canal Co. v. Frank*, 72 *Neb.* 136, 100 *N.W.* 286 (1904).
- 23 *Neb. Rev. Stat.* § 46-250 (Reissue 1978).
- 24 See generally Hutchins, *supra* note 20, at 341 (discussing legislative history of *Neb. Rev. Stat.* § 46-250).
- 25 See generally Hutchins, *supra* note 20, at 341-42.
- 26 *Neb. Rev. Stat.* § 46-242 (Reissue 1978).
- 27 "... the rights of prior appropriators shall not be adversely affected by such exchange of water." *Id.*
- 28 *Neb. Rev. Stat.* § 46-158 (Reissue 1978).
- 29 *Neb. Rev. Stat.* § 46-122 (Reissue 1978).
- 30 The relevant statutory language purports to permit interchange of water at the option of the **owner** or **lessee** of lands in the district. Use of the singular suggests an intent to limit the option

to individuals who own or lease multiple tracts of land.

31 This would seem to follow from use of the word "interchange" in the statute which implies the existence of mutual rights.

32 **Neb. Rev. Stat. § 46-158** (Reissue 1978).

33 Preferences are the subject of a separate policy issue study.

34 **See generally**, *Hickman v. Loup River Public Power Dist.*, 173 Neb. 428, 113 N.W.2d 617 (1962).

35 **See generally**, *North Loup River Public Power and Irrigation Dist. v. Loup River Pub. Power Dist.*, 142 Neb 141, 5 N.W.2d 240 (1942).

36 **See, Preferences in the Use of Water** 1-7 to 1-8 (Task Force Report to the Nebraska Natural Resources Commission, April, 1981).

37 Corporeal interests, such as those in real property, cannot be abandoned. Incorporeal interests, however, are subject to abandonment. **See, e.g.**, *State ex. rel. Sorensen v. Mitchell Irrigation Dist.*, 129 Neb. 586, 262 N.W. 543 (1935).

38 **Neb. Rev. Stat. § 46-229.02** (Reissue 1978).

CHAPTER 2

TRANSFER OF SURFACE WATER RIGHTS IN OTHER STATES

INTRODUCTION

All western states except Nebraska authorize owners of surface water rights to transfer those rights to others, who in turn are free to use the water in a different place or for a different purpose.¹ The ability to transfer appropriation rights has long been recognized in most western states.² Most western courts viewed appropriation rights as property that could be transferred freely in contrast with the doctrine of riparian rights which treated water rights as incidents of land ownership.³ Since the appropriation right arose only as a result of application of water to beneficial use, the right was deemed to be a separately transferable property interest apart from the land.⁴ While voluntary transfers of water rights in the western states today are quite common,⁵ such transfers are subject to a wide variety of administrative procedures designed to ensure that the rights of other water users are not adversely affected by the transfer.

As discussed in Chapter One, transfers of surface water rights can involve changes in the point of diversion, changes in the use of appropriated water, changes in the location of use of appropriated water, or some combination thereof.⁶ All western states recognize the right to change a point of diversion,⁷ including Nebraska.⁸ Unlike Nebraska, however, most states also permit changes in purpose or place of use, although such changes are subject to a wide variety of restrictions.

Limitations on the free transfer of surface water rights generally are of five types: 1) appurtenancy requirements; 2) preferences limitations; 3) transbasin diversion restrictions; 4) public interest restrictions; and 5) the "no injury" requirement.⁹ Each of the major limitations is discussed below.

Most western states provide that water rights are appurtenant to the land.¹⁰ Nebraska, however, seemingly is alone in holding that water rights are **inseparable from the land**. Other states that adhere to the appurtenancy rule provide that water rights can be severed from the land and transferred apart from the land.¹¹ The appurtenancy rule, under such circumstances, merely serves to transfer a water right with

the land absent severance of the right. The few states that do not provide for unrestricted severance of the water right generally authorize such severance for particular purposes.¹² In short, only Nebraska appears to tie water rights inseparably to the land in virtually all instances.

A second restriction on transfers of water rights found in some western states is a provision limiting changes in use to superior or preferred uses.¹³ Such provisions inevitably have as their purpose the imposition of legal impediments to the conversion of agricultural water rights to industrial water rights.¹⁴ At times, the agricultural preservation objective of the legislative restrictions is clear on the face of the statute.¹⁵

A third limitation on free transfer of water rights found in some western states is directed at interbasin transfers of water.¹⁶ Nebraska's interbasin transfer law,¹⁷ for instance, undoubtedly would apply to voluntary transfers of surface water if Nebraska law were changed to facilitate such transfers. In most western states, however, no specific limits on interbasin transfers are imposed; rather, the basin of origin is given limited protection by the "no injury" rule.

A fourth restriction on unlimited transfers of western water rights is the imposition of a public interest requirement. Nearly all western states provide that an initial appropriation application can be rejected if it is not in the public interest.¹⁸ If initial rights are conditioned on meeting a public interest test, it would seem to follow that a transfer of rights also should be subject to a public interest standard. Otherwise, an individual could acquire a right by transfer that he would be unable to acquire by initial appropriation. Since transfers may increase or decrease the amount of flow through certain reaches of a river without necessarily adversely affecting any vested rights, application of a public interest criterion may have important consequences. Three western states clearly apply a public interest test to proposed transfers of surface water rights.¹⁹

The final, and most significant limitation on the transferability of surface water rights is the so-called "no injury" rule. Transfers are approved only insofar as they do not injure the rights of others.²⁰ Thus, junior appropriators are protected from adverse effects caus-

ed by the transfer of senior rights. Junior appropriators, in effect, are entitled to rely on stream conditions in effect at the time they make their appropriations. Senior appropriators, of course, are protected by their priority date.

Other appropriators can be adversely affected by transfers in a number of ways.²¹ Appropriations are measured by the amount of water diverted rather than the amount of water consumed. Consequently, downstream appropriators can be injured by a transfer if the transferor consumes a greater proportion of the water diverted than did the transferee prior to the transfer. Alternatively, the transfer might be outside the basin or downstream from the existing use thereby depriving certain landowners of the return flows to which they had been accustomed. Consequently, under the no injury rule, only the amount of water consumed can be transferred.²² If a diversion is moved downstream on an effluent stream,²³ the amount of the transfer right must be reduced by the loss of water in transit.²⁴ Similarly, if a water right is used only seasonally, as is commonly the case for an irrigation appropriation, only the seasonal consumption is a proper subject for transfer.²⁵

Limiting the transfer of surface water rights to the amount of water consumed does not entirely eliminate transfer induced injuries to other appropriators. Transfers that rearrange the position of priorities on a stream can cause injury even if the total amount of water consumed declines.²⁶ For example, moving a senior right upstream may deprive intervening junior appropriators of the full quantity of their rights.²⁷ Similar, though less severe, problems accompany downstream transfers.²⁸ The complexity of the problem suggests that agencies should be given great flexibility if transfers are to be permitted in the face of a no injury rule.

Given the complexity of the no injury rule, placement of the burden of proof can have a substantial impact on whether or not a transfer will be approved.²⁹ In nearly all western states, the burden of proof is on the proponent of the change. Thus, the transferor has the burden of demonstrating that other appropriators will not be injured by the terms of the proposed transfer. While the precise enforcement of this burden varies from state to state,³⁰ the end result of the burden is a legal bias against transfers.

Transfers of water rights often require creative solutions if the no injury rule is to be satisfied.³¹ Thus, statutory provisions must be broadly drafted to give water right administrators flexibility in fashioning solutions. In essence, most of the legislation in the western states that facilitates voluntary transfers of surface water rights does so by removing legal barriers to transfers or by establishing broad criteria to be followed in approving transfers. Because flexibility is needed to comply with the many permutations of "no injury" transfers, the technical features of specific transfers are left to administrative discretion.

The following material summarizes the law of surface water transfers in the sixteen other western states.

TRANSFERS IN WESTERN STATES

Arizona

Arizona statutes specifically provide for the assignment of appropriation permits.³² To avoid losing priority upon the transfer of a right, however, the following conditions must be met:

- 1) Transfers must be approved by a water rights administrator.
- 2) Vested rights to use water must not be affected by the transfer.
- 3) The water rights to be transferred must have been perfected and not lost by forfeiture or abandonment.
- 4) Transfer of water rights from lands within an irrigation district requires approval of the district.
- 5) Transfer of water rights from lands within a watershed or drainage area that supplies water to an irrigation district requires approval of the district.
- 6) A show cause hearing is held on any proposed transfers giving those adversely affected by a transfer an opportunity to object.³³

California

California case law has long held that appropriation rights were transferable property interests.³⁴ Today, statutes expressly make it the established policy of the state "to encourage the voluntary transfer of water and water rights . . ."³⁵ To facilitate this policy, changes in the point of diversion, the place of use, or the purpose of use are authorized subject to approval of a water rights administration board.³⁶ Before granting approval of such changes the board must be satisfied that the change "will not operate to the injury of any legal user of water involved."³⁷ In addition, the board must disapprove a transfer request if it would "unreasonably affect fish, wildlife, or other instream uses. . ."³⁸

Colorado

Colorado courts have held that the right to make a change of use is an inherent property right that can always be enforced provided that the rights of others are not injuriously affected by the change.³⁹ Colorado statutes define "change of water right" to include changes in the type, place, or time of use, changes in

the point of diversion or the means of diversion, and changes in the type or location of storage.⁴⁰ Proponents of a change of water right must seek approval of the change in a Colorado Water Court.⁴¹ Application for a change of water right must include a description of the water right, its amount and priority, and a description of the proposed change. After notice, a hearing is held on the proposed change and the change is to be approved if evidence establishes that the plan will not injuriously affect the holders of vested or conditional water rights.⁴² If likely injury is demonstrated, the proposed change can be approved subject to additional terms and conditions that include, but are not limited to, limitations on use of the transferred right and limitations on the time of use of the transferred right.⁴³

Idaho

Idaho statutes provide for changes in the point of diversion, period of use, place of use, or nature of use of existing rights.⁴⁴ Applications are subject to approval of the director of the department of water resources who must grant approval provided no other water rights are injured, the change does not enlarge the original right, and the change is in the local public interest as defined by statutes.⁴⁵

Kansas

Kansas statutes give water right owners the right to change the place of use, the point of diversion, or the use made of water without loss of priority.⁴⁶ Before a change is approved the owner of the right must demonstrate that the proposed change is reasonable and will not impair existing rights and that the proposed change relates to the same local source of supply as that to which the water right relates.⁴⁷

Montana

Water rights in Montana are appurtenant to the land and normally pass with a conveyance of the land.⁴⁸ Upon approval of the department that administers water rights, however, a water right can be severed from the land and transferred.⁴⁹ Transfers involving change of the point of diversion, place of use, purpose of use, or place of storage must be approved if the proposed change does not adversely affect the rights of other persons.⁵⁰ An additional restriction is placed on the conversion of agricultural water rights to other uses. An appropriator of more than 15 cubic feet per second cannot change the appropriation use from agricultural to industrial.⁵¹ The department may approve proposed changes subject to conditions, restrictions, and limitations that it feels are necessary to protect the rights of other appropriators, including limitations on the time for completion of a change.⁵²

Nevada

Nevada allows assignment of water permits, but such assignments are binding only between the parties unless the assignment is filed for record in the office of the state engineer.⁵³ Water right holders must apply to change the place of diversion, manner of use, or place of use.⁵⁴ After notice⁵⁵ and an opportunity for protest,⁵⁶ the state engineer makes a decision on the application. Requests are to be approved unless they will impair existing rights or be detrimental to public welfare.⁵⁷ In all instances, the state engineer may require submission of such additional information as will enable him properly to guard the public interest.⁵⁸

New Mexico

The right to transfer water rights generally is recognized by New Mexico law.⁵⁹ Irrigation rights are appurtenant to the land but can be severed by the landowner and transferred to other locations provided the changes are made without detriment to existing rights as demonstrated in an application to the state engineer.⁶⁰ Appropriate notice must be given to interested parties before the application can be approved.⁶¹ Changes in the purpose of use or the point of diversion are also authorized by statute subject to similar conditions.⁶²

North Dakota

North Dakota law permits the assignment of water rights subject to approval of the state engineer.⁶³ The assignment will be approved provided the transferor offers "reasonable proof" that such assignment or transfer can be made without detriment to existing rights.⁶⁴ A change in the purpose of use, however, may only be exercised for a superior use as defined in North Dakota statutes.⁶⁵

Oklahoma

Oklahoma statutes provide that irrigation water rights are appurtenant to the land but that such rights can be severed from the land and used if "it should at any time become impracticable to beneficially or economically use water for the irrigation of any land to which the right of use of same is appurtenant."⁶⁶ This provision apparently has never been interpreted. The severed right can be transferred to another parcel of land provided a water right administration board, after notice and hearing, determines that the change can be made without detriment to existing rights.⁶⁷ Any permit to appropriate water can be assigned to another party upon filing for record in the office of the board.⁶⁸

Oregon

Owners of water rights in Oregon may change the use, place of use, or point of diversion in all cases by complying with specified procedures.⁶⁸ Briefly, an owner seeking a change must file an application containing specified information,⁷⁰ the director must give notice by publication,⁷¹ and a hearing must be held if objections are filed.⁷² If a hearing is required, the director is authorized to approve the transfer if he finds the proposed change can be effected without injury to existing rights.⁷³

South Dakota

South Dakota laws authorize changes in the place of diversion, storage, or use as prescribed by statute.⁷⁴ Furthermore, permits explicitly can be assigned.⁷⁵ Although irrigation rights are generally appurtenant to the land,⁷⁶ they can be severed and transferred to other land provided it becomes impracticable to use the water economically or beneficially on the original tract and provided the change is not detrimental to existing rights.⁷⁷ The terms "economically or beneficially impracticable" have not been construed by the South Dakota Supreme Court. Except for the no injury rule, however, the transfer of irrigation rights is not restricted if the water transferred is to be used by a municipal or common distribution system for specified domestic purposes, schools, hospitals, fire protection, or similar uses.⁷⁸ Furthermore, certain post-1977 rights may not be protected by the no injury rule.⁷⁹

Texas

Texas statutes do not directly address the issue of how water rights transfers are accomplished, but regulations exist governing changes in use, place of use, and point of diversion.⁸⁰ Texas courts have long recognized the ability of a water right holder to transfer use or place of use subject to administrative approval.⁸¹ Furthermore, various Texas statutes clearly contemplate transfers. It is illegal, for instance, to sell a permanent water right unless the right has been perfected by a certified filing or an authorization has been obtained.⁸² Any change in reservoirs, canals, or diversion works also require approval.⁸³ Finally, Texas statutes define permanent water rights as easements that pass with the land⁸⁴ and provide that a written instrument conveying a permanent water right can be recorded in the same manner as any other instrument conveying an interest in land.⁸⁵

Utah

Utah statutes allow water right holders to change the point of diversion, the use, or the place of use of water

provided the transfer does not impair vested rights **without just compensation.**⁸⁶ All permanent changes require approval of the state engineer who makes his recommendations after investigation and after notice and a hearing if vested rights are affected.⁸⁷ Applications are not automatically rejected, however, if vested rights are adversely affected; rather, applications can be approved as to part of the water involved or upon condition that adversely affected rights be acquired.⁸⁸

Washington

Washington statutes provide that water rights are appurtenant to the land.⁸⁹ Such rights can be severed and transferred, however, if a change can be made without detriment or injury to existing rights.⁹⁰ Those seeking to transfer water rights to a new use or place of use must file a formal application with the supervisor of water resources.⁹¹ Approval is withheld until notice is given and an opportunity to comment has expired.⁹²

Wyoming

In Wyoming, water rights are appurtenant to the land and cannot be detached except as specifically provided for by statute.⁹³ A water right can be changed to a new place of use or to a new use if certain statutory procedures are followed⁹⁴ and if a change in use is to a preferred use.⁹⁵ Generally, Wyoming prefers domestic use over municipal, municipal over power, power over industry, and industry over agriculture.⁹⁶ The procedure for approving a change in use or place of use may involve a public hearing at the applicant's expense.⁹⁷ Before approving a change, the board of control must find that the change does not increase the historic rate of diversion, exceed the historic amount of diversion, increase the amount of historic consumption, decrease the historic return flow, or in any other manner injure existing appropriators.⁹⁸ In addition, the board is to consider all facts it deems pertinent including the economic loss to the community and state occasioned by the transfer,⁹⁹ the extent to which such losses are offset by the new use,¹⁰⁰ and the availability of alternative sources of water to supply the new use.¹⁰¹ A statutory procedure is also available to change the point of diversion.¹⁰²

SUMMARY

All western states except Nebraska permit voluntary transfers of water rights. Such transfers can involve changes in the point of diversion, use of water, or place of use of water. While specific regulating provisions vary from state to state, the goal of most states is to foster voluntary transfers of water rights under conditions that generally protect the rights of other users and the public.

- 1 **See generally** Meyers & Posner, **Market Transfers of Water Rights**, National Water Commission, Legal Study No. 4 (1972).
- 2 **See, e.g.**, *Maeris v. Bicknell*, 7 Cal. 261 (1857).
- 3 **See generally** 1 **Water and Water Rights** § 51.9 (R. Clark, ed. 1967).
- 4 **See generally** Gould, "Conversion of Aricultural Water Rights to Industrial Use," 27 **Rocky Mt. Min. L. Inst.** 1791, 1801 (1982).
- 5 **See generally** Meyers & Posner, *supra* note 1, at 8.
- 6 Other transfers can also be envisioned. Among them are transfers of natural flow rights to storage rights, storage rights to natural flow rights, and groundwater rights to surface rights or vice versa.
- 7 Gould, *supra* note 4 at 1802, n.36.
- 8 **Neb. Rev. Stat.** § 46-250 (Reissue 1978).
- 9 **See generally** Gould, *supra* note 4.
- 10 1 W. Hutchins, **Water Rights in the Nineteen Western States** 455 (1971).
- 11 Gould, *supra* note 4, at 1803-04.
- 12 **See, e.g.**, **Wyo. Stat.** §§ 41-3-101 to 41-3-104 (1977 & Cum. Supp. 1982).
- 13 **See, e.g.**, **N.D. Cent. Code** § 61-04-15.1(3) (Supp. 1981).
- 14 **See generally** Gould, *supra* note 4, at 1807-08.
- 15 **See Mont. Rev. Codes Ann.** § 85-2-402(3) (1981) which provides: "[a]n appropriator of more than 15 cubic feet per second may not change the purpose of use of an appropriation right from an agricultural use to an industrial use.
- 16 **See generally** Gould, *supra* note 4, at 1811-12.
- 17 **Neb. Rev. Stat.** §§ 46-288, 289 (Supp. 1981).
- 18 Gould, *supra* note 4, at 1812-13.
- 19 **See Cal. Water Code** § 1735 (West Cum. Supp. 1982); **Nev. Rev. Stat.** § 533.370(1) (1979); **Wyo. Stat.** § 41-3-104(A) (1977).
- 20 The no-injury rule is, in reality, a legal means of forcing the internalization of external costs caused by the proposed transfer. **See generally** Chapter Three, *infra*.
- 21 **See generally** Gould, *supra* note 4, at 1823-41.
- 22 *Id.* at 1823-26.
- 23 An effluent stream is a stream that loses water to groundwater aquifers as it flows to the sea.
- 24 **See, e.g.**, *Haney v. Neace-Stock Co.*, 109 Or. 93, 216 P. 757 (1923).
- 25 **See, e.g.**, *City of Westminster v. Church*, 167 Colo. 1, 445 P.2d 52 (1968).
- 26 **See generally** Chapter Three, *infra*.
- 27 **See generally** Gould, *supra* note 4, at 1840.
- 28 **See generally** Ellis and DuMars, "The Two Tiered Market in Western Water", 57 **Neb. L. Rev.** 333, 363-65 (1978).
- 29 **See generally** Gould, *supra* note 4, at 1844-45.
- 30 **See, e.g.**, *City of Colorado Springs v. Yust*, 126 Colo. 289, 249 P.2d 151 (1952); *Tanner v. Humphreys*, 87 Utah 164, 48 P.2d 484 (1935).
- 31 **See generally** *Basin Elec. Power Corp. v. State Bd. of Control*, Wyo., 578 P. 2d 557 (1978).
- 32 **Ariz. Rev. Stat. Ann.** § 45-149(A) (West Cum. Supp. 1982).
- 33 *Id.* § 45-172.
- 34 *Maeris v. Bicknell*, 7 Cal. 261 (1857).
- 35 **Cal. Water Code** § 109 (West Cum. Supp. 1982).
- 36 *Id.* § 1701 (West 1977).
- 37 *Id.* § 1702.
- 38 *Id.* § 1735 (West Cum. Supp. 1982).
- 39 *Brighton Ditch Co. v. City of Englewood*, 124 Colo. 366, 237 P.2d 116 (1951).
- 40 **Colo. Rev. Stat.** § 37-92-103(5) (1973).
- 41 *Id.* § 37-92-302(1)(a) (Cum. Supp. 1981).
- 42 *Id.* § 37-92-305(3) (1973).
- 43 *Id.* § 37-92-305(4).
- 44 **Idaho Code** § 42-222(1) (Cum. Supp. 1981).
- 45 *Id.*
- 46 **Kan. Stat. Ann.** § 82a-708b (1977).
- 47 *Id.* § 82a-708b(2), (3).
- 48 **Mont. Rev. Codes Ann.** § 85-2-403 (1981).
- 49 *Id.*
- 50 *Id.* § 85-2-402.
- 51 *Id.* § 85-2-402(3).
- 52 *Id.* § 85-2-402(4).
- 53 **Nev. Rev. Stat.** § 533.385 (1979).
- 54 *Id.* § 533.345.
- 55 *Id.* § 533.360.
- 56 *Id.* § 533.365.
- 57 *Id.* § 533.370.1.
- 58 *Id.* § 533.375.
- 59 **N.M. Stat. Ann.** § 72-5-22 (1978).
- 60 *Id.*
- 61 *Id.*
- 62 *Id.* § 72-5-24.
- 63 **N.D. Cent. Code** § 61-04-15 (1981 Supp.).
- 64 *Id.*
- 65 *Id.* § 61-04-15.1.
- 66 **Okla. Stat. Ann.** tit. 82, § 105.22 (West Cum. Supp. 1981).
- 67 *Id.*
- 68 *Id.* § 105.24.
- 69 **Or. Rev. Stat.** § 540.510 (1981).
- 70 *Id.* § 540.520(1).
- 71 *Id.* § 540.520(2).
- 72 *Id.* § 540.520(3).
- 73 *Id.* § 540.530(1).
- 74 **S.D. Compiled Laws Ann.** § 46-5-31 (1967).
- 75 *Id.* § 46-5-32.
- 76 *Id.* § 46-5-33.

- 77 **Id.** § 46-5-34.
78 **Id.** § 46-5-34.1.
79 **Id.**
80 3 W. Hutchins, **Water Rights Laws in the Nineteen Western States** 514 (1977).
81 **Cf.** *Clark v. Briscoe Irr. Co.*, 200 S.W.2d 674 (Tex. Civ. App. 1947) (holding that the right to change the place or purpose of use is not an absolute one).
82 **Tex. Water Code Ann.** tit. 11, § 084 (Vernon Cum. Supp. 1982).
83 **Id.** § 144.
84 **Id.** § 040(a).
85 **Id.** § 040(b).
86 **Utah Code Ann.** § 73-3-3 (1980).
87 **Id.**
- 88 **Id.**
89 **Wash. Rev. Code Ann.** § 90.03.380 (1962).
90 **Id.**
91 **Id.**
92 **Id.**
93 **Wyo. Stat.** § 41-3-101 (Cum. Supp. 1982).
94 **Id.** § 41-3-104(a) (1977).
95 **Id.** § 41-3-103.
96 **Id.** § 41-3-102.
97 **Id.** § 41-3-104(a).
98 **Id.**
99 **Id.** § 41-3-104(a)(i).
100 **Id.** § 41-3-104(a)(ii).
101 **Id.** § 41-3-104(a)(iii).
102 **Id.** § 41-3-114.
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CHAPTER 3

ECONOMIC AND LEGAL CONSEQUENCES OF WATER RIGHT TRANSFERS

ECONOMIC CONSEQUENCES

Water is used efficiently when it is put to its highest and best use. As economic conditions change over time water must be reallocated to different uses and users if ultimate economic efficiency is to be obtained. If water transfers are effectively barred, as in Nebraska, inefficient allocations of water are institutionalized. Any resulting problems become progressively more severe with the passage of time.

Market forces tend to allocate resources to their highest and best uses provided rights to the resources are transferable. If water rights are transferable, high value users will be willing to pay more for water than low value users can earn using the water themselves. When this occurs, it is to the advantage of both the low value user and the high value user to transfer water rights to the high value user. Consequently, voluntary transfers tend to promote the highest and best use of water over time.

Absent some regulation of water right transfers, however, transfers that are advantageous to the transferee and the transferor may still fail to yield an efficient allocation of resources for society as a whole. The problem arises because voluntary water right transfers have associated external costs that impact on persons who are not parties to the transaction. Examples of these impacts include reduced or altered patterns of return flow, altered streamflow in various parts of the stream, and diminished economic activity in localized areas. These external costs can fall on other appropriators or on non-appropriators who use the stream for aesthetic, recreational, or environmental purposes. If an efficient allocation of water is to be achieved through the transfer process these external costs must be accounted for. The legal means by which these external costs are internalized is through the "no injury" rule.

The no injury rule provides that voluntary transfers must be structured so as not to injure or injure unreasonably the rights of other appropriators.¹ In some states the rule is broadened to encompass interests other than those of appropriators.² The economic goal of such rules is to make the transferring parties consider and address all the costs and impacts of their pro-

posed transfers. Physical changes that create external costs include: 1) increases in consumption; 2) stream conveyance losses; 3) changes in the time pattern of diversion; and 4) changes in the pattern of use.³

Water right transfers that increase the amount of water consumption have important and obvious economic impacts on other parties. If an old use was 50% consumptive and the new use is 100% consumptive, 50% of the diversion formerly returned to the stream as return flow is now consumed and is therefore lost to other appropriators.⁴ Downstream appropriators undoubtedly would have relied on the existence of return flows in constructing their own water use facilities. If the reasonable expectations of return flow users could be defeated by voluntary transfers, the result undoubtedly would be perceived to be unfair. Moreover, economic inefficiencies would arise from the resulting decrease in the certainty of holding a water right.⁵ The existence of such consumption related problems is commonly addressed by limiting water transfers to the amount of water consumed in the existing use. This, in essence, gives junior appropriators the right to rely on stream conditions in existence on the date they filed their applications to appropriate. An alternative solution, suggested in a National Water Commission Report, would be to give appropriators a property interest in return flows in addition to an interest in water consumptively used.⁶ Those return flow rights could then be sold by appropriators.

Stream conveyance losses may occur when rights are transferred to a new point of diversion and place of use. On a downstream transfer, a portion of the water released by the transfer may be lost to groundwater aquifers. To account for this external cost, transfers must be adjusted for expected stream conveyance losses.

Some water rights, especially irrigation rights, are mainly seasonal uses of water. If the full rate of diversion, limited by percent consumed, is transferred to a user who intends to use water year round, the impact on the stream system will be greater under the new use than under the existing use. For this reason, transfers typically are restricted in the case of irrigation rights to cover diversions only during a period of time approx-

imating the irrigation season.

By far the most difficult problems associated with transfers occur because of changes in the pattern of use. Such problems arise because the point of diversion and the point at which return flows enter a stream are changed by some transfers. Injuries may result from disrupted patterns of use even if the degree of consumption remains unchanged. The existence of transaction costs makes it impossible for voluntary transfers to automatically achieve an efficient solution.⁷ Problems with downstream transfers can generally be solved by limiting the amount of the transfer to the amount consumed in the original use adjusted for stream conveyance losses. Generally, no one is injured⁸ though stream flows below the new use may increase under some circumstances. Such transfers are inhibited, however, by the inability of the transferor to capture the full value of his transferred right.⁹ Upstream transfers present even more severe difficulties. If a senior right is transferred upstream above a junior right located between the old and new senior uses, the bypassed junior right is always in danger of being adversely affected by exercise of the new senior right no matter how the transferred right is quantified.¹⁰ The only obvious solution is to destroy the priority of the senior right at least as to all bypassed junior rights.

Transfer of appropriation rights also affects interests other than those of appropriators. Streamflow changes not directly injuring other appropriators may have an important effect on fish or wildlife habitat, groundwater recharge, waste assimilation, and on recreational, scenic, and other values of the stream. Such effects also must be evaluated and included in any economic calculus before it can be determined whether or not a proposed transfer is economically advantageous.

An efficient allocation of water rights is difficult to achieve with transfers because of the nature of the appropriation right. Such rights are expressed in terms of diversion rates for particular uses instead of in absolute quantities of water. Furthermore, the existence of a priority system causes many difficulties, particularly with respect to upstream transfers. As a consequence of the property rights system, voluntary transfers tend to be expensive. Buyers and sellers must be located, the rights of third parties and the general public protected, and various administrative regulations complied with. Such problems are exacerbated by the tendency to issue appropriations in excess of the historic flows of the river.¹¹ Thus, transaction costs of voluntary water right transfers are high and act as barriers to transfers that would increase economic efficiency. One goal of any water rights transfer mechanism therefore, should be the elimination or reduction of transfer costs to the degree possible.

It should be noted that an effective market in water rights cannot exist until water becomes relatively scarce. Scarcity creates value and value creates the incentive to transfer. Removing legal barriers to transfers in Nebraska would not automatically result in

shifting rights in the near term, but over time transfers would likely increase as water supplies become more scarce.

LEGAL CONSEQUENCES

Most of the legal consequences associated with voluntary transfers of water rights concern the need to protect third party or public rights from the negative impacts of such transfers. The existence of a "no injury" rule already has been discussed at length. An additional possible legal consequence of voluntary transfers is the effect such transfers might have on the ability of the state to control export of water beyond its borders.

While the issue of water embargoes is beyond the scope of this study, it is possible that state law could control the degree to which the Supreme Court of the United States would tolerate state restrictions on the private export of water.¹² An argument can be made that if water rights can be transferred within the state they cannot be restricted from transfer outside the state given the requirements of the Commerce Clause of the U.S. Constitution.¹³

FOOTNOTES

- ¹ See generally 1 W. Hutchins, **Water Rights Laws in the Nineteen Western States** 628-33 (1971).
- ² See, e.g., **Cal. Water Code** § 1735 (West Cum. Supp. 1982); **Wyo. Stat.** § 41-3-104(A) (1977).
- ³ See generally Gould, "Conservation of Agricultural Water Rights to Industrial Use", 27 **Rocky Mt. Min. L. Inst.** 1791, 1823-44 (1982).
- ⁴ See generally Johnson, Gisser, and Werner, "The Definition of a Surface Water Right and Transferability", 27 **J. L. & Econ.** 273 (1981).
- ⁵ For a general discussion of the need or security and flexibility in a water rights system, see Ciriacy-Wantrup, "Water Economics: Relations to Law and Policy" in 1 **Waters & Water Rights** § 63 (R. Clark ed. 1967).
- ⁶ A Commission report suggested that purchasers of water rights should receive title not only to the quantity of water consumptively used but also to the return flow that the use generates. See Meyers & Posner, **Market Transfer of Water Rights** 29 (National Water Commission Legal Study No. 4, 1972).
- ⁷ See generally Burness and Quirk, "Water Law, Water Transfers, and Economic Efficiency: The Colorado River", 23 **J. L. & Econ.** 111, 130-33 (1980).
- ⁸ While generally no one is injured if downstream transfers are limited to the amount of consumptive use, exceptions exist that mandate review of transfer on a case by case basis. See generally

Ellis and DuMars, "The Two-Tiered Market in Western Water", 57 **Neb. L. Rev.** 333, 363-65 (1978).

- ⁹ **See generally** Meyers & Posner, **supra** note 6.
- ¹⁰ **See generally** Gould, **supra** note 3, at 1840.
- ¹¹ Return flow problems in New Mexico, for instance, have largely been avoided by limiting the number and quantity of water rights to a level the stream could satisfy. **See** Ellis and DuMars, **supra** note 8, at 365-67.
- ¹² **Cf.** *City of Altus v. Carr*, 255 F. Supp. 828, **aff'd**, 385 U.S. 85 (1966) (resting at least in part on Texas law which adopts the "absolute ownership" theory of groundwater rights) and *State ex rel. Douglas v. Sporhase*, 208 Neb. 703, 305 N.W. 2d 614, **rev'd. and remanded** 102 S. Ct. 345 (1982).
- ¹³ U.S. CONST. art 1, § 8, cl. 3.
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CHAPTER 4

ALTERNATIVE LEGISLATIVE POLICY ACTIONS

INTRODUCTION

Previous chapters have analyzed Nebraska law relative to the transfer of surface water rights and have discussed the law of water rights transfers in selected states. In addition, the economic and legal consequences of transferability have been discussed. Nebraska law is unique in the legal and institutional barriers it places on voluntary transfers of water rights. While great variation can be found in the degree to which transfers are restricted in other states, only Nebraska has restrictions that are so onerous as to constitute an effective ban on transfers.

This chapter lists only three major alternatives (1) no change; (2) permit voluntary transfers; and (3) adopt a sophisticated system of water banking. *Alternative #2*, however, delineates numerous options that might be included in any permissive transfer system. The ultimate policy decision to be faced, however, is a very simple one: shall voluntary transfers of water and water rights be permitted or shall they continue to be prohibited? The economic and legal arguments bearing on this basic policy issue were covered in **Chapter Three** and will not be repeated here. The focus of this chapter is on how transfers might be facilitated if the underlying policy decision were decided in favor of transfers.

Identification of Alternatives

Alternative #1: Make no change in existing law respecting the transferability of surface water rights.

Alternative #2: Provide that surface water rights may be freely severed from the land and transferred to a new use or a new location of use without loss of priority, provided that such transfers are approved in accordance with law. Option a): Establish an administrative mechanism to consider approval of water transfers, assuring interested parties of notice and an opportunity to be heard.

Option b): Provide that transfers will be approved only if it can be demonstrated that existing appropriators are in no way injured by the transfer.

Option c): Provide that transfers will be approved only if adversely affected users are fully and fairly compensated.

Option d): Provide that the amount of a transfer shall not exceed the amount of water consumed in the original use.

Option e): Provide that transfers may not be approved if the transfer does not appear to be in the public interest.

Option f): Provide that transfers will be disapproved if they would because an unreasonable adverse effect on the habitat of fish or wildlife, or on the recreational or aesthetic value of the stream.

Option g): Provide that transfers of water rights will only be permitted from one use to a similar use.

Option h): Provide that surface water rights can only be transferred to a preferred use.

Option i): Provide that surface water rights can only be transferred within the boundaries of an irrigation district, mutual irrigation company, reclamation district, public power and irrigation district, or irrigation project area of a natural resources district.

Option j): Provide that the burden of sustaining the desirability of any transfer is on the proponent of the transfer.

Alternative #3: Institute a water banking system to facilitate a market in surface water rights.

Information Presented for Each Alternative

For each alternative and option, information is presented under two headings: **Description and Methods of Implementation** and **Impacts**. Information under the first heading, **Description and Methods of Implementation** describes the alternative or option

and how it might be implemented. For each alternative strengths and weaknesses are discussed. The major issue under most alternatives and options is the nature of restrictions to be placed on voluntary transfers of water rights and why such restrictions might be appropriate or inappropriate.

Information under the second heading, **Impacts**, summarizes the socio-economic and/or physical-hydrologic and environmental impacts of each alternative or option when appropriate. For many of the alternatives and options, impacts are either incalculable or unpredictable. This is particularly true with respect to physical/hydrologic and environmental impacts. Generally, assuming adherence to the no injury rule, impacts of alternatives that facilitate transfers cannot be isolated from the transfers themselves. The transfers that will occur depend on specific economic relationships over time, which are impossible to predict.

DISCUSSION OF THE ALTERNATIVES

Alternative #1: Make no change in existing law respecting the transferability of surface water rights.

Description and Methods of Implementation. Existing Nebraska law concerning the transferability of surface water rights was described in **Chapter One**. This alternative would preserve the current situation. As a practical matter, surface water rights in Nebraska are not transferable, certainly if the rights vested subsequent to April 3, 1895. While rights vesting prior to April 4, 1895 theoretically are transferable, no mechanism exists to facilitate the transfer. A no transfer policy is economically inefficient, as demonstrated in **Chapter Three**.

Impacts. The major impact of a no transfer policy is economic; water is permanently locked into its initial use. As long as water has some value in its present use a water right will not be abandoned. In a world of scarcity, however, resources should be put to their highest and best use. Locking water into existing uses increases the likelihood that more valuable needs will remain unmet. On the other hand, it is very difficult to transfer water rights without adversely affecting some other interests, although adverse effects can be minimized. A prohibition on transfers thus gives existing users the most security of right.

Alternative #2: Provide that surface water rights may be freely severed from the land and transferred to a new use or a new location of use without loss of priority, provided that such

transfers are approved in accordance with law.

Description and Methods of Implementation. This alternative would preserve the rule that surface water rights are appurtenant to the land, but allow them to be severed and transferred apart from the land. Absent such severance and transfer, water rights would continue to pass with the title to land as occurs presently. The last clause of this alternative contemplates some administrative or other formal approval mechanism before such transfers could take place. Approval of the director of the Department of Water Resources might be required. While an approval mechanism is not necessarily required, it would appear to be desirable given the likelihood that third parties would be affected by any transfer. Furthermore involving the Department of Water Resources in any transfer process would assure that state records would be adjusted to reflect any changes in the location, use, or ownership of a particular right.

The alternative could be implemented rather easily by statute. A representative statute might read as follows:

Appropriation rights are for the purpose stated in the application and are appurtenant to the land where the water is put to beneficial use. Such rights may, however, be severed from the land and transferred to a new location, or the purpose of use may be altered provided that any such transfer of use or location of use is first approved by the Director of the Department of Water Resources.

The options following this alternative represent a nonexclusive and nonexhaustive list of ways the legislature might constrain the Director in the exercise of his approval authority.

Impacts. *Alternative #2* would remove the major impediment to voluntary transfers of water rights in Nebraska. As demonstrated in **Chapter Three**, voluntary transfers are desirable from the standpoint of achieving economic efficiency. Equity impacts of the alternative depend on the extent to which existing rights of appropriators and other users are protected from the adverse impacts of transfers. Such effects are discussed in detail in the various options following this alternative. In general, the physical-hydrologic and environmental impacts of a transfer policy cannot be predicted absent knowledge of specific transfers that will become economically feasible given a transfer policy.

Option a): Establish an administrative mechanism to consider approval of water transfers, assuring interested parties

of notice and an opportunity to be heard.

Description and Methods of Implementation. This optional addition to *Alternative #2* would establish a procedure for the Department of Water Resources or other body to use in reviewing an application for a transfer of water rights. A major concern of those opposed to transfers is the fear that rights of third parties could be adversely affected by the transfer. This alternative would help preserve third-party rights by providing for notice to interested parties and a right of such parties to object to a transfer application. Such provisions also assist the decisionmaker in securing the maximum amount of information for the decision-making process.

Implementing this alternative requires legislation as well as development of regulations by the agency charged with approval. Implementing legislation might read as follows:

Upon receipt of an application for approval of a water right transfer, the Director of the Department of Water Resources shall cause to be printed a notice of the application in one newspaper of general circulation in every county containing lands likely to be affected by the transfer. Such notice shall be at applicant's expense and run for three consecutive weeks. The notice shall contain all pertinent information contained in the application for transfer and a statement informing interested parties of a right to formally object at any time prior to the elapse of two weeks from the date of final publication. In the event of formal objection, a hearing will be convened within three weeks at which time all interested parties may introduce evidence and cross examine witnesses.

Of course, a variety of alternative notice and hearing provisions might be substituted.

Impacts. The major impact of this option is to help insure that all factors are considered in approving the application. The potential transferor and transferee will consider only the costs and benefits to each other. By putting third parties on notice and giving them an opportunity to be heard, the Director will be made aware of possible injuries to third party rights that should be considered in the approval process.

Option b): Provide that transfers will be approved only if it can be demonstrated that existing appropriators are in no way injured by the transfer.

Description and Methods of Implementation. This option would direct the Department of Water Resources to withhold its approval from transfer applications if it

appears that other appropriators would be injured by the transfer. An implementing statute might read as follows:

No application to transfer water rights will be approved if it appears that other appropriators would be injured by the transfer.

This language could be made more or less restrictive depending on how much discretion the legislature would want to give the Department of Water Resources. If **any** injury to other appropriators would negate a transfer, it is probable few transfers would take place. An alternative would be to provide for denial of a permit if other appropriators were **unreasonably** injured so that minimal interferences could be ignored.

Impacts. This option is designed to protect the expectations of other appropriators whose appropriations might contain an earlier or later priority date than that of the right being transferred. Thus, the relative position of those with appropriation rights would be preserved as of the time of the transfer. No current appropriators would suffer an adverse equity impact because of the transfer. Efficient transfers might be barred, however, under circumstances where a transferor could afford to compensate other appropriators for their losses.

Option c): Provide that transfers will be approved only if adversely affected users are full and fairly compensated.

Description and Methods of Implementation. This option is similar to the previous one in that it is designed to prevent harm to other appropriators. Under this option, however, the fact of injury alone would not bar the transfer. To the extent that injured parties could be fully and fairly compensated, the transfer would be approved. An implementing statute might read as follows:

No application for transfer of surface water rights will be approved unless the transferor fairly compensates injured appropriators to the full extent of their injury.

Impacts. This alternative preserves the equitable position of present users much as the previous alternative does. It is more desirable from an economic perspective, however, since it keeps single current users from halting a transfer on injury ground if the purported injury could be fully and fairly compensated in other ways. This assumes, of course, that it is possible to accurately determine what constitutes full and fair compensation in individual cases.

Option d): Provide that the amount of a transfer shall not exceed the amount of water consumed in the original use.

Description and Methods of Implementation. This option is an attempt to avoid transfer-related injuries to third parties by limiting the amount of water that can be transferred. One of the more common injuries to third parties caused by water right transfers is reduced water flows. Limiting the size of the transfer to the amount of water consumed in the original use would help alleviate return flow problems.

A major difficulty with this option is that of actually measuring and determining the amount of water consumed. Direct measurement of water consumption is very expensive. Consequently, estimates of consumptive use are commonly employed, at least for vegetative consumption. The most common estimating technique is the Blaney-Criddle method,¹ which applies temperature and sunshine data to crop specific consumptive use coefficients developed for particular geographic areas.² As with all estimating techniques, however, results may not be accurate under all conditions.³

Legislation to implement this alternative might read as follows:

The quantity of water transferred upon approval of the transfer application shall not exceed the amount of water consumptively used under the current use.

Such legislation might also provide that the quantity of water transferred could not exceed the historic rate of diversion under the existing use.

Impacts. The impacts of this option are similar to those of other no injury options. Existing appropriators are protected by the rule. Properly administered, this option is merely a codification of the no injury rule in a more formal setting. From an economic perspective, limiting the amount of transferable water to the amount of water historically consumed is generally deemed to be an essential element of an efficient water rights transfer mechanism.

Option e): Provide that transfers may not be approved if the transfer does not appear to be in the public interest.

Description and Methods of Implementation. This option parallels similar language in the appropriation section of the Nebraska constitution.⁴ If an initial application to appropriate water is subject to denial where demanded by the public interest, it would seem transfers of water rights should be subject to the same prohibitions. Although the parameters of "public interest" have not been defined in Nebraska, presumably they could encompass social, economic, and environmental factors.

Implementing language of a statute might read as follows:

An application for transfer of a water right shall be denied if such denial is demanded by the public interest.

Impacts. The impacts of this alternative cannot be determined absent some understanding of the circumstances when the public interest language would come into play. Potentially, however, such a provision could be used to negate transfers if the public generally would be injured by a transfer or if specific non-appropriators, or groups of non-appropriators, would be injured.

Option f): Provide that transfers will be disapproved if they would cause an unreasonable adverse effect on the habitat of fish or wildlife, or on the recreational or aesthetic value of streams.

Description and Methods of Implementation. This option addresses transfer-caused injuries to interests other than those of appropriators. Changing the location of use, in certain circumstances, may have a significant impact on streamflows without necessarily injuring the rights of other appropriators. The problem may be particularly acute in critical habitat areas related to a river, or along particularly scenic or high recreational use portions of the river. This option would allow the Director of the Department of Water Resources to take such factors into account in the consideration of a transfer request.

The text of an implementing statute might read as follows:

An application for a permit to transfer surface water rights shall be denied if the Director determines that the effect of the transfer would be to cause unreasonable harm to the habitat of fish or wildlife or to unreasonably interfere with the aesthetic and recreational value of the stream.

The statute as drafted would not bar transfers in the event of **any** injury to the non-appropriative values of a stream but would preclude approval only if such injury was **unreasonable**.

Impacts. Potentially, this option could have positive economic and environmental impacts. It recognizes the real and substantial problem of adverse effects on recreational and environmental values and acknowledges that such effects should be considered in a decision-making process if economically inefficient transfers of water are to be avoided.

Option g): Provide that transfers of water rights will only be permitted from one use to a similar use.

Description and Methods of Implementation. This option would prohibit transfers that resulted in a new purpose of use. Only changes in the location of use would be allowed. As a practical matter its major importance would be to prohibit the voluntary conversion of agricultural water rights into industrial water rights.

An implementing statute might read as follows:

An application for transfer of a water right shall not be approved unless the water transferred is to be applied to a substantially similar use after the transfer as it was applied before the transfer.

Impacts. This option would substantially restrict the transferability of water rights as compared with other options. Consequently, its economic impact would be extremely limited. One of the major benefits of voluntary transfers is to help assure that water is applied to its highest and best use over time. By prohibiting changes in the purpose of use, this option would prevent full realization of these benefits.

Option h): Provide that surface water rights can only be transferred to a preferred use.

Description and Methods of Implementation. This option would permit changes in the purpose of use, but only if the new use was a preferred use⁵ under Nebraska law. Thus, industrial water rights could be freely transferred to a new use, but agricultural rights could be transferred only to domestic uses, and domestic rights could not be transferred at all. An alternative formulation of the rule would provide that voluntary transfers would not be approved if the new use was a less preferred one. Such a formulation would make it possible to transfer rights within a preference class as well as to a high preference class.

Statutory language to implement this option might read as follows:

An application for a voluntary transfer of surface water rights shall be denied if the new use is a less preferred use than the existing use.

Impacts. No apparent economic reason exists that would justify restricting the **voluntary** transfer of water rights by imposing a preference scheme. To the extent that existing preferences do not reflect economic reality, restricting transfers to less preferred users would be economically inefficient. Traditionally, preferences find application where **involuntary** transfers are contemplated. It would seem that they serve no justifiable purpose where **voluntary** transfers are at issue.

Option i): Provide that surface water rights can only be transferred within the boundaries of an irrigation district, mutual irrigation company, reclamation

district, public power and irrigation district, or irrigation project area of a natural resources district.

Description and Methods of Implementation. Unlike the previous two options that would restrict transfers involving changes in the **purpose** of use, this option is designed to restrict transfers involving changes in the **place** of use.

Transfers would be approved only if both tracts of land involved were located within the service area of an irrigation project sponsored by a public entity. Changes in the purpose of use could also be imposed by combining this option with option (g). Thus, transfers would also be allowed only for irrigation purposes.

Impacts. Since transfers within the irrigation project area would normally not involve changes in the point of diversion or quantity of water consumed, there should not be any adverse impacts on other appropriators except perhaps those also within the project area. Adverse environmental impacts should also be non-existent or minimal. This option would promote efficiency in use within irrigation project areas. However, it would prevent what could otherwise be economically efficient transfers of water rights outside of such areas.

Option j): Provide that the burden of sustaining the desirability of any transfer is on the proponent of the transfer.

Description and Methods of Implementation. This option provides that the burden is on the proponent of a transfer to convince the approving agency that the transfer should be approved. To the extent statutory or administrative requirements are created, the proponent would have the burden of meeting the requirements. The effect is to make the transferor prove the transfer would not injure any other parties rather than requiring the other parties to prove that they would be injured.

Implementing language might read as follows:

The proponent of a voluntary water rights transfer shall have the burden of proving that the proposed transfer complies in all respects with statutory standards.

Impacts. Placing the burden of proof on the proponent of a transfer creates an inherent bias against the transfer. Conversely, placing the burden on opponents of the transfer would create an inherent bias in favor of the transfer. Requiring the proponent to bear the ultimate burden, however, probably comports with most persons' notion of fairness in that it preserves the status quo unless the proponent can demonstrate clearly that other interests will not be unduly affected by the transfer. On the other hand, an extreme application of

the burden of proof would negate most transfers. One option would be to substitute "reasonably demonstrating" for "proving" in the suggested implementing language. Many variations are possible.

Alternative #3: Institute a water banking system to facilitate a market in surface water rights.

Description and Methods of Implementation. A water bank is a sophisticated water allocation mechanism that is designed to facilitate a market in water rights.⁶ Owners of water rights could deposit their right to use water in a water bank or they could continue to use their water allocation. Individuals desiring additional allocations of water could "borrow" from the bank. The price established by the bank would be the price necessary to clear the market of rights; that is, the price set by the bank would allow the water rights to be used beneficially, rather than allowing them to lie unused. The bank would not actually hold water rights, but would act as a clearing house. The "interest charges" would be paid to depositors, that is, to those who are willing to voluntarily give up all or a part of their water rights for a period of time. Returns to depositors would vary with demand conditions and the length of time that one agreed to sign away one's right. Permanent transfers could also be facilitated by the bank.

A successful water banking system would require sophisticated data and accurate modeling. The bank itself would be in the position of assuring that its transactions did not injure other rights. A substantial commitment of resources would be required if a water bank were to be created. Optimal design may require regional water banks with provision for interbank transfers.⁷ Currently, water banks are probably on the cutting edge of technological possibility. They tend to become more feasible, however, as water becomes more valuable. Although limited examples of water banking can be found,⁸ many conceptual problems must be resolved before large scale water banks become practical.⁹ Water banking or brokering, however, may offer the ultimate water management tool at some time in the future.

Impacts. The major impact of a water banking system would be the extent to which transfers would be facilitated. Rights could be transferred on a short term, long term, or permanent basis. The state could participate in the banking transactions on behalf of recreational users or environmental values. Transaction costs would be minimized since parties would deal with the bank rather than with each other. In theory, banks would make it possible to bring a large number of buyers and sellers together, a necessary condition if a market is to operate efficiently. Free, flexible transfers should lead to the highest and best use of available water supplies at any moment of time. Since

participation in the bank would be voluntary, water banking would result in no adverse equity impacts for individuals. In short, a theoretical water banking program has uniformly positive impacts. Whether or not the hydrologic and modeling data necessary for such a proposal could be put together at any cost is highly problematical at the present time.

SUMMARY

The ultimate policy decision addressed in this chapter, and indeed in this entire report, is the extent to which surface water rights ought to be transferable. The three alternatives and ten options suggested could be combined into far more permutations and combinations. Adoption of certain options precludes adoption of others but many are not mutually exclusive. In addition, many variations of individual options could be suggested. However, the alternatives and options do give a fair range of the various policy decisions that need to be addressed in contemplating the transfer of surface water rights.

If a decision is made to permit transfers the structure of any transfer mechanism must be considered. Finally, it is theoretically possible to create a full-fledged market system of allocating surface water rights through use of water banks and brokers.

FOOTNOTES

- ¹ Gould, "Conversion of Agricultural Water Rights to Industrial Use", 27 *Rocky Mt. Min. Law Inst.* 791, 1826 (1982).
 - ² The Blaney-Criddle formula is fully explained in Blaney and Criddle, "Determining Water Requirements for Settling Water Disputes", 4 *Nat. Resources J.* 29 (1964).
 - ³ Blaney-Criddle coefficients must be developed for different environments. If the coefficients used don't closely correspond to the environment in question, conclusions as to consumption will not be accurate. Developing site specific coefficients would be very costly. **See generally** Ellis and DuMars, "The Two-Tiered Market in Western Water", 57 *Neb. L. Rev.* 333, 362-63 (1978).
 - ⁴ NEB. CONST., art. XV, § 6.
 - ⁵ Preferences are the subject of a separate policy issue study. For sharp criticism of preference oriented restrictions on the transfer of water rights see Oeltjen & Fischer, "Allocation of Rights to Water: Preferences, Priorities, and the Role of the Market", 57 *Neb. L. Rev.* 245 (1978).
 - ⁶ **See generally** Angelides and Bardach, *Water Banking: How to Stop Wasting Agricultural Water* (Inst. for Contemporary Studies, 1978).
 - ⁷ *Id.* at 19.
 - ⁸ *Id.* at 17-19.
 - ⁹ **See generally id.** at 15-18; Gould, *supra* note 1, at 1850.
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CHAPTER 5

RELATIONSHIP OF THIS STUDY TO OTHERS

Each policy issue study being conducted demonstrates the interrelationship between water policy issues. Water policy is complex, and no method of distinguishing issues can successfully eliminate overlaps. The purpose of this chapter is to identify the most significant relationships between this study and the other policy issue studies being conducted as part of the State Water Planning and Review Process.

Identifying those relationships is important in each case since any particular water policy action will have greater impact upon overall water policy than the resolution of the immediate issue at hand. At a minimum, actions that will prevent consideration of new information at a later date will be discouraged by focusing on the interrelationship of policy issues.

Significant relationships can be identified between the subject of this report, *Transferability of Surface Water Rights*, and several of the other policy issue studies being conducted. The extent of that relationship, if any, is addressed study by study in the material which follows.

STUDY #1: INSTREAM FLOWS

To the extent they would change the location of diversions, transfers of surface water rights could intentionally or unintentionally affect instream flows and the water uses that are dependent upon maintenance of those flows. Some of the options to *Alternative #2* in this report (particularly option f) would require assessment of those instream effects before approval of a water right transfer could be granted. Other options would provide no specific protection for those uses.

Alternatives #10 and 11 in the January, 1982 *Instream Flows Report* deal specifically with voluntary transfers of surface water rights. The first of those alternatives would authorize the transfer of natural flow permits for instream uses, while the second would prohibit such transfers.

STUDY #2: WATER QUALITY

Since surface water quality can depend greatly upon the amount of water available to dilute pollutants, relationships between the *Water Quality Study* and this study are much the same as those noted above for the *Instream Flows Report*. The actual relationship in specific situations would depend upon the extent to which individual transfers of water rights would affect water quality or would be accomplished for the benefit of water quality.

STUDY #3: GROUNDWATER RESERVOIR MANAGEMENT

The relationship between this study and the *Groundwater Reservoir Management Study* are similar to those noted above for **Studies #1 and #2**. Certain reaches of some Nebraska streams naturally recharge groundwater aquifers. A change in the point of diversion of a surface water appropriation could affect such recharge either beneficially or adversely, depending upon the circumstances of the transfer. Such effects could be assessed prior to approval of a water right transfer.

STUDY #4: WATER USE EFFICIENCY

One of the primary justifications for allowing transferability of surface water rights would be an anticipated improvement in economic efficiency. While the *Water Use Efficiency Study* is to be directed primarily at physical efficiency as opposed to economic efficiency, the two are often closely related. When the value of water per unit is high, there is a greater likelihood that physical efficiency will be sought. Authorizing transferability of surface water rights, therefore, also could be identified as a possible alternative in the *Water Use Efficiency Report* when it is completed in 1984.

STUDY #5: SELECTED WATER RIGHTS ISSUES

Report #1, Preferences in the Use of Water. As the *Preferences in the Use of Water Report* noted, that study and this one are closely related. Both reports point out that surface water preferences operate as a limited exception to the rule that surface water rights cannot be transferred in Nebraska. While exercise of a preference may not technically result in a transfer of the water right from the inferior to the superior user, the same result occurs, at least in the short term, i.e. the superior user gets the water by compensating the inferior user for his loss. A major difference between exercise of a preference and transfer of a water right is in the permanence of the action taken. Preferences are exercised only when there is insufficient water for the needs of both the superior and inferior users. When the water is adequate for both, they both may divert up to their allocated amount. By contrast, when a surface water right is transferred, the original owner no longer has rights to use the water and has to obtain a new appropriation with a later priority date if he or she desires to continue to use water from the stream. The primary difference between exercise of a preference and transfer of a water right, however, is that transfers are voluntary transactions among all parties while a preference can be exercised over the objections of inferior users.

Transferability of surface water rights could be implemented without modifying the current preferences system. Transferability would be authorized only in willing buyer-willing seller situations, while preferences could continue to allow the **involuntary** reallocation of water to preferred users during times of shortage. If Option (h) of *Alternative #2* of this report were implemented, the relationship between preferences and transferability would be particularly direct. That option would allow a transfer only to a superior use. Implementation of that option essentially would amount to an extension of the current preferences system, the difference being the ability to permanently transfer a water right from one user to another rather than simply allowing temporary interference with that right.

Report #2, Drainage of Diffused Surface Waters. No significant relationships with this study have been identified.

Report #3, Water Rights Adjudication. Implementation of *Alternative #2* in this report could result in fewer water rights being cancelled for nonuse. Water users no longer desiring to make use of the water might investigate the possibility of a sale of that water right rather than allowing it to become subject to forfeiture for more than three years non-use.

Report #4, Property Rights in Groundwater. No significant relationships with this study have been identified.

Report #5, Riparian Rights. If riparian claims were adjudicated and integrated into the appropriations system, the number of water rights potentially subject to transfer would increase by the number of such claims integrated. The number of third parties potentially affected by water rights transfers would also increase by the same number. The effect could be to prevent some transfers which might have otherwise occurred had riparian rights not been adjudicated and integrated.

Report #6, Interstate Water Uses and Conflicts. One alternative identified in the *Interstate Water Uses and Conflicts Report* is the possibility of Nebraska offering to buy water rights in upstream states. If that were possible, *Alternative #3* in this report (instituting a water banking system) would be one way to redistribute the purchased water rights to Nebraska users.

At least one other relationship between these two studies can be identified. A likely impact of authorizing the transfer of water rights would be the retention of some early priority rights that would otherwise have been cancelled because of non-use. If this were to occur, it might enhance Nebraska's position in the resolution of interstate disputes.

Report #8, Beneficial Use. Although a task force report has been completed on the subject of beneficial use, the report may not be finalized by the Commission because of the increasingly evident overlap between that study and the other studies being conducted, particularly Water Use Efficiency. If a Beneficial Use report is actually prepared, it appears that relationships with this report would be similar to those addressed earlier under *Study #4: Water Use Efficiency*.

STUDY #6: MUNICIPAL WATER NEEDS

The report on *Municipal Water Needs* is being completed at approximately the same time as this report. One of the alternatives presented in that report is to allow municipalities to purchase water rights and to do so specifically for the purpose of maintaining streamflow for recharge of municipal well fields. If transferability of surface water rights were authorized, municipalities would be among the more likely candidates to express interest in purchasing such rights. Water for municipal use has a relatively high economic value.

**STUDY #7:
SUPPLEMENTAL WATER SUPPLIES**

The *Supplemental Water Supplies Study* will address ways to redistribute water supplies to areas where supplies are inadequate. Although that study will primarily deal with presently unused supplies, it will not necessarily be restricted to such sources. Voluntary transfers of water rights are one method that could be used to supplement water supplies in any particular location.

**STUDY #8:
INTERBASIN TRANSFERS**

**STUDY #9:
WEATHER MODIFICATION**

**STUDY #10:
WATER - ENERGY**

**STUDY #11:
SURFACE - GROUNDWATER
INTEGRATION**

Studies #8 and #9 were originally scheduled for completion as a part of the State Water Planning and Review Process, but have since been cancelled. *Studies #10 and #11* are identified and discussed in the September 15, 1982 Annual Report and Plan of Work. The scope of these two studies, however, has not been well defined at the time this report is being prepared and no attempt has been made to identify possible relationships with this study.

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Appendix A

SUMMARY OF HEARING

REPORT #7

TRANSFERABILITY OF SURFACE WATER RIGHTS

2:00 p.m., 7:00 p.m.
SEPTEMBER 8, 1982
Lincoln, Nebraska
Nebraska State Office Building

PUBLIC NOTICE

Legal notice of this hearing was published in eight newspapers across the State of Nebraska. Press releases were sent to every newspaper and radio station in the state.

HEARING PROCEDURE

This hearing was held simultaneously with hearings on two other *Selected Water Rights Issues Policy Study* reports and on the *Municipal Water Needs Policy Issue Study*. Robert W. Bell and Henry P. Reifschneider presided jointly over the hearing and James R. Cook conducted the hearing. A brief summary of each report was presented prior to the receipt of testimony. Those present were given an opportunity to testify on all of the reports. An informal question and answer period was then conducted, and an opportunity for additional testimony was offered prior to the conclusion of the hearing.

TESTIMONY OFFERED

No testimony was presented on Report #7 on *Transferability of Surface Water Rights*.

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Appendix B

SUMMARY OF HEARING

REPORT #7

TRANSFERABILITY OF SURFACE WATER RIGHTS

2:00 p.m., 7:00 p.m.
SEPTEMBER 29, 1982
Ogallala, Nebraska
Holiday Inn

PUBLIC NOTICE

Legal notice of this hearing was published in nine newspapers across the State of Nebraska. Press releases were sent to every newspaper and radio station in the state.

HEARING PROCEDURE

This hearing was held simultaneously with hearings on two other *Selected Water Rights Issues Policy Study* reports and on the *Municipal Water Needs Policy Issue Study*. Commission members Wayne Johnson, Maureen Monen, and Henry Reifschneider presided jointly over the hearing and James R. Cook conducted the hearing. A brief summary of each report was presented prior to the receipt of testimony. Those present were given an opportunity to testify on all of the reports. An informal discussion with questions and answers was then conducted. An opportunity for additional testimony was offered prior to the conclusion of the hearing.

TESTIMONY OFFERED

A brief summary of the report noted that it dealt only with the right to use water in natural streams. At the present time, surface water rights are issued for a specific purpose on specific land for a specific quantity and cannot be transferred. A short discussion period ensued with a number of questions asked and comments made concerning the report and the alternatives.

One individual asked how the banking system would work. It was explained that the state would act as a depository or a broker. Another person questioned whether the state would in that case receive a commission and the appropriator selling the right, actual payment. The view was offered that this type of system would be an entirely new concept and should be given a lot of consideration before taking any action.

It was mentioned that *Alternative #2* would permit transfers to occur without a loss of priority. In response

to a question on whether there was any kind of timetable, it was stated that transfers need not necessarily be permanent. It was suggested that there could be an agreement reached for a certain number of years to sell a water right.

The comment was made that if surface water rights became transferable, they might also become more susceptible to condemnation. It was noted that many of the mechanical aspects of transferability would depend on how the Legislature decided to implement the concept.

Formal testimony was offered as follows:

1. **Mervyn Gompert, North Platte Natural Resources District.** Mr Gompert offered testimony in favor of *Alternative #1* recommending no change in existing law. He pointed out that agriculture is the dominant feature in Nebraska. He was concerned that agriculture cannot afford to compete with industry and other uses and therefore, other factors, than dollars, need to be considered if any transfers are to be made. In his opinion, the present system has worked well and should not be changed. However, if forced to choose among the options under *Alternative #2*, option g might be acceptable.

2. **Don Steen, Jirdon Land, Co., Pathfinder North Platte Valley Livestock, Co.** Mr. Steen presented testimony based upon findings in, and his interpretation of the recently completed *High Plains-Ogallala Aquifer Study* report. Projections in that report indicate, in Steen's opinion, that the state of Nebraska is in a unique position to become the leader in the future in processing up to 30% of all the beef and pork in the United States. He believes the state of Nebraska could preempt the states of Kansas and Texas, by developing those agricultural processing industries in Nebraska at less cost.

Unfortunately, Steen pointed out, water rights in Nebraska cannot be transferred to an agricultural processor. One cannot operate a packing plant because one cannot obtain the water. His recommendation, therefore, was that while we should still be jealous of our water, we should consider limited transferability of

water rights for crop processing. He felt that we may be able to use water more efficiently by using the water for agricultural processing and the people who carry out the processing in order to assure a market for the crops we produce. In this vein, he favors *Alternative #2*, options a, b, c, d, e, and i with some modifications.

3. **Kent Miller, Twin Platte Natural Resources District.** Mr. Miller suggested that if *Alternative #2* is considered, the option that provides that transfers will be approved only if there is **no** injury to third parties (option b) should be selected. He further urged that a strict interpretation is needed to protect third parties.

4. **Bruce Snyder.** Mr. Snyder questioned the assumption he feels is made throughout the report that the one who can afford to pay for the water will make the best use of it. "Highest economic use" are the particular words to which he referred. He had serious reservations about this because costs for some water users can often be passed through, for example, to customers by a power plant. Another criticism offered was that the report appears to gloss over the fact that there might be a problem with water leaving the state if such a transfer policy were adopted, and that this should be clarified.

Appendix C

LEGISLATURE OF NEBRASKA EIGHTY-EIGHTH LEGISLATURE FIRST SESSION (1983) LEGISLATIVE BILL 21

Committee: Public Works

Adopted: February 23, 1983

Signed by Governor Kerrey: February 25, 1983

Probable Effective Date: Late August, 1983 (3 months after adjournment of the 1983 Legislature).

FOR AN ACT to amend section 46-122, Reissue Revised Statutes of Nebraska, 1943, relating to surface water and irrigation; to modify provisions relating to certain water rights; to authorize a change of location; to provide duties; and to repeal the original section.

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

Section 1. That section 46-122, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:
46-122. It is hereby expressly provided that all water distributed for irrigation purposes shall attach to and follow the tract of land to which it is applied, unless a change of location has been approved pursuant to section 6 of this act.

~~The; Provided; however; the~~ board of directors may by the adoption of appropriate bylaws ~~by laws provide~~ for the suspension of water delivery to any land in such district upon which the irrigation taxes levied and assessed thereon shall remain due and unpaid for two years. It shall be the duty of the directors to make all necessary arrangements for right-of-way for laterals from the main canal to each tract of land subject to assessment, and when necessary the board shall exercise its right of eminent domain to procure right-of-way for the laterals and shall make such rules in regard to the payment for such right-of-way as may be just and equitable.

Sec. 2. Any person having a permit to appropriate water for beneficial purposes issued pursuant to Chapter 46 who desires to transfer the use of such water appropriation to a different location within the same river basin than that specified in the permit shall apply for approval of such change to the Department of Water Resources.

Sec. 3. Upon receipt of an application filed under section 2 of this act, the Director of Water Resources shall cause a notice of such application to be published at the applicant's expense at least once a week for three weeks in at least one newspaper of general circulation in each county containing lands on which the water appropriation is or is proposed to be located and a newspaper of general circulation in Nebraska:

Such notice shall be published at least once a week for three consecutive weeks, and shall contain a description of the water appropriation, the number assigned such permit in the records of the department, the date of priority, a description of the lands to which such water appropriation is proposed to be applied, and any other relevant information.

The notice shall state that any person may in writing object to and request a hearing on the application at any time prior to the elapse of two weeks from the date of final publication.

Sec. 4. The department may hold a hearing on an application filed under section 2 of this act on its own motion, and shall hold a hearing if requested by any person.

Sec. 5. Any hearing held pursuant to section 4 of this act shall be conducted in accordance with sections 46-209 and 46-210.

Sec. 6. The Director of Water Resources shall approve an application filed pursuant to section 2 of this act 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 quantity of water to be transferred to the new location will not exceed the amount consumptively used under the current use;

(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 (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.

Sec. 7. That original section 46-122, Reissue Revised Statutes of Nebraska, 1943, is repealed.
