

STATE OF NEBRASKA  
DEPARTMENT OF NATURAL RESOURCES

In the Matter of Appropriation A-7603.	)	Case 2013-46-CC-1
	)	
	)	<b><u>CORRECTED</u></b>
Water Division 2-A.	)	NOTICE OF HEARING

Following the Department of Natural Resources issuing a Preliminary Determination of Nonuse under the provisions of *Neb. Rev. Stat.* §§ 46-229 to 46-229.06 regarding surface water appropriation A-7603, Broken Bar Nine Living Trust through Co-Trustees Annelda B. Helzer, Gary Hyde, Tyler Marr and their representing attorney Jovan Lausterer filed a Contest of the Department's determination. On June 12, 2014, Department staff filed a motion requesting that this matter be scheduled for hearing. The Preliminary Determination of Nonuse was issued based upon a Report of Field Investigation submitted by Department staff that showed nonuse for a period of more than five years.

Therefore, NOTICE IS HEREBY GIVEN that a hearing will be held at 10:00 a.m., on July 31, 2014, in the Department of Natural Resources Main Conference Room, 4<sup>th</sup> Floor, State Office Building, 301 Centennial Mall South, Lincoln, Nebraska. The hearing is for the purpose of taking evidence on the facts regarding nonuse of part or all of surface water appropriation A-7603 and whether part or all of the appropriation is subject to cancellation under the provisions of *Neb. Rev. Stat.* §§ 46-229 to 46-229.06 (a copy of which is enclosed herein). The hearing will be held pursuant to *454 Neb. Admin. Code*, Chapter 7 (a copy of which is enclosed herein) and the Nebraska Administrative Procedures Act.

Appropriation A-7603 has a priority date of May 27, 1955, and authorizes the use of water for irrigation of the 126.1 acres of land described below. The water may be diverted from the North Loup River at a point of diversion located on the right bank of the stream in the S½ of Section 10 and in the NE¼NE¼ of Section 15, both in Township 22 North, Range 20 West of the 6<sup>th</sup> P.M. in Loup County. The rate that water may be diverted shall not exceed 1.15 cubic foot per second (cfs) from all points of diversion.

Township 22 North, Range 20 West of the 6 <sup>th</sup> P.M. in Loup County	Acres
Section 10: Lot 5	24.8
Lot 6 (E½SW¼)	32.6
Lot 7 (SW¼SE¼)	16.1
Section 15: NE¼NW¼	3.9
NW¼NE¼	33.8
NE¼NE¼	12.5
SE¼NE¼	<u>2.4</u>
TOTAL	126.1

"If no person appears at the hearing, such water appropriation or unused part thereof shall be declared forfeited and annulled." (*Neb. Rev. Stat. § 46-229.04*) A party may appear on his or her behalf in the contested case proceeding or may be represented by an attorney or other representative as permitted by law. Parties to the hearing may request a prehearing conference as allowed under 454 NAC 7.010.01. Parties should be prepared to present testimony and factual evidence supporting their allegations at the hearing time and location described above.

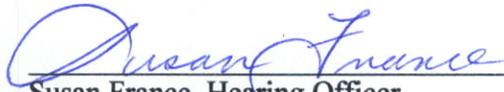
The Hearing Officer is Susan France, Department of Natural Resources, P.O. Box 94676, Lincoln, Nebraska 68509-4676; phone (402) 471-1684, email: susan.france@nebraska.gov.

Mike Thompson, Division Head, Permits and Registrations Division, should be contacted regarding any questions on information regarding the owner's rights and options, including what constitutes sufficient cause for nonuse. Mr. Thompson can be reached at (402) 471-0587.

Individuals with disabilities may request auxiliary aids and service necessary for participation by contacting the Hearing Officer at P.O. Box 94676, Lincoln, NE 68509-4676, (402) 471-1684, by July 25, 2014.

STATE OF NEBRASKA  
DEPARTMENT OF NATURAL RESOURCES

Dated: July 1, 2014

  
Susan France, Hearing Officer

**CERTIFICATE OF SERVICE**

The undersigned certifies that this Notice of Hearing was served on July 1, 2014, by personal service to LeRoy Sievers, Department of Natural Resources; and was sent by certified United States Mail, postage prepaid, return receipt requested to:

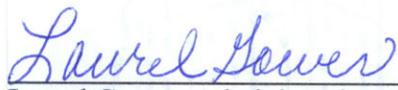
Annelda B. Helzer, Co-Trustee  
Broken Bar Nine Living Trust  
1650 West 8<sup>th</sup> Street  
Loveland, Colorado 80537

Tyler Marr, Co-Trustee  
Broken Bar Nine Living Trust  
4217 10<sup>th</sup> Street SW  
Loveland, Colorado 80537

Gary Hyde, Co-Trustee  
Broken Bar Nine Living Trust  
44177 Highway 91  
Taylor, Nebraska 68879

Jovan Lausterer  
Bromm Lindahl Freeman-Caddy & Lausterer  
551 North Linden  
P.O. Box 277  
Wahoo, Nebraska 68066

Custer Federal Savings & Loan Association  
341 South 10<sup>th</sup> Avenue  
Broken Bow, Nebraska 68822

  
Laurel Gower, Administrative Assistant

TITLE 454  
CHAPTER 7 - CONTESTED CASES

017 Rehearing and Appeals.

017.01 Petition for Rehearing. Any party aggrieved by any final order issued at or after the conclusion of a hearing, may, within thirty days after receipt of such decision, file with the Department a petition for rehearing. The petition shall set forth the grounds relied upon for requesting a rehearing.

017.01A Review. The Director shall review the petition and may deny the petition if it is without sufficient merit. If sufficient grounds are established, the Director or Department shall grant a rehearing. Such rehearing shall be conducted pursuant to this Chapter.

017.01B Effect on Appeal Procedure. Parties should not assume that filing a request for rehearing extends the deadline for appeal to the Court of Appeals or other applicable court.

017.02 Appeal shall be made under the applicable statutes.

## **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.

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. No cancellation under this subsection shall prohibit an irrigation district, a reclamation district, a public power and irrigation district, or a mutual irrigation company or canal company from asserting the rights provided by subsections (5) and (6) of section 46-229.04.

(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.

(7) A water appropriation that has not been perfected pursuant to the terms of the permit may be canceled by the department without complying with sections 46-229.01 to 46-229.04 if the owner of such appropriation fails to comply with any of the conditions of approval in the permit,

except that this subsection does not apply to appropriations to which subsection (2) of section 46-237 applies.

**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; Laws 2006, LB 1226, § 7.

Under former law, a notice of hearing on the adjudication of a water right that states the place and time of the hearing, names and describes the appropriation that is the subject of the hearing, states that the Department of Natural Resources' records indicate that the land approved for irrigation under the appropriation has not been irrigated for more than 3 consecutive years, states that the hearing will be held pursuant to sections 46-229 to 46-229.05, as amended, states that all interested persons shall appear at the hearing and show cause why the appropriation or part of the appropriation should not be canceled or annulled, states that the appropriation may be canceled if no one appears at the hearing, includes the address, post office box number, telephone number, and fax number of the Department of Natural Resources, and attaches copies of sections 46-229 to 46-229.05 provides adequate notice of the issues to be taken up at the hearing and contains the information required

under this section. In re Water Appropriation A-4924, 267 Neb. 430, 674 N.W.2d 788 (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) a copy of the form that such owner may file to contest such determination, if notice is provided in accordance with subsection (1) of section 46-229.02 and is mailed; (j) the location where the owner may obtain a form to file to contest such determination, if notice is provided in accordance with subsection (1) of section 46-229.02 and is published; 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; Laws 2006, LB 1226, § 8.

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 a hearing held pursuant to section 46-229.03, the verified field investigation report of an employee of the department, or such other report or information that is relied upon by the department to reach the preliminary determination of nonuse, 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, a reclamation district, a public power and irrigation district, a mutual irrigation company or canal company, or the United States Bureau of Reclamation 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, or five years after an order of cancellation issued by the department following the filing of a voluntary relinquishment of the water appropriation that has been signed by the landowner and the

appropriator of record, to assign the right to use that portion of the appropriation to other land within the district or the area served by the company, to file an application for a transfer in accordance with section 46-290, or to transfer the right in accordance with sections 46-2,127 to 46-2,129. The department shall issue its order of cancellation within sixty days after receipt of the voluntary relinquishment unless the relinquishment is conditioned by the landowner upon an action of a governmental agency. If the relinquishment contains such a provision, the department shall issue its order of cancellation within sixty days after receipt of notification that such action has been completed. The department shall be notified of any such assignment within thirty days after such assignment. 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 reinitiate 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 reinitiated 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; Laws 2006, LB 1226, § 9; Laws 2007, LB701, § 15.

Under former law, at a hearing pursuant to subsection (1) of this section, the presentation of prima facie evidence for the forfeiture and annulment of a water appropriation in the form of the verified field investigation report of an employee of the Department of Natural Resources shifts the burden to an interested party to present evidence that the water appropriation has been put to a beneficial use during the prior 3 consecutive years. In re Water Appropriation A-4924, 267 Neb. 430, 674 N.W.2d 788 (2004).

Under former law, evidence of beneficial use of a water appropriation more than 3 years prior to the hearing on the adjudication of the water right does not sustain the burden of an interested party after presentation of prima facie evidence for the forfeiture and annulment of the water appropriation. In re Water Appropriation A-4924, 267 Neb. 430, 674 N.W.2d 788 (2004).

Under former law, once it has been established that a water appropriation has not been used for more than 3 consecutive years, it is the burden of the interested party to present evidence that there was sufficient cause for nonuse.

In re Water Appropriation A-4924, 267 Neb. 430, 674 N.W.2d 788 (2004).

Under former law, use of a water appropriation only when another water source is inadequate and 3 years prior to the hearing on the adjudication of the water appropriation does not establish sufficient cause for nonuse pursuant to subsection (3)(c) of this section. In re Water Appropriation A-4924, 267 Neb. 430, 674 N.W.2d 788 (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.

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).

#### **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.