

LEGISLATURE OF NEBRASKA

ONE HUNDRED FIRST LEGISLATURE

FIRST SESSION

LEGISLATIVE BILL 438

Introduced by Fischer, 43.

Read first time January 20, 2009

Committee: Natural Resources

A BILL

1 FOR AN ACT relating to water; to amend section 46-2,115,
2 Reissue Revised Statutes of Nebraska, and section
3 46-290, Revised Statutes Cumulative Supplement, 2008; to
4 prohibit instream appropriations in fully appropriated or
5 overappropriated areas; to harmonize provisions; and to
6 repeal the original sections.
7 Be it enacted by the people of the State of Nebraska,

1 Section 1. Section 46-290, Revised Statutes Cumulative
2 Supplement, 2008, is amended to read:

3 46-290 (1) (a) Except as provided in this section and
4 sections 46-2,120 to 46-2,130, any person having a permit to
5 appropriate water for beneficial purposes issued pursuant to
6 sections 46-233 to 46-235, 46-240.01, 46-241, 46-242, or 46-637
7 and who desires (i) to transfer the use of such appropriation to
8 a location other than the location specified in the permit, (ii)
9 to change that appropriation to a different type of appropriation
10 as provided in subsection (3) of this section, or (iii) to change
11 the purpose for which the water is to be used under a natural-flow,
12 storage, or storage-use appropriation to a purpose not at that time
13 permitted under the appropriation shall apply for approval of such
14 transfer or change to the Department of Natural Resources.

15 (b) The application for such approval shall contain (i)
16 the number assigned to such appropriation by the department, (ii)
17 the name and address of the present holder of the appropriation,
18 (iii) if applicable, the name and address of the person or entity
19 to whom the appropriation would be transferred or who will be
20 the user of record after a change in the location of use, type
21 of appropriation, or purpose of use under the appropriation, (iv)
22 the legal description of the land to which the appropriation is
23 now appurtenant, (v) the name and address of each holder of a
24 mortgage or deed of trust for the land to which the appropriation
25 is now appurtenant, (vi) if applicable, the legal description of

1 the land to which the appropriation is proposed to be transferred,
2 (vii) if a transfer is proposed, whether other sources of water
3 are available at the original location of use and whether any
4 provisions have been made to prevent either use of a new source
5 of water at the original location or increased use of water from
6 any existing source at that location, (viii) if applicable, the
7 legal descriptions of the beginning and end of the stream reach
8 to which the appropriation is proposed to be transferred for the
9 purpose of augmenting the flows in that stream reach, (ix) if a
10 proposed transfer is for the purpose of increasing the quantity
11 of water available for use pursuant to another appropriation, the
12 number assigned to such other appropriation by the department, (x)
13 the purpose of the current use, (xi) if a change in purpose of
14 use is proposed, the proposed purpose of use, (xii) if a change in
15 the type of appropriation is proposed, the type of appropriation to
16 which a change is desired, (xiii) if a proposed transfer or change
17 is to be temporary in nature, the duration of the proposed transfer
18 or change, and (xiv) such other information as the department by
19 rule and regulation requires.

20 (2) If a proposed transfer or change is to be temporary
21 in nature, a copy of the proposed agreement between the current
22 appropriator and the person who is to be responsible for use of
23 water under the appropriation while the transfer or change is in
24 effect shall be submitted at the same time as the application.

25 (3) Regardless of whether a transfer or a change in

1 the purpose of use is involved, the following changes in type of
2 appropriation, if found by the Director of Natural Resources to
3 be consistent with section 46-294, may be approved subject to the
4 following:

5 (a) A natural-flow appropriation for direct out-of-stream
6 use may be changed to a natural-flow appropriation for aboveground
7 reservoir storage or for intentional underground water storage;

8 (b) A natural-flow appropriation for intentional
9 underground water storage may be changed to a natural-flow
10 appropriation for direct out-of-stream use or for aboveground
11 reservoir storage;

12 (c) A natural-flow appropriation for direct out-of-stream
13 use, for aboveground reservoir storage, or for intentional
14 underground water storage may be changed to an instream
15 appropriation subject to sections 46-2,107 to 46-2,119 if the
16 director determines that the resulting instream appropriation would
17 be consistent with subdivisions (2), (3), ~~and~~ (4), and (5) of
18 section 46-2,115;

19 (d) A natural-flow appropriation for direct out-of-stream
20 use, for aboveground reservoir storage, or for intentional
21 underground water storage may be changed to an appropriation for
22 induced ground water recharge if the director determines that the
23 resulting appropriation for induced ground water recharge would be
24 consistent with subdivisions (2)(a)(i) and (ii) of section 46-235;
25 and

1 (e) The incidental underground water storage portion,
2 whether or not previously quantified, of a natural-flow or
3 storage-use appropriation may be separated from the direct-use
4 portion of the appropriation and may be changed to a natural-flow
5 or storage-use appropriation for intentional underground water
6 storage at the same location if the historic consumptive use
7 of the direct-use portion of the appropriation is transferred
8 to another location or is terminated, but such a separation and
9 change may be approved only if, after the separation and change,
10 (i) the total permissible diversion under the appropriation will
11 not increase, (ii) the projected consequences of the separation
12 and change are consistent with the provisions of any integrated
13 management plan adopted in accordance with section 46-718 or 46-719
14 for the geographic area involved, and (iii) if the location of the
15 proposed intentional underground water storage is in a river basin,
16 subbasin, or reach designated as overappropriated in accordance
17 with section 46-713, the integrated management plan for that river
18 basin, subbasin, or reach has gone into effect, and that plan
19 requires that the amount of the intentionally stored water that is
20 consumed after the change will be no greater than the amount of the
21 incidentally stored water that was consumed prior to the change.
22 Approval of a separation and change pursuant to this subdivision
23 (e) shall not exempt any consumptive use associated with the
24 incidental recharge right from any reduction in water use required
25 by an integrated management plan for a river basin, subbasin, or

1 reach designated as overappropriated in accordance with section
2 46-713.

3 Whenever any change in type of appropriation is approved
4 pursuant to this subsection and as long as that change remains in
5 effect, the appropriation shall be subject to the statutes, rules,
6 and regulations that apply to the type of appropriation to which
7 the change has been made.

8 (4) The Legislature finds that induced ground water
9 recharge appropriations issued pursuant to sections 46-233 and
10 46-235 and instream appropriations issued pursuant to section
11 46-2,115 are specific to the location identified in the
12 appropriation. Neither type of appropriation shall be transferred
13 to a different location, changed to a different type of
14 appropriation, or changed to permit a different purpose of use.

15 (5) In addition to any other purposes for which transfers
16 and changes may be approved, such transfers and changes may
17 be approved if the purpose is (a) to augment the flow in a
18 specific stream reach for any instream use that the department has
19 determined, through rules and regulations, to be a beneficial use
20 or (b) to increase the frequency that a diversion rate or rate of
21 flow specified in another valid appropriation is achieved.

22 For any transfer or change approved pursuant to
23 subdivision (a) of this subsection, the department shall be
24 provided with a report at least every five years while such
25 transfer or change is in effect. The purpose of such report shall

1 be to indicate whether the beneficial instream use for which the
2 flow is augmented continues to exist. If the report indicates that
3 it does not or if no report is filed within sixty days after
4 the department's notice to the appropriator that the deadline
5 for filing the report has passed, the department may cancel its
6 approval of the transfer or change and such appropriation shall
7 revert to the same location of use, type of appropriation, and
8 purpose of use as prior to such approval.

9 (6) A quantified or unquantified appropriation for
10 incidental underground water storage may be transferred to a new
11 location along with the direct-use appropriation with which it is
12 recognized if the director finds such transfer to be consistent
13 with section 46-294 and determines that the geologic and other
14 relevant conditions at the new location are such that incidental
15 underground water storage will occur at the new location. The
16 director may request such information from the applicant as
17 is needed to make such determination and may modify any such
18 quantified appropriation for incidental underground water storage,
19 if necessary, to reflect the geologic and other conditions at the
20 new location.

21 (7) Unless an incidental underground water storage
22 appropriation is changed as authorized by subdivision (3)(e)
23 of this section or is transferred as authorized by subsection
24 (6) of this section or subsection (1) of section 46-291, such
25 appropriation shall be canceled or modified, as appropriate, by

1 the director to reflect any reduction in water that will be stored
2 underground as the result of a transfer or change of the direct-use
3 appropriation with which the incidental underground water storage
4 was recognized prior to the transfer or change.

5 Sec. 2. Section 46-2,115, Reissue Revised Statutes of
6 Nebraska, is amended to read:

7 46-2,115 An application for an instream appropriation
8 which is pending on or filed after January 1, 1997, shall be
9 approved by the director if he or she finds that:

10 (1) In order to allow for future beneficial uses, there
11 is unappropriated water available to provide the approved instream
12 flow rate at least twenty percent of the time during the period
13 requested;

14 (2) The appropriation is necessary to maintain the
15 existing recreational uses or needs of existing fish and wildlife
16 species;

17 (3) The appropriation will not interfere with any senior
18 surface water appropriation;

19 (4) The rate and timing of the flow is the minimum
20 necessary to maintain the existing recreational uses or needs of
21 existing fish and wildlife species; and

22 (5) The instream appropriation is not in a river basin,
23 subbasin, or reach that has been determined or designated by the
24 department to be fully appropriated or overappropriated; and

25 ~~(5)~~ (6) The application is in the public interest.

1 The application may be granted for a rate of flow that is
2 less than that requested by the applicant or for a shorter period
3 of time than requested by the applicant.

4 Sec. 3. Original section 46-2,115, Reissue Revised
5 Statutes of Nebraska, and section 46-290, Revised Statutes
6 Cumulative Supplement, 2008, are repealed.