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Cancelling a Surface Water Right for Nonuse, by Pam Anderson

In Nebraska, **all water appropriations must be for a beneficial or useful purpose.** When an appropriator fails to use the water for the beneficial use specified in the permit for **more than five years, the water right can be cancelled** by the Department. Water rights can only be lost after going through a cancellation procedure with full due process protections. Water rights are not lost by forfeiture or any automatic process in Nebraska.

A cancellation starts with an investigation by the local field office staff. If they determine that there was water available during the last five years and that there was not “sufficient cause” to not use the water, then the appropriator will be sent a “Notice of Preliminary Determination of Nonuse.” State law dictates what is “sufficient cause” for not using a water appropriation for five years. **Section 46-229.04** describes the complete list of acceptable excuses for not using the water.

46-229.04.

(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.

The water right is cancelled if the appropriator doesn't respond to the notice. However, the appropriator may disagree with the Department's preliminary determination and request a contested case hearing. The hearing resembles a trial but there is a hearing officer instead of a judge or magistrate and the rules of evidence are not followed strictly. If the appropriator cannot prove that he or she had sufficient cause to not use the water, the water right is cancelled.

There is no increase in stream flow when a water right is cancelled for nonuse. This is because the water hadn't been diverted from the stream for at least five years prior to the cancellation. It is in effect "paper water" at that point. **The Department does not rely on "paper water" to determine if there is unappropriated water available for a new water use.** Instead, the historic flow method is used. The Department looks at stream gage data, observation and experience from water administration to decide if there is enough flowing water to issue a permit. The Department does not attempt to add up all of the water rights that have ever been issued and calculate how much "paper water" has been appropriated. It would be impossible to get an accurate picture of available stream flow by adding up all of the permits in a basin. Every year, the amount of water diverted from the stream changes because farmers change crops and each crop has different water needs or a farmer may put his or her land in EQIP or CREP and not irrigate at all for several years. The prior appropriation system is dynamic and rewards the senior irrigators who developed their fields first. Junior irrigators are entitled to take whatever is left.

The fact that an appropriator is not using his or her water right and it hasn't been cancelled yet does not affect whether or not a basin is determined to be fully appropriated. The only appropriations considered are those actually being used. A basin is fully appropriated if a senior appropriator requests junior appropriators that are diverting water to be closed so often that the junior appropriators cannot divert at least 65% of the water needed during the peak irrigation season or 85% during the entire season. **An unused paper water right does not factor into the calculations at all.**