

LEGISLATURE OF NEBRASKA

ONE HUNDREDTH LEGISLATURE

SECOND SESSION

**LEGISLATIVE BILL 924**

Introduced by Fischer, 43.

Read first time January 14, 2008

Committee: Natural Resources

A BILL

1 FOR AN ACT relating to water; to amend sections 37-807 and  
2 46-2,110, Reissue Revised Statutes of Nebraska, and  
3 section 46-713, Revised Statutes Cumulative Supplement,  
4 2006; to provide for offsets to streamflow depletions as  
5 prescribed; to change provisions relating to the Nongame  
6 and Endangered Species Conservation Act, instream flow  
7 appropriations, and evaluation of water supplies under  
8 the Nebraska Ground Water Management and Protection Act;  
9 to harmonize provisions; and to repeal the original  
10 sections.

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

1           Section 1. (1) Depletions to streamflow created by new  
2 uses may be offset by corresponding gains to streamflow resulting  
3 from any of the ground water controls authorized pursuant to an  
4 integrated management plan or program adopted in accordance with  
5 the Nebraska Ground Water Management and Protection Act. Natural  
6 resources districts may also offset any depletions to streamflow  
7 caused by new water uses by acquiring rights to existing uses of  
8 ground water and retiring those existing uses on a temporary or  
9 permanent basis. Rights to uses of ground water acquired by natural  
10 resources districts for the purpose of offsetting the depletions  
11 to streamflow caused by new water uses shall be protected from  
12 diversion as follows:

13           (1) The natural resources district within which such  
14 rights are or will be acquired shall quantify the amount of gain to  
15 streamflow resulting from the retirement of an existing use and the  
16 location within the applicable stream of such gain. Quantification  
17 of the gain to streamflow and the depletions to streamflow shall be  
18 made using the best available science;

19           (2) The natural resources district seeking to offset a  
20 new water use shall prepare and file a notice of offset with  
21 the Department of Natural Resources. The notice of offset shall  
22 inform the department of the location and quantification of the  
23 gain created by the retirement of the existing water use and the  
24 location of the new use that will be offset. The notice of offset  
25 shall also include a quantification of the depletion to streamflow

1 and the location of such depletion caused by the new use; and

2 (3) Upon receiving the notice of offset, the department  
3 shall take such action as is necessary to protect the amount  
4 of water specified in the notice of offset from diversion, by  
5 persons holding surface water appropriations, between the location  
6 of gain to streamflow created by the retired use and the location  
7 of depletion to streamflow caused by the new use. To assist a  
8 natural resources district in preparing the notice of offset, the  
9 department shall consult with the natural resources district and  
10 provide assistance in determining the best available science.

11 Sec. 2. Natural resources districts may offset depletions  
12 to streamflow caused by new water uses by creating corresponding  
13 gains to streamflow by acquiring rights to existing surface water  
14 appropriations and discontinuing those existing uses on a permanent  
15 or temporary basis. Surface water appropriations acquired by a  
16 natural resources district for the purpose of offsetting the  
17 impacts to streamflow caused by new water uses shall be protected  
18 from diversion by other surface water appropriators as follows:

19 (1) The natural resources district within which the  
20 surface water appropriation is or will be acquired shall quantify  
21 the amount of gain to streamflow resulting from the discontinuance  
22 of the existing use and the location within the applicable  
23 stream of such gain. Quantification of the gain to streamflow  
24 and depletions to streamflow shall be done using the best available  
25 science;

1           (2) The natural resources district seeking to offset a  
2 new water use shall prepare and file a notice of offset with the  
3 Department of Natural Resources. The notice of offset shall inform  
4 the department of the location and quantification of the gain  
5 created by the discontinuance of the existing appropriation and the  
6 location of the new use that will be offset. The notice of offset  
7 shall also include a quantification of the depletion to streamflow  
8 and the location of such depletion caused by the new use; and

9           (3) Upon receiving the notice of offset, the department  
10 shall take such action as is necessary to protect the amount of  
11 water specified in the notice of offset from diversion, by persons  
12 holding surface water appropriations, between the location of gain  
13 to the streamflow created by the discontinued use and the location  
14 of depletion to the streamflow created by the new use. To assist a  
15 natural resources district in preparing the notice of offset, the  
16 department shall consult with the natural resources district and  
17 provide assistance in determining the best available science.

18           Sec. 3. Section 37-807, Reissue Revised Statutes of  
19 Nebraska, is amended to read:

20           37-807 (1) The commission shall establish such programs,  
21 including acquisition of land or aquatic habitat or interests  
22 therein, as are necessary for the conservation of nongame,  
23 threatened, or endangered species of wildlife or wild plants.  
24 Acquisition for the purposes of this subsection shall not include  
25 the power to obtain by eminent domain.

1           (2) In carrying out programs authorized by this  
2 section, the commission shall consult with other states having  
3 a common interest in particular species of nongame, endangered,  
4 or threatened species of wildlife or wild plants and may enter  
5 into agreements with federal agencies, other states, political  
6 subdivisions of this state, or private persons with respect  
7 to programs designed to conserve such species including, when  
8 appropriate, agreements for administration and management of any  
9 area established under this section or utilized for conservation  
10 of such species.

11           (3) The Governor shall review other programs administered  
12 by him or her and utilize such programs in furtherance of the  
13 purposes of the Nongame and Endangered Species Conservation Act.  
14 All other state agencies shall, in consultation with and with  
15 the assistance of the commission, utilize their authorities in  
16 furtherance of the purposes of the act by carrying out programs  
17 for the conservation of endangered species and threatened species  
18 listed pursuant to section 37-806 and by taking such action  
19 necessary to insure that actions authorized, funded, or carried  
20 out by them do not jeopardize the continued existence of such  
21 endangered or threatened species or result in the destruction or  
22 modification of habitat of such species which is determined by the  
23 commission to be critical. For purposes of this subsection, state  
24 agency means any department, agency, board, bureau, or commission  
25 of the state or any corporation whose primary function is to act

1 as, and while acting as, an instrumentality or agency of the state,  
2 except that state agency shall not include a natural resources  
3 district or any other political subdivision.

4 (4) (a) Promptly after conclusion of consultation under  
5 subsection (3) of this section, the commission shall provide  
6 to the state agency and the applicant for a project under the  
7 Nongame and Endangered Species Conservation Act, if any, a written  
8 statement setting forth the commission's opinion and a summary of  
9 the information on which the opinion is based, detailing how the  
10 state agency action affects the species or its critical habitat.  
11 If jeopardy or adverse modification is found, the commission shall  
12 suggest reasonable and prudent alternatives which it believes would  
13 comply with the act and which can be taken by the state agency or  
14 applicant in implementing the state agency action. The issuance of  
15 each opinion constitutes a state agency action that is subject to  
16 administrative review upon the request of any applicant.

17 (b) Any applicant for a permit under the act may apply  
18 for an exemption from the state agency action to the exemption  
19 committee established under subdivision (c) of this subsection  
20 if, after consultation under subsection (3) of this section, the  
21 commission finds jeopardy or adverse modification will result and  
22 there are no reasonable and prudent alternatives. Such application  
23 shall be made within thirty days after issuance of the opinion  
24 from the commission. The exemption committee shall provide an  
25 opportunity for hearing to the applicant and the commission and

1 shall take any evidence as is necessary to determine whether  
2 to grant the exemption. The exemption committee shall grant  
3 the exemption if (i) granting the exemption does not result in  
4 the extinction of the species, (ii) reasonable mitigation and  
5 enhancement measures can be reasonably taken by the applicant, and  
6 (iii) the applicant's project is of significant importance to the  
7 economic well-being of the state.

8 (c) For purposes of this section, the exemption committee  
9 shall consist of the Governor or his or her designee, the director  
10 of the state agency or his or her designee, and one designee  
11 by each natural resources district within which the applicant's  
12 project is located.

13 ~~(4)~~ (5) The commission shall provide notice and hold a  
14 public meeting prior to the implementation of conservation programs  
15 designed to reestablish threatened, endangered, or extirpated  
16 species of wildlife or wild plants through the release of animals  
17 or plants to the wild. The purpose of holding such a public meeting  
18 shall be to inform the public of programs requiring the release  
19 to the wild of such wildlife or wild plants and to solicit public  
20 input and opinion. The commission shall set a date and time for  
21 the public meeting to be held at a site convenient to the proposed  
22 release area and shall publish a notice of such meeting in a legal  
23 newspaper published in or of general circulation in the county or  
24 counties where the proposed release is to take place. The notice  
25 shall be published at least twenty days prior to the meeting and

1 shall set forth the purpose, date, time, and place of the meeting.

2           Sec. 4. Section 46-2,110, Reissue Revised Statutes of  
3 Nebraska, is amended to read:

4           46-2,110 Following notice and a public hearing, any  
5 natural resources district or the Game and Parks Commission may  
6 file with the director an application for a permit to appropriate  
7 water for instream flows in each stream segment identified pursuant  
8 to section 46-2,109. The commission shall obtain the approval  
9 of each natural resources district within which the instream  
10 appropriation, if granted, would attach prior to filing an  
11 application with the director. Each natural resources district  
12 shall obtain the approval of the commission prior to filing the  
13 application. The application shall include the locations on the  
14 stream at which the need for instream flows begins and ends and the  
15 time of year when instream flows are most critical. The application  
16 shall also provide a detailed description of the amount of water  
17 necessary to provide adequate instream flows.

18           Sec. 5. Section 46-713, Revised Statutes Cumulative  
19 Supplement, 2006, is amended to read:

20           46-713 (1)(a) By January 1 of each year beginning in  
21 2006 and except as otherwise provided in this section and section  
22 46-720, the Department of Natural Resources shall complete an  
23 evaluation of the expected long-term availability of hydrologically  
24 connected water supplies for both existing and new surface water  
25 uses and existing and new ground water uses in each of the



1 state's river basins and shall issue a report that describes the  
2 results of the evaluation. For purposes of the evaluation and the  
3 report, a river basin may be divided into two or more subbasins or  
4 reaches. A river basin, subbasin, or reach for which an integrated  
5 management plan has been or is being developed pursuant to sections  
6 46-715 to 46-717 or pursuant to section 46-719 shall not be  
7 evaluated unless it is being reevaluated as provided in subsection  
8 (2) of this section. For each river basin, subbasin, or reach  
9 evaluated, the report shall describe (i) the nature and extent  
10 of use of both surface water and ground water in each river  
11 basin, subbasin, or reach, (ii) the geographic area within which  
12 the department preliminarily considers surface water and ground  
13 water to be hydrologically connected and the criteria used for  
14 that determination, and (iii) the extent to which the then-current  
15 uses affect available near-term and long-term water supplies.  
16 River basins, subbasins, and reaches designated as overappropriated  
17 in accordance with subsection (4) of this section shall not be  
18 evaluated by the department.

19 (b) Based on the information reviewed in the evaluation  
20 process, the department shall arrive at a preliminary conclusion  
21 for each river basin, subbasin, and reach evaluated as to  
22 whether such river basin, subbasin, or reach presently is fully  
23 appropriated without the initiation of additional uses. The  
24 department shall not make any preliminary conclusions that a  
25 basin, subbasin, or reach is fully appropriated unless all surface

1 water appropriations located within the basin, subbasin, or reach  
2 have been investigated pursuant to section 46-229.02 within the  
3 preceding three years to determine whether all or a portion of  
4 the appropriation has been forfeited or abandoned. The department  
5 shall also determine if and how such preliminary conclusion would  
6 change if no additional legal constraints were imposed on future  
7 development of hydrologically connected surface water and ground  
8 water and reasonable projections are made about the extent and  
9 location of future development in such river basin, subbasin, or  
10 reach.

11 (c) In addition to the conclusion about whether a river  
12 basin, subbasin, or reach is fully appropriated, the department  
13 shall include in the report, for informational purposes only,  
14 a summary of relevant data provided by any interested party  
15 concerning the social, economic, and environmental impacts of  
16 additional hydrologically connected surface water and ground water  
17 uses on resources that are dependent on streamflow or ground water  
18 levels but are not protected by appropriations or regulations.

19 (d) In preparing the report, the department shall rely  
20 on the best scientific data, information, and methodologies readily  
21 available to ensure that the conclusions and results contained  
22 in the report are reliable. In its report, the department shall  
23 provide sufficient documentation to allow these data, information,  
24 methodologies, and conclusions to be independently replicated  
25 and assessed. Upon request by the department, state agencies,

1 natural resources districts, irrigation districts, reclamation  
2 districts, public power and irrigation districts, mutual irrigation  
3 companies, canal companies, municipalities, and other water users  
4 and stakeholders shall provide relevant data and information in  
5 their possession. The Department of Natural Resources shall specify  
6 by rule and regulation the types of scientific data and other  
7 information that will be considered for making the preliminary  
8 determinations required by this section.

9 (2) The department shall complete a reevaluation of  
10 a river basin, subbasin, or reach for which an integrated  
11 management plan has been or is being prepared if the department has  
12 reason to believe that a reevaluation might lead to a different  
13 determination about whether such river basin, subbasin, or reach  
14 is fully appropriated or overappropriated. A decision to reevaluate  
15 may be reached by the department on its own or in response  
16 to a petition filed with the department by any interested  
17 person. To be considered sufficient to justify a reevaluation,  
18 a petition shall be accompanied by supporting information showing  
19 that (a) new scientific data or other information relevant to the  
20 determination of whether the river basin, subbasin, or reach is  
21 fully appropriated or overappropriated has become available since  
22 the last evaluation of such river basin, subbasin, or reach, (b)  
23 the department relied on incorrect or incomplete information when  
24 the river basin, subbasin, or reach was last evaluated, or (c)  
25 the department erred in its interpretation or application of the

1 information available when the river basin, subbasin, or reach was  
2 last evaluated. If a petition determined by the department to be  
3 sufficient is filed before March 1 of any year, the reevaluation of  
4 the river basin, subbasin, or reach involved shall be included in  
5 the next annual report prepared in accordance with subsection (1)  
6 of this section. If any such petition is filed on or after March 1  
7 of any year, the department may defer the reevaluation of the river  
8 basin, subbasin, or reach involved until the second annual report  
9 after such filing.

10 (3) A river basin, subbasin, or reach shall be deemed  
11 fully appropriated if the department determines based upon its  
12 evaluation conducted pursuant to subsection (1) of this section  
13 and information presented at the hearing pursuant to subsection  
14 (4) of section 46-714 that then-current uses of hydrologically  
15 connected surface water and ground water in the river basin,  
16 subbasin, or reach cause or will in the reasonably foreseeable  
17 future cause (a) the surface water supply to be insufficient to  
18 sustain over the long term the beneficial or useful purposes for  
19 which existing natural-flow or storage appropriations were granted  
20 and the beneficial or useful purposes for which, at the time of  
21 approval, any existing instream appropriation was granted, (b) the  
22 streamflow to be insufficient to sustain over the long term the  
23 beneficial uses from wells constructed in aquifers dependent on  
24 recharge from the river or stream involved, or (c) reduction in  
25 the flow of a river or stream sufficient to cause noncompliance

1 by Nebraska with an interstate compact or decree, or other formal  
2 state contract or agreement. ~~or applicable state or federal laws.~~

3 (4) (a) A river basin, subbasin, or reach shall be deemed  
4 overappropriated if, on July 16, 2004, the river basin, subbasin,  
5 or reach is subject to an interstate cooperative agreement among  
6 three or more states and if, prior to such date, the department  
7 has declared a moratorium on the issuance of new surface water  
8 appropriations in such river basin, subbasin, or reach and has  
9 requested each natural resources district with jurisdiction in the  
10 affected area in such river basin, subbasin, or reach either (i)  
11 to close or to continue in effect a previously adopted closure of  
12 all or part of such river basin, subbasin, or reach to the issuance  
13 of additional water well permits in accordance with subdivision  
14 (1) (k) of section 46-656.25 as such section existed prior to July  
15 16, 2004, or (ii) to temporarily suspend or to continue in effect  
16 a temporary suspension, previously adopted pursuant to section  
17 46-656.28 as such section existed prior to July 16, 2004, on the  
18 drilling of new water wells in all or part of such river basin,  
19 subbasin, or reach.

20 (b) Within sixty days after July 16, 2004, the department  
21 shall designate which river basins, subbasins, or reaches are  
22 overappropriated. The designation shall include a description of  
23 the geographic area within which the department has determined that  
24 surface water and ground water are hydrologically connected and the  
25 criteria used to make such determination.

1                   Sec. 6. Original sections 37-807 and 46-2,110, Reissue  
2 Revised Statutes of Nebraska, and section 46-713, Revised Statutes  
3 Cumulative Supplement, 2006, are repealed.