

STATE OF NEBRASKA  
**DEPARTMENT OF NATURAL RESOURCES**

**SURFACE WATER**  
**CHAPTER 46, ARTICLE 2**

**AUGUST 2004**

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SURFACE WATER

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CHAPTER 46

REISSUE REVISED STATUTES OF NEBRASKA 1943

ARTICLE 2

GENERAL PROVISIONS REGULATING IRRIGATION

(a) PUBLIC RIGHTS

46-201.        Water for irrigation; declared natural want. Water for the purposes of irrigation in the State of Nebraska is hereby declared to be a natural want.

Source:        Laws 1895, c. 69, § 65, p. 268; R.S.1913, § 3369; Laws 1919, c. 190, tit. VII, art. V, div. 1, § 1, p. 831; C.S.1922, § 8406; C.S.1929, § 46-501.

46-202.        Natural streams; unappropriated water; dedication to public use; appropriated water; further appropriation. (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.

(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.

Source:        Laws 1895, c. 69, § 42, p. 260; R.S.1913, § 3370; Laws 1919, c. 190, tit. VII, art. V, div. 1, § 2, p. 831; C.S.1922, § 8407; C.S.1929, § 46-502; R.S.1943, § 46-202; Laws 1963, c. 277, § 1, p. 833; Laws 1965, c. 271, § 1, p. 773; Laws 1980, LB 802, § 1; Laws 1983, LB 198, § 4.

46-202.01.    Repealed. Laws 1965, c. 271, s. 3.

(b) FIRST APPROPRIATORS

46-203.        First appropriators; declared first in right. As between appropriators, the one first in time is first in right.

Source:        Laws 1889, c. 68, § 7, p. 504; R.S.1913, § 3371; Laws 1919, c. 190, tit. VII, art. V, div. 1, § 3, p. 832; C.S.1922, § 8408; C.S.1929, § 46-503.

46-204. Natural streams; priority of appropriations; first in time, first in right; preference from nature of use. The right to divert unappropriated waters of every natural stream for beneficial use shall never be denied except when such denial is demanded by the public interest. Priority of appropriation shall give the better right as between those using the water for the same purposes, but when the waters of any natural stream are not sufficient for the use of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming it for any other purpose, and those using the water for agricultural purposes shall have the preference over those using the same for manufacturing purposes.

Source: Laws 1895, c. 69, § 43, p. 260; R.S.1913, § 3372; Laws 1919, c. 190, tit. VII, art. V, div. 1, § 4, p. 832; C.S.1922, § 8409; C.S.1929, § 46-504; R.S.1943, § 46-204; Laws 1963, c. 277, § 2, p. 833; Laws 1965, c. 271, § 2, p. 773; Laws 1981, LB 252, § 1.

46-205. First appropriators; date of priority. The priority of an appropriation shall date from the filing of the application in the office of the Department of Natural Resources.

Source: Laws 1895, c. 69, § 31, p. 254; R.S.1913, § 3373; Laws 1919, c. 190, tit. VII, art. V, div. 1, § 5, p. 832; C.S.1922, § 8410; C.S.1929, § 46-505; R.S.1943, § 46-205; Laws 2000, LB 900, § 94.

46-206. Appropriation; water to be returned to stream. The water appropriated from a river or stream shall not be turned or permitted to run into the waters or channel of any other river or stream than that from which it is taken or appropriated, unless such stream exceeds in width one hundred feet, in which event not more than seventy-five percent of the regular flow shall be taken and any such taking shall be subject to the provisions of section 46-289.

Source: Laws 1889, c. 68, § 6, p. 504; Laws 1893, c. 40, § 3, p. 378; R.S.1913, § 3376; Laws 1919, c. 190, tit. VII, art. V, div. 1, § 8, p. 832; C.S.1922, § 8413; C.S.1929, § 46-508; R.S.1943, § 46-206; Laws 1981, LB 252, § 2.

46-207. Appropriation; no land to be crossed by more than one ditch. No tract of land shall be crossed by more than one ditch, canal or lateral without the written consent and agreement of the owners thereof, if the first ditch, canal or lateral can be made to answer the purpose for which the second is desired or intended.

Source: Laws 1889, c. 68, § 3, p. 504; R.S.1913, § 3377; Laws 1919, c. 190, tit. VII, art. V, div. 1, § 9, p. 832; C.S.1922, § 8414; C.S.1929, § 46-509.

(c) DEPARTMENT OF NATURAL RESOURCES; GENERAL POWERS AND DUTIES

46-208. Transferred to section 61-205.  
46-209. Transferred to section 61-206.  
46-210. Transferred to section 61-207.  
46-211. Repealed. Laws 1984, LB 897, s. 5.

- 46-212. Transferred to section 61-208.
- 46-212.01. Transferred to section 61-209.
- 46-212.02. Repealed. Laws 2000, LB 900, s. 256.
- 46-213. Transferred to section 61-211.
- 46-214. Repealed. Laws 1981, LB 545, s. 52.

(d) WATER DIVISIONS

- 46-215. Transferred to section 61-212.
- 46-216. Transferred to section 61-213.
- 46-217. Transferred to section 61-214.
- 46-218. Transferred to section 61-215.
- 46-219. Transferred to section 61-216.
- 46-220 Repealed. Laws 1953, c. 157, s. 3.
- and 46-221.
- 46-222 Repealed. Laws 1987, LB 140, s. 15.
- to 46-224.
- 46-225. Repealed. Laws 1953, c. 157, s. 3.

(e) ADJUDICATION OF WATER RIGHTS

46-226. Determination of priority and amount of appropriation; duty of department. The department shall make proper arrangements for the determination of priorities of right to use the public waters of the state and determine the same. The method of determining the priority and amount of appropriation shall be fixed by the department.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 2, § 7, p. 835; C.S.1922, § 8426; C.S.1929, § 81-6307; R.S.1943, § 46-226; Laws 2000, LB 900, § 95.

46-226.01. Application for recognition of incidental underground water storage; procedure. 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 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.

Source: Laws 1983, LB 198, § 5; Laws 1985, LB 488, § 2.

46-226.02. Application; director; approval; conditions. (1) The director may approve an application filed pursuant to section 46-226.01 or 46-297 subject to the following conditions:

- (a) The rate, quantity, or time of surface water diversion shall not be increased from that approved for the appropriation at the time the application is filed;

(b) 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;

(c) The priority date shall remain the same as that of the original appropriation; and

(d) When the application is for recognition of incidental underground water storage, such stored water is being withdrawn or is otherwise being used for beneficial purposes.

(2) For an application filed pursuant to section 46-226.01, the burden shall be on the applicant to prove that underground water storage has occurred.

(3) 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.

(4) The director's order of approval shall specify:

(a) The source of the water stored or to be stored underground;

(b) The underground water storage method; and

(c) A description of the area served or to be served by the water stored underground.

Source:           Laws 1983, LB 198, § 6; Laws 1985, LB 488, § 3; Laws 1995, LB 350, § 2.

46-226.03.    Terms, defined. For purposes of sections 46-226 to 46-243:

(1) Department means the Department of Natural Resources;

(2) Director means the Director of Natural Resources;

(3) Incidental underground water storage has the same meaning as in section 46-296;

(4) Induced ground water recharge means the process by which ground water withdrawn from wells near a natural stream is replaced by surface water flowing in the stream;

(5) Intentional underground water storage has the same meaning as in section 46-296;

(6) Public water supplier means a city, village, municipal corporation, metropolitan utilities district, rural water district, natural resources district, irrigation district, reclamation district, or sanitary and improvement district which supplies or intends to supply water to inhabitants of cities, villages, or rural areas for domestic or municipal purposes;

(7) Underground water storage has the same meaning as in section 46-296; and

(8) Well means a well, subsurface collector, or other artificial opening or excavation in the ground from which ground water flows under natural pressure or is artificially withdrawn.

Source: Laws 1993, LB 301, § 1; Laws 2000, LB 900, § 96; Laws 2004, LB 962, § 5.  
Operative date July 16, 2004.

46-227. Water in streams; measurement; duty of department. The department shall measure or cause to be measured the quantity of water flowing in the several streams of the state, shall make a record thereof in the office of the department, and shall from time to time make such additional measurements as may be necessary, in considering applications for water appropriations and such controversies as may arise regarding the distribution of water.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 2, § 8, p. 835; C.S.1922, § 8427; C.S.1929, § 81-6308; R.S.1943, § 46-227; Laws 2000, LB 900, § 97.

46-228. Flowing water; standards of measurement. The standard of measurement for flowing water, both for determining the flow of water in natural streams and for the purpose of distributing it therefrom when appropriations have been made for direct flow, shall be one cubic foot per second of time. The standard of measurement of the volume of water shall be one acre-foot, equivalent to forty-three thousand five hundred sixty cubic feet, and when water is stored in any natural or artificial reservoir, this standard shall be used for determining the capacity of storage reservoirs, the amount stored, and the amount used therefrom, except that for public water supplier appropriations, the standard of measurement may be in terms of gallons.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 2, § 21, p. 843; C.S.1922, § 8440; C.S.1929, § 81-6321; R.S.1943, § 46-228; Laws 1993, LB 301, § 2.

46-229. Appropriations; beneficial or useful purpose required; termination; procedure. All appropriations for water must be for a beneficial or useful purpose and, except as provided in sections 46-290 to 46-294 and 46-2,122 to 46-2,125, when the owner of an appropriation or his or her successor in interest ceases to use it for such purpose for more than five consecutive years, the right may be terminated only by the director pursuant to sections 46-229.02 to 46-229.05.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 2, § 9, p. 835; C.S.1922, § 8428; C.S.1929, § 81-6309; R.S.1943, § 46-229; Laws 1947, c. 172, § 1(1), p. 520; Laws 1983, LB 380, § 1; Laws 1984, LB 818, § 1; Laws 1993, LB 302, § 2; Laws 1995, LB 99, § 14; Laws 2000, LB 900, § 98; Laws 2004, LB 962, § 6.  
Operative date July 16, 2004.

1. Beneficial use
2. Loss of appropriation
3. Miscellaneous

**1. Beneficial use**

Beneficial use requires, in the case of an appropriation for irrigation purposes, actual application of the water to the land for the purpose of irrigation. *Hostetler v. State*, 203 Neb. 776, 280 N.W.2d 75 (1979).

The diversion of some amount of water into the ditch a few days before suit is filed to cancel the water appropriation does not constitute a beneficial use within the meaning of this section. *Hostetler v. State*, 203 Neb. 776, 280 N.W.2d 75 (1979).

To constitute a beneficial use within the meaning of the appropriation statute the use must be one described in the appropriation. *Hostetler v. State*, 203 Neb. 776, 280 N.W.2d 75 (1979).

Under this section all appropriations for water must be for some beneficial or useful purpose, and when the appropriator or his successor in interest ceases to use it for such purpose the right ceases. *Hostetler v. State*, 203 Neb. 776, 280 N.W.2d 75 (1979).

**2. Loss of appropriation**

A completed appropriation of water for power purposes remains a valid appropriation to the full extent of its granted right unless restricted by a finding of abandonment or nonuser. *Hickman v. Loup River P. P. Dist.*, 176 Neb. 416, 126 N.W.2d 404 (1964).

Appropriation may be lost either by abandonment or nonuser. *State v. Nielsen*, 163 Neb. 372, 79 N.W.2d 721 (1956).

Evidence, in proceeding to forfeit appropriation of water for nonuser, supported judgment for contestee. *State v. Delaware-Hickman Ditch Co.*, 114 Neb. 806, 210 N.W. 279 (1926).

**3. Miscellaneous**

This section has become the fixed policy of the state. *State v. Birdwood Irr. Dist.*, 154 Neb. 52, 46 N.W.2d 884 (1951).

Under former law, provision empowering Department of Roads and Irrigation to cancel water appropriation, where water was not put to beneficial use, was not unconstitutional as violative of due process, or as giving department judicial powers. *Dawson County Irr. Co. v. McMullen*, 120 Neb. 245, 231 N.W. 840 (1930).

Under former law, appeal from decree refusing to cancel water rights may be taken to district court instead of directly to Supreme Court. *State v. Oliver Bros.*, 119 Neb. 302, 228 N.W. 864 (1930).

Under former law, dismissal of proceeding by Department of Roads and Irrigation to cancel water rights did not bind other appropriators not parties. *Kinnan v. France*, 113 Neb. 99, 202 N.W. 452 (1925).

In determining priorities, former state board could recognize and determine existing conditions and limitations, but could not impose new. *Enterprise Irr. Dist. v. Tri-State Land Co.*, 92 Neb. 121, 138 N.W. 171 (1912).

46-229.01. Department; examine condition of ditches. The department shall, as often as necessary, examine into the condition of all ditches constructed or partially constructed within the state and shall compile information concerning the condition of every water appropriation and all ditches and canals and other works constructed or partially constructed thereunder.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 2, § 9, p. 836; C.S.1922, § 8428; C.S.1929, § 81-6309; R.S.1943, § 46-229; Laws 1947, c. 172, § 1(2), p. 520; Laws 2000, LB 900, § 99.

46-229.02. Appropriations; preliminary determination of nonuse; notice; order of cancellation; procedure. (1) If, based upon the results of a field investigation or upon information, however obtained, the department makes preliminary determinations (a) that an appropriation has not been used, in whole or in part, for a beneficial or useful purpose or having been so used at one time has ceased to be used, in whole or in part, for such purpose for more than five consecutive years and (b) that the department knows of no reason that constitutes sufficient cause, as provided in section 46-229.04, for such nonuse or that such nonuse has continued beyond the additional time permitted because of the existence of any applicable sufficient cause, the department shall serve notice of such preliminary determinations upon the owner or owners of such appropriation and upon any other person who is an owner of the land under such appropriation. Such notice shall contain the information required by section 46-229.03, shall be provided in the manner required by such section, and shall be posted on the department's web site. Each owner of the appropriation and any owner of the land under such appropriation shall have thirty days after the mailing or last publication, as applicable, of such notice to notify the department, on a form provided by the department, that he or she contests the department's preliminary determination of nonuse or the department's preliminary determination of the absence of sufficient cause for such nonuse. Such notification shall indicate the reason or reasons the owner is contesting the department's preliminary determination and include any information the owner believes is relevant to the issues of nonuse or sufficient cause for such nonuse.

(2) If no owner of the appropriation or of the land under the appropriation provides notification to the department in accordance with subsection (1) of this section, the director may issue an order canceling the appropriation in whole or in part. The extent of such cancellation shall not exceed the extent described in the department's notice to the owner or owners in accordance with subsection (1) of this section. A copy of the order canceling the appropriation, or part thereof, shall be posted on the department's web site and shall be provided to the owner or owners of the appropriation and to any other owner of the land under the appropriation in the same manner that notices are to be given in accordance with subsection (2), (3), or (4) of section 46-229.03, as applicable.

(3) If an owner of the appropriation provides notification to the department in accordance with subsection (1) of this section, the department shall review the owner's stated reasons for contesting the department's preliminary determination and any other information provided with the owner's notice. If the department determines that the owner has provided sufficient

information for the department to conclude that the appropriation should not be canceled, in whole or in part, it shall inform the owners of the appropriation, and any other owners of the land under the appropriation, of such determination.

(4) If the department determines that an owner has provided sufficient information to support the conclusion that the appropriation should be canceled only in part and if (a) the owner or owners filing the notice of contest agree in writing to such cancellation in part and (b) such owner or owners are the only known owners of the appropriation and of the land under the appropriation, the director may issue an order canceling the appropriation to the extent agreed to by the owner or owners and shall provide a copy of such order to such owner or owners.

(5) If the department determines that subsections (2), (3), and (4) of this section do not apply, it shall schedule and conduct a hearing on the cancellation of the appropriation in whole or in part. Notice of the hearing shall be provided to the owner or owners who filed notices with the department pursuant to subsection (1) of this section, to any other owner of the appropriation known to the department, and to any other owner of the land under the appropriation. The notice shall be posted on the department's web site and shall be served or published, as applicable, in the manner provided in subsection (2), (3), or (4) of section 46-229.03, as applicable.

(6) Following a hearing conducted in accordance with subsection (5) of this section and subsection (1) of section 46-229.04, the director shall render a decision by order. A copy of the order shall be provided to the owner or owners of the appropriation and to any other person who is an owner of the land under the appropriation. The copy of the order shall be posted on the department's web site and shall be served or published, as applicable, in the same manner that notices are to be given in accordance with subsection (2), (3), or (4) of section 46-229.03, as applicable, except that if publication is required, it shall be sufficient for the department to publish notice that an order has been issued. Any such published notice shall identify the land or lands involved and shall provide the address and telephone number that may be used to obtain a copy of the order.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 2, § 9, p. 836; C.S.1922, § 8428; C.S.1929, § 81-6309; R.S.1943, § 46-229; Laws 1947, c. 172, § 1(3), p. 521; Laws 1963, c. 278, § 1, p. 834; Laws 1983, LB 380, § 2; Laws 1984, LB 1000, § 1; Laws 2004, LB 962, § 7.  
Operative date July 16, 2004.

Nonuse for over three years terminates the user's rights by statutory cancellation proceedings. *Northport Irr. Dist. v. Jess*, 215 Neb. 152, 337 N.W.2d 733 (1983).

The statutory forfeiture provisions of the section apply to vested rights in water appropriations established prior to April 4, 1895. *In re Water Appropriation Nos. 442A, 461, 462, and 485*, 210 Neb. 161, 313 N.W.2d 271 (1981).

An unexcused nonuse of water appropriation rights by a predecessor in title binds the successor in title. *Hostetler v. State*, 203 Neb. 776, 280 N.W.2d 75 (1979).

Procedure for cancellation of water rights is not exclusive. *State v. Nielsen*, 163 Neb. 372, 79 N.W.2d 721 (1956).

Under former law, Department of Roads and Irrigation could forfeit water right for nonuser for more than three years. *State v. Birdwood Irr. Dist.*, 154 Neb. 52, 46 N.W.2d 884 (1951).

46-229.03. Appropriations; preliminary determination of nonuse; notice; contents; service. (1) The notice provided by the department in accordance with subsection (1) or (5) of section 46-229.02 shall contain: (a) A description of the appropriation; (b) the number assigned to the appropriation by the department; (c) the date of priority; (d) the point of diversion; (e) if the notice is published, the section or sections of land which contain the lands located under such appropriation; (f) if the notice is served by personal service or by registered or certified mail, a description of the lands which are located under such appropriation, a description of the information used by the department to reach the preliminary determinations of nonuse, and a copy of section 46-229.04; (g) a description of the owner's options in response to the notice; (h) a department telephone number which any person may call during normal business hours for more information regarding the owner's rights and options, including what constitutes sufficient cause for nonuse; (i) if the notice is provided in accordance with subsection (1) of section 46-229.02 and is mailed, a copy of the form that such owner may file to request a departmental hearing; (j) if the notice is provided in accordance with subsection (1) of section 46-229.02 and is published, the location where the owner may obtain a form to file to request a departmental hearing; and (k) if the notice is provided in accordance with subsection (5) of section 46-229.02, the date, time, and location of the hearing.

(2) For any owner whose name and address are known to the department or can be reasonably obtained by the department, the notice shall be served by personal service or by registered mail or certified mail. Any landowner's name or address shall be considered reasonably obtainable if that person is listed as an owner of the land involved, on the records of the county clerk or register of deeds for the county in which the land is located.

(3) For any owner whose name and address are not known to the department and cannot reasonably be obtained by the department, such notice shall be served by publication in a legal newspaper published or of general circulation in any county in which the place of diversion is located and in a legal newspaper published or of general circulation in each county containing land for which the right to use water under the appropriation is subject to cancellation. Each such publication shall be once each week for three consecutive weeks.

(4) Landowners whose property under such appropriation is located within the corporate limits of a city or village shall be served by the publication of such notice in a legal newspaper published or of general circulation in the county in which the city or village is located. The notice shall be published once each week for three consecutive weeks.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 2, § 9, p. 836; C.S.1922, § 8428; C.S.1929, § 81-6309; R.S.1943, § 46-229; Laws 1947, c. 172, § 1(4), p. 521; Laws 1957, c. 242, § 39, p. 852; Laws 1973, LB 186, § 5; Laws 1980, LB 648, § 1; Laws 1986, LB 960, § 32; Laws 1987, LB 140, § 3; Laws 2004, LB 962, § 8.  
Operative date July 16, 2004.

Notice of hearing on cancellation of water rights must be given to the party appearing of record to be the owner. State v. Nielsen, 163 Neb. 372, 79 N.W.2d 721 (1956).

This section does not fix the time in which an appropriator must put water to a beneficial use. North Loup River P. P. & I. Dist. v. Loup River P. P. Dist., 162 Neb. 22, 74 N.W.2d 863 (1956).

46-229.04. Appropriations; hearing; decision; nonuse; considerations; consolidation of proceedings; when. (1) At such hearing the verified field investigation report of an employee of the department shall be prima facie evidence for the forfeiture and annulment of such water appropriation. If no person appears at the hearing, such water appropriation or unused part thereof shall be declared forfeited and annulled. If an interested person appears and contests the same, the department shall hear evidence, and if it appears that such water has not been put to a beneficial use or has ceased to be used for such purpose for more than five consecutive years, the same shall be declared canceled and annulled unless the department finds that (a) there has been sufficient cause for such nonuse as provided for in subsection (2), (3), or (4) of this section or (b) subsection (5) or (6) of this section applies.

(2) Sufficient cause for nonuse shall be deemed to exist for up to thirty consecutive years if such nonuse was caused by the unavailability of water for that use. For a river basin, subbasin, or reach that has been designated as overappropriated pursuant to section 46-713 or determined by the department to be fully appropriated pursuant to section 46-714, the period of time within which sufficient cause for nonuse because of the unavailability of water may be deemed to exist may be extended beyond thirty years by the department upon petition therefor by the owner of the appropriation if the department determines that an integrated management plan being implemented in the river basin, subbasin, or reach involved is likely to result in restoration of a usable water supply for the appropriation.

(3) Sufficient cause for nonuse shall be deemed to exist indefinitely if such nonuse was the result of one or more of the following:

- (a) For any tract of land under separate ownership, the available supply was used but on only part of the land under the appropriation because of an inadequate water supply;
- (b) The appropriation is a storage appropriation and there was an inadequate water supply to provide the water for the storage appropriation or less than the full amount of the storage appropriation was needed to keep the reservoir full; or

(c) The appropriation is a storage-use appropriation and there was an inadequate water supply to provide the water for the appropriation or use of the storage water was unnecessary because of climatic conditions.

(4) Sufficient cause for nonuse shall be deemed to exist for up to fifteen consecutive years if such nonuse was a result of one or more of the following:

- (a) Federal, state, or local laws, rules, or regulations temporarily prevented or restricted such use;
- (b) Use of the water was unnecessary because of climatic conditions;
- (c) Circumstances were such that a prudent person, following the principles of good husbandry, would not have been expected to use the water;
- (d) The works, diversions, or other facilities essential to use the water were destroyed by a cause not within the control of the owner of the appropriation and good faith efforts to repair or replace the works, diversions, or facilities have been and are being made;
- (e) The owner of the appropriation was in active involuntary service in the armed forces of the United States or was in active voluntary service during a time of crisis;
- (f) Legal proceedings prevented or restricted use of the water; or
- (g) The land subject to the appropriation is under an acreage reserve program or production quota or is otherwise withdrawn from use as required for participation in any federal or state program or such land previously was under such a program but currently is not under such a program and there have been not more than five consecutive years of nonuse on that land since that land was last under that program.

The department may specify by rule and regulation other circumstances that shall be deemed to constitute sufficient cause for nonuse for up to fifteen years.

(5) When an appropriation is held in the name of an irrigation district, reclamation district, public power and irrigation district, or mutual irrigation company or canal company and the director determines that water under that appropriation has not been used on a specific parcel of land for more than five years and that no sufficient cause for such nonuse exists, the right to use water under that appropriation on that parcel shall be terminated and notice of the termination shall be posted on the department's web site and shall be given in the manner provided in subsection (2), (3), or (4) of section 46-229.03. The district or company holding such right shall have five years after the determination to assign the right to use that portion of the appropriation to other land within and served by the district or company or to file an application for a transfer in accordance with section 46-290. The department shall be notified of any such assignment within thirty days thereafter. If the district or company does not assign the right to use that portion of the appropriation to other land, does not file an application for a transfer within the five-year period, or does not notify the department within thirty days after any such assignment, that portion of the appropriation shall be canceled without further proceedings by the department and the district or company involved shall be so notified by the department. During the time within which assignment of a portion of an appropriation is pending, the allowable

diversion rate for the appropriation involved shall be reduced, as necessary, to avoid inconsistency with the rate allowed by section 46-231 or with any greater rate previously approved for such appropriation by the director in accordance with section 46-229.06.

(6) When it is determined by the director that an appropriation, for which the location of use has been temporarily transferred in accordance with sections 46-290 to 46-294, has not been used at the new location for more than five years and that no sufficient cause for such nonuse exists, the right to use that appropriation at the temporary location of use shall be terminated. Notice of that termination shall be posted on the department's web site and shall be given in the manner provided in subsection (2), (3), or (4) of section 46-229.03. The right to reinstate use of that appropriation at the location of use prior to the temporary transfer shall continue to exist for five years after the director's determination, but if such use is not reinstated at that location within such five-year period, the appropriation shall be subject to cancellation in accordance with sections 46-229 to 46-229.04.

(7) If at the time of a hearing conducted in accordance with subsection (1) of this section there is an application for incidental or intentional underground water storage pending before the department and filed by the owner of the appropriation, the proceedings shall be consolidated.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 2, § 9, p. 837; C.S.1922, § 8428; C.S.1929, § 81-6309; R.S.1943, § 46-229; Laws 1947, c. 172, § 1(5), p. 521; Laws 1973, LB 186, § 6; Laws 1983, LB 380, § 3; Laws 1987, LB 140, § 4; Laws 1987, LB 356, § 1; Laws 1995, LB 350, § 3; Laws 2000, LB 900, § 100; Laws 2004, LB 962, § 9.  
Operative date July 16, 2004.

The statutory procedure set forth is not the only procedure for canceling water rights. When an application is made to transfer water rights which no longer exist because of nonuse, the director may cancel the rights in the transfer proceeding if the evidence shows that the rights have expired through nonuse. In re Applications T-61 and T-62, 232 Neb. 316, 440 N.W.2d 466 (1989).

This section does not violate constitutional notions of due process. In re Water Appropriation Nos. 442A, 461, 462, and 485, 210 Neb. 161, 313 N.W.2d 271 (1981).

Reports of department engineers are prima facie evidence on issue of abandonment. State v. Birdwood Irr. Dist., 154 Neb. 52, 46 N.W.2d 884 (1951).

46-229.05. Adjudication of water rights; appeal. An appeal may be taken from the decision of the department upon such hearing as provided by section 61-207.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 2, § 9, p. 837; C.S.1922, § 8428; C.S.1929, § 81-6309; R.S.1943, § 46-229; Laws 1947, c. 172, § 1(6), p. 522; Laws 1991, LB 732, § 106; Laws 2000, LB 900, § 101.

46-229.06. Appropriations; partial cancellation; rate of diversion; determination. When a departmental proceeding that is conducted pursuant to sections 46-229 to 46-229.04 concerns the partial cancellation of an appropriation, the department may receive evidence on the question of whether, following such partial cancellation, a reduction in the rate of diversion to the maximum rate prescribed in section 46-231 would result in an authorized diversion rate less than the rate necessary, in the interests of good husbandry, for the production of crops on the

lands that remain subject to the appropriation. If the director determines, based on a preponderance of the evidence, that such rate would be less than the rate necessary, in the interests of good husbandry, for the production of crops, he or she may approve a diversion rate for the remaining portion of the appropriation greater than the maximum rate authorized by section 46-231. Such increased rate can be no greater than the rate authorized for the appropriation prior to the partial cancellation and no greater than the rate determined by the director to be necessary, in the interests of good husbandry, for the production of crops on the lands that remain subject to the appropriation.

Source: Laws 2004, LB 962, § 10.  
Operative date July 16, 2004.

46-230. Adjudication of water rights; record; duty of appropriation owner to furnish information; notice. (1) As the adjudication of a stream progresses and as each claim is finally adjudicated, the director shall make and cause to be entered of record in his or her office an order determining and establishing the priorities of right to use the water of such stream, the amount of the appropriation of the persons claiming water from such stream and the character of use for which each appropriation is found to have been made, and the address of the owner of each water appropriation.

(2) Whenever requested by the department, the owner of any appropriation not held by an irrigation district, reclamation district, public power and irrigation district, or mutual irrigation or canal company shall provide the department with the name, address, and telephone number of each then-current owner of the appropriation and with the name, address, and telephone number of any tenant or other person who is authorized by the owner to receive opening and closing notices and other departmental communications relating to the appropriation. Each appropriation owner shall also notify the department any time there is a change in any of such names, addresses, or telephone numbers. Notice of ownership changes may be provided to the department in the manner provided in section 76-2,124 or in any other manner authorized by the department. If notice of an ownership change is provided other than in accordance with such section, the notice shall include such evidence of ownership as the director may require. Notice of all other changes may be provided in any manner authorized by the department. Upon receipt of any new information, the department shall update its records. The department shall not collect a fee for the filing of any such information or for updating its records.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 2, § 10, p. 837; C.S.1922, § 8429; C.S.1929, § 81-6310; Laws 1941, c. 29, § 11, p. 137; C.S.Supp.,1941, § 81-6310; R.S.1943, § 46-230; Laws 1973, LB 186, § 7; Laws 1979, LB 204, § 1; Laws 2000, LB 900, § 102; Laws 2001, LB 667, § 2; Laws 2002, LB 458, § 1; Laws 2004, LB 962, § 11.  
Operative date July 16, 2004.

46-231. Amount and priority of appropriation; determination; limitation of amount; storage water. Each appropriation shall be determined in its priority and amount by the time at which it is made and the amount of water which the works are constructed to carry. An appropriator shall at no time be entitled to the use of more than he or she can beneficially use for the purposes for which the appropriation has been made, and the amount of any appropriation made by means of enlargement of the distributing works shall be determined in like manner.

An allotment from the natural flow of streams for irrigation shall not exceed one cubic foot per second of time for each seventy acres of land and shall not exceed three acre-feet in the aggregate during one calendar year for each acre of land for which such appropriation has been made, and an allotment shall not exceed the least amount of water that experience may indicate is necessary, in the exercise of good husbandry, for the production of crops. Such limitations do not apply to storage waters or to water appropriations transferred pursuant to sections 46-2,122 to 46-2,125 and 46-2,127 to 46-2,129.

When storage water is being used in addition to the natural flow, the person in charge of the ditch or canal shall, upon his or her request and within twenty-four hours thereof, be notified in writing by the user of such storage waters of the time of withdrawal from natural streams to be distributed according to law.

When an appropriation is for irrigation purposes and the amount is so small that a proper distribution and application is impractical, as much water as the applicant can use without waste may be allotted for a limited time so fixed by the department as to give each appropriator his or her just share without violating other rights, so long as (1) the volume of water used in a twenty-four-hour period does not exceed the amount of water that would otherwise have been allowed at the approved fixed continuous rate for a twenty-four-hour period or (2) the volume of water used in a seven-day, Monday-through-Sunday period does not exceed the amount of water that would otherwise have been allowed at the approved fixed continuous rate for a seven-day period. The department shall determine schedules among appropriators to assure that other rights are not violated.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 2, § 11, p. 837; C.S.1922, § 8430; Laws 1929, c. 133, § 1, p. 486; C.S.1929, § 81-6311; R.S.1943, § 46-231; Laws 1987, LB 140, § 5; Laws 1993, LB 789, § 1; Laws 1995, LB 99, § 15; Laws 2000, LB 900, § 103.

46-232. Repealed. Laws 1955, c. 183, s. 6.

#### (f) APPLICATION FOR WATER

46-233. Application to appropriate water; time of making; contents; procedure; priority date; notice; hearing; temporary permit; emergency use. (1) The United States and every person 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 such construction, enlargement, or extension, or

(c) taking any water from any constructed works, make an application to the department for a permit to make such appropriation. A permit may be obtained to appropriate public waters for intentional underground water storage and recovery of such water. A public water supplier may make application to appropriate public waters for induced ground water recharge.

(2) The application shall be upon a form prescribed and furnished by the 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 it may be estimated, (d) the location of any proposed work in connection with the appropriation, (e) the estimated time required for its completion, which estimated time shall include the period required for the construction of ditches, pumps, and other features or devices, (f) the time estimated at which the application of the water for the beneficial purposes shall be made, which time 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 (i) if for induced ground water recharge by a public water supplier, a statement of the times of the year when and location along a stream where flows for induced ground water recharge are proposed and (ii) if for irrigation, a description of the land to be irrigated by the water and the amount, and (h) such facts and supporting documentation as are required by the department which shall include, but not be limited to, the depth of all wells, the extent of the underlying aquifer, the expected rate of recharge, the minimum flow or flows necessary to sustain the well field throughout the reach identified, and the period of time that a well field would continue to meet minimal essential needs of the public water supplier when there is no flow as those factors relate to and are part of an evaluation of pertinent hydrologic relationships.

A public water supplier making application for induced ground water recharge may submit with its application a statement of the amount of induced ground water recharge water which the public water supplier presently uses as well as the amount of induced ground water recharge water it anticipates using in the next twenty-five-year period. Such statement shall also quantify the total amount of water the public water supplier presently uses from the well field as well as the total amount of water it anticipates using from the well field in the next twenty five year period.

(3) Upon receipt of an application containing the information set forth in this section, the department shall (a) make a record of the receipt of the application, (b) cause the application 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 ninety days after its receipt. Ninety days shall be allowed for the refiling of the application, and in default of such refiling, the application shall stand dismissed. Except as provided in subsection (4) of this section, 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 rules and regulations thereunder. During the pendency of any application or upon its approval, the department, upon proper authorization and request of the applicant, may assign the application a later priority date.

(4) For public water supplier wells in existence on September 9, 1993, the priority date assigned to an application for induced ground water recharge made by a public water supplier shall be:

- (a) June 27, 1963, for water supply wells and facilities constructed and placed in service on or before June 27, 1963;
- (b) January 1, 1970, for water supply wells and facilities constructed and placed in service on or after June 28, 1963, and on or before December 31, 1969;
- (c) January 1, 1980, for water supply wells and facilities constructed and placed in service on or after January 1, 1970, and on or before December 31, 1979;
- (d) January 1, 1990, for water supply wells and facilities constructed and placed in service on or after January 1, 1980, and on or before December 31, 1989; and
- (e) January 1, 1993, for water supply wells and facilities constructed and placed in service on or after January 1, 1990, and on or before September 9, 1993.

(5) Prior to taking action on an application for induced ground water recharge, the director shall publish notice of such application at the applicant's expense at least once each week for three consecutive weeks in a newspaper of general circulation in the area of the stream segment and also in a newspaper of statewide circulation. The notice shall state that any person having an interest may, in writing, object to the application. Any such objection shall be filed with the department within two weeks after the final publication of the notice.

(6) After the director has accepted the application made under subsection (2) of this section as a completed application and published notice as required under subsection (5) of this section, the director shall, if he or she determines that a hearing is necessary, set a time and place for a public hearing on the application. The hearing shall be held within reasonable proximity to the area in which the wells are or would be located. At the hearing the applicant shall present all hydrological data and other evidence supporting its application. All interested parties shall be allowed to testify and present evidence relative to the application.

(7) An unapproved application pending on August 26, 1983, may be amended to include appropriation for intentional underground water storage and recovery of such water.

(8) Application may be made to the department for a temporary permit to appropriate water. The same standards for granting a permanent appropriation shall apply for granting such temporary permit except when the temporary permit is for road construction or other public use construction and the amount of water requested is less than ten acre-feet in total volume. For temporary permits for public-use construction, the applicant shall include on the application the location of the diversion, the location of use, a description of the project, the amount of water requested, and the person to contact. Temporary permits for public-use construction and for less than ten acre-feet in total volume may be granted without any determination of unappropriated

water and shall be considered to be in the public interest. The requirement of filing a map or plans with the application for a temporary permit may be waived at the discretion of the director. In granting a temporary permit, the director shall specify a date on which the right to appropriate water under the permit shall expire. Under no circumstances shall such date be longer than one calendar year after the date the temporary permit was granted. Temporary permits shall be administered during times of shortage based on priority. The right to appropriate water shall automatically terminate on the date specified by the director on the temporary permit without further action by the department.

(9) Water may be diverted from any stream, reservoir, or canal by any fire department or emergency response services for the purpose of extinguishing a fire in progress in an emergency without obtaining a permit from the department. The installation of a dry well for this purpose is allowed without the prior permission of the department, but the department shall be informed of any such installation, its location, and the party responsible for its installation and maintenance within thirty days after the installation.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 2, § 16, p. 841; C.S.1922, § 8435; C.S.1929, § 81-6316; R.S.1943, § 46-233; Laws 1955, c. 138, § 1, p. 513; Laws 1957, c. 198, § 1, p. 696; Laws 1983, LB 198, § 7; Laws 1993, LB 301, § 3; Laws 1993, LB 789, § 2; Laws 2000, LB 900, § 104; Laws 2001, LB 129, § 3.

46-233.01. Permit to appropriate water for use in another state; application; considerations; determination. (1) Application may be made to the department for a permit to appropriate any of the public surface waters of the State of Nebraska to be diverted or stored in Nebraska for use in any other state.

(2) In determining whether to grant such application, the director shall consider the following factors:

- (a) Whether unappropriated water exists in the source of supply named in the application;
- (b) Whether such application and appropriation when perfected are not otherwise detrimental to the public welfare;
- (c) Whether denial of the application is demanded by the public interest; and
- (d) Whether the proposed use is a beneficial use of water.

(3) When determining whether denial of such application is demanded by the public interest, the director shall consider the following factors:

- (a) The economic, environmental, and other benefits of the proposed use;
- (b) Any adverse economic, environmental, and other impacts of the proposed use;
- (c) Any current beneficial uses being made of the unappropriated water;
- (d) The economic, environmental, and other benefits of not allowing the appropriation and preserving the water supply for beneficial uses within the state;
- (e) Alternative sources of water supply available to the applicant; and

(f) Any other factors consistent with the purposes of this section that the director deems relevant to protecting the interests of the state and its citizens.

The application shall be deemed in the public interest if the overall benefits to Nebraska are greater than the adverse impacts to Nebraska. The director's order granting or denying an application shall specify the reasons for such action, including a discussion of the required factors for consideration, and shall document such decision by reference to the hearing record, if any, and to any other sources used by the director in making the decision.

Source: Laws 1953, c. 161, § 1, p. 504; Laws 1987, LB 146, § 4; Laws 2000, LB 900, § 105.

46-233.02. Appropriation of water for use in another state; laws governing; rights of appropriators. Such applications and all rights thereunder shall be governed by the provisions of the Constitution and statutes of Nebraska as now existing or hereafter amended. Appropriators under the provisions of sections 46-233.01 and 46-233.02 shall have no greater rights than those under appropriations for use within the State of Nebraska.

Source: Laws 1953, c. 161, § 2, p. 505.

46-234. Application for water; refusal; grounds; effect; necessity for consent; perfection of appropriation; time allowed. If there is no unappropriated water in the source of supply or if a prior appropriation has been perfected to water the same land to be watered by the applicant, the department may refuse such application. An application may also be refused (1) if existing facilities other than those owned or operated by the applicant are to be utilized and the applicant fails to show, by documentary evidence, agreements with the owner and operator of the facilities to allow the applicant to use such facilities or (2) when denial is demanded by the public interest. The party making such application shall not prosecute such work so long as such refusal continues in force. An application for appropriation shall not be exclusive of any of the lands included therein until the owner or owners of such land give consent to the same in proper form duly acknowledged. No application made or canal constructed, prior to the application of the water and the perfection of an appropriation therefor or the filing of the consent, shall prevent other applications from being allowed and other canals from being constructed to irrigate the same lands or any of them. In case of an application for an appropriation of water for the development of water power, the department shall promptly act upon such application and limit the time within which such appropriation shall be perfected to the period within which the proposed power project can be completed by uninterrupted and expeditious construction.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 2, § 18, p. 842; Laws 1921, c. 291, § 1, p. 941; C.S.1922, § 8437; C.S.1929, § 81-6318; R.S.1943, § 46-234; Laws 1981, LB 252, § 3; Laws 1984, LB 672, § 1; Laws 2000, LB 900, § 106.

46-235. Application for water; approval; date of priority; conditional or partial approval; hearing; director; powers and duties. (1) For applications other than those to appropriate public waters for induced ground water recharge, if there is unappropriated water in the source of supply named in the application, if such application and appropriation when perfected are not otherwise detrimental to the public welfare, and if denial of the application is not demanded by the public interest, the department shall approve the application and shall make a record in its office and return the application to the applicant, who shall on receipt thereof be authorized to proceed with the work and to take such measures as may be necessary to perfect such application into an appropriation. The priority of such application and appropriation when perfected shall date from the filing of the application in the office of the department, and the date of filing shall be regarded as the priority number thereof. The department may, upon examination of such application, approve it for a shorter period of time for perfecting the proposed appropriation or for a smaller amount of water or of land than applied for. The department may also impose such other reasonable conditions as it deems appropriate to protect the public interest. An applicant aggrieved by the action of the department shall, upon proper showing, be granted a hearing before the department, which hearing shall be conducted in accordance with the rules of procedure adopted by the department, and a full and complete record shall be kept of all such proceedings. When a complete record of the case has been made up, the department shall render an opinion of facts and of law based upon the evidence before it.

(2)(a) An application for an induced ground water recharge appropriation for public water supplier wells constructed and placed in service before September 9, 1993, shall be approved by the director if he or she finds that:

(i) The appropriation is necessary to maintain the well or wells for the use or uses for which the appropriation has been requested;

(ii) The rate and timing of the flow is the amount reasonably necessary to maintain the well or wells for the uses for which the appropriation has been requested; and

(iii) The application is in the public interest and is not detrimental to the public welfare. There shall be a rebuttable presumption that wells which are the subject of an application pursuant to subdivision (2)(a) of this section are in the public interest and are not detrimental to the public welfare.

(b) The director may approve the application for a well or wells constructed before September 9, 1993, but may specifically deny the applicant the right to request regulation of junior appropriators if the director, at the time of approval, finds that the well or wells, at the time of their construction, were not located, designed, or constructed so as to take reasonable advantage of aquifer conditions in the area to minimize the frequency and amount of the demand for flows for induced ground water recharge. Thereafter a public water supplier holding an approved application which has been denied the right to request regulation of junior appropriators may petition the director for a hearing to present evidence showing the director that the well or wells have been modified, relocated, or reconstructed to take reasonable advantage of the aquifer conditions in the area. If the director determines that the well or wells have been so modified, relocated,

or reconstructed, the director shall cause to be modified the approval of the application to allow for the regulation of junior appropriators, subject to the restrictions or conditions applicable to public water suppliers.

(c) An application for an induced ground water recharge appropriation for public water supplier wells constructed and placed in service before September 9, 1993, shall not be subject to the requirements of sections 46-288 and 46-289.

(3) An application for an induced ground water recharge appropriation for public water supplier wells constructed or to be constructed on or after September 9, 1993, shall be approved by the director if he or she makes the findings required by subdivision (2)(a) of this section and further finds that:

(a) There is unappropriated water available for the appropriation; and

(b) The well or wells involved have been or will be located and constructed to take reasonable advantage of aquifer conditions in the area to minimize the frequency and amount of the demand for flows for induced ground water recharge.

(4)(a) The director may approve the application filed under subsection (2) or (3) of this section for a smaller amount of water than requested by the applicant. The director may also impose reasonable conditions on the manner and timing of the appropriation which the director deems necessary to protect the public interest. The director may grant an appropriation for specific months of the year if so demanded by the public interest. If the director approves the application, he or she shall issue a written order, which written order shall include the findings required by this section, the amount of the appropriation, and any conditions or limitations imposed under this section.

(b) In determining whether an application for an appropriation for induced ground water recharge is in the public interest, the director's considerations shall include, but not be limited to, the possible adverse effects on existing surface water or ground water users and the economic, social, and environmental value of such uses, including, but not limited to, irrigation, recreation, fish and wildlife, public water supply, induced ground water recharge for public water supply systems, and water quality maintenance.

(c) The stream segment and the determination of a reasonable and necessary amount of water required for induced ground water recharge purposes throughout the reach shall be defined specifically by the director in the order issued under this section.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 2, § 17, p. 842; C.S.1922, § 8436; C.S.1929, § 81-6317; R.S.1943, § 46-235; Laws 1981, LB 252, § 4; Laws 1987, LB 140, § 6; Laws 1993, LB 301, § 4; Laws 2000, LB 900, § 107.

Subsection (1) of this section does not require that the director engage in a particular sequential consideration of the issues presented by an application. *Central Platte NRD v. City of Fremont*, 250 Neb. 252, 549 N.W.2d 112 (1996).

Approval of an application merely authorizes the successful applicant to take other measures to perfect the application into an appropriation. *In re Applications A-16027 et al.*, 242 Neb. 315, 495 N.W.2d 23 (1993).

Because the word "may" in a statute will be given its ordinary, permissive, and discretionary meaning unless it can be shown that the intent of the drafters would be defeated by the application of such a meaning, the Department of Water Resources may decline to approve an appropriation of water which is significantly less than the application requests and may also impose such other reasonable conditions as it deems appropriate to protect the public interest. *In re Application A-15738*, 226 Neb. 146, 410 N.W.2d 101 (1987).

Order approving application for appropriation may be made subject to limitations and conditions. *Ainsworth Irr. Dist. v. Bejot*, 170 Neb. 257, 102 N.W.2d 416 (1960).

Discretionary power of approval by department is conferred. *Custer Public Power Dist. v. Loup River Public Power Dist.*, 162 Neb. 300, 75 N.W.2d 619 (1956).

Approval of application for an appropriation is an exercise of quasi-judicial power by the department. *North Loup River P. P. & I. Dist. v. Loup River P. P. Dist.*, 162 Neb. 22, 74 N.W.2d 863 (1956).

An appropriation of public waters may be allowed in an amount less than that applied for, and if the applicant is dissatisfied, he must appeal. *Loup River Public Power District v. North Loup River Public Power & Irr. Dist.*, 142 Neb. 141, 5 N.W.2d 240 (1942).

The irrigation act of 1889 prescribed no method of making a claim of appropriation of water, except the construction of works in which to divert the water and diverting it into such works. The extent of the appropriation was measured by the appropriation claimed, but within the limits of the capacity of the diversion works. *Vonburg v. Farmers Irr. Dist.*, 132 Neb. 12, 270 N.W. 835 (1937).

46-235.01. Public water supplier; appropriation for induced ground water recharge; hearing; evidence of beneficial use; priority date; vesting. A public water supplier which has received an appropriation for induced ground water recharge pursuant to section 46-235 may, from time to time and within twenty-five years after the priority assigned pursuant to section 46-233, petition the department for a hearing to present evidence showing that all or part of the original projection for additional water needs specified pursuant to subsection (2) of section 46-233 corresponds with the actual use. To the extent the public water supplier is making beneficial use of all or a portion of the water projected in the original application, the right to use such additional water shall vest and the priority date of such anticipated water use shall date back to the priority date assigned pursuant to section 46-233. A public water supplier may not request such a hearing at intervals of less than five years for each approved application.

Source: Laws 1993, LB 301, § 5.

46-235.02. Public water supplier; payment of compensation; when. (1) Just compensation shall be required if a public water supplier exercises a preference to the injury of a senior appropriator.

(2) Just compensation shall be provided by a public water supplier to any injured junior appropriator whose appropriation was perfected prior to September 9, 1993, if and to the extent such injury resulted from regulation of junior appropriators requested by the public water supplier to provide water for any purpose other than domestic. Such compensation shall not be required to a junior appropriator if the regulation requested is to provide water for domestic purposes only. At the time any junior appropriator whose appropriation was perfected prior to September 9, 1993, is regulated at the request of a public water supplier, the department shall determine for each such appropriator the extent to which the regulation is for domestic purposes and the extent to which it is for other purposes.

(3) A cause of action for just compensation shall accrue at the time a junior appropriator is regulated by the department.

Source: Laws 1993, LB 301, § 6; Laws 2000, LB 900, § 108.

46-235.03. Public water suppliers; natural resources districts; powers. Natural resources districts shall have the authority to impose restrictions or controls on public water suppliers as specified in the Nebraska Ground Water Management and Protection Act. Such restrictions or controls may limit the withdrawal of ground water to a greater degree or extent than is otherwise permitted or allowed by a permit issued by the department.

Source: Laws 1993, LB 301, § 7; Laws 2000, LB 900, § 109.

#### **Cross Reference**

**Nebraska Ground Water Management and Protection Act**, see section 46-656.01.

46-235.04. Induced ground water recharge appropriations; administration; transfer of priority dates; procedure. (1) Induced ground water recharge appropriations shall be administered in the same manner as prescribed by Chapter 46, article 2, for other appropriations. Appropriations for induced ground water recharge may be canceled and annulled as provided in sections 46-229.02 to 46-229.05.

(2) The department may approve the transfer of priority dates among water wells, including replacement water wells, located within a single well field that are subject to an induced recharge appropriation, or are part of an application for such an appropriation, to improve the well field's efficiency of operation with respect to river flow. The transfers shall be approved if the department finds that (a) the transfers would not increase the quantity of induced ground water recharge under the original priority date or application, (b) the amount of water withdrawn from water wells under the original priority date or application would not increase, (c) the quantity of streamflow needed to sustain well field operation under the original priority date would decrease, (d) the transfer would not impair the rights of other appropriators, and (e) the transfer is in the public interest in the same manner as provided in section 46-235. The department may assign multiple priority dates to a single water well that replaces two or more water wells which are abandoned. Replacement water wells installed pursuant to this subsection must be installed within the same well field as the abandoned water well. Notice shall be

furnished and any hearing held as provided in sections 46-291 and 46-292. For purposes of this subsection, single well field means those contiguous tracts of land owned or leased by the applicant containing two or more water wells subject to induced recharge.

Source: Laws 1993, LB 301, § 8; Laws 1995, LB 871, § 2; Laws 1997, LB 30, § 1; Laws 2000, LB 900, § 110; Laws 2004, LB 962, § 12.  
Operative date July 16, 2004.

46-236. Application for water power; lease from state required; fee; renewal; cancellation; grounds. Within six months after the approval of an application for water power as provided for in section 46-234 and before placing water to any beneficial use, the applicant shall enter into a contract with the State of Nebraska, through the department, for leasing the use of all water so appropriated. Such lease shall be upon forms prepared by the department, and the time of such lease shall not run for a greater period than fifty years; and for the use of water for power purposes the applicant shall pay into the state treasury on or before January 1 each year fifteen dollars for each one hundred horsepower for all water so appropriated. Upon application of the lessee or its assigns, the department shall renew the lease so as to continue it and the water appropriation in full force and effect for an additional period of fifty years.

Upon the failure of the applicant to comply with any of the provisions of such lease and the failure to pay any of such fees, the department shall notify the lessee that the required fees have not been paid to the department or that the lessee is not otherwise in compliance with the provisions of the lease. If the lessee has not come into compliance with all provisions of the lease or has not paid to the department all required fees within fifteen calendar days after the date of such notice, the department shall issue an order denying the applicant the right to divert or otherwise use the water appropriation for power production. The department shall rescind the order denying use of the water appropriation at such time as the lessee has come into compliance with all provisions of the lease and has paid all required fees to the department. If after forty-five calendar days from the date of issuance of the order the lessee is not in compliance with all provisions of the lease or required fees have not been paid to the department, such lease and water appropriation shall be canceled by the department.

Source: Laws 1921, c. 291, § 1, p. 942; C.S.1922, § 8437; C.S.1929, § 81-6318; R.S.1943, § 46-236; Laws 1972, LB 1306, § 1; Laws 1987, LB 140, § 7; Laws 2000, LB 900, § 111.

State may lease use of public waters for power purposes. Hickman v. Loup River P. P. Dist., 176 Neb. 416, 126 N.W.2d 404 (1964).

Applicant for use of water for power purposes may make lease with state. Hickman v. Loup River P. P. Dist., 173 Neb. 428, 113 N.W.2d 617 (1962).

46-237. Map or plat; requirements; failure to furnish; effect. (1) Within six months after approval and allowance of an application other than an application to appropriate public waters for induced ground water recharge, the applicant shall file in the office of the department a map or plat which shall conform to the rules and regulations of the department as to material, size, coloring, and scale. Such map or plat shall show the source from which the proposed appropriation is to be taken and all proposed dams, dikes, reservoirs, canals,

powerhouses, and other structures for the purpose of storing, conveying, or using water for any purpose whatsoever and their true courses or positions in connection with the boundary lines and corners of lands which they occupy. The lands to be irrigated shall be identified in the manner prescribed by the department. No rights shall be deemed to have been acquired until the provisions of this section have been complied with. Except as provided in subsection (2) of this section, failure to so comply shall work a forfeiture of the appropriation and all rights thereunder.

(2) For any appropriation with a priority date earlier than 1958 but for which either the appropriator has failed to comply with the requirements of subsection (1) of this section or a map or plat required by such subsection has been lost or destroyed through no fault of the appropriator, the lack of such compliance or of such map or plat shall not be the basis for a departmental adjudication or cancellation of the appropriation and the appropriation shall not be subject to legal challenge by any party on that basis.

(3) The department may notify any appropriator subject to subsection (2) of this section of the need to file a map or plat of lands under such appropriation. Unless the department grants an extension for good cause shown, the appropriator shall file the required map within three years after that notification and such map shall conform to the rules and regulations of the department as to material, size, coloring, and scale. If the appropriator fails to comply, the department may deny the appropriator the right to divert or withdraw water subject to the appropriation until compliance has been achieved.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 2, § 19, p. 843; C.S.1922, § 8438; C.S.1929, § 81-6319; R.S.1943, § 46-237; Laws 1993, LB 301, § 9; Laws 2000, LB 900, § 112; Laws 2004, LB 962, § 13.  
Operative date July 16, 2004.

Filing of map was required as a step in completing appropriation of water. *Ainsworth Irr. Dist. v. Bejot*, 170 Neb. 257, 102 N.W.2d 416 (1960).

Under former law, where application for appropriation was approved by Department of Roads and Irrigation, and

filing of map, etc., was made within six months thereafter pursuant to earlier section, department had discretion to extend time to complete work, owing to abnormal conditions. *In re Application of Babson*, 105 Neb. 317, 180 N.W. 562 (1920).

46-238. Construction of project; time restrictions; failure to comply; forfeiture; extension of time for completion of work; appeal. (1) Within six months after the approval of any application for water for irrigation, power, or other useful purpose by the department, the person making such application shall commence the excavation or construction of the works in which it is intended to divert the water and the actual construction of any water power plant and reservoir or reservoirs for storage in connection therewith and shall vigorously, diligently, and uninterruptedly prosecute such work to completion unless temporarily interrupted by some unavoidable and natural cause. A failure to comply with this section shall work a forfeiture of the appropriation and all rights under the appropriation. The cost of promotion and engineering work shall not be considered a part of the cost of construction, and the progress of the construction work shall be such that one-tenth of the total work shall be completed within one year from the date of approval of the application. The construction of all work required in connection with the proposed project shall be prosecuted in the manner described in this section and with such a force as shall assure the average rate of constructional progress necessary to

complete such work or works within the time stipulated in the approval of such application, notwithstanding the ordinary delays and casualties that must be expected and provided against. A failure to carry on the construction of either an irrigation project or a water power project as outlined in this section shall work a forfeiture of the appropriation and all rights under the appropriation, and the department shall cancel such appropriation. The department shall have free access to all records, books, and papers of any irrigation or water power company, shall have the right to go upon the right-of-way and land of any such company, shall inspect the work to see that it is being done according to plans and specifications approved by the department, and shall also keep a record of the cost of construction work when deemed advisable for physical valuation purposes.

(2) The department may extend, for reasonable lengths of time, the time for completion of works, the application of water to a beneficial use, or any of the other requirements for completing or perfecting an application for flow or storage rights as fixed in the approval of an application or otherwise for the appropriation of water. Such extension may be granted upon a petition to the department and the showing of reasonable cause. The department shall cause a notice of each petition received to be published at the petitioner's expense in at least one newspaper of general circulation in the county or counties of the appropriation once a week for three consecutive weeks. The department shall hold a hearing on the issue of extension on its own motion or if requested by any interested person. If a hearing is held, notice shall be given by certified mail to the applicant, to any person who requested a hearing, and to any person who requests notification of the hearing. The department may grant the extension in the absence of a hearing if no requests for a hearing are received. Any interested person may be made a party to such action. Any party affected by the decision on the petition may appeal directly to the Court of Appeals. Subsequent extensions may be made in the same manner.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 2, § 13, p. 838; C.S.1922, § 8432; C.S.1929, § 81-6313; R.S.1943, § 46-238; Laws 1957, c. 198, § 2, p. 698; Laws 1979, LB 545, § 1; Laws 1980, LB 649, § 1; Laws 1987, LB 140, § 8; Laws 1991, LB 278, § 1; Laws 1991, LB 732, § 107; Laws 2000, LB 900, § 113.

Extension of completion date for construction of irrigation works was authorized when such extension was made necessary by some unavoidable and natural cause. *Hickman v. Loup River P. P. Dist.*, 176 Neb. 416, 126 N.W.2d 404 (1964).

Where one appropriator was not barred by one-year time limitation and brought action, subsequent appropriators could appear and contest by petition in intervention. *Hickman v. Loup River P. P. Dist.*, 173 Neb. 428, 113 N.W.2d 617 (1962).

Extension of time to complete appropriation was ratified by legislative act. *Ainsworth Irr. Dist. v. Harms*, 170 Neb. 228, 102 N.W.2d 416 (1960); *Ainsworth Irr. Dist. v. Bejot*, 170 Neb. 257, 102 N.W.2d 429 (1960).

Time for construction of a project could be extended where temporarily interrupted by unavoidable cause. *North Loup River P. P. & I. Dist. v. Loup River P. P. Dist.*, 162 Neb. 22, 74 N.W.2d 863 (1956).

Property rights in water for irrigation consist not alone in the amount of, but also in the priority of, the appropriation. *Vonburg v. Farmers Irr. Dist.*, 132 Neb. 12, 270 N.W. 835 (1937).

Under former law, adjudication of Department of Roads and Irrigation in proceeding to cancel water right, ordering that work be carried on under this section, was not binding upon other appropriators not parties. *Kinnan v. France*, 113 Neb. 99, 202 N.W. 452 (1925).

46-239.      Repealed. Laws 1955, c. 183, s. 6.

46-240. Additional appropriation; conditions; application procedure. 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 stored underground, for irrigation or any other beneficial purpose, 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 intentionally 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.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 2, § 28, p. 845; C.S.1922, § 8447; C.S.1929, § 81-6328; R.S.1943, § 46-240; Laws 1983, LB 198, § 8; Laws 1985, LB 488, § 4.

46-240.01. Supplemental additional appropriations; agricultural appropriators; application. All appropriators of water for agricultural purposes of less than the statutory limit of direct flow from the public waters of this state within the drainage basin of the stream from which such waters originate shall be entitled to such additional appropriation or appropriations from the direct flow of such stream, within the statutory limits provided by law, as may be necessary and required for the production of crops in the practice of good husbandry. To accomplish such purpose, existing agricultural appropriators within the drainage basin having less than the statutory limit of direct flow shall, as a matter of right, be entitled upon application therefor to the approval and grant of such additional supplemental appropriation or appropriations from the direct flow of such stream as will not make the total appropriations, for the lands upon which such water is to be used, exceed the limits provided by law and as may be necessary and required for the production of crops upon such lands with the practice of good husbandry. Applications for such supplemental additional appropriations from the direct flow, upon the approval or granting thereof, shall have priority within the drainage basin as of the date such applications are filed in the office of the department.

Source: Laws 1953, c. 160, § 1, p. 503; Laws 2000, LB 900, § 114.

46-241. Application for water; storage reservoirs; facility for underground water storage; eminent domain; procedure; duties and liabilities of owner. (1) Every person intending to construct and operate a storage reservoir for irrigation or any other beneficial purpose or intending to construct and operate a facility for intentional underground water storage and recovery shall, except as provided in subsections (2) and (3) of this section and section 46-243, make an application to the department upon the prescribed form and provide such plans, drawings, and specifications as are necessary to comply with section 46-257. 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 under this section and any approval required by section 46-257, the applicant shall have the right to construct and impound in such reservoir, or store in and recover from such underground water storage facility, all water not otherwise appropriated and any appropriated water not needed for immediate use, to

construct and operate necessary ditches for the purpose of conducting water to such storage reservoir or facility, and to condemn land for such reservoir, 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) Any person intending to construct an on-channel reservoir with a water storage impounding capacity of less than fifteen acre-feet measured below the crest of the lowest open outlet or overflow shall be exempt from subsection (1) of this section as long as there will be (a) no diversion or withdrawal of water from the reservoir for any purpose other than for watering range livestock and (b) no release from the reservoir to provide water for a downstream diversion or withdrawal for any purpose other than for watering range livestock. This subsection does not exempt any person from the requirements of section 46-257 or 54-2425.

(3) Any person intending to construct a reservoir, holding pond, or lagoon for the sole purpose of holding, managing, or disposing of animal or human waste shall be exempt from subsection (1) of this section. This subsection does not exempt any person from any requirements of section 46-233, 46-257, or 54-2425.

(4) Every person intending to modify or rehabilitate an existing storage reservoir so that its impounding capacity is to be increased shall comply with subsection (1) of this section.

(5) The owner of a 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 does not have the right to store water in such reservoir or facility during the time that such water is required in ditches for direct irrigation or for any reservoir or facility holding a senior 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 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 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 dam shall be constructed in accordance with section 46-257, and the outlet works shall be installed so that water may be released in compliance with this section. The requirement for outlet works may be waived by the department upon a showing of good cause. Whenever any person diverts water from a public stream and returns 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, if no prior appropriator for beneficial use is prejudiced by such diversion.

(6) An application for storage and recovery of water intentionally 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.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 3, § 17, p. 852; C.S.1922, § 8467; C.S.1929, § 46-617; R.S.1943, § 46-241; Laws 1951, c. 101, § 91, p. 487; Laws 1955, c. 183, § 2, p. 515; Laws 1971, LB 823, § 1; Laws 1973, LB 186, § 8; Laws 1983, LB 198, § 9; Laws 1985, LB 103, § 2; Laws 1985, LB 488, § 5; Laws 1995, LB 309, § 1; Laws 2000, LB 900, § 115; Laws 2003, LB 619, § 4; Laws 2004, LB 916, § 2; Laws 2004, LB 962, § 14.

Note: The Revisor of Statutes has pursuant to section 49-769 correlated LB 916, section 2, with LB 962, section 14, to reflect all amendments.

Note: The changes made by LB 916 became effective July 16, 2004. The changes made by LB 962 became operative July 16, 2004.

Pondage, captured by reservoir during nonirrigation season, or from waters during irrigation season which are not subject to appropriation, is entitled to be held by a public power district for use in operation and maintenance of its power works. *Platte Valley Irr. Dist. v. Tilley*, 142 Neb. 122, 5 N.W.2d 252 (1942).

Damages recoverable in a condemnation proceeding must be based upon the value of the land in the condition it was at the time of the condemnation. In re *Platte Valley Public Power & Irr. Dist.*, 137 Neb. 313, 289 N.W. 383 (1939).

Legislature contemplated the payment for, and not abatement of, damage from seepage arising from construction of permanent reserves. *Applegate v. Platte Valley Public Power & Irr. Dist.*, 136 Neb. 280, 285 N.W. 585 (1939).

Defendant district was entitled to condemn right-of-way for transmission lines across plaintiffs' lands irrespective of boundary lines. *Johnson v. Platte Valley Public Power & Irr. Dist.*, 133 Neb. 97, 274 N.W. 386 (1937).

Public power and irrigation districts are not authorized to take private property for public use without just compensation. *State ex rel. Loseke v. Fricke*, 126 Neb. 736, 254 N.W. 409 (1934).

Right of eminent domain, provided for in this section, cannot be exercised where purpose of proposed condemnation is to take part of one person's land, against his will, as site for reservoir from which to irrigate land of another, for his sole benefit. *Vetter v. Broadhurst*, 100 Neb. 356, 160 N.W. 109 (1916).

46-242. Use of stored water; permit; application; conditions; limitations; procedure. (1) After the completion to the satisfaction of the department of a storage reservoir for which a permit has been obtained pursuant to section 46-241, 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 the land to be irrigated.

(2) Application may be made for a permit to appropriate water for the irrigation of land lying both upstream and downstream from 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 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 a person other than the owner of a reservoir at any time, the application shall not be approved by the department until the applicant shows, by documentary evidence, sufficient interest in such storage reservoir to entitle the applicant to enough water for the purpose set forth in the application.

(4) Application may be made for a permit to appropriate water from a storage reservoir, subject to subsection (3) of this section, or an intentional underground water storage facility, subject to subsection (6) of section 46-241, for instream use of water for recreation or fish and wildlife if the appropriation will not prejudice the rights of any prior appropriator for a beneficial use.

(5) An unapproved application for a permit pursuant to this section which is pending on August 26, 1983, may be amended to include use of stored water for intentional underground water storage.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 3, § 17, p. 852; C.S.1922, § 8467; C.S.1929, § 46-617; R.S.1943, § 46-242; Laws 1955, c. 183, § 3, p. 516; Laws 1965, c. 272, § 1, p. 774; Laws 1983, LB 198, § 10; Laws 1991, LB 277, § 1; Laws 2000, LB 900, § 116; Laws 2003, LB 619, § 5.  
Effective date April 17, 2003.

46-242.01 and 46-242.02. Repealed. Laws 1996, LB 890, s. 1.

46-243. Application for water; reservoir intended for raising water level. A reservoir constructed for the purpose of holding water back and raising it in order that it may be applied to lands of a higher level or given a greater head for power, shall not be considered a storage reservoir, but such reservoir together with the diverting or impounding dam, must be described in an application for flowing water when water is to be raised, in order to perfect the appropriation.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 3, § 17, p. 853; C.S.1922, § 8467; C.S.1929, § 46-617.

(g) IRRIGATION WORKS; CONSTRUCTION, OPERATION, AND REGULATION

46-244. Canals; declared works of internal improvement; laws applicable. Canals and other works constructed for irrigation or water power purposes, or both, are hereby declared to be works of internal improvement; and all laws applicable to works of internal improvement are hereby declared to be applicable to such canal and irrigation works.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 3, § 1, p. 846; C.S.1922, § 8451; C.S.1929, § 46-601.

46-245.        Irrigation canal, defined; laws applicable. Any canal constructed for the purpose of developing water power, or any other useful purpose, and from which water can be taken for irrigation, is hereby declared to be an irrigation canal and all laws relating to irrigation canals shall be deemed applicable thereto.

Source:        Laws 1893, c. 40, § 2, p. 378; R.S.1913, § 3375; Laws 1919, c. 190, tit. VII, art. V, div. 1, § 7, p. 832; C.S.1922, § 8412; C.S.1929, § 46-507.

46-246.        Ditches, dams, or similar works; construction; right of eminent domain. All persons desirous of constructing a ditch, building a dam or dams for the purpose of storing water for irrigation, evaporation, and water power purposes, or conveying water to be applied to domestic, agricultural or any other beneficial use, or any dam, dike, reservoir, wasteway, subterranean gallery, filtering wells or other works for collecting, cleansing, filtering, retaining or storing water for any such use, or to enlarge any such ditch, conduit or waterworks, or to change the course thereof in any place, or to relocate the headgate or to change the point at which the water is to be taken into such canal or other waterworks, or to enlarge any ditch, canal or other works, or to construct any ditch, or to lay pipes or conduits for conveying or distributing water so collected or stored to the place of using the same, or to set, place or construct a wheel, pump, machine or apparatus for raising water out of any stream, lake, pond or well so that the same may flow or be conveyed to the place of using or storing the same, and who shall be unable to agree with the owner or claimant of any lands necessary to be taken for the site of any such works or any part thereof, touching the compensation and damages, shall be entitled to condemn the right-of-way over or through the lands of others, for any and all such purposes.

Source:        Laws 1919, c. 190, tit. VII, art. V, div. 3, § 2, p. 846; C.S.1922, § 8452; C.S.1929, § 46-602.

46-247.        Ditches, dams, or similar works; construction; eminent domain; procedure. In case of the refusal of the owner or claimant of any lands through which such ditch, canal, or other works are proposed to be made or constructed, to allow the passage thereof, the person desiring the right-of-way may acquire same through the exercise of the power of eminent domain. The procedure to condemn property shall be exercised in the manner set forth in sections 76-704 to 76-724.

Source:        Laws 1919, c. 190, tit. VII, art. V, div. 3, § 3, p. 847; C.S.1922, § 8453; C.S.1929, § 46-603; R.S.1943, § 46-247; Laws 1951, c. 101, § 92, p. 487.

46-248.        Right-of-way for irrigation laterals; condemnation; procedure. Whenever any person has acquired any rights to water for any lands owned by him, where, prior to the building of the laterals and the application of the water, any intervening canal, ditch, or lateral has been constructed, he shall have the right to construct laterals from such irrigation canal to the

lands owned by him and to have such irrigation laterals across the lands and intervening canals to the land owned by him. If such intervening owner shall refuse to sell the right-of-way for such irrigation lateral, the owner shall have the right of eminent domain to condemn such right-of-way. The procedure to condemn property shall be exercised in the manner set forth in sections 76-704 to 76-724.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 3, § 4, p. 847; C.S.1922, § 8454; C.S.1929, § 46-604; R.S.1943, § 46-248; Laws 1951, c. 101, § 93, p. 488.

46-249. Irrigation works constructed by authority of United States; right-of-way over public lands; grant; school lands excepted. There is hereby granted, over all the lands now or hereafter belonging to the State of Nebraska, except school lands held in trust by the Board of Educational Lands and Funds, a right-of-way for ditches, tunnels and telephone and transmission lines necessary to the construction and operation of any irrigation works constructed by authority of the United States; and in all conveyances such right-of-way shall be reserved.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 3, § 5, p. 847; C.S.1922, § 8455; C.S.1929, § 46-605; R.S.1943, § 46-249; Laws 1965, c. 273, § 1, p. 775.

46-250. Places of diversion; storage sites; changes; procedure. The owner of any ditch, storage reservoir, storage capacity, or other device for appropriating water may, upon petition to the Department of Natural Resources, and upon its approval, change the point at which the water under any water appropriation of record is diverted from a natural stream or reservoir, change the line of any flume, ditch, or aqueduct, or change a storage site. No reclamation district or power appropriator may change the established return flow point without the approval of the department.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 3, § 6, p. 848; C.S.1922, § 8456; C.S.1929, § 46-606; Laws 1941, c. 91, § 1, p. 361; C.S.Supp.,1941, § 46-606; R.S.1943, § 46-250; Laws 1951, c. 150, § 1, p. 598; Laws 1953, c. 158, § 1, p. 496; Laws 2000, LB 900, § 117.

Appropriator cannot change place of use of water, or extend ditch without permission of and subject to control of department. *Farmers & Merchants Irr. Co. v. Gothenburg Water Power & Irr. Co.*, 73 Neb. 223, 102 N.W. 487 (1905).

46-251. Irrigation works; use of state lands and highways; grant; right-of-way; condemnation. All persons desirous of constructing any of the works provided for in sections 46-244 to 46-250 shall have the right to occupy state lands and obtain right-of-way over and across any highway in this state for such purpose without compensation, except public school lands. All bridges or crossings over such ditches, laterals and canals shall be constructed under the supervision of the Department of Roads, if on a state highway, and under the supervision of the county board or governing body of a municipality, if on a highway under the jurisdiction of such board or governing body. All such persons may obtain a right-of-way not to exceed sixteen feet in width, for a like purpose along, parallel to, and upon one side of any highway by condemnation proceedings where the same does not interfere with the proper drainage of such

highway. In such cases the abutting landowner and the county may grant such right-of-way, or in case of their refusal notice shall be served upon them and proceedings had as in other cases. Not more than one such ditch or lateral shall be permitted along the side of the same highway.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 3, § 7, p. 848; C.S.1922, § 8457; C.S.1929, § 46-607; R.S.1943, § 46-251; Laws 1961, c. 227, § 2, p. 672.

46-252. Conducting of water into or along natural channels; withdrawal; permit, when required; liability. (1) Any person may conduct, either from outside the state or from sources located in the state, quantities of water over and above those already present into or along any of the natural streams or channels of this state, for purposes of instream beneficial uses or withdrawal of some or all of such water for out-of-stream beneficial uses, at any point without regard to any prior appropriation of water from such stream, due allowance being made for losses in transit to be determined by the Department of Natural Resources. The department shall monitor movement of the water by measurements or other means and shall be responsible for assuring that such quantities are not subsequently diverted or withdrawn by others unless they are authorized to do so by the person conducting the water.

(2) Except as provided in subsections (3) and (4) of this section, before any person may conduct water into or along any of the natural streams or channels of the state, he or she shall first obtain a permit from the department. Application for the permit shall be made on forms provided by the department. Applications shall include plans and specifications detailing the intended times, amounts, and streamreach locations and such other information as required by the department. The water subject to such a permit shall be deemed appropriated for the use specified in the permit. Permitholders shall be liable for any damages resulting from the overflow of such stream or channel when water so conducted contributed to such overflow.

(3) Any person actually engaged in the construction or operation of any water power plant may, without filing with the department and upon payment of all damages, use any such stream or channel for a tailrace or canal and may, whenever necessary, widen, deepen, or straighten the bed of any such stream. All damages resulting therefrom shall be determined in the manner set forth in sections 76-704 to 76-724.

(4) Any person holding a storage use permit pursuant to section 46-242 shall not be required to obtain the permit required by this section.

(5) Nothing in this section shall be construed to exempt a person from obtaining any other permits required by law.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 3, § 8, p. 848; C.S.1922, § 8458; C.S.1929, § 46-608; R.S.1943, § 46-252; Laws 1951, c. 101, § 94, p. 488; Laws 1955, c. 183, § 4, p. 516; Laws 1992, LB 49, § 1; Laws 2000, LB 900, § 118.

Diversion of water through lands of others without their consent may be enjoined. *Kuhlmann v. Platte Valley Irr. Dist.*, 166 Neb. 493, 89 N.W.2d 768 (1958).

Damages recoverable in a condemnation proceeding must be based upon the value of the land in the condition it was at the time of the condemnation. *In re Platte Valley Public Power & Irr. Dist.*, 137 Neb. 313, 289 N.W. 383 (1939).

Natural stream can be used to conduct irrigation water, but user is liable for damages arising from such use, and, if damage is likely to continue, use may be enjoined. *Hagadone v. Dawson County Irr. Co.*, 136 Neb. 258, 285 N.W. 600 (1939).

Defendant district was authorized to condemn right-of-way for transmission lines across plaintiffs' lands irrespective of boundary lines. *Johnson v. Platte Valley Public Power & Irr. Dist.*, 133 Neb. 97, 274 N.W. 386 (1937).

Diversion of waters across lands of another without compliance with statute was enjoined, though permission was granted by board of public works. *Harris v. Steele*, 110 Neb. 213, 193 N.W. 268 (1923).

In interest of good husbandry, flow of surface waters along natural depressions or drainways through farm lands may be accelerated and incidentally increased by artificial means. *Steiner v. Steiner*, 97 Neb. 449, 150 N.W. 205 (1914).

46-253. Ditches; changing line; flow maintained; liability. No owner of any ditch or canal shall change the line of the ditch or canal so as to interfere with the use of water by anyone, who, prior to the proposed change, had used water for irrigation purposes from such ditch or canal, and the owner of such ditch or canal shall keep the same in good repair so as to permit the water to flow in a quantity sufficient to furnish the statutory amount to the lands entitled thereto at all reasonable times. The majority of the water users under any ditch may designate such reasonable time for the use of water as such majority may determine upon, upon a written notice signed by such majority to the persons in control of such ditch or canal. The owners, or those in control, may limit the flow of water in the canal in accordance with such notice, between April 1 and May 1, and October 1 and November 15. No ditch shall be closed between May 1 and October 1. For a failure to cause the water to flow as aforesaid, the owners, or those in control, of any such ditch or canal shall be liable to anyone for any damage resulting from such failure, unavoidable accidents and shortage in the source of supply excepted.

Source: Laws 1895, c. 69, § 46, p. 261; R.S.1913, § 3436; Laws 1915, c. 65, § 1, p. 164; Laws 1919, c. 190, tit. VII, art. V, div. 3, § 9, p. 849; C.S.1922, § 8459; Laws 1925, c. 132, § 1, p. 347; Laws 1927, c. 143, § 1, p. 387; C.S.1929, § 46-609; Laws 1937, c. 104, § 1, p. 363; C.S.Supp.,1941, § 46-609.

46-254. Interfering with waterworks; taking water without authority; penalty. Any person owning or in control of any ditch, reservoir, or other device for appropriating or using water who willfully opens, closes, changes, or interferes with any headgate or controlling gate, or by any method or means takes any water from any natural stream, reservoir, or other source, through any ditch or canal to any land or lands, or allows the same to be done, or uses or allows to be used any water upon any land or lands, or for any other purpose whatsoever, without authority from the Department of Natural Resources, or who stores water in or releases water

from a reservoir other than in compliance with orders of the Director of Natural Resources or his or her representative, shall be guilty of a Class II misdemeanor. Each day that the water is allowed to run without authority from the department shall constitute a separate offense.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 3, § 10, p. 849; C.S.1922, § 8460; C.S.1929, § 46-610; R.S.1943, § 46-254; Laws 1973, LB 186, § 9; Laws 1977, LB 40, § 257; Laws 2000, LB 900, § 119.

### **Cross Reference**

**Drover of livestock, duty to prevent damages**, see section 54-305.

46-255. Ditches; construction through private property; bridges and gates. Any person, constructing a ditch or canal through the lands of another, having no interest in such ditch or canal, shall build such ditch or canal in a substantial manner so as to prevent damage to such land. In all cases where necessary for the free and convenient use of lands on both sides of the ditch or canal by the owner or owners of such lands, the owner or those in control of such ditch shall erect substantial and convenient bridges across such canal or ditch, and they shall erect and keep in order suitable gates at the point of entrance and exit of such ditch through any enclosed field.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 3, § 11, p. 850; C.S.1922, § 8461; C.S.1929, § 46-611.

46-256. Persons controlling canals or reservoirs; headgates and measuring devices; failure to construct; construction by Department of Natural Resources. Persons owning or controlling any ditch, canal, or reservoir for the purpose of storing or using water for any purpose shall, upon thirty days' notice by the Department of Natural Resources, construct and maintain at the point of diversion a substantial headgate, of a design approved by the department, so built that it may be closed, or partially closed and fastened at any stage with lock or seal. They shall also construct a device for measuring and apportioning the water appropriated, which device shall be of a design approved by the department and built at the most practical point to be selected and fixed by it. If they neglect or refuse, for a period of ten days, to construct such headgate and measuring device, the department shall refuse to allow any water to be delivered to or used by or through any such ditch, canal, or reservoir or any other contrivance or device for appropriating, using, or storing water, and the department may construct bars, dams, or other obstructions to prevent such delivery or use.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 2, § 26, p. 844; C.S.1922, § 8445; C.S.1929, § 81-6326; R.S.1943, § 46-256; Laws 2000, LB 900, § 120.

Installation of measuring device was properly required as a condition to allowance of appropriation of water. Ainsworth Irr. Dist. v. Bejot, 170 Neb. 257, 102 N.W.2d 416 (1960).

Appropriated waters should be measured at the point of diversion. Loup River Public Power Dist. v. North Loup River Public Power & Irr. Dist., 142 Neb. 141, 5 N.W.2d 240 (1942).

46-257. Dam, holding pond, or lagoon construction; submit plans; low-hazard dams; exception; certification; violation; penalties. (1) Except as provided in subsection (3) of this section, any person intending to construct, modify, or rehabilitate a dam for any purpose, including, but not limited to, providing a reservoir for temporary or permanent storage of surface water, well water, human or animal waste effluent, or mine tailings and sediments, shall submit an application for approval along with plans, drawings, and specifications of the project to the Department of Natural Resources before beginning such construction, modification, or rehabilitation. When applicable, the applicant shall at the same time submit an application to comply with section 46-241. Except as provided in subsection (3) of this section, any person intending to abandon an existing dam through breaching or removal or as otherwise defined by the department shall submit to the department such plans and drawings as are requested by the department before beginning such abandonment. No dam shall be constructed, modified, rehabilitated, or abandoned until the required plans, drawings, and specifications have been approved by the department.

(2) An applicant for a permit for a livestock waste control facility which includes a dam, holding pond, or lagoon for which approval by the Department of Natural Resources is not otherwise required by this section, but is required by the Department of Environmental Quality under section 54-2412, shall submit an application for approval along with plans, drawings, and specifications to the Department of Natural Resources and obtain approval before beginning construction. The Department of Natural Resources shall approve or deny the dam, holding pond, or lagoon within sixty days after the request is made.

(3) Subsection (1) of this section does not apply to the construction, modification, rehabilitation, or abandonment of a dam which (a) is a low-hazard dam, as defined in the rules and regulations of the department, (b) is less than twenty-five feet high, measured from the lowest elevation of the natural ground at the downstream toe of the dam to the top of the dam, (c) has a total storage capacity of less than fifty acre-feet between the lowest elevation of the downstream toe of the dam and the top of the dam, and (d) is not subject to subsection (1) or (4) of section 46-241.

(4) Within sixty days after completion of any dam, holding pond, or lagoon subject to subsection (1) or (2) of this section, a certification in the form required by the Department of Natural Resources that the dam, holding pond, or lagoon has been constructed in accordance with the plans, drawings, and specifications approved by the department shall be filed with the department for review and approval. The department may, in coordination with the Department of Environmental Quality, provide for the filing with both departments of a single certification of completion that will satisfy the applicable requirements of both departments when the dam, holding pond, or lagoon is part of a livestock waste control facility. The Department of Natural Resources shall approve or disapprove the certification and notify the owner or other responsible party within thirty days after the date of such filing, except that if the department determines that the certification is incomplete it shall so notify the owner or other responsible party and shall approve or disapprove the certification within thirty days after the date the owner or other responsible party files a complete certification. Neither the applicant nor any other person shall

store water in any reservoir created by a dam, holding pond, or lagoon subject to subsection (1) or (2) of this section or otherwise operate such dam, holding pond, or lagoon if the department disapproves the certification as provided in this subsection.

(5) Subsection (3) of this section does not waive any requirements of the Department of Environmental Quality.

(6) Whenever the Director of Natural Resources determines that a dam, holding pond, or lagoon has been constructed or operated in violation of subsection (1), (2), or (4) of this section, he or she may order the immediate removal of such dam, holding pond, or lagoon and if necessary may institute legal proceedings to obtain compliance with such order.

(7) Any person constructing a dam, holding pond, or lagoon without having complied with subsection (1), (2), or (4) of this section shall be guilty of a Class V misdemeanor, and every day such dam, holding pond, or lagoon is maintained shall be considered a separate offense.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 2, § 27, p. 845; C.S.1922, § 8446; C.S.1929, § 81-6327; Laws 1941, c. 182, § 1, p. 713; C.S.Supp.,1941, § 81-6327; R.S.1943, § 46-257; Laws 1961, c. 228, § 1, p. 675; Laws 1971, LB 823, § 2; Laws 1973, LB 186, § 10; Laws 1977, LB 40, § 258; Laws 1979, LB 45, § 1; Laws 1985, LB 103, § 3; Laws 1995, LB 309, § 2; Laws 1998, LB 1209, § 16; Laws 2000, LB 900, § 121; Laws 2003, LB 619, § 6.  
Effective date April 17, 2003.

46-258. Ditches; maintenance; outlets; headgates; duties of owner. Any owner or person in control of any ditch for irrigation purposes shall have the ditch in order to receive water from the source of supply on or before April 15 of each year, shall construct necessary outlets in the banks for the delivery of water to all persons who are entitled to the same, and shall maintain a substantial headgate and measuring box or weir at the head of each lateral, which shall be constructed in accordance with plans and specifications approved by the Department of Natural Resources. A multiplicity of outlets shall be avoided. The outlet shall be at the most convenient and practicable point consistent with the protection and safety of the ditch and the efficient distribution of water among the various claimants thereof.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 3, § 12, p. 850; C.S.1922, § 8462; C.S.1929, § 46-612; R.S.1943, § 46-258; Laws 2000, LB 900, § 122.

This section does not affect the duty of irrigation district to furnish water, but only prescribes upon whom duty to construct outlets rests. State ex rel. Clarke v. Gering Irr. Dist., 109 Neb. 642, 192 N.W. 212 (1923).

46-259. Running water in rivers and ravines; right to use. The right to the use of running water flowing in any river or stream or down any canyon or ravine may be acquired by appropriation by any person.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 3, § 13, p. 850; C.S.1922, § 8463; C.S.1929, § 46-613.

46-260. Repealed. Laws 1987, LB 140, s. 15.

46-261. Lands to be irrigated; appropriations transferred; information filed with Department of Natural Resources; recording gauges; failure to install; effect. (1) The Department of Natural Resources may require an appropriator or his or her agent to furnish the department, by April 1 in any year, a list or map of all lands to be irrigated, the acreage of each tract, and the names of the owners, controllers, or officers for every ditch, reservoir, or other device for appropriating, diverting, carrying, or distributing water to be used as a basis for the distribution of water until April 1 of the following year, and if so ordered such a list or map shall be furnished by the appropriator or his or her agent to the department.

(2) By April 1, any district or company which has transferred an appropriation pursuant to sections 46-2,127 to 46-2,129 in the previous calendar year shall provide the department:

- (a) A legal description and list or map of the tracts of land receiving and transferring an appropriation of water, or portion thereof, within the district or company;
- (b) The water appropriation permit number under sections 46-233 to 46-235 and the priority date of the water appropriation;
- (c) A statement on whether objections were filed, whether a hearing was held, and how consent was given;
- (d) The effective date of the transfer of the appropriation; and
- (e) A statement summarizing the water use on the receiving and transferring tracts of land.

(3) The department may require the owner or controller of any canal or ditch to install an approved recording gauge at one or more specific locations to record the amount of water used.

(4) For any appropriation not held by an irrigation district, a reclamation district, a public power and irrigation district, or a mutual irrigation or canal company, the department may require the owner of an appropriation for irrigation purposes to provide the department with any or all of the following information relative to the use of water under the appropriation during the previous irrigation season: (a) A list or map of all lands irrigated; (b) the acreage of each tract irrigated; (c) the rate at which water was diverted; (d) the amount diverted; (e) for any lands under the appropriation that were not irrigated, any sufficient cause, as described in section 46-229.04, which the appropriator claims was the reason for such nonuse; and (f) any other information needed by the department to properly monitor and administer use of water under the

appropriation. If the appropriator claims sufficient cause for nonuse, he or she shall also provide the department with any evidence the department requires as a condition for accepting such claimed cause as sufficient cause to excuse nonuse.

(5) The department may deny an appropriator the right to any water to be delivered to or used by or through any ditch, reservoir, or other contrivance for the appropriation, use, or storage of water if the appropriator is not in compliance with this section, with subsection (2) of section 46-230, or with any conditions of any permit, notice, or order of the department concerning the appropriation. The department may construct bars or dams or may install such other devices as are necessary to prevent such delivery or use.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 3, § 15, p. 851; C.S.1922, § 8465; C.S.1929, § 46-615; R.S.1943, § 46-261; Laws 1979, LB 245, § 1; Laws 1981, LB 114, § 1; Laws 1995, LB 94, § 1; Laws 1995, LB 99, § 16; Laws 2000, LB 900, § 123; Laws 2004, LB 962, § 15.  
Operative date July 16, 2004.

Filing of acreage reports did not establish use of water for irrigation purposes. *Rogers v. Petsch*, 174 Neb. 313, 117 N.W.2d 771 (1962).

It is the duty of the state to see that the waters of its streams used for irrigation purposes will not be wasted, and

that prior appropriators will be protected as against subsequent appropriators. *State ex rel. Sorensen v. Mitchell Irr. Dist.*, 129 Neb. 586, 262 N.W. 543 (1935)

46-262. Duties of persons taking water; noncompliance; liability. No person shall accept more water from any ditch, canal or reservoir than he is justly entitled to. On finding that he is receiving more water either through his headgates or by means of leaks, or by any other means, than he is entitled to receive he shall immediately take steps to prevent the same. If he knowingly permits such excess water to come upon his land, and fails to promptly notify the owner of such ditch, canal or reservoir, he shall be liable in damages to any person who shall be injured thereby.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 3, § 16, p. 851; C.S.1922, § 8466; C.S.1929, § 46-616.

46-263. Water; neglecting and preventing delivery; penalty. Any person having charge of a ditch or canal used for irrigation purposes, who shall neglect or refuse to deliver water as herein provided, or any person or persons who shall prevent or interfere with the proper delivery of water to the person or persons having the right thereto, shall be guilty of a Class III misdemeanor.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 3, § 18, p. 853; C.S.1922, § 8468; C.S.1929, § 46-618; R.S.1943, § 46-263; Laws 1977, LB 40, § 259; Laws 1987, LB 140, § 9.

46-263.01. Water; molesting or damaging measuring device; penalty. Any person, or persons, who shall molest, tamper with, break into or damage in any way any device used for the measuring and recording of the water flowing in any stream, canal or reservoir in this state shall be guilty of a Class II misdemeanor.

Source: Laws 1947, c. 172, § 3, p. 522; Laws 1969, c. 385, § 1, p. 1353; Laws 1977, LB 40, § 260.

46-263.02. Water; molesting or damaging measuring device; apprehension and conviction; reward. The Department of Natural Resources is hereby authorized and empowered to offer and pay out of the fees collected by the department rewards of not to exceed twenty-five dollars in any case for the apprehension and conviction of any person or persons violating the provisions of section 46-263.01.

Source: Laws 1947, c. 172, § 4, p. 522; Laws 2000, LB 900, § 124.

46-264. Repealed. Laws 1973, LB 88, s. 1.

46-265. Embankments; maintenance; return of unused water; duties of owner. The owner or owners of any irrigation ditch or canal shall carefully maintain the embankments thereof so as to prevent waste therefrom, and shall return the unused water from such ditch or canal with as little waste thereof as possible to the stream from which such water was taken, or to the Missouri River.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 3, § 20, p. 854; C.S.1922, § 8470; C.S.1929, § 46-620.

46-266. Irrigation water; overflow on roads; duty of owner to prevent; violation; penalty. No owner of any water power or irrigation ditch, canal or lateral shall so construct, maintain or operate the same as to permit any water to escape therefrom upon any public road or highway. No person in the application of water in the irrigation of lands shall permit the same to escape from such lands and to flow upon any public road or highway. Any person violating any of the provisions of this section shall be guilty of a Class V misdemeanor. Each day water is permitted to flow or escape upon any public road or highway in violation of the foregoing prohibitions shall be deemed a separate and distinct offense. The overseer of highways or other officer in charge of road work in the area in which a violation occurs shall make complaint therefor, but no other person shall be precluded from making complaint.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 3, § 21, p. 854; C.S.1922, § 8471; C.S.1929, § 46-621; R.S.1943, § 46-266; Laws 1959, c. 181, § 14, p. 660; Laws 1977, LB 40, § 261.

46-267. Repealed. Laws 2001, LB 170, s. 30; Laws 2001, LB 173, s. 22.

46-268. Contract for use of water; record; rights of grantee unimpaired by foreclosure of liens. Whenever any person, association or corporation owning any irrigation ditch or canal enters into a contract with a landowner to carry water to any tract of land having a water appropriation, such carriage contract shall be recorded in the county where such land is situated in the same manner and under the same conditions as deeds for real estate. Such contract, from the date of the recording thereof, shall be binding upon the grantor, his, their or its successors or assigns, and all persons claiming any interest in such ditch or canal. No foreclosure or other proceedings to subject the property of the owner of such ditch or canal to the satisfaction of any lien or claim shall in any manner impair the right of such grantee, his heirs, administrators or assigns, to the use of the water from such ditch or canal in the quantity and manner provided in his deed or contract.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 3, § 23, p. 855; C.S.1922, § 8473; C.S.1929, § 46-623; R.S.1943, § 46-268; Laws 1947, c. 172, § 2, p. 522.

46-269. Mutual irrigation companies; recognized; bylaws; when lawful. Any corporation or association organized under the laws of this state for the purpose of constructing and operating canals, reservoirs, and other works for irrigation purposes, and deriving no revenue from their operation, shall be termed a mutual irrigation company, and any bylaws adopted by such company, not in conflict herewith, shall be deemed lawful and so recognized by the courts of this state; PROVIDED, such bylaws do not impair the rights of one shareholder over another.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 3, § 24, p. 855; C.S.1922, § 8474; C.S.1929, § 46-624.

46-270. Irrigation projects; how financed. Any corporation or association organized under the law of this state for the purpose of constructing and operating canals, reservoirs, and other works for irrigation and water power purposes shall have power to borrow money, to issue bonds, and to mortgage its property and franchises in the same manner as railroad corporations.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 3, § 25, p. 855; Laws 1921, c. 271, § 1, p. 900; C.S.1922, § 8475; C.S.1929, § 46-625; R.S.1943, § 46-270; Laws 2000, LB 900, § 125; Laws 2001, LB 420, § 31.

Landowner held not liable for increase in annual maintenance charge. *Faught v. Platte Valley P. P. & I. Dist.*, 155 Neb. 141, 51 N.W.2d 253 (1952).

Irrigation companies have right to mortgage property, and mortgage can be foreclosed without making water users parties to action. *Almeria Irr. Canal Co. v. Tzschuck Canal Co.*, 67 Neb. 290, 93 N.W. 174 (1903).

46-271. Corporations or associations; construction or operation of canals or reservoirs; assessments of stock; when authorized; how enforced. Any corporation or association organized under the laws of this state for the purpose of constructing or operating canals, reservoirs or other works for irrigation purposes may, through its board of directors or trustees, assess the shares, stock, or interest of the stockholders thereof for the purpose of obtaining funds to defray the necessary running expenses. Any assessments levied under this

section shall become and be a lien upon the stock or interest so assessed. Such assessments shall, if not paid, become delinquent at the expiration of sixty days, and the stock or interest may be sold at public sale to satisfy such lien. Notice of such sale shall be published for three consecutive weeks prior thereto, in some newspaper published and of general circulation in the county where the office of the company is located. Upon the date mentioned in the advertisement, or upon the date to which the sale may have been adjourned, such stock or interest, or so much thereof as may be necessary to satisfy such lien and costs, shall be sold to the highest bidder for cash.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 3, § 26, p. 855; C.S.1922, § 8476; C.S.1929, § 46-626; R.S.1943, § 46-271; Laws 1996, LB 299, § 23.

46-272. Water users' associations organized under reclamation act of the United States; stock subscriptions; how recorded; fees. The county clerk is hereby authorized to accept from water users' associations, organized in conformity with the requirements of the United States under the reclamation act, books containing printed copies of their articles of incorporation and forms of subscription to stock, and to use such books for recording the stock subscriptions of such associations. The charges for the recording thereof shall be made on the basis of the number of words actually written therein.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 3, § 29, p. 857; C.S.1922, § 8479; C.S.1929, § 46-629.

46-273. Water; United States may furnish to individuals; conditions and requirements. The United States of America is hereby authorized, in conformity to the laws of the State of Nebraska, to appropriate, develop, and store any unappropriated flood or unused waters, in connection with any project constructed by the United States pursuant to the provisions of an Act of Congress approved June 17, 1902, being An Act providing for the reclamation of arid lands (32 Stat. L. 388), and all acts amendatory thereof and supplemental thereto. When the officers of the United States Bureau of Reclamation determine that any water so developed or stored is in excess of the needs of the project as then completed or is flood or unused water, the United States may contract to furnish such developed, stored, flood, or unused water, under the terms and conditions imposed by Act of Congress and the rules and regulations of the United States, to any person who may have theretofore been granted a permit to appropriate a portion of the normal flow of any stream, if the water so appropriated shall, during some portion of the year, be found insufficient for the needs of the land to which it is appurtenant. The United States and every person entering into a contract as herein provided shall have the right to conduct such water into and along any of the natural streams of the state, but not so as to raise the waters thereof above the ordinary high water mark, and may take out the same again at any point desired, without regard to the prior rights of others to water from the same stream; but due allowance shall be made for losses in transit, the amount of such allowance to be

determined by the Department of Natural Resources. The department shall supervise and enforce the distribution of such water so delivered with like authority and under the same provisions as in the case of general appropriators.

Source: Laws 1919, c. 190, tit. VII, art. V, div. 3, § 28, p. 856; C.S.1922, § 8478; C.S.1929, § 46-628; R.S.1943, § 46-273; Laws 1955, c. 183, § 5, p. 517; Laws 1987, LB 140, § 10; Laws 2000, LB 900, § 126.

Contract restricting use of storage water by any one landowner to an amount sufficient to irrigate one hundred sixty acres was valid. Frenchman Valley Irr. Dist. v. Smith, 167 Neb. 78, 91 N.W.2d 415 (1958).

Injury to reclamation service, by taking seepage water which the United States had a contract to sell, may be enjoined. Ramshorn Ditch Co. v. United States, 269 F. 80 (8th Cir. 1920).

The scope of the appropriative rights in connection with a federal reclamation project are the same as those in connection with any irrigation canal, and includes the right to collect seepage waters from any parts of the lands and to reapply them upon any other lands within the project and under the appropriation. United States v. Tilley, 124 F.2d 850 (8th Cir. 1941).

46-274 to 46-276. Repealed. Laws 1963, c. 425, art. VIII, s. 2.

46-277. Dams; inspection; notice to repair; completion; powers and duties of Department of Natural Resources; powers and duties of Director of Natural Resources. The owner or operator of any dam and appurtenant works which has or will have a storage capacity of fifty acre-feet or more below the top of the dam, including surcharge storage through any emergency spillway, or will be twenty-five feet in height or more, measured from the natural bed of the stream or watercourse at the downstream toe of the dam to the top of the dam and is constructed for impounding or diversion of water or the containment of waste effluent, sediments, or other materials, shall keep such dam and appurtenant works in a state of repair to be approved by the Department of Natural Resources. The Director of Natural Resources shall determine the safety inspection requirements, frequency of inspections, and reporting details on the inspections of the dams based on the hazard classification and actual conditions of each dam. The owner or operator shall provide the department access to such dams at all reasonable times. When an inspection reveals a structure in an unsafe condition, the director shall give notice to the owner to place such dam and appurtenant works in such state of repair as will meet the approval of the director. The repair shall be completed in not more than ninety days or such reasonable time as may be determined by the director. Such notice shall be in writing and shall be served in the same manner as court summonses are served.

Source: Laws 1931, c. 45, § 1, p. 143; C.S.Supp.,1941, § 81-6332; R.S.1943, § 46-277; Laws 1973, LB 186, § 11; Laws 1979, LB 544, § 1; Laws 1995, LB 309, § 3; Laws 2000, LB 900, § 127.

46-278.        Dams; failure to repair; penalty. Any owner or owners of such dam who neglect or refuse to repair such dam within three months after receiving written notice from the Director of Natural Resources so to do, shall be guilty of a Class V misdemeanor, and every day that such owner or owners neglect or refuse to repair such dam after the expiration of three months from date of receiving notice so to do shall be considered a separate offense.

Source:        Laws 1931, c. 45, § 2, p. 143; C.S.Supp.,1941, § 81-6333; R.S.1943, § 46-278; Laws 1977, LB 40, § 262; Laws 2000, LB 900, § 128.

(h) HOGS RUNNING IN LATERALS

46-279 and 46-280.    Repealed. Laws 1987, LB 140, s. 15.

(i) ARTESIAN WATER

46-281.        Artesian water; waste prohibited. It shall be unlawful for any owner or owners, lessee or lessees, occupier or occupiers, foreman or superintendent of any farm, town lot or other real estate in the State of Nebraska, where artesian water has been found or may be found hereafter, to allow the water from wells or other borings or drillings on any farm, town lot, or other real estate in Nebraska to flow out and run to waste in any manner to exceed what will flow or run through a pipe one-half of one inch in diameter, except where the water is first used for irrigation, or to create power for milling or other mechanical purposes.

Source:        Laws 1897, c. 84, § 1, p. 358; R.S.1913, § 3527; C.S.1922, § 2927; C.S.1929, § 46-172.

46-282.        Artesian water; waste; penalty. Any person or persons who own, occupy or have control of any farm, town lot or other real estate in the State of Nebraska, who fail or refuse to close or shut off any wastage of artesian water to the amount that section 46-281 allows on any farm, town lot or other real estate which they own, occupy or have control of, after being notified in writing by any person having the benefit of such mutual artesian water supply, within forty-eight hours after such notification, shall be subject to arrest, and shall be guilty of a Class V misdemeanor; and if such wastage be not abated within twenty-four hours after such arrest and conviction, it shall be a second offense against the provisions of section 46-281 and be subject to the same fine as for the first offense. Every like offense or neglect of each twenty-four hours thereafter shall be considered an additional offense against the provisions of section 46-281.

Source:        Laws 1897, c. 84, § 2, p. 358; R.S.1913, § 3528; C.S.1922, § 2928; C.S.1929, § 46-173; R.S.1943, § 46-282; Laws 1977, LB 40, § 264.

(j) WATER REUSE PIT

46-283.        Legislative findings. The Legislature hereby finds and declares that the practice of reusing ground water from irrigation water reuse pits on irrigated land contributes to the efficient use and conservation of the state's water resources and that such reuse may be more feasible when done from irrigation water reuse pits located within natural streams.

Source:        Laws 1980, LB 908, § 1.

46-284.        Definitions, sections found. For purposes of sections 46-283 to 46-287, unless the context otherwise requires, the definitions found in sections 46-285 and 46-286 shall be used.

Source:        Laws 1980, LB 908, § 2.

46-285.        Irrigation water reuse pit, defined. Irrigation water reuse pit shall mean an excavation constructed to capture, for reuse, runoff resulting from ground water irrigation or a structure designed for the purpose of water impoundment which is used for this same purpose so long as the capacity of the facility does not exceed fifteen acre-feet.

Source:        Laws 1980, LB 908, § 3.

46-286.        Headwater segment of a natural stream, defined. Headwater segment of a natural stream shall mean that portion of a natural stream near its origin which exhibits a natural configuration in the land surface and serves to concentrate and give direction to overland flow. Such portion of a natural stream shall have a flow of such intermittent occurrence as to afford usage by normal tillage or grazing practices.

Source:        Laws 1980, LB 908, § 4.

46-287.        Irrigation water reuse pit; reusing ground water; exempt from certain provisions. Notwithstanding any other provision of law, any person intending to or in the process of reusing ground water from an irrigation water reuse pit located within a headwater segment of a natural stream shall be exempt from the provisions of Chapter 46, article 2, which would otherwise apply to such pits, and from the provisions of section 46-637.

Source:        Laws 1980, LB 908, § 5.

(k) INTERBASIN TRANSFERS

46-288.        Interbasin transfers; terms, defined. For purposes of this section and section 46-289, unless the context otherwise requires:

(1) Basin of origin shall mean the river basin in which the point or proposed point of diversion of water is located;

(2) Beneficial use shall include, but not be limited to, reasonable and efficient use of water for domestic, municipal, agricultural, industrial, commercial, power production, subirrigation, fish and wildlife, ground water recharge, interstate compact, water quality maintenance, or recreational purposes. Nothing in this subdivision shall be construed to affect the preferences for use of surface water as provided in section 46-204;

(3) Interbasin transfer shall mean the diversion of water in one river basin and the transportation of such water to another river basin for storage or utilization for a beneficial use; and

(4) River basin shall mean any of the following natural hydrologic basins of the state as shown on maps located in the Department of Natural Resources: (a) The White River and Hat Creek basin; (b) the Niobrara River basin; (c) the Platte River basin, including the North Platte and South Platte River basins, except that for purposes of transfer between the North and South Platte River basins each shall be considered a separate river basin; (d) the Loup River basin; (e) the Elkhorn River basin; (f) the Republican River basin; (g) the Little Blue River basin; (h) the Big Blue River basin; (i) the Nemaha River basin; and (j) the Missouri tributaries basin.

Source: Laws 1981, LB 252, § 5; Laws 1993, LB 789, § 3; Laws 2000, LB 900, § 129.

46-289. Legislative findings; interbasin transfers; application for water; factors considered; order issued. The Legislature finds, recognizes, and declares that the transfer of water to outside the boundaries of a river basin may have impacts on the water and other resources in the basin and that such impacts differ from those caused by uses of water within the same basin in part because any unused water will not be returned to the stream from which it is taken for further use in that river basin. The Legislature therefore recognizes the need to delineate factors for consideration by the Director of Natural Resources when evaluating an application made pursuant to section 46-233 which involves an interbasin transfer of water in order to determine whether denial of such application is demanded by the public interest. Those considerations shall include, but not be limited to, the following factors:

(1) The economic, environmental, and other benefits of the proposed interbasin transfer and use;

(2) Any adverse impacts of the proposed interbasin transfer and use;

(3) Any current beneficial uses being made of the unappropriated water in the basin of origin;

(4) Any reasonably foreseeable future beneficial uses of the water in the basin of origin;

(5) The economic, environmental, and other benefits of leaving the water in the basin of origin for current or future beneficial uses;

(6) Alternative sources of water supply available to the applicant; and

(7) Alternative sources of water available to the basin of origin for future beneficial uses.

The application shall be deemed in the public interest if the overall benefits to the state and the applicant's basin are greater than or equal to the adverse impacts to the state and the basin of origin. The director's order granting or denying an application shall specify the reasons for such action, including a discussion of the required factors for consideration, and shall document such decision by reference to the hearing record, if any, and to any other sources used by the director in making the decision.

Source: Laws 1981, LB 252, § 6; Laws 1986, LB 309, § 2; Laws 2000, LB 900, § 130.

The provisions of this section are not applicable to instream flow applications. *Central Platte NRD v. State of Wyoming*, 245 Neb. 439, 513 N.W.2d 847 (1994).

This statute establishes a procedure to be followed in determining whether an appropriation application must be denied. *Little Blue N.R.D. v. Lower Platte North N.R.D.*, 210 Neb. 862, 317 N.W.2d 726 (1982).

#### (1) INTRABASIN TRANSFERS

46-290. Appropriation; application to transfer or change; contents; approval.

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

(b) The application for such approval shall contain (i) the number assigned to such appropriation by the department, (ii) the name and address of the present holder of the appropriation, (iii) if applicable, the name and address of the person or entity to whom the appropriation would be transferred or who will be the user of record after a change in the type of appropriation or purpose of use under the appropriation, (iv) the legal description of the land to which the appropriation is now appurtenant, (v) the name and address of each holder of a mortgage or deed of trust for the land to which the appropriation is now appurtenant, (vi) if applicable, the legal description of the land to which the appropriation is proposed to be transferred, (vii) if a transfer is proposed, whether other sources of water are available at the original location of use and whether any provisions have been made to prevent either use of a new source of water at the original location or increased use of water from any existing source at that location, (viii) if applicable, the legal descriptions of the beginning and end of the stream reach to which the appropriation is proposed to be transferred for the purpose of augmenting the flows in that stream reach, (ix) if a proposed transfer is for the purpose of increasing the quantity of water available for use pursuant to another appropriation, the number assigned to such other

appropriation by the department, (x) the purpose of the current use, (xi) if a change in purpose of use is proposed, the proposed purpose of use, (xii) if a change in the type of appropriation is proposed, the type of appropriation to which a change is desired, (xiii) if a proposed transfer or change is to be temporary in nature, the duration of the proposed transfer or change, and (xiv) such other information as the department by rule and regulation requires.

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

(3) Regardless of whether a transfer or a change in the purpose of use is involved, the following changes in type of appropriation, if found by the Director of Natural Resources to be consistent with section 46-294, may be approved subject to the following:

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

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

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

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

(e) The incidental underground water storage portion, whether or not previously quantified, of a natural-flow or storage-use appropriation may be separated from the direct-use portion of the appropriation and may be changed to a natural-flow or storage-use appropriation for intentional underground water storage at the same location if the historic consumptive use of the direct-use portion of the appropriation is transferred to another location or is terminated, but such a separation and change may be approved only if, after the separation and change, (i) the total permissible diversion under the appropriation will not increase, (ii) the projected consequences of the separation and change are consistent with the provisions of any integrated management plan adopted in accordance with section 46-718 or 46-719 for the geographic area involved, and (iii) if the location of the proposed intentional underground water storage is in a river basin, subbasin, or reach designated as overappropriated in accordance with section 46-713, the integrated management plan for that river basin, subbasin, or reach has gone into effect, and that plan requires that the amount of the intentionally stored water that is consumed after the change will be no greater than the amount of the incidentally stored water that

was consumed prior to the change. Approval of a separation and change pursuant to this subdivision (e) shall not exempt any consumptive use associated with the incidental recharge right from any reduction in water use required by an integrated management plan for a river basin, subbasin, or reach designated as overappropriated in accordance with section 46-713.

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

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

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

For any transfer or change approved pursuant to subdivision (a) of this subsection, the department shall be provided with a report at least every five years while such transfer or change is in effect. The purpose of such report shall be to indicate whether the beneficial instream use for which the flow is augmented continues to exist. If the report indicates that it does not or if no report is filed within sixty days after the department's notice to the appropriator that the deadline for filing the report has passed, the department may cancel its approval of the transfer or change and such appropriation shall revert to the same location of use, type of appropriation, and purpose of use as prior to such approval.

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

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

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

Source: Laws 1983, LB 21, § 2; Laws 1995, LB 99, § 17; Laws 2000, LB 900, § 131; Laws 2004, LB 962, § 16.  
Operative date July 16, 2004.

46-291. Application; review; notice; contents; comments. (1) Upon receipt of an application filed under section 46-290 for a transfer in the location of use of an appropriation, the Department of Natural Resources shall review it for compliance with this subsection. The Director of Natural Resources may approve the application without notice or hearing if he or she determines that: (a) The appropriation is used and will continue to be used exclusively for irrigation purposes; (b) the only lands involved in the proposed transfer are (i) lands within the quarter section of land to which the appropriation is appurtenant, (ii) lands within such quarter section of land and one or more quarter sections of land each of which is contiguous to the quarter section of land to which the appropriation is appurtenant, or (iii) lands within the boundaries or service area of and capable of service by the same irrigation district, reclamation district, public power and irrigation district, or mutual irrigation or canal company; (c) after the transfer, the total number of acres irrigated under the appropriation will be no greater than the number of acres that could legally be irrigated under the appropriation prior to the transfer; (d) all the land involved in the transfer is under the same ownership or is within the same irrigation district, reclamation district, public power and irrigation district, or mutual irrigation or canal company; (e) the transfer will not result in a change in the point of diversion; and (f) the transfer will not diminish the water supply available for or otherwise adversely affect any other water appropriator. If transfer of an appropriation with associated incidental underground water storage is approved in accordance with this subsection, the associated incidental underground water storage also may be transferred pursuant to this subsection as long as such transfer would continue to be consistent with the requirements of this subsection. If necessary, the boundaries of the incidental underground water storage area may be modified to reflect any change in the location of that storage consistent with such a transfer. Transfers shall not be approved pursuant to this subsection until the department has adopted and promulgated rules and regulations establishing the criteria it will use to determine whether proposed transfers are consistent with subdivision (1)(f) of this section.

(2) If after reviewing an application filed under section 46-290 the director determines that it cannot be approved pursuant to subsection (1) of this section, he or she shall cause a notice of such application to be posted on the department's web site, to be sent by certified mail to each holder of a mortgage or deed of trust that is identified by the applicant pursuant to subdivision (1)(b)(v) of section 46-290, and to be published at the applicant's expense at least once each week for three consecutive weeks in at least one newspaper of general circulation in each county containing lands to which the appropriation is appurtenant and, if applicable, in at least one newspaper of general circulation in each county containing lands to which the appropriation is proposed to be transferred.

(3) The notice shall contain: (a) A description of the appropriation; (b) the number assigned to such appropriation in the records of the department; (c) the date of priority; (d) if applicable, a description of the land or stream reach to which such water appropriation is proposed to be transferred; (e) if applicable, the type of appropriation to which the appropriation is proposed to be changed; (f) if applicable, the proposed change in the purpose of use; (g) whether the proposed transfer or change is to be permanent or temporary and, if temporary, the duration of the proposed transfer or change; and (h) any other information the director deems relevant and essential to provide the interested public with adequate notice of the proposed transfer or change.

(4) The notice shall state (a) that any interested person may object to and request a hearing on the application by filing such objections in writing specifically stating the grounds for each objection and (b) that any such objection and request shall be filed in the office of the department within two weeks after the date of final publication of the notice.

(5) Within the time period allowed by this section for the filing of objections and requests for hearings, the county board of any county containing land to which the appropriation is appurtenant and, if applicable, the county board of any county containing land to which the appropriation is proposed to be transferred may provide the department with comments about the potential economic impacts of the proposed transfer or change in such county. The filing of any such comments by a county board shall not make the county a party in the application process, but such comments shall be considered by the director in determining pursuant to section 46-294 whether the proposed transfer or change is in the public interest.

Source: Laws 1983, LB 21, § 3; Laws 2000, LB 900, § 132; Laws 2004, LB 962, § 17.  
Operative date July 16, 2004.

46-292. Application; hearing. The Department of Natural Resources may hold a hearing on an application filed under section 46-290 on its own motion and shall hold a hearing if a timely request therefor is filed by any interested person in accordance with section 46-291. Any such hearing shall be subject to section 61-206.

Source: Laws 1983, LB 21, § 4; Laws 2000, LB 900, § 133; Laws 2004, LB 962, § 18.  
Operative date July 16, 2004.

46-293. Application; review; Director of Natural Resources; powers. (1) The Director of Natural Resources shall independently review each application subject to subsection (2) of section 46-291 to determine whether the requirements of section 46-294 will be met if the transfer or change is approved. The requirement of this subsection is not altered when there are objectors who have become parties to the proposed transfer or change, but if a hearing is called by the Department of Natural Resources on its own motion or as the result of a request therefor

filed in accordance with subsection (4) of section 46-291, any evidence considered by the director in making such determinations shall be made a part of the record of the hearing as provided in section 84-914.

(2) Either on his or her own motion or in response to objections or comments received pursuant to subsection (4) or (5) of section 46-291, the director may require the applicant to provide additional information before a hearing will be scheduled or, if no hearing is to be held, before the application will receive further consideration. The information requested may include economic, social, or environmental impact analyses of the proposed transfer or change, information about the amount of water historically consumed under the appropriation, copies of any plans for mitigation of any anticipated adverse impacts that would result from the proposed transfer or change, and such other information as the director deems necessary in order to determine whether the proposed transfer or change is consistent with section 46-294.

Source: Laws 1983, LB 21, § 5; Laws 2000, LB 900, § 134; Laws 2004, LB 962, § 9.  
Operative date July 16, 2004.

46-294. Applications; approval; requirements; conditions; burden of proof.  
(1) Except for applications approved in accordance with subsection (1) of section 46-291, the Director of Natural Resources shall approve an application filed pursuant to section 46-290 only if the application and the proposed transfer or change meet the following requirements:

- (a) The application is complete and all other information requested pursuant to section 46-293 has been provided;
- (b) The proposed use of water after the transfer or change will be a beneficial use of water;
- (c)(i) Any requested transfer in the location of use is within the same river basin as defined in section 46-288 or (ii) the river basin from which the appropriation is to be transferred is tributary to the river basin to which the appropriation is to be transferred;
- (d) Except as otherwise provided in subsection (4) of this section, the proposed transfer or change, alone or when combined with any new or increased use of any other source of water at the original location or within the same irrigation district, reclamation district, public power and irrigation district, or mutual irrigation or canal company for the original or other purposes, will not diminish the supply of water available for or otherwise adversely affect any other water appropriator and will not significantly adversely affect any riparian water user who files an objection in writing pursuant to section 46-291;
- (e) The quantity of water that is transferred for diversion or other use at the new location will not exceed the historic consumptive use under the appropriation or portion thereof being transferred, except that this subdivision does not apply to a transfer in the location of use if both the current use and the proposed use are for irrigation, the number of acres to be irrigated will not increase after the transfer, and the location of the diversion from the stream will not change;
- (f) The appropriation, prior to the transfer or change, is not subject to termination or cancellation pursuant to sections 46-229 to 46-229.04;

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

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

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

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

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

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

(2) The applicant has the burden of proving that the proposed transfer or change will comply with subdivisions (1)(a) through (l) of this section, except that (a) the burden is on a 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 and (b) if both the current use and the proposed use after a transfer are for irrigation, the number of acres to be irrigated will not increase after the transfer, and the location of the diversion from the stream will not change, there is a rebuttable presumption that the transfer will be consistent with subdivision (1)(d) of this section.

(3) In approving an application, the director may impose any reasonable conditions deemed necessary to protect the public interest, to ensure consistency with any of the other criteria in subsection (1) of this section, or to provide the department with information needed to properly and efficiently administer the appropriation while the transfer or change remains in effect. If necessary to prevent diminution of supply for any other appropriator, the conditions imposed by the director shall require that historic return flows be maintained or replaced in quantity, timing, and location. After approval of any such transfer or change, the appropriation

shall be subject to all water use restrictions and requirements in effect at any new location of use and, if applicable, at any new diversion location. An appropriation for which a transfer or change has been approved shall retain the same priority date as that of the original appropriation. If an approved transfer or change is temporary, the location of use, purpose of use, or type of appropriation shall revert to the location of use, purpose of use, or type of appropriation prior to the transfer or change.

(4) In approving an application for a transfer, the director may also authorize the overlying of water appropriations on the same lands, except that if any such overlying of appropriations would result in either the authorized diversion rate or the authorized aggregate annual quantity that could be diverted to be greater than is otherwise permitted by section 46-231, the director shall limit the total diversion rate or aggregate annual quantity for the appropriations overlain to the rate or quantity that he or she determines is necessary, in the exercise of good husbandry, for the production of crops on the land involved. The director may also authorize a greater number of acres to be irrigated if the amount and rate of water approved under the original appropriation is not increased by the change of location. An increase in the number of acres to be irrigated shall be approved only if (a) such an increase will not diminish the supply of water available to or otherwise adversely affect another water appropriator or (b) the transfer would not adversely affect the water supply for any river basin, subbasin, or reach that has been designated as overappropriated pursuant to section 46-713 or determined to be fully appropriated pursuant to section 46-714 and (i) the number of acres authorized under the appropriation when originally approved has not been increased previously, (ii) the increase in the number of acres irrigated will not exceed five percent of the number of acres being irrigated under the permit before the proposed transfer or a total of ten acres, whichever acreage is less, and (iii) all the use will be either on the quarter section to which the appropriation was appurtenant before the transfer or on an adjacent quarter section.

Source:           Laws 1983, LB 21, § 6; Laws 1984, LB 818, § 2; Laws 1993, LB 789, § 4;  
Laws 2000, LB 900, § 135; Laws 2004, LB 962, § 20.  
Operative date July 16, 2004.

46-294.01.    Appropriation; temporary transfer; filings required. Whenever a temporary transfer is approved in accordance with sections 46-290 to 46-294, the Department of Natural Resources shall cause copies of the following to be filed with the county clerk or register of deeds of the county in which the land subject to the appropriation prior to the transfer is located: (1) The permit by which the appropriation was established; (2) the agreement by which the temporary transfer is to be effected; and (3) the order of the Director of Natural Resources approving the temporary transfer. Whenever renewal of a temporary transfer is approved pursuant to section 46-294.02, the department shall cause a copy of the order of the director approving such renewal to be filed with the county clerk or register of deeds of such county. Such documents shall be indexed to the land subject to the appropriation prior to the transfer.

The costs of the filing and indexing shall be charged to the applicant for the transfer or renewal, and failure to pay such costs shall be grounds for the director to negate any prior approval of the transfer or renewal.

Source: Laws 2004, LB 962, § 21.  
Operative date July 16, 2004.

46-294.02. Appropriation; temporary transfer or change; renewal or extension. A temporary transfer or a change in the type or purpose of use of an appropriation may be renewed or otherwise extended by the parties thereto at any time following the midpoint of the transfer or change term, but any such renewal or extension is subject to review and approval pursuant to sections 46-290 to 46-294. No renewal or extension shall cause the term of any such temporary transfer or change to exceed thirty years in duration from the date the renewal or extension is approved by the Director of Natural Resources.

Source: Laws 2004, LB 962, § 22.  
Operative date July 16, 2004.

46-294.03. Appropriation; temporary transfer or change; effect on classification and valuation. For purposes of assessment pursuant to sections 77-1343 to 77-1363, neither the temporary transfer or change of an appropriation nor any resulting land-use changes on the land to which the appropriation was appurtenant prior to the transfer or change shall cause the land to be reclassified to a lower value use or the valuation of the land to be reduced, but the land may be reclassified to a higher value use and its valuation may be increased if a higher value use is made of the land while the temporary transfer or change is in effect. Land from which an appropriation has been permanently transferred shall be classified and valued for tax purposes in accordance with the use of the land after the transfer.

Source: Laws 2004, LB 962, § 23.  
Operative date July 16, 2004.

46-294.04. Appropriation; temporary transfer or change; effect on rights of condemnation. During the time within which a temporary transfer or change in purpose of use of an appropriation is in effect, the appropriation may not be used to invoke any rights of condemnation that are based on preference of use, but such appropriation shall be subject to the exercise of such rights by owners of other appropriations that are for water uses superior to the pretransfer or prechange use of the water under the transferred or changed appropriation.

Source: Laws 2004, LB 962, § 24.  
Operative date July 16, 2004.

46-294.05. Rules and regulations. The Director of Natural Resources may adopt and promulgate rules and regulations to carry out sections 46-290 to 46-294.04.

Source: Laws 2004, LB 962, § 25.  
Operative date July 16, 2004.

(m) UNDERGROUND WATER STORAGE

46-295. Legislative findings. 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, to the extent of potential benefit from intentional underground water storage, in the financial obligations necessary for construction, operation, and maintenance of water projects which cause intentional underground water storage.

The Legislature finds that uses of water for incidental and intentional underground water storage are beneficial uses of water which contribute to the recharge of Nebraska's aquifers 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, for authorizing intentional underground water storage, and for authorizing the levying and collection of fees and assessments on persons who withdraw or otherwise use or benefit from intentional underground water storage as provided in sections 46-299 to 46-2,106.

Nothing in sections 46-202, 46-226.01, 46-226.02, 46-233, 46-240, 46-241, 46-242, 46-295 to 46-2,106, 46-544, and 46-712 shall be construed to alter existing statutes regarding the relationship between naturally occurring surface and ground water.

Source: Laws 1983, LB 198, § 1; Laws 1985, LB 488, § 6; Laws 1989, LB 45, § 2; Laws 1996, LB 108, § 4; Laws 2000, LB 900, § 136; Laws 2004, LB 962, § 26.  
Operative date July 16, 2004.

46-296. Terms, defined. For purposes of sections 33-105, 46-202, and 46-295 to 46-2,106, unless the context otherwise requires:

- (1) Department means the Department of Natural Resources;
- (2) Director means the Director of Natural Resources;

(3) Person means a natural person, partnership, limited liability company, association, corporation, municipality, or agency or political subdivision of the state or of the federal government;

(4) Underground water storage means the act of storing or recharging water in underground strata. Such water shall be known as water stored underground but does not include ground water as defined in section 46-706 which occurs naturally;

(5) Intentional underground water storage means 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 means underground water storage which occurs as an indirect result, rather than an intended or planned purpose, of a water project or use and includes, but is not limited to, seepage from reservoirs, canals, and laterals, and deep percolation from irrigated lands.

Source: Laws 1983, LB 198, § 2; Laws 1985, LB 488, § 7; Laws 1993, LB 121, § 277; Laws 1996, LB 108, § 5; Laws 2000, LB 900, § 137; Laws 2004, LB 962, § 27.  
Operative date July 16, 2004.

46-297. Permit to appropriate water; modification to include underground water storage; procedure. 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. If the applicant is an individual, the application for a permit shall include the applicant's social security number. 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 46-226.02.

Source: Laws 1983, LB 198, § 11; Laws 1997, LB 752, § 120.

46-298. Repealed. Laws 1989, LB 45, § 6.

46-299. Permittee; authorized to levy a fee or assessment; limitation. Any person who has obtained a permit for intentional underground water storage associated with a project not existing on August 26, 1983, and recovery of such water, pursuant to section 46-233, 46-240, 46-241, 46-242 or 46-297 may, subject to section 46-2,101, 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.

Source: Laws 1983, LB 198, § 13.

46-2,100. Fee or assessment; limitation. No fee or assessment may be levied pursuant to section 46-299 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.

Source: Laws 1983, LB 198, § 14; Laws 1989, LB 45, § 3.

46-2,101. Fee or assessment; application for approval; contents; fee schedule.

(1) Any person intending to levy fees or assessments in accordance with section 46-299 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 authority to levy such fees on a form prescribed and furnished by the department.

(2) Such an application shall include a fee schedule and the following information:

- (a) The source of the water stored or to be stored underground;
- (b) The underground water storage method;
- (c) The relative amounts of water stored or to be stored underground and naturally occurring ground water;
- (d) The data or reference studies used by the applicant to determine the underground water storage;
- (e) A description of the areas served or to be served by the water stored underground;
- (f) The amount of surface water, if any, for which the applicant has an appropriation; and
- (g) The manner, use, and location of any such surface water appropriation.

The application shall be processed under the applicable rules and regulations of the department adopted and promulgated pursuant to section 61-206.

(3) An application shall be approved if the fees, assessments, modified fees, or modified assessments appear reasonable and comply with the requirements of section 46-299.

(4) The department shall review approved fee schedules every five years after approval to determine whether the fees should be increased, decreased, or eliminated, except that if the adopted schedules have been pledged to repayment of financing for the project, the department shall only review after repayment is completed.

Source: Laws 1983, LB 198, § 15; Laws 1985, LB 488, § 9; Laws 1989, LB 45, § 4; Laws 2000, LB 900, § 138.

46-2,102. Fee or assessment; lien. A fee or assessment levied pursuant to section 46-299 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.

Source: Laws 1983, LB 198, § 16; Laws 1989, LB 45, § 5.

46-2,103. Injunction; when issued. Any person who has obtained approval of fees or assessments pursuant to section 46-2,101, 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.

Source: Laws 1983, LB 198, § 17.

46-2,104. Director's order; not subject to collateral attack. If an action is commenced pursuant to section 46-2,102 or 46-2,103, an order of the director identifying water stored or to be stored underground, or approving fees or assessments, may not be collaterally attacked.

Source: Laws 1983, LB 198, § 18.

46-2,105. Appeal. Any person aggrieved by a decision made or an order issued by the director pursuant to section 46-226.02, 46-233, 46-240, 46-241, 46-242, 46-297, or 46-2,101 may appeal as provided in section 61-207.

Source: Laws 1983, LB 198, § 19; Laws 2000, LB 900, § 139.

46-2,106.     Use of underground stored water; authorized. 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 46-2,101.

Source:       Laws 1983, LB 198, § 20.

(n) INSTREAM APPROPRIATIONS

46-2,107.     Legislative findings. The Legislature finds that the maintenance, conservation, management, storage, and timely release of the waters of the natural streams within the State of Nebraska are in the public interest and are practices essential to the well-being of present and future generations. In furtherance of these practices, the public interest demands the recognition of instream uses for fish, recreation, and wildlife. The Legislature also finds that proposals for future water development should fully consider multiple uses, including instream flows whether from natural flow or from reservoir releases, and recognizes the positive impact of impoundments which can provide significant instream flow benefits.

Source:       Laws 1984, LB 1106, § 23.

46-2,108.     Appropriation of water for instream flows; terms, defined. (1) For purposes of sections 46-2,107 to 46-2,119, unless the context otherwise requires:

- (a) Department means the Department of Natural Resources;
- (b) Director means the Director of Natural Resources; and
- (c) Instream appropriation means the undiverted application of the waters of a natural stream within or bordering upon the state for recreation or fish and wildlife purposes.

(2) An instream appropriation may be obtained only by the Game and Parks Commission or a natural resources district and only for that amount of water necessary for recreation or fish and wildlife. The instream use of water for recreation or fish and wildlife shall be considered a beneficial use of water.

Source:       Laws 1984, LB 1106, § 24; Laws 1985, LB 102, § 13; Laws 1997, LB 877, § 1; Laws 2000, LB 900, § 140.

46-2,109.     Streams with need for instream flows; identification; study. Each natural resources district and the Game and Parks Commission shall conduct studies to identify specific stream segments which the district or commission considers to have a critical need for instream flows. Such studies shall quantify the instream flow needs in the identified stream segments.

Any district or the Game and Parks Commission may request the assistance of the Conservation and Survey Division of the University of Nebraska, the Game and Parks Commission, the Department of Environmental Quality, the Department of Natural Resources, or any other state agency in order to comply with this section.

Source: Laws 1984, LB 1106, § 25; Laws 1985, LB 102, § 14; Laws 1993, LB 3, § 6; Laws 2000, LB 900, § 141.

46-2,110. Permit to appropriate water for instream flows; application; requirements. Following notice and a public hearing, any natural resources district or the Game and Parks Commission may file with the director an application for a permit to appropriate water for instream flows in each stream segment identified pursuant to section 46-2,109. The application shall include the locations on the stream at which the need for instream flows begins and ends and the time of year when instream flows are most critical. The application shall also provide a detailed description of the amount of water necessary to provide adequate instream flows.

Source: Laws 1984, LB 1106, § 26; Laws 1985, LB 102, § 15; Laws 2000, LB 900, § 142.

46-2,111. Permit to appropriate water for instream flows; director; powers and duties. (1) The Legislature finds that instream appropriations for recreation, fish, and wildlife should consider preferences among different uses and that all appropriations should consider the possible legal relationship between surface water and ground water. Thus the Legislature finds that, since such issues have not been fully considered, the director shall not grant any permit to appropriate water, except as specified in subsection (2) of this section, before January 1, 1997, for any application pending on or filed after June 2, 1995.

(2) The director may grant applications for (a) appropriations for flood control or sediment control structures which will not make or cause to be made any consumptive use of the impounded water, (b) applications for temporary appropriations for public construction that are five cubic feet per second or less, or (c) applications by public water suppliers for induced ground water recharge appropriations pursuant to sections 46-233 to 46-238.

Source: Laws 1995, LB 871, § 5; Laws 2000, LB 900, § 143.

46-2,112. Permit to appropriate water for instream flows; hearing; when; notice; director; powers. A permit to appropriate water for instream flows shall be subject to review every fifteen years after it is granted. Notice of a pending review shall be published in a newspaper published or of general circulation in the area involved at least once each week for three consecutive weeks, the last publication to be not later than fourteen years and ten months after the permit was granted or after the date of the director's action following the last such review, whichever is later. The notice shall state that any interested person may file comments relating to the review of the instream appropriation or may request a hearing to present evidence relevant to such review. Any such comments or request for hearing shall be filed in the

headquarters office of the department within six weeks after the date of final publication of the notice. If requested by any interested person, the director shall schedule a hearing. The purpose of the hearing shall be to receive evidence regarding whether the water appropriated under the permit still provides the beneficial uses for which the permit was granted and whether the permit is still in the public interest. The hearing shall proceed under the rebuttable presumption that the appropriation continues to provide the beneficial uses for which the permit was granted and that the appropriation is in the public interest. After the hearing, the director may by order modify or cancel, in whole or in part, the instream appropriation.

Source: Laws 1997, LB 877, § 2; Laws 2000, LB 900, § 144; Laws 2004, LB 962, § 28.  
Operative date July 16, 2004.

46-2,113. Director; modify appropriation or application; when. It is in the state's and the public interest that the filing of the following classes of applications before the department demand that the director shall appropriately modify any existing or pending instream appropriation or application to not interfere with such application or the granting of such appropriation:

- (1) Applications for induced recharge to public water supply wells;
- (2) Applications for storage rights necessary for flood and sediment control projects which are dry or will not result in a net consumption of water exceeding two hundred acre-feet on an average annual basis;
- (3) Applications for transfer permits associated with natural flow, storage use, power generation, or hydropower;
- (4) Applications for de minimis uses; or
- (5) Applications for industrial or manufacturing de minimis consumptive uses.

Source: Laws 1997, LB 877, § 3; Laws 2000, LB 900, § 145.

46-2,114. Proposed instream appropriation; additional studies; notice of application. Prior to taking action on an application for an instream appropriation, the director shall conduct any studies he or she deems necessary to evaluate the application and shall publish notice of such application at the applicant's expense at least once a week for three consecutive weeks in a newspaper of general circulation in the area of the stream segment and also in a newspaper of statewide circulation. The notice shall state that any person having an interest may in writing object to and request a hearing on the application. Any such objection and request for hearing shall be filed with the department within two weeks of final publication of the notice.

Source: Laws 1984, LB 1106, § 30; Laws 1985, LB 102, § 16; Laws 1987, LB 140, § 11; Laws 1991, LB 278, § 2; Laws 2000, LB 900, § 146.

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

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

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

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

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

(5) The application is in the public interest.

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

Source:       Laws 1984, LB 1106, § 31; Laws 1985, LB 102, § 17; Laws 1997, LB 877, § 4; Laws 2000, LB 900, § 147.

To find that there is sufficient unappropriated water available under subsection (1) of this section, the director is not required to consider future ground water depletion. To find that there is sufficient unappropriated water available under subsection (1) of this section, the director must account for water which may be diverted by pending senior applications and approved-but-unconstructed senior applications. To find that there is sufficient unappropriated water available under subsection (1) of this section, the director must find that there is enough water that is not subject to beneficial use elsewhere. The director is permitted to base this finding on historical flow data. For a water supply to be "available" within the meaning of subsection (1) of this section, the water supply must be fairly dependable and continuous. In the context of an instream flow application to maintain existing wildlife habitats, "fairly dependable and continuous" means the flow regime which the species can bear. A party can show noninterference, under subsection (3) of this section, by showing that the sought-after appropriation will be (1) an undiverted application (2) of the waters of a natural stream within or bordering upon the state (3) for recreation or fish and wildlife purposes. In order to provide a clear basis for an order

granting or denying an instream flow application, the Director of Water Resources is required to discuss each of the elements listed in this section. However, the director is not required to include, as part of his public interest analysis, a discussion of forgone uses. *Central Platte NRD v. State of Wyoming*, 245 Neb. 439, 513 N.W.2d 847 (1994).

Subsection (2) of this section does not require a showing of an imminent threat to the use for which protection is sought, but requires a finding of a sufficient causal link between maintaining the flow and maintaining the use for which the flow is requested. In re Application A-16642, 236 Neb. 671, 463 N.W.2d 591 (1990).

When an instream flow application requests different flow rates at different locations along a single stream segment, the denial of the application as one location is to be viewed as a reduction in the requested rate of flow as authorized by this section. Any reduction in the length of the stream segment occasioned by such denial is but incidental to the flow reduction, and the director may define the stream segment under section 46-2,118(1) in such a way as to reflect the appropriations as granted. In re Application A-16642, 236 Neb. 671, 463 N.W.2d 591 (1990).

46-2,116. Application for instream appropriation; public interest determination; factors. In determining whether an application for an instream appropriation is in the public interest, the director shall consider the following factors:

(1) The economic, social, and environmental value of the instream use or uses including, but not limited to, recreation, fish and wildlife, induced recharge for municipal water systems, and water quality maintenance; and

(2) The economic, social, and environmental value of reasonably foreseeable alternative out-of-stream uses of water that will be foregone or accorded junior status if the appropriation is granted.

Source: Laws 1984, LB 1106, § 32; Laws 1985, LB 102, § 18; Laws 1991, LB 772, § 5.

46-2,116.01. Application for instream appropriation; use of stored water; study. If the director determines that there is insufficient unappropriated natural flow available for an application for an instream appropriation and if the applicant consents, the department may conduct a study to determine whether the instream flow needs can be met through the use of stored water in new storage facilities. The study shall address the availability of storage sites, the estimated cost of providing any required storage, and such other findings and conclusions as the department deems appropriate.

Source: Laws 1985, LB 102, § 19; Laws 1991, LB 772, § 6; Laws 2000, LB 900, § 148.

46-2,116.02. Instream appropriation; use of stored water; funding. If the department determines that instream flow needs can be met through the use of stored water in new storage facilities after a study conducted under section 46-2,116.01, the applicant may request financial assistance for the construction of necessary storage facilities from the Nebraska Resources Development Fund. The cost of the project may be shared with any other users of the stored water.

Source: Laws 1985, LB 102, § 20; Laws 1991, LB 772, § 7; Laws 2000, LB 900, § 149.

46-2,117. Contested case hearing; mediation or nonbinding arbitration required; when; costs. The director shall not conduct a contested case hearing on an instream appropriation application filed after January 1, 1997, other than a hearing to address procedural matters, until such time as the parties have completed mediation or nonbinding arbitration. Mediation or nonbinding arbitration shall be deemed completed when the person retained to conduct the mediation or nonbinding arbitration has concluded further efforts would probably not result in resolution of major issues. The costs of mediation or nonbinding arbitration shall be shared by the parties.

Source: Laws 1997, LB 877, § 5; Laws 2000, LB 900, § 150.

46-2,118. Instream appropriation; limited to defined stream segment. (1) All water used to provide instream flows shall be applied only to that segment of the stream for which the appropriation is granted. The stream segment and the determination of a reasonable and necessary amount of water required for instream flow purposes shall be defined specifically by the director in the permit.

(2) After the water allowed for instream flows has passed through the defined stream segment, all rights to such water shall be deemed relinquished and the water shall be available for appropriation.

Source: Laws 1984, LB 1106, § 34; Laws 2000, LB 900, § 151.

When an instream flow application requests different flow rates at different locations along a single stream segment, the denial of the application as to one location is to be viewed as a reduction in the requested rate of flow as authorized by section 46-2,115. Any reduction in the length of the stream segment occasioned by such denial is

but incidental to the flow reduction, and the director may define the stream segment under subsection (1) of this section in such a way as to reflect the appropriations as granted. In re Application A-16642, 236 Neb. 671, 463 N.W.2d 591 (1990)

46-2,119. Instream appropriations; manner of administration. Instream appropriations shall be administered in the same manner as prescribed by Chapter 46, article 2, for other appropriations. Reservoirs shall not be required by the director to release, for the benefit of an instream appropriation, water previously impounded in accordance with section 46-241 or 46-243. Reservoirs with storage rights senior to an instream appropriation shall not be required to pass, for the benefit of that instream appropriation, inflows that could be stored by such reservoir if the instream appropriation were not in effect. Notwithstanding subsection (5) of section 46-241, a reservoir with storage rights senior to an instream appropriation also shall not be required to pass inflows for downstream direct irrigation if the appropriation for direct irrigation is junior to and would be denied water because of that instream appropriation. Instream appropriations may be canceled as provided in sections 46-229.02 to 46-229.05.

Source: Laws 1984, LB 1106, § 35; Laws 1988, LB 953, § 1; Laws 2000, LB 900, § 152; Laws 2004, LB 962, § 29.  
Operative date July 16, 2004.

#### (o) TRANSFER OF APPROPRIATIONS

46-2,120. District or company; notice to landowner; when required; terms, defined.  
(1) Any irrigation district, reclamation district, public power and irrigation district, rural water district, or mutual irrigation or canal company using the procedure described in sections 46-2,121 to 46-2,129 and which is exempt from sections 84-1408 to 84-1414 shall provide notice by mail to each owner of land in the district or served by the company not less than seven days before any meeting or hearing under sections 46-2,121 to 46-2,129.

(2) For purposes of sections 46-2,120 to 46-2,130:

- (a) Department means the Department of Natural Resources; and
- (b) Director means the Director of Natural Resources.

Source: Laws 1995, LB 99, § 1; Laws 2000, LB 900, § 153.

46-2,121. District or company; hold appropriation; sections; how construed. Any irrigation district, reclamation district, public power and irrigation district, rural water district, or mutual irrigation or canal company shall hold all water appropriations filed in the district's or company's name for the benefit of the owners of land to which the water appropriations are attached. Sections 46-2,120 to 46-2,129 shall not be construed to modify the rights of landowners to any water appropriation.

Source: Laws 1995, LB 99, § 2.

46-2,122. District or company; application for transfer and map; filing requirements; approval; conditions. (1) Any irrigation district, reclamation district, public power and irrigation district, rural water district, or mutual irrigation or canal company may file an application for transfer and a map with the department identifying all tracts of lands that have received water delivered by the district or company and beneficially applied to the tract in at least one of the preceding ten consecutive years. The application for transfer and map shall be prepared and filed in accordance with the rules and regulations of the department.

(2) Any tract of land within the boundaries of the district or served by the company may receive a water appropriation, or portion thereof, transferred from a tract or tracts of land currently under the appropriation on file with the department. The director shall grant the transfer if:

- (a) The owner of the land to which the water appropriation is attached and the owner of the ditch, canal, or other diverting works subject to transfer consent in writing to the department to the transfer of the appropriation from the tract of land;
- (b) The water allotment on the receiving tract of land will not exceed the amount that can be beneficially used for the purposes for which the appropriation was made and will not exceed the least amount of water that experience may indicate is necessary, in the exercise of good husbandry, for the production of crops;
- (c) The water will be applied on the receiving tract to a use in the same preference category as the use on the transferring tract; and
- (d) The aggregate water use within the district or company after transfer will not exceed the aggregate water appropriation held by the district or company for the benefit of the owners of land to which the water appropriations are attached.

Source: Laws 1995, LB 99, § 3; Laws 2000, LB 900, § 154.

46-2,123. Hearing on application and map. The department may hold a hearing on the application for transfer and map under section 46-2,122 if the department determines that a hearing is necessary to determine whether the application for transfer and map are in compliance with such section. The department shall hold a hearing on the application if requested by any owner of land within the district or served by the company. The hearing shall be conducted in accordance with section 61-206 and the rules and regulations of the department.

Source: Laws 1995, LB 99, § 4; Laws 2000, LB 900, § 155.

46-2,124. District or company; notice prior to meeting; requirements. Any irrigation district, reclamation district, public power and irrigation district, rural water district, or mutual irrigation or canal company intending to file an application for transfer and a map with the department under section 46-2,122 shall give notice prior to the meeting at which the application and map will be approved for filing. Notice shall be given in the manner provided in section 46 2,128.

Source: Laws 1995, LB 99, § 5; Laws 2000, LB 900, § 156.

46-2,125. Order granting application and map; contents; appeal. After an investigation and hearing, if applicable, the director shall issue an order granting or denying the application for transfer and map under section 46-2,122. The director shall deny the application if the conditions in subsection (2) of such section are not met. An order granting or denying an application for transfer and map shall be in writing and shall specify the following:

- (1) The tracts of land retaining an appropriation;
- (2) The tracts of land receiving an appropriation; and
- (3) The tracts of land transferring an appropriation.

An appeal may be taken from the decision of the department on the application for transfer and map as provided in section 61-207.

Source: Laws 1995, LB 99, § 6; Laws 2000, LB 900, § 157.

46-2,126. Priority date. Any water appropriation transferred to a tract of land under sections 46-2,122 to 46-2,125 shall retain the original priority date for the water appropriation.

Source: Laws 1995, LB 99, § 7.

46-2,127. District or company; transfer of appropriation for agricultural purposes; when. After obtaining approval of an application for transfer and map pursuant to sections 46-2,122 to 46-2,126, the board of directors of any irrigation district, reclamation district, public power and irrigation district, rural water district, or mutual irrigation or canal

company may transfer an appropriation of water distributed for agricultural purposes from a tract or tracts of land within the district or served by the company to another tract or tracts of land within the boundaries of the district or served by the company if:

(1) The district or company finds that the transferring tract of land has received and had water, delivered by the district or company pursuant to a valid appropriation, beneficially applied in at least one of the preceding five consecutive years or that there has been sufficient cause for nonuse in the same manner as provided in section 46-229.04;

(2) The owner of the land to which the water appropriation is attached consents in writing to the transfer of the appropriation from his or her tract of land;

(3) The water appropriation, or portion thereof, proposed to be transferred has not been transferred by the board of directors of the district or company in the previous four years;

(4) The water allotment on the receiving tract of land will not exceed the amount that can be beneficially used for the purposes for which the appropriation was made and will not exceed the least amount of water that experience may indicate is necessary, in the exercise of good husbandry, for the production of crops; and

(5) After the transfer, the aggregate water use within the district or company will not exceed the aggregate water appropriation held by the district or company for the benefit of owners of land to which the water appropriations are attached.

Source:           Laws 1995, LB 99, § 8; Laws 2004, LB 962, § 30.  
Operative date July 16, 2004.

46-2,128.    District or company; transfer of appropriation for agricultural purposes; published notice; contents. Commencing at least six weeks but not more than twelve weeks before transferring any water appropriations under section 46-2,127, the district or company shall cause notice of the proposed transfer to be published at least once a week for three consecutive 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 applied. The district or company shall also provide the notice to the department. The notice shall contain:

(1) A description of the water appropriation to be transferred;

(2) The number assigned the water appropriation permit in the records of the department under sections 46-233 to 46-235;

(3) The priority date of the water appropriation;

(4) A description of the land to which the water appropriation is proposed to be applied;

(5) A statement that any owner of land within the district or served by the canal company may object to and request a hearing on the proposed transfer within seven calendar days after final publication; and

(6) Any other relevant information.

Source: Laws 1995, LB 99, § 9; Laws 2000, LB 900, § 158.

46-2,129. District or company; transfer of appropriation for agricultural purposes; hearing; notice; powers and duties; priority date. (1) The board of directors of the district or company, or the board's designee, may hold a hearing on a proposed transfer under section 46-2,127 and shall hold a hearing if requested by any owner of land within the district or served by the canal company. Notice of a hearing under this subsection shall be published at least seven calendar days prior to the hearing in at least one newspaper of general circulation in each county containing lands upon which the water appropriation is or is proposed to be applied. If the hearing is held by the board's designee, the board's designee shall make a written recommendation to the board within fifteen calendar days after the hearing. The board shall act upon the proposed transfer at the board's next regular or special meeting following receipt of the designee's recommendation.

(2) The board of directors may transfer the water appropriation at a regular or special meeting.

(3) Any water appropriation transferred to a tract of land under section 46-2,127 shall retain the original priority date for the water appropriation.

(4) All transfers shall be reported annually to the department pursuant to section 46-261.

Source: Laws 1995, LB 99, § 10.

46-2,130. Sections; how construed. Nothing in sections 46-2,120 to 46-2,129 shall be construed to limit or restrict the powers of the department with respect to adjudication of water rights.

Source: Laws 1995, LB 99, § 11; Laws 2000, LB 900, § 159.

46-2,131. Termination date December 31, 2009. Legislative findings. The Legislature finds that there are significant issues relating to the laws of Nebraska governing the management and use of Nebraska surface water and ground water. The issues to be examined are: (1) A review of Laws 1996, LB 108, to determine what, if any, changes are needed to adequately address Nebraska's conjunctive use management issues; (2) an evaluation of the utility of allowing temporary water transfers and, if deemed useful, development of draft legislation and procedures for authorizing and implementing a temporary water transfer law; (3) an evaluation of the utility of authorizing additional types of permanent water transfers and, if deemed useful, development of draft legislation and procedures for authorizing and

implementing additional types of permanent water transfers; (4) a determination as to the usefulness of water leasing or transfers and development of a potential water banking system that would facilitate the temporary or permanent transfer of water uses; and (5) a determination as to what other ways, if any, inequities between surface water users and ground water users need to be addressed and potential actions the state could take to address any such inequities. To address such issues, the Governor shall appoint a Water Policy Task Force as provided in section 46-2,132.

Source: Laws 2002, LB 1003, § 1.

46-2,132. Termination date December 31, 2009. Water Policy Task Force; members.

(1) The members of the Water Policy Task Force shall include:

- (a) Twenty irrigators, with at least one irrigator from each of the state's thirteen river basins, giving consideration to maintaining a balance between surface water users and ground water users. Three irrigators shall be selected from the Republican River Basin, two irrigators shall be selected from the North Platte River Basin, two irrigators shall be selected from the middle Platte River Basin, two irrigators shall be selected from the Loup River Basin, two irrigators shall be selected from the Elkhorn River Basin, two irrigators shall be selected from the Big Blue River Basin, one irrigator shall be selected from the South Platte River Basin, one irrigator shall be selected from the lower Platte River Basin, one irrigator shall be selected from the Little Blue River Basin, one irrigator shall be selected from the Nemaha River Basin, one irrigator shall be selected from the Niobrara River Basin, one irrigator shall be selected from the White Hat River Basin, and one irrigator shall be selected from the Missouri tributaries basin;
- (b) three representatives from differing agricultural organizations;
- (c) three representatives from differing environmental organizations;
- (d) two representatives from differing recreational organizations;
- (e) three representatives to represent the state at large;
- (f) five representatives suggested for the Governor's consideration by the Nebraska Association of Resources Districts;
- (g) four representatives suggested for the Governor's consideration by the Nebraska Power Association;
- (h) five representatives suggested for the Governor's consideration by the League of Nebraska Municipalities, with consideration given to maintaining a balance between larger and smaller municipalities; and
- (i) such other members as the Governor deems appropriate to provide the task force with adequate and balanced representation. The Governor shall notify the Legislature upon completion of the appointments.

(2) Additional members of the task force shall be:

- (a) One representative from the Department of Natural Resources to coordinate as appropriate with other state agencies;
- (b) one representative from the Attorney General's office;
- (c) the chairperson of the Natural Resources Committee of the Legislature; and
- (d) the vice chairperson of the Natural Resources Committee of the Legislature. Other members of the Legislature may participate as desired.

(3) If any member of the task force is unable to serve for any reason, the Governor shall appoint a successor to such member. The successor shall represent the same constituency as the member such successor replaces.

Source: Laws 2002, LB 1003, § 2; Laws 2004, LB 962, § 31.  
Operative date July 16, 2004.  
Termination date December 31, 2009.

46-2,133. Termination date December 31, 2009. Meeting facilitator. On behalf of the Water Policy Task Force, the Natural Resources Committee of the Legislature shall contract for the services of a meeting facilitator and such other assistance as the task force deems necessary within the limits of the funds appropriated. Such contract shall have the approval of the Executive Board of the Legislative Council. In making its selection for facilitator, the Natural Resources Committee shall consult with the Attorney General's office and the Department of Natural Resources.

Source: Laws 2002, LB 1003, § 3.

46-2,134. Termination date December 31, 2009. Executive committee; duties. The Water Policy Task Force shall select an executive committee. The executive committee shall consist of three representatives from irrigation interests; one representative from an agricultural organization; one representative from an environmental organization; one representative from a recreational organization; one representative of the state at large; one representative of natural resources districts; one representative of the Nebraska Power Association; one representative of municipalities; one representative of the Department of Natural Resources; one representative of the Attorney General's office; and the chairperson and vice chairperson of the Natural Resources Committee of the Legislature. Each executive committee member shall be responsible for representing the rest of his or her interest group on the executive committee. The executive committee shall be responsible for developing the operating rules of the task force and for developing proposals and recommendations to be considered by the entire task force. The executive committee shall apply for a grant of a minimum of three hundred fifty thousand dollars from the Nebraska Environmental Trust Fund prior to the application deadline of September 9, 2002, for grants to be awarded and funded in 2003.

Source: Laws 2002, LB 1003, § 4.

46-2,135.     Termination date December 31, 2009. Meetings. The Water Policy Task Force shall meet at least twice each year to consider the proposals and recommendations of the executive committee and any other additional times as the executive committee determines to be necessary to accomplish the objectives established in section 46-2,131.

Source:       Laws 2002, LB 1003, § 5; Laws 2004, LB 962, § 32.  
Operative date July 16, 2004.  
Termination date December 31, 2009.

46-2,136.     Termination date December 31, 2009. Duties. The Water Policy Task Force shall discuss the issues described in section 46-2,131 and such related issues as it deems appropriate, shall identify options for resolution of such issues, and shall make recommendations to the Legislature and the Governor relating to any water policy changes the task force deems desirable.

The task force shall complete its work within eighteen months after the Governor notifies the Legislature that all members of the task force have been appointed and a meeting facilitator has been selected.

Source:       Laws 2002, LB 1003, § 6.

46-2,137.     Termination date December 31, 2009. Water Policy Task Force Cash Fund; created; use; investment. The Water Policy Task Force Cash Fund is created. The fund shall be administered by the Department of Natural Resources and expended at the direction of the Water Policy Task Force. The fund shall consist of funds appropriated by the Legislature, money received as gifts, grants, and donations, and transfers authorized under sections 2-1579 and 66-1519. Any money in the fund available for investment shall be invested by the state investment officer pursuant to the Nebraska Capital Expansion Act and the Nebraska State Funds Investment Act.

Source:       Laws 2002, LB 1003, § 7.

#### **Cross References**

**Nebraska Capital Expansion Act**, see section 72-1269.

**Nebraska State Funds Investment Act**, see section 72-1260.

46-2,138.     Sections; termination. Sections 46-2,131 to 46-2,137 terminate December 31, 2009.

Source:       Laws 2004, LB 962, § 33.  
Operative date July 16, 2004.

Footnotes:

Class I misdemeanor: Maximum – not more than one year imprisonment, or one thousand dollars fine, or both. Minimum – none.

Class II misdemeanor: Maximum – six months imprisonment, or one thousand dollars fine, or both. Minimum – none.

Class III misdemeanor: Maximum – three months imprisonment, or five hundred dollars fine, or both. Minimum – none.

Class IV misdemeanor: Maximum – no imprisonment, or five hundred dollars fine. Minimum – one hundred dollars fine.

Class V misdemeanor: Maximum – no imprisonment, or one hundred dollars fine. Minimum – none