

LEGISLATIVE BILL 488

Approved by the Governor April 26, 1985

Introduced by Vickers, 38; Schmit, 23

AN ACT relating to water resources; to amend sections 33-105, 46-226.01, 46-226.02, 46-240, 46-295, 46-296, 46-298, and 46-2,101, Reissue Revised Statutes of Nebraska, 1943, and section 46-241, Reissue Revised Statutes of Nebraska, 1943, as amended by section 2, Legislative Bill 103, Eighty-ninth Legislature, First Session, 1985; to require a fee for certain applications; to restate intent; to redefine a term; to change provisions relating to incidental and intentional underground water storage; to repeal the original sections; and to declare an emergency.

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

Section 1. That section 33-105, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

33-105. There shall be paid to the Department of Water Resources in advance for the services of the Director of Water Resources by the party demanding or necessitating the service the following fees:

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

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

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

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

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

dollars;

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

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

(8) For filing, recording, and examining each application for approval of authority to levy fees for withdrawing water stored incidentally underground, five hundred dollars;

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

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

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

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

(13) ~~(12)~~ For certificate and seal, one dollar.

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

Sec. 2. That section 46-226.01, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

46-226.01. Any person having an approved perfected appropriation may file with the department an application for recognition of incidental underground water storage associated with such appropriation, ~~and for recovery of such water,~~ on a form prescribed and furnished by the department without cost. Upon receipt of an application, the department shall proceed in accordance with rules and regulations adopted and promulgated by the department.

Sec. 3. That section 46-226.02, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

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

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

(2) (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; and

(3) (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 include an identification of the water stored or to be stored underground 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.

Sec. 4. That section 46-240, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

46-240. Whenever any person shall desire to divert any of the unappropriated waters of any natural lake or reservoir, or any person shall desire to recover any unappropriated water intentionally ~~or incidentally~~ stored underground, for 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.

Sec. 5. That section 46-241, Reissue Revised Statutes of Nebraska, 1943, as amended by section 2, Legislative Bill 103, Eighty-ninth Legislature, First

Session, 1985, be amended to read as follows:

46-241. (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 sections 46-243 and 46-257, make an application to the Department of Water Resources upon the prescribed form. Such application shall be filed and proceedings had thereunder in the same manner and under the same rules and regulations as other applications. Upon the approval of such application, the applicant shall have the right to impound in such reservoir, or store in and recover from such underground water storage facility, all waters 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) 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 shall 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 of Water Resources to meet the requirements for such purposes as determined by the department, except that a reservoir or facility owner shall not be required to release water for this purpose which has been legally stored. Any dam shall be constructed in accordance with ~~the provisions of~~ section 46-257, and the outlet works shall be installed in such a manner that water may be released in compliance with ~~the provisions of~~ this section. Whenever any person shall divert water from a public stream and return it into the same stream, he or she may take out the same amount of water, less a reasonable deduction for losses in transit, to be determined by the department, providing no prior appropriator for beneficial use shall be prejudiced by such diversion.

(3) An application for storage and recovery of water ~~incidentally~~ intentionally stored underground may be

made only by an appropriator of record who shall show, by documentary evidence, sufficient interest in the underground water storage facility to entitle the applicant to the water requested.

Sec. 6. That section 46-295, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

46-295. 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 measurable economic benefit from incidental underground water storage or for potential benefit from intentional underground water storage, in the financial obligations necessary for construction, operation, and maintenance of water projects which cause intentional or incidental underground water storage.

The Legislature finds that uses of water for incidental and intentional underground water storage are beneficial uses of water 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, as provided in sections 46-226-01, 46-226-02, and 46-240, for authorizing intentional underground water storage, as provided in sections 46-233, 46-240, 46-241, 46-242, and 46-297, and for authorizing the levying and collection of fees and assessments on persons who withdraw or otherwise use or benefit from intentional or incidental underground water storage as provided in sections 46-298 to 46-2, 106.

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

Sec. 7. That section 46-296, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

46-296. As used in sections 33-105, 46-202, 46-226.01, 46-226.02, 46-233, 46-240, 46-241, 46-242, and 46-295 to 46-2, 106, unless the context otherwise requires:

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

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

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

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

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

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

Sec. 8. That section 46-298, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

46-298. (1) Any person who has obtained recognition of incidental underground water storage associated with an existing project, and authorization for use of such water, pursuant to sections 46-226.01 and 46-226.02 may, subject to section 46-2,101, levy a maximum fee of fifty cents per year per acre irrigated by mechanical withdrawal against any person who withdraws such stored water. The fee shall be determined according to the degree to which incidental underground storage has occurred and the actual benefit to the overlying land. The person who assesses the fee shall provide to each landowner at the time of the initial assessment or at the time of modification of the assessment a written summary of the landowner's underground storage and an explanation of the fee for each tract of land so assessed. Nothing in this subsection shall be construed to prohibit an applicant from applying and receiving authorization for a fee in an amount or for a number of years less than that authorized under this subsection.

(2) In lieu of the annual fee determined pursuant to subsection (1) of this section, any person who has obtained recognition of incidental underground water storage associated with an existing project, and authorization for use of such water, pursuant to sections 46-226.01 and 46-226.02 may, subject to section 46-2,101, levy a one-time fee of fifty cents per acre irrigated by mechanical withdrawal against any person who withdraws such stored water.

Sec. 9. That section 46-2,101, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

46-2,101. (1) Any person intending to levy fees or assessments in accordance with section 46-298 or 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;

(g) The manner, use, and location of any such surface water appropriation; and

(h) For an application under section 46-298 only (i) the amount of any surface water directly delivered by the applicant within the five years prior to the date of application, (ii) the amount and location of any land actually served by surface water directly delivered by the applicant within such five years, and (iii) an identification of any land served by water stored underground which was not served with surface water directly delivered by the applicant within the last five years.

The application shall be processed under the applicable rules and regulations of the department adopted pursuant to section 46-209.

(3) In developing a fee schedule, the applicant may include the reasonable and necessary costs associated with securing all approvals under section 46-298, except that assessments shall not exceed the maximum fee allowed pursuant to such section.

(4) An application under section 46-298 shall be approved only if the applicant demonstrates (a) the measurable benefits of the underground storage, (b) the economic necessity to recover costs, and (c) that the fees are reasonable and comply with the requirements of section 46-298.

(5) An application under section 46-299 shall be approved if ~~The director shall approve such fees,~~ assessments, modified fees, or modified assessments ~~if they~~ appear reasonable and comply with the ~~applicable~~ requirements of section 46-298 ~~or~~ 46-299.

(6) 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.

Sec. 10. That original sections 33-105, 46-226.01, 46-226.02, 46-240, 46-295, 46-296, 46-298, and 46-2,101, Reissue Revised Statutes of Nebraska, 1943, and section 46-241, Reissue Revised Statutes of Nebraska, 1943, as amended by section 2, Legislative Bill 103, Eighty-ninth Legislature, First Session, 1985, are repealed.

Sec. 11. Since an emergency exists, this act shall be in full force and take effect, from and after its passage and approval, according to law.