

LEGISLATURE OF NEBRASKA
ONE HUNDRED SECOND LEGISLATURE
SECOND SESSION
LEGISLATIVE BILL 526
Final Reading

Introduced by Carlson, 38.

Read first time January 18, 2011

Committee: Natural Resources

A BILL

1 FOR AN ACT relating to water; to amend section 46-294, Reissue
2 Revised Statutes of Nebraska; to change provisions
3 relating to water transfers; to repeal the original
4 section; and to declare an emergency.
5 Be it enacted by the people of the State of Nebraska,

1 Section 1. Section 46-294, Reissue Revised Statutes of
2 Nebraska, is amended to read:

3 46-294 (1) Except for applications approved in accordance
4 with subsection (1) of section 46-291, the Director of Natural
5 Resources shall approve an application filed pursuant to section
6 46-290 only if the application and the proposed transfer or change
7 meet the following requirements:

8 (a) The application is complete and all other information
9 requested pursuant to section 46-293 has been provided;

10 (b) The proposed use of water after the transfer or
11 change will be a beneficial use of water;

12 (c)(i) Any requested transfer in the location of use is
13 within the same river basin as defined in section 46-288 or (ii) the
14 river basin from which the appropriation is to be transferred is
15 tributary to the river basin to which the appropriation is to be
16 transferred;

17 (d) Except as otherwise provided in subsection (4) of
18 this section, the proposed transfer or change, alone or when combined
19 with any new or increased use of any other source of water at the
20 original location or within the same irrigation district, reclamation
21 district, public power and irrigation district, or mutual irrigation
22 or canal company for the original or other purposes, will not
23 diminish the supply of water available for or otherwise adversely
24 affect any other water appropriator and will not significantly
25 adversely affect any riparian water user who files an objection in

1 writing pursuant to section 46-291;

2 (e) The quantity of water that is transferred for
3 diversion or other use at the new location will not exceed the
4 historic consumptive use under the appropriation or portion thereof
5 being transferred, except that this subdivision does not apply to (i)
6 a transfer in the location of use if both the current use and the
7 proposed use are for irrigation, the number of acres to be irrigated
8 will not increase after the transfer, and the location of the
9 diversion from the stream will not change or (ii) a transfer or
10 change in the purpose of use of a surface water irrigation
11 appropriation as provided for in subsection (3), (5), or (6) of
12 section 46-290 if the transfer or change in purpose will not diminish
13 the supply of water available or otherwise adversely affect any other
14 water appropriator, adversely affect Nebraska's ability to meet its
15 obligations under a multistate agreement, or result in administration
16 of the prior appropriation system by the Department of Natural
17 Resources, which would not have otherwise occurred;

18 (f) The appropriation, prior to the transfer or change,
19 is not subject to termination or cancellation pursuant to sections
20 46-229 to 46-229.04;

21 (g) If a proposed transfer or change is of an
22 appropriation that has been used for irrigation and is in the name of
23 an irrigation district, reclamation district, public power and
24 irrigation district, or mutual irrigation or canal company or is
25 dependent upon any such district's or company's facilities for water

1 delivery, such district or company has approved the transfer or
2 change;

3 (h) If the proposed transfer or change is of a storage-
4 use appropriation and if the owner of that appropriation is different
5 from the owner of the associated storage appropriation, the owner of
6 the storage appropriation has approved the transfer or change;

7 (i) If the proposed transfer or change is to be
8 permanent, either (i) the purpose for which the water is to be used
9 before the transfer or change is in the same preference category
10 established by section 46-204 as the purpose for which the water is
11 to be used after the transfer or change or (ii) the purpose for which
12 the water is to be used before the transfer or change and the purpose
13 for which the water is to be used after the transfer or change are
14 both purposes for which no preferences are established by section
15 46-204;

16 (j) If the proposed transfer or change is to be
17 temporary, it will be for a duration of no less than one year and,
18 except as provided in section 46-294.02, no more than thirty years;

19 (k) The transfer or change will not be inconsistent with
20 any applicable state or federal law and will not jeopardize the
21 state's compliance with any applicable interstate water compact or
22 decree or cause difficulty in fulfilling the provisions of any other
23 formal state contract or agreement; and

24 (l) The proposed transfer or change is in the public
25 interest. The director's considerations relative to the public

1 interest shall include, but not be limited to, (i) the economic,
2 social, and environmental impacts of the proposed transfer or change
3 and (ii) whether and under what conditions other sources of water are
4 available for the uses to be made of the appropriation after the
5 proposed transfer or change. The Department of Natural Resources
6 shall adopt and promulgate rules and regulations to govern the
7 director's determination of whether a proposed transfer or change is
8 in the public interest.

9 (2) The applicant has the burden of proving that the
10 proposed transfer or change will comply with subdivisions (1)(a)
11 through (l) of this section, except that (a) the burden is on a
12 riparian user to demonstrate his or her riparian status and to
13 demonstrate a significant adverse effect on his or her use in order
14 to prevent approval of an application and (b) if both the current use
15 and the proposed use after a transfer are for irrigation, the number
16 of acres to be irrigated will not increase after the transfer, and
17 the location of the diversion from the stream will not change, there
18 is a rebuttable presumption that the transfer will be consistent with
19 subdivision (1)(d) of this section.

20 (3) In approving an application, the director may impose
21 any reasonable conditions deemed necessary to protect the public
22 interest, to ensure consistency with any of the other criteria in
23 subsection (1) of this section, or to provide the department with
24 information needed to properly and efficiently administer the
25 appropriation while the transfer or change remains in effect. If

1 necessary to prevent diminution of supply for any other appropriator,
2 the conditions imposed by the director shall require that historic
3 return flows be maintained or replaced in quantity, timing, and
4 location. After approval of any such transfer or change, the
5 appropriation shall be subject to all water use restrictions and
6 requirements in effect at any new location of use and, if applicable,
7 at any new diversion location. An appropriation for which a transfer
8 or change has been approved shall retain the same priority date as
9 that of the original appropriation. If an approved transfer or change
10 is temporary, the location of use, purpose of use, or type of
11 appropriation shall revert to the location of use, purpose of use, or
12 type of appropriation prior to the transfer or change.

13 (4) In approving an application for a transfer, the
14 director may also authorize the overlying of water appropriations on
15 the same lands, except that if any such overlying of appropriations
16 would result in either the authorized diversion rate or the
17 authorized aggregate annual quantity that could be diverted to be
18 greater than is otherwise permitted by section 46-231, the director
19 shall limit the total diversion rate or aggregate annual quantity for
20 the appropriations overlain to the rate or quantity that he or she
21 determines is necessary, in the exercise of good husbandry, for the
22 production of crops on the land involved. The director may also
23 authorize a greater number of acres to be irrigated if the amount and
24 rate of water approved under the original appropriation is not
25 increased by the change of location. An increase in the number of

1 acres to be irrigated shall be approved only if (a) such an increase
2 will not diminish the supply of water available to or otherwise
3 adversely affect another water appropriator or (b) the transfer would
4 not adversely affect the water supply for any river basin, subbasin,
5 or reach that has been designated as overappropriated pursuant to
6 section 46-713 or determined to be fully appropriated pursuant to
7 section 46-714 and (i) the number of acres authorized under the
8 appropriation when originally approved has not been increased
9 previously, (ii) the increase in the number of acres irrigated will
10 not exceed five percent of the number of acres being irrigated under
11 the permit before the proposed transfer or a total of ten acres,
12 whichever acreage is less, and (iii) all the use will be either on
13 the quarter section to which the appropriation was appurtenant before
14 the transfer or on an adjacent quarter section.

15 Sec. 2. Original section 46-294, Reissue Revised Statutes
16 of Nebraska, is repealed.

17 Sec. 3. Since an emergency exists, this act takes effect
18 when passed and approved according to law.