

LEGISLATIVE BILL 198

Approved by the Governor May 17, 1983

Introduced by Schmit, 23; Clark, 47; Jacobson, 33;
Kahle, 37; DeCamp, 40; Wagner, 41;
Beyer, 3; Sieck, 24; H. Peterson, 35;
Goodrich, 20; Warner, 25 Nichol, 48;
Lundy, 36

AN ACT relating to water resources; to amend sections 46-233, 46-240, 46-241, and 46-242, Reissue Revised Statutes of Nebraska, 1943, and sections 33-105, 46-202, and 46-544, Revised Statutes Supplement, 1982; to state intent; to define terms; to prescribe fees; to provide for permits and modification of permits for incidental and intentional underground water storage; to change provisions relating to permits; to authorize the levying and collection of fees and assessments; to authorize the use of injunctions; to provide duties; to provide for severability; and to repeal the original sections.

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

Section 1. The Legislature recognizes that, as a result of water project operations, surface water in some areas of the state has been, is, and will be in the future intentionally and incidentally stored in and withdrawn from underground strata. The Legislature acknowledges that rights to water intentionally or incidentally stored underground and rights to withdrawal of such water should be formally recognized and quantified, and recognizes the propriety of all beneficiaries proportionately sharing in the financial obligations necessary for construction, operation, and maintenance of water projects which cause intentional or incidental underground water storage.

The Legislature finds that uses of water for incidental and intentional underground water storage are beneficial uses of water and that comprehensive, conjunctive management of surface water and intentional or incidental underground water storage is essential for the continued economic prosperity and well-being of the state, serves the public interest by providing an

element of certainty essential for investment in water resources development, and will improve Nebraska's standing in the event of interstate dispute.

To facilitate optimum beneficial use of water by the people of Nebraska, the Legislature recognizes the need for authorizing the recognition of incidental underground water storage as provided in section 46-240 and sections 5 and 6 of this act, for authorizing intentional underground water storage as provided in sections 46-233, 46-240, 46-241, and 46-242, and section 11 of this act, and for authorizing the levying and collection of fees and assessments on persons who withdraw or otherwise use or benefit from intentional or incidental underground water storage as provided in sections 12 to 20 of this act.

Nothing in this act shall be construed to alter existing statutes regarding the relationship between naturally occurring surface and ground water.

Sec. 2. As used in sections 33-105, 46-202, 46-233, 46-240, 46-241, and 46-242, and sections 1, 2, 5, 6, and 11 to 20 of this act, unless the context otherwise requires:

(1) Department shall mean the Department of Water Resources;

(2) Director shall mean the Director of Water Resources;

(3) Person shall mean a natural person, partnership, association, corporation, municipality, or any agency or political subdivision of the state or of the federal government;

(4) Underground water storage shall mean the act of storing water in underground strata. Such water shall be known as water stored underground, but the term shall not include ground water, as defined in section 46-657, which occurs naturally;

(5) Intentional underground water storage shall mean underground water storage which is an intended purpose or result of a water project or use. Such storage may be accomplished by any lawful means such as injection wells, infiltration basins, canals, reservoirs, and other reasonable methods; and

(6) Incidental underground water storage shall mean underground water storage which occurs as an indirect result, rather than an intended or planned purpose, of a water project or use, and may include, but shall not be limited to, seepage from reservoirs, canals, and laterals, and deep percolation from irrigated lands.

Sec. 3. That section 33-105, Revised Statutes Supplement, 1982, be amended to read as follows:

33-105. There shall be paid to the Department of Water Resources in advance for the services of the

Director of Water Resources by the party demanding or necessitating the service the following fees:

(1) For filing, recording, and examining each application for a storage reservoir, for the first five thousand acre-feet or fraction thereof, twenty-five dollars, and for each additional five thousand acre-feet or fraction thereof, ten dollars;

(2) For filing, recording, and examining each application for, or modification of a permit to include, intentional or incidental underground water storage and recovery, five hundred dollars;

(3) For filing, recording, and examining each application for water for irrigation from a natural stream, for the first one thousand acres proposed for irrigation or fraction thereof, two hundred dollars, and for each additional thousand acres or fraction thereof, one hundred dollars;

(4) For filing, recording, and examining each application for water for irrigation from a storage reservoir, for the first one thousand acres proposed for irrigation or fraction thereof, fifty dollars, and for each additional thousand acres or fraction thereof, twenty-five dollars;

(5) For filing, recording, and examining each application for water for power purposes, for each theoretical fifty horsepower or fraction thereof, five dollars;

(6) For filing, recording, and examining each application for water for each stock water reservoir, fish pond, ice pond, or other useful purpose for which no fee has been fixed, ten dollars;

(7) For filing, recording, and examining each application for withdrawal of ground water for industrial purposes, for the first three thousand acre-feet or fraction thereof, one thousand five hundred dollars, and for each additional one thousand acre-feet or fraction thereof, seven hundred fifty dollars;

(8) For filing any petition, affidavit, or other paper, ten dollars;

(9) For recording any deed or document pertaining to land covered in whole or in part by a water appropriation or any instrument other than an application, ten dollars;

(10) For blueprint copy of any map or drawing or for other copy of drawings or photostatic copy of any record, a reasonable sum to be fixed by the department in an amount estimated to cover the actual cost of preparing such a reproduction;

(11) For the examination of plans for any new dam and reservoir or enlargement, one dollar for each foot in height of the dam, and actual expenses while visiting and examining the site; and

(12) For certificate and seal, one dollar.

7 except that for any document filed with the Director of Water Resources in his or her capacity as Secretary to the Nebraska Power Review Board there shall be no charge.

The Director of Water Resources shall keep a record of all money thus received. At the end of each calendar month he or she shall pay the same to the State Treasurer for the use of the General Fund and take his or her receipt therefor and file the same with the records of his or her office.

Sec. 4. That section 46-202, Revised Statutes Supplement, 1982, be amended to read as follows:

46-202. (1) The water of every natural stream not heretofore appropriated within the State of Nebraska, including the Missouri River, is hereby declared to be the property of the public and is dedicated to the use of the people of the state, subject to appropriation, as herein provided.

(2) The water of every natural stream within the State of Nebraska, including the Missouri River, appropriated for storage in a surface reservoir or for underground water storage, is hereby declared to be subject to further appropriation for recovery and beneficial use.

Sec. 5. Any person having an approved perfected appropriation may file with the department an application for recognition of incidental underground water storage associated with such appropriation, and for recovery of such water, on a form prescribed and furnished by the department without cost. Upon receipt of an application, the department shall proceed in accordance with rules and regulations adopted and promulgated by the department.

Sec. 6. The director may approve an application filed pursuant to section 5 or 11 of this act subject to the following conditions:

(1) The rate, quantity, or time of surface water diversion shall not be increased from that approved for the original appropriation;

(2) If the water stored or to be stored underground will be used for irrigation purposes, the director may approve the service of additional amounts of land or different lands not identified to be served with facilities included under the original appropriation, if the director determines that the change is in the public interest, and that any interference with the rights of senior appropriators as a result of such change is unavoidable and not material; and

(3) The priority date shall remain the same as that of the original appropriation.

The director may grant the application in a

modified or reduced form, if required by the public interest, and may impose such other reasonable conditions as deemed appropriate to protect the public interest. The approval shall include an identification of the water stored or to be stored underground.

Sec. 7. That section 46-233, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

46-233. (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. A permit may be obtained to appropriate public waters for intentional underground water storage and recovery of such water.

(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 the department without cost to an applicant. Such application shall set forth (a) the name and post-office 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) Upon receipt of the application required by the provisions of subsection (1) of this section and containing the information set forth in subsection (2) of this section, the department shall (a) make a record of the receipt of such application, (b) cause the same to be recorded in its office, and (c) make a careful

examination of the application to ascertain whether it sets forth all the facts necessary to enable the department to determine the nature and amount of the proposed appropriation. If such an examination shows the application in any way defective, it shall be returned to the applicant for correction, with a statement of the correction required, within thirty days after its receipt; and thirty days shall be allowed for the refiling thereof and, in default of such refiling, the application shall stand dismissed. If so filed and corrected as required within such time, the application shall, upon being accepted and allowed, take priority as of the date of the original filing, subject to compliance with the future provisions of the law and the regulations thereunder. During ; Provided, that during the pendency of an application or upon its approval, the department, upon proper authorization and request of the applicant, may assign the application a later priority date.

(4) An unapproved application pending on the effective date of this act may be amended to include appropriation for intentional underground water storage and recovery of such water.

Sec. 8. That section 46-240, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

46-240. Whenever any person shall desire to divert any of the unappropriated waters of any natural lake or reservoir, or any person shall desire to recover any unappropriated water intentionally or incidentally stored underground, for the irrigation or any other beneficial purpose, of irrigating land for which water has already been appropriated, but for which in times of scarcity no water can be obtained from the appropriation already made therefor, such person may make application therefor and proceed as in cases of original application for appropriation.

An application for recovery of water stored underground may be made only by an appropriator of record who shows, by documentary evidence, sufficient interest in the underground water storage facility to entitle the applicant to the water requested.

Sec. 9. That section 46-241, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

46-241. (1) Every person, intending to construct and maintain a storage reservoir for irrigation or any other beneficial useful purpose or intending to construct and maintain a facility for intentional underground water storage and recovery, shall make an application to the Department of Water Resources upon a form prescribed and furnished to the applicant without cost. Such application shall be filed

and proceedings had thereunder in the same manner and under the same rules and regulations as other applications. Upon the approval of such application the applicant shall have the right to impound in such reservoir, or store in and recover from such facility, all waters not otherwise appropriated and any appropriated water not needed for immediate use, to construct and maintain necessary ditches for the purpose of conducting water to such storage reservoir or facility, and to condemn land for such reservoir, and ditches, or other facility. The procedure to condemn property shall be exercised in the manner set forth in sections 76-704 to 76-724.

(2) The owner of a such storage reservoir or facility shall be liable for all damages arising from leakage or overflow of the water therefrom, or from the breaking of the embankment of such reservoir. The owner or possessor of a reservoir or intentional underground water storage facility owners or possessors of reservoirs shall not have the right to store impound any water whatever in such reservoir or facility reservoirs during the time that such water is required in ditches for direct irrigation or for any reservoir or facility the reservoirs holding a senior rights right. Every person who owns, controls, or operates a reservoir or intentional underground water storage facility, except political subdivisions of this state, shall be required to pass through the outlets of such reservoirs reservoir or facility, whether presently existing or hereafter constructed, a portion of the measured inflows to furnish water for livestock in such amounts and at such times as directed by the Department of Water Resources to meet the requirements for such purposes as determined by the department, except that a reservoir or facility owner shall not be required to release water for this purpose which has been legally stored. Any The reservoir dam shall be constructed in accordance with the provisions of section 46-257, and the outlet works shall be installed in such a manner that water may be released in compliance with the provisions of this section. Whenever any person shall divert water from a public stream and return it into the same stream, he or she may take out the same amount of water, less a reasonable deduction for losses in transit, to be determined by the department, providing no prior appropriator for beneficial use shall be prejudiced by such diversion.

(3) An application for recovery of water stored underground may be made only by an appropriator of record who shall show, by documentary evidence, sufficient interest in the underground water storage facility to entitle the applicant to the water requested.

Sec. 10. That section 46-242, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

46-242. (1) After the completion to the satisfaction of the Department of Water Resources of a such storage reservoir for which a permit has been obtained pursuant to section 46-241, to the satisfaction of the Department of Water Resources, any person, proposing to apply to beneficial use the water stored, shall file with the department an application for a permit, particularly describing the use to which the water is to be applied and, if for irrigation, describing a description of the land to be irrigated.

(2) Application Such application may be made for a permit to appropriate water for the irrigation of land lying both upstream and downstream from such a storage reservoir or intentional underground water storage facility. Under an approved application for a permit to appropriate water stored in a reservoir or facility for use on land upstream from such reservoir or facility, water may be diverted from the stream by the applicant and a compensating amount of water shall be released from the reservoir or facility for the use of downstream appropriators, but the rights of prior appropriators shall not be adversely affected by such exchange of water.

(3) The owner of a such storage reservoir shall have a preferred right to make such application for a period of six months from the time limited for the completion of such reservoir. The date of the expiration of such period shall be endorsed upon the application when allowed. If an application is made by any other than such owner of a reservoir or owners at any time, the same shall not be approved by the department until the applicant shall show, by documentary evidence, that he has acquired a sufficient interest in such storage reservoir to entitle the applicant him to enough water for the purpose set forth in the application. No appropriation of stored water for irrigation shall exceed three acre-feet during any calendar year for each acre of land for which such appropriation may be made.

(4) An unapproved application for a permit pursuant to this section, which is pending on the effective date of this act, may be amended to include use of stored water for intentional underground water storage.

Sec. 11. Any person who has an approved, unperfected appropriation pursuant to Chapter 46, article 2, may apply to the department for a modification of such permit to include intentional underground water storage associated with the appropriation. The application shall be made on a form

prescribed and furnished by the department without cost to the applicant. Upon receipt of such an application, the department shall proceed in accordance with rules and regulations adopted and promulgated by the department, subject to section 6 of this act.

Sec. 12. Any person who has obtained recognition of incidental underground water storage associated with an existing project, and authorization for use of such water, pursuant to sections 5 and 6 of this act may, subject to section 15 of this act, levy a fee of fifty cents per year per acre irrigated by mechanical withdrawal against any person who withdraws such stored water.

Sec. 13. Any person who has obtained a permit for intentional underground water storage associated with a project not existing on the effective date of this act, and recovery of such water, pursuant to section 46-233, 46-240, 46-241, 46-242 or section 11 of this act may, subject to section 15 of this act, levy a fee or assessment against any person for the right or probable right to withdraw or otherwise use such stored water. Such fee or assessment may be levied against any land in connection with which such underground water storage has occurred or probably will occur, and may be varied based on the degree to which underground water storage has occurred or will occur. No fee or assessment shall represent more than the fair market value of such recharge, except that a fee or assessment may include a sum sufficient to amortize the operation, maintenance, repair, and capital costs of the project, apportioned on the degree to which recharge has occurred or is likely to occur, and on the degree to which any surface water is delivered.

Sec. 14. No fee or assessment may be levied pursuant to section 12 or 13 of this act for withdrawals from wells with a capacity of less than one hundred gallons per minute which are solely for domestic purposes as defined in section 46-613.

Sec. 15. Any person intending to levy fees or assessments in accordance with section 12 or 13 of this act, or to modify such fees or assessments, shall, prior to levying such fees, assessments, modified fees, or modified assessments, file with the department an application for approval of such fees on a form prescribed and furnished by the department. Such application shall include a fee schedule and shall be processed under the applicable rules and regulations of the department adopted pursuant to section 46-209. The director shall approve such fees, assessments, modified fees, or modified assessments if they appear reasonable and comply with the applicable requirements of section 12 or 13 of this act.

Sec. 16. A fee or assessment levied pursuant

to section 12 or 13 of this act shall become a lien on the property benefited, or to be benefited, thirty days after the due date of such fee or assessment. The person levying the fee or assessment may collect such fee or assessment if it remains unpaid after thirty days after the due date by commencing an action in district court against the owner of the land benefited or to be benefited to foreclose the lien or to recover the amount due, except that no lien shall become effective until notice thereof is filed with the register of deeds in the county in which the benefited property is located and such lien shall relate back only to the date of filing.

Sec. 17. Any person who has obtained approval of fees or assessments pursuant to section 15 of this act, may commence an action to enjoin any person from withdrawing or otherwise using the stored water if the person has not entered into an agreement to pay fees or assessments for such stored water, or has failed and refused to pay a fee or assessment for a period of thirty days from and after the due date of the fee or assessment. No injunction may be obtained against withdrawals from wells with a capacity of less than one hundred gallons per minute which are solely for domestic uses as defined in section 46-613.

Sec. 18. If an action is commenced pursuant to section 16 or 17 of this act, an order of the director identifying water stored or to be stored underground, or approving fees or assessments, may not be collaterally attacked.

Sec. 19. Any person aggrieved by a decision made or an order issued by the director pursuant to section 46-233, 46-240, 46-241, or 46-242 or section 6, 11, or 15 of this act may appeal as provided in section 46-210.

Sec. 20. Any person may use water stored incidentally or intentionally underground for which the appropriate permits have not been obtained or for which approval of fees has not been obtained pursuant to section 15 of this act.

Sec. 21. That section 46-544, Revised Statutes Supplement, 1982, be amended to read as follows:

46-544. If the board of a reclamation district shall determine, in any year, that there are certain lands within the said district, not included within Classes B, C, and D, as hereinafter provided; which receive special direct benefits from recharging of the ground water reservoirs by water originating from district works, then in such case the board shall in such year fix an amount to be levied upon such tangible property which in the opinion of the board will compensate the district for the special direct benefits

accruing to such tangible property by reason of recharged ground water reservoirs under such land by water originating from the district works. Such amount shall in no case exceed, together with all other amounts levied made under Class A, on such land the sum of fourteen cents on each one hundred dollars of the actual valuation of the said land. Such owner of lands specially assessed for special direct benefits shall have notice, hearing, and the right of appeal and shall be governed by the provision of section 46-554.

The authority provided in this section may not be used if the district has obtained approval to levy fees or assessments pursuant to section 15 of this act.

Sec. 22. A natural resources district shall, prior to adopting or amending any rules and regulations for a control area pursuant to section 46-666, or for a management area pursuant to section 46-673.09, consult with any holders of permits for intentional or incidental underground water storage and recovery issued pursuant to section 46-233, 46-240, 46-241, or 46-242, or section 6 or 11 of this act.

Sec. 23. If any section in this act or any part of any section shall be declared invalid or unconstitutional, such declaration shall not affect the validity or constitutionality of the remaining portions thereof.

Sec. 24. That original sections 46-233, 46-240, 46-241, and 46-242, Reissue Revised Statutes of Nebraska, 1943, and sections 33-105, 46-202, and 46-544, Revised Statutes Supplement, 1982, are repealed.