

Nebraska

Department of Natural Resources

NEBRASKA'S WATER MANAGEMENT RESOURCE

Providing the sound science and support for managing
Nebraska's most precious resource.

Cancelation of Unused Surface Water Rights

AWSE Spring Workshop – Salt Lake City

Mike Thompson, Permits & Registrations Division Head
Nebraska Department of Natural Resources

6/9/2015

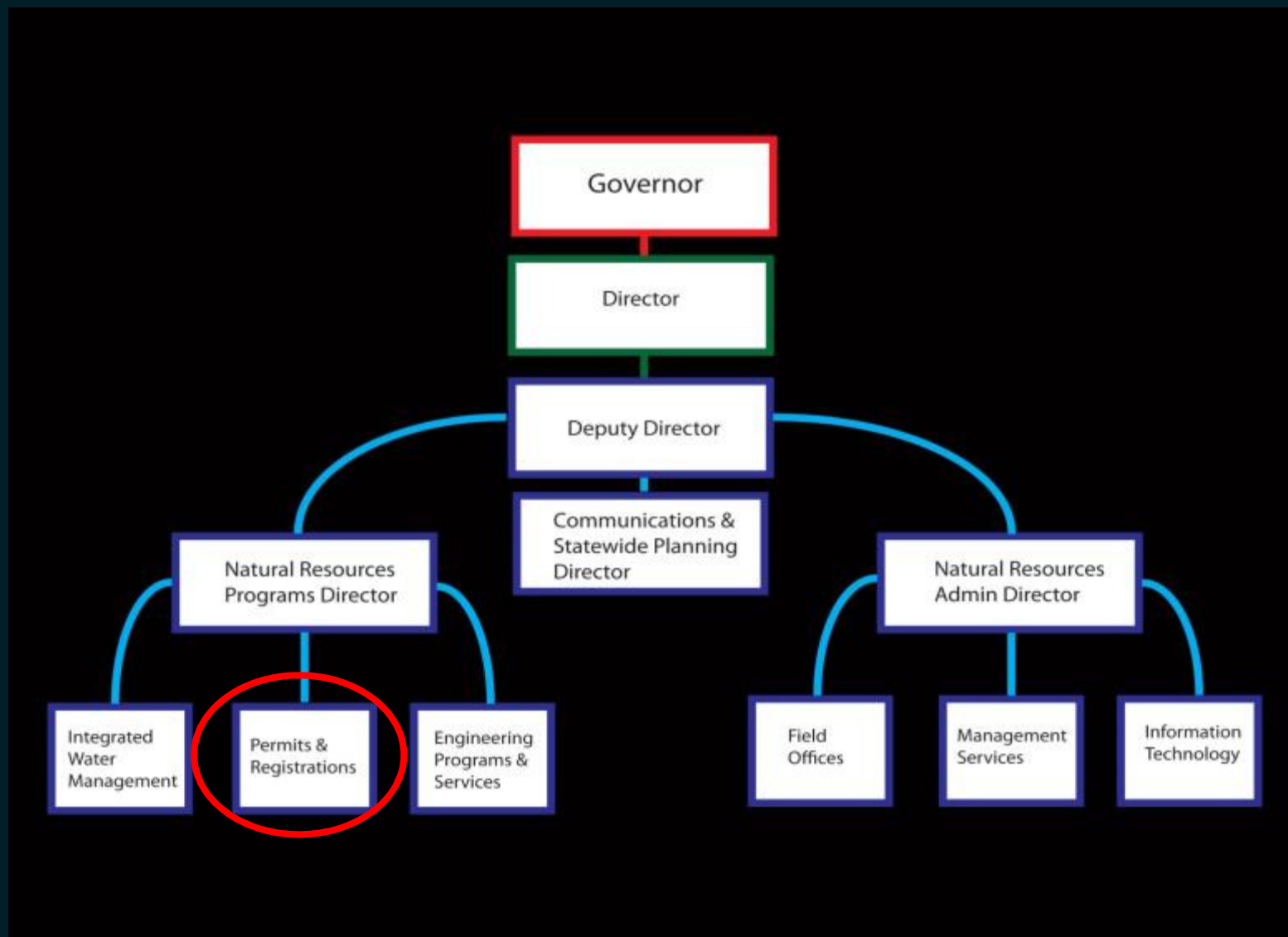
Irrigation in Nebraska

- ❑ About 9.1 Million irrigated acres
- ❑ Approximately 7.7 Million acres are irrigated with groundwater (more if incl. comingling)
- ❑ 1.4 Million irrigated under surface water appropriations
- ❑ Surface water is no more than 16% of total

Department of Natural Resources (DNR) General Authority

- **Neb. Rev. Stat. 61-206**

- ☐ **The Department of Natural Resources is given jurisdiction over all matters pertaining to water rights for irrigation, power, or other useful purposes except as such jurisdiction is specifically limited by statute.**
- ☐ **It may refuse to allow any water to be used by claimants until their rights have been determined and made of record.**



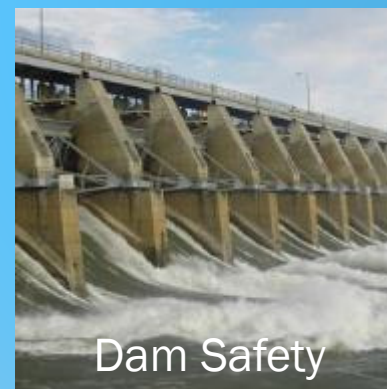
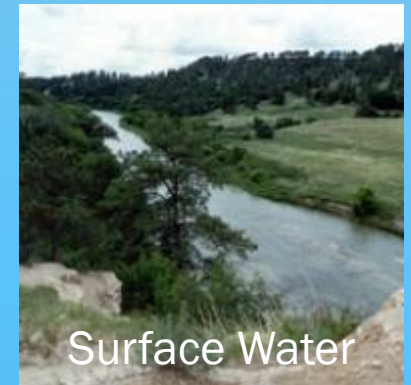


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Water Planning
and Integrated
Management

Surface Water

Groundwater

Floodplain
Management

Dam Safety

Field Offices

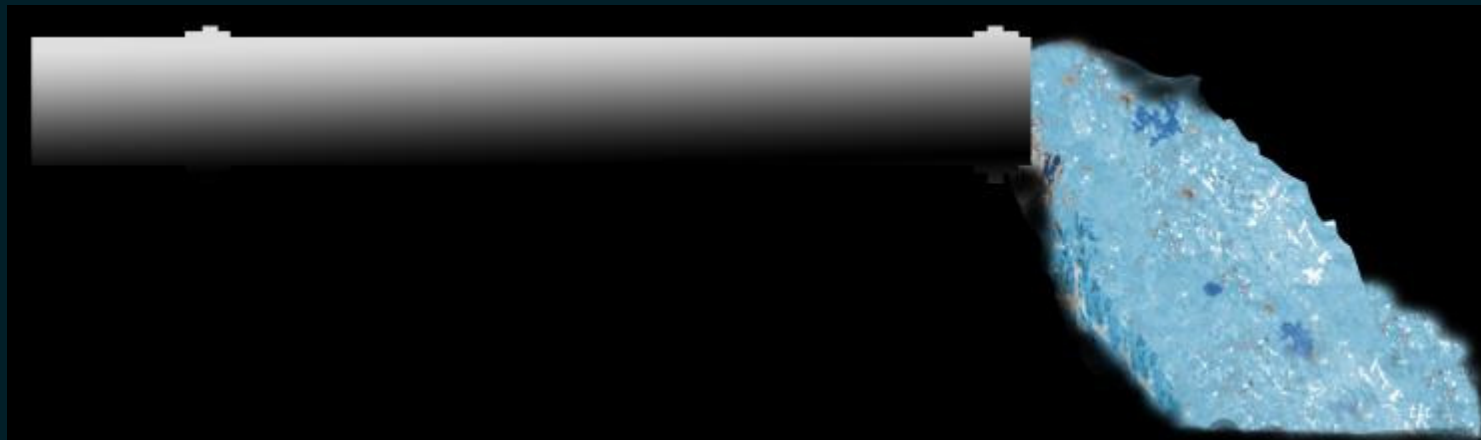
Surface Water Rights Staff

- ❑ 3 Program Specialists Processing New Applications & Transfers
- ❑ 2 Administrative Assistants doing a variety of activities
- ❑ 1 Full time temporary Administrative Assistant
- ❑ 2 GIS / Mapping staff assigned from another Division
- ❑ 1 Shared Clerical Assistant
- ❑ 1 Shared Attorney



Surface Water Appropriations

- ❑ ~8,800 surface water rights
- ❑ ~7,000 are irrigation related water rights including storage for irrigation
- ❑ Irrigation rights account for >80% of sw appropriations



Use of Water from Nebraska's Streams

- ❑ **Before 1895 a Claim** could be posted at proposed Diversion site and intentions filed in local County Courthouse – this led to a lot of confusion, so...
- ❑ By popular demand the Act of **April 4, 1895** was passed that set up our current system of surface water appropriation of the public waters and the state-wide system of water right administration (**birth of the application process**)
- ❑ Existing **Riparian** users and Claims could still be exercised and quantified as needed **through the courts** or subsequent state agencies authorized by statute

Act of April 4, 1895

Provisions for Surface Water

- ❑ **Doctrine of Prior Appropriation** - State Board of Irrigation created to bring order and certainty from the chaotic system that existed prior to passing the Act
- ❑ Authorized State Board of Irrigation (now the Department of Natural Resources) to act on applications for the use of unappropriated water from streams
- ❑ Administration of water rights by state water superintendants in 2 main divisions
- ❑ Process of adjudicating established water rights in order to quantify and prioritize them on streams state-wide (almost 1000 were certified in first 3 years)
- ❑ New Permits were to be issued specifying **priority, amount, purpose and location**

Act of April 4, 1895 continued

- ❑ Order of **Preference** (1st Domestic, 2nd Agriculture, 3rd Manufacturing), which was later added to the constitution
- ❑ Declared Irrigation a “**natural want**”, added to constitution in 1920
- ❑ 1 Cubic Foot per Second (CFS) was **max diversion rate** for every 70 acres of land
- ❑ Prohibited Transbasin Diversions and Changes in Place of Use (now it is allowed)
- ❑ Facilitated the formation of irrigation districts

APPLICATIONS

NEB. REV. STAT. 46-233

- ☐ Application to appropriate water must be made to DNR before commencing construction or taking water
- ☐ Application must list purpose, water source, location of diversion, location of use, amount requested, time to complete construction, time of first beneficial use
- ☐ Defective Applications are returned with 90 day deadline
- ☐ Public Notice of applications – Newspaper & on DNR website
- ☐ Any other supporting information DNR deems necessary to complete a review of the application

PERFECTING AN APPROPRIATION

- ❑ If approved, water must be used for the beneficial purpose and at the approved location within the time allotted for perfection as specified in the approval order
- ❑ This is commonly described as the beneficial use period for a provisional water appropriation
- ❑ After the period has ended, DNR staff will conduct a field investigation to determine if and to what extent the new appropriation has been utilized
- ❑ Any unused portion will be canceled (**without a hearing**) and any remaining portion will be considered a perfected water right

A Perfected Irrigation Appropriation

- ❑ Property right that attaches to the land under permit
- ❑ Adds value to appurtenant land
- ❑ May not be canceled without due process

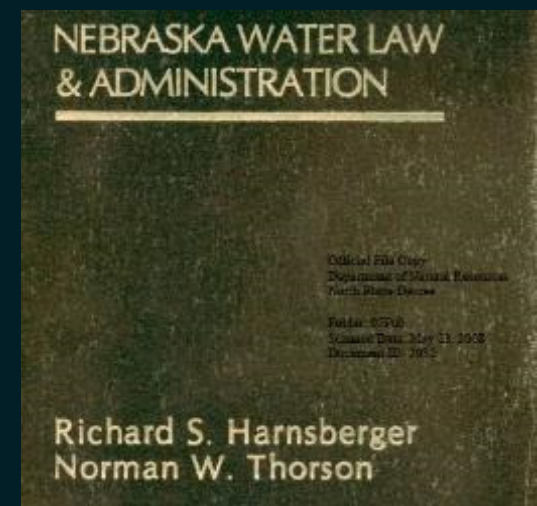
Cancelation / Adjudication

Why bother?

- ❑ Unused water appropriations are canceled so that junior water users who are actively exercising their right to use water may move up in the priority system
- ❑ Dormant senior rights coming back on line after a long absence can upset the balance of active uses on a stream
- ❑ If we only have active water rights on the books it improves our planning capabilities
- ❑ Water use estimates can be more reliable

Surface Water Right Cancellation Statistics

- ❑ Since 1895 over 21,000 applications have been filed
- ❑ Over 12,000 have been dismissed, denied or canceled
- ❑ In the most recent 5 years, 2010-2014 there have been about partial or full 480 cancellation orders issued
- ❑ These cancellations reduced the number of permitted acres by about 25,000 and about 300 cfs of flow
- ❑ Most cancellations within last 40 years



When you see the term “**adjudication**” does that equate in your mind with cancelation of unused water appropriations?



Terminology

- ❑ In Nebraska when we speak of adjudicating water appropriations we are usually referring to administrative due process to identify and cancel forfeited water rights
- ❑ It can also mean the process of verifying beneficial use of provisional (new) water rights as perfected appropriations after 3 irrigation seasons have elapsed
- ❑ In this sense we have been adjudicating continuously since the law of 1895 was passed



➤ Statutory Cancellation

➤ Neb. Rev. Stat. §46-229 et al

- More than 5 years since last used beneficially
- Excusable Reasons may preserve the right
- Notice that DNR intends to cancel is given to landowners and others with a property interest
- May be contested
- Negotiation is possible if additional factual information is provided

➤ “Statutory Forfeiture”

➤ Common Law

- Generally referenced in Nebraska case law as “nonuse”
- Lack of beneficial use for more than statutory period of 10 years (real estate law)
- In other words, nothing happens until after 10 years
- Until recently, was thought to have been replaced by Statutory Cancellation relative to water rights

➤ Abandonment

➤ Common Law

- A right is relinquished by owner
- No regard to future possession by that owner or anyone else
- Intent to forsake or desert the right
- Occurs immediately with demonstration of intent to abandon at that time

“Statutory Forfeiture” aka Common Law Nonuse

- ❑ Recently resurrected by court, began with administrative complaint about administration of prior appropriation in Niobrara R.
- ❑ Various permutations of the complaints went to Nebraska Supreme Court 3 times
- ❑ Court was inconsistent in nomenclature, but the nonuse of a property right for more than 10 years can lead to an abandonment determination
- ❑ The complainants did not prevail and for over 40 years there is no record of this approach being successful

Common Law Abandonment

- ❑ Has not been successful in terms of contested cases
- ❑ Hard to prove “intent”, if there is a counter argument
- ❑ Is useful in terms of cooperatively submitting relinquishment papers, signed by landowners

Statutory Cancellation

- ❑ Until the court confused the terminology, this is what department staff considered forfeiture
- ❑ Land owners and anyone with an equitable property interest must be informed of the proceedings
- ❑ Surface water irrigation rights are appurtenant to specific tracts of land and have qualities of property right
- ❑ Due process is required and the manner of cancellation is prescribed in statute

Statutory Cancellation

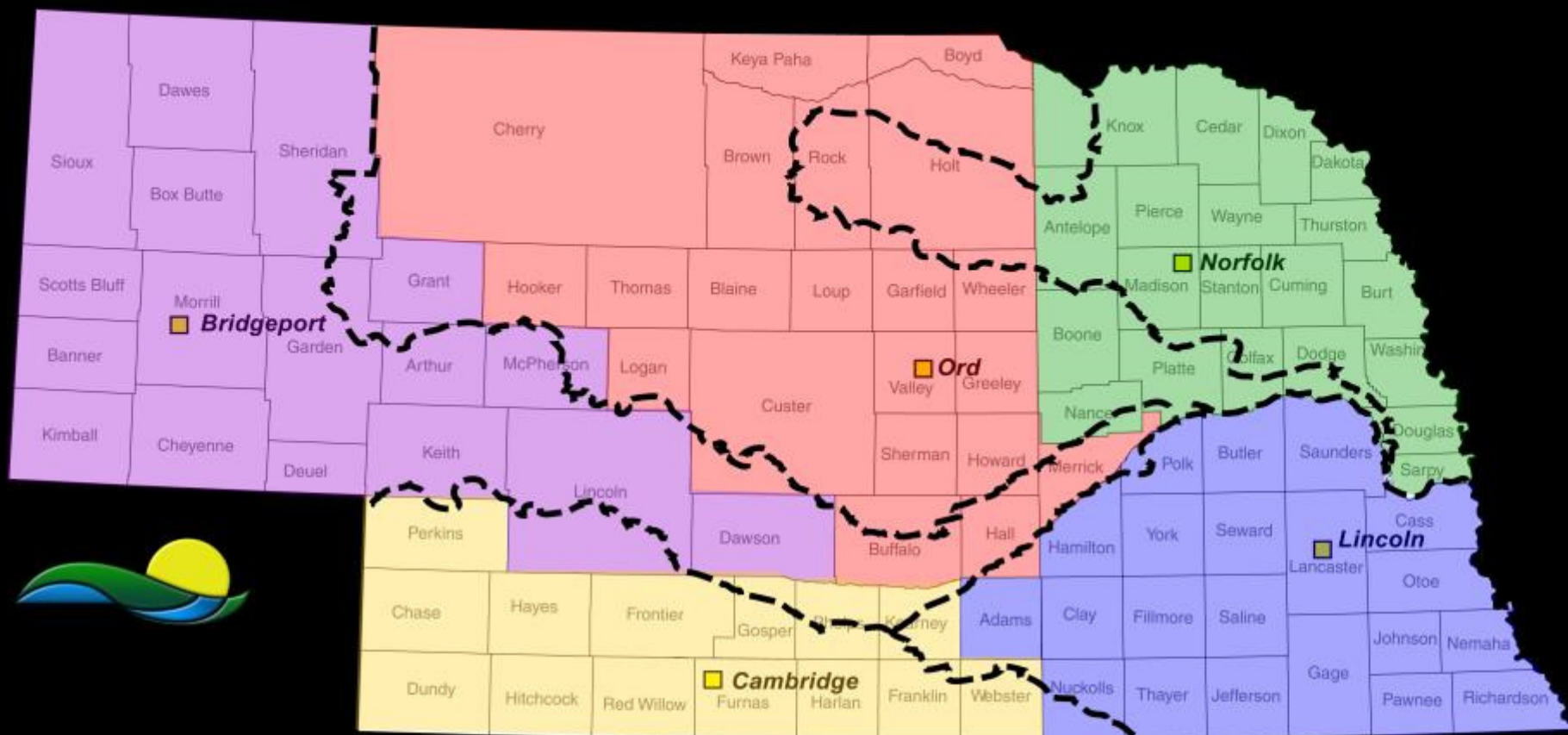
- ❑ Significantly altered in 2004 as part of legislative bill LB962, which instituted the integrated management process
- ❑ Before 2004 Department staff were obligated to hold a hearing, regardless of whether anyone was likely to show up
- ❑ While it generated impressive statistics, it was wasteful to have staff watching the clock tick to see if anyone would show up to defend a forfeited or abandoned right

Preliminary Determination of Nonuse (PDNU)

- ❑ Neb. Rev. Stat. §§46-229 through 46-229.05
- ❑ Now Department staff generate a notarized report
- ❑ If part or all of appropriation is subject to cancelation, the owners in DNR records and/or shown at the county register of deeds are notified
- ❑ This is a “Notice of Preliminary Determination of Nonuse”

Statutory Cancellation

- ❑ Usually water must be used for the beneficial purpose for which permit was granted at least once every 5 years although the number of excuses increased in 2004 with passing of LB962
- ❑ Abandoned appropriations may be voluntarily relinquished by the person or entity holding the right
- ❑ The Department may investigate the status of an appropriation in order to determine if it is subject to cancellation



Nebraska Department of Natural Resources Field Office Boundaries Map

Dam Inspection Boundaries

- Ord Field Office
- Bridgeport Field Office
- Norfolk Field Office
- Cambridge Field Office
- Lincoln Field Office
- DNR Field Office Location

Surface Water Administration Boundaries



Bridgeport Field Office
 729 Main Street
 P.O. Box 787
 Bridgeport, Nebraska 69336-0787
 Phone: 308-262-1930
 Fax: 308-262-1939

Cambridge Field Office
 622 Patterson
 P.O. Box 426
 Cambridge, Nebraska 69022
 Phone: 308-697-3730
 Fax: 308-697-3200

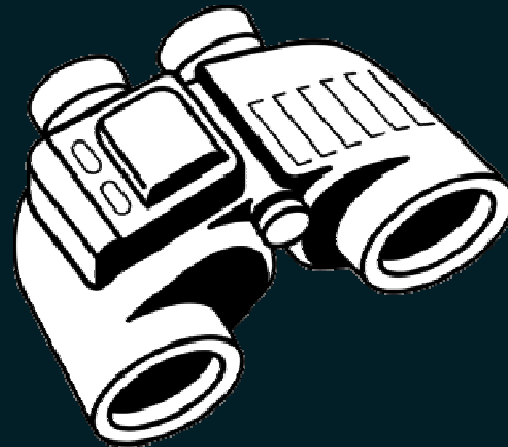
Norfolk Field Office
 601 East Benjamin Ave.,
 Suite 101
 Norfolk, Nebraska 68701
 Phone: 402-370-3377
 Fax: 402-371-0653

Ord Field Office
 North Highway 11
 P.O. Box 251
 Ord, Nebraska 68862
 Phone: 308-728-3325
 Fax: 308-728-9967

Lincoln Field Office
 301 Centennial Mall South
 P.O. Box 94676
 Lincoln, Nebraska 68509-4676
 Phone: 402-471-2363
 Fax: 402-471-2900

Investigation & Report – No Frills

- ☐ Observations and Interviews by Field Office Staff
- ☐ Measurement or Gaged Flow at time of investigation
- ☐ Marked and annotated aerial photo if necessary
- ☐ Listing of those interviewed
- ☐ Verification of ownership records at county register of deeds office



Investigation & Report – New & Improved

- ❑ Field offices and new data gathering section frequently visit diversion sites and record information
- ❑ Mandatory and voluntary water use reporting is being implemented and will be used
- ❑ Database enhancements and integration will improve situational awareness of field staff



THE TRINOCULARS OFFERED
NO REAL BENEFITS.

Cancellation Process – No Frills Version

- ☐ Report generated
- ☐ Owners notified and given copy of report
- ☐ Thirty day wait to see what owners will do
- ☐ If no response, Order of Cancellation Issued
- ☐ If contest filed a hearing is scheduled
- ☐ Pre-hearing conference (may be by telephone)
- ☐ Hearing held
- ☐ Final Order issued
- ☐ May be appealed to Nebraska Court of Appeals

Cancellation Process Improvements

- ❑ People are often defensive, irritated and confused when the notice is received, so...
- ❑ It is better to request a phone call and go over the situation with them in a matter of fact way
- ❑ Quite often the projects have been abandoned
- ❑ Discuss voluntary relinquishment
- ❑ Success rate > 30%
- ❑ Fewer hearings
- ❑ Some negotiation is allowed by law



Hearing Process Improvements

- ❑ Even if wooing a relinquishment doesn't occur, simple communication and dialog makes hearing run more smoothly
- ❑ Usually sharing our information and intentions will result in the appropriator sharing their position
- ❑ Dialog makes preparation for hearing straightforward, by limiting the number of excusable reason defenses for which staff must prepare
- ❑ Water rights section now has an attorney to consult and represent them as needed

Before the Hearing

- ❑ If the appropriator will not be represented by legal counsel, we offer to discuss the process before the hearing begins (no hearing officer present of course)
- ❑ This is done outside the hearing room and usually the appropriators are appreciative of the courtesy and the hearing is more amicable

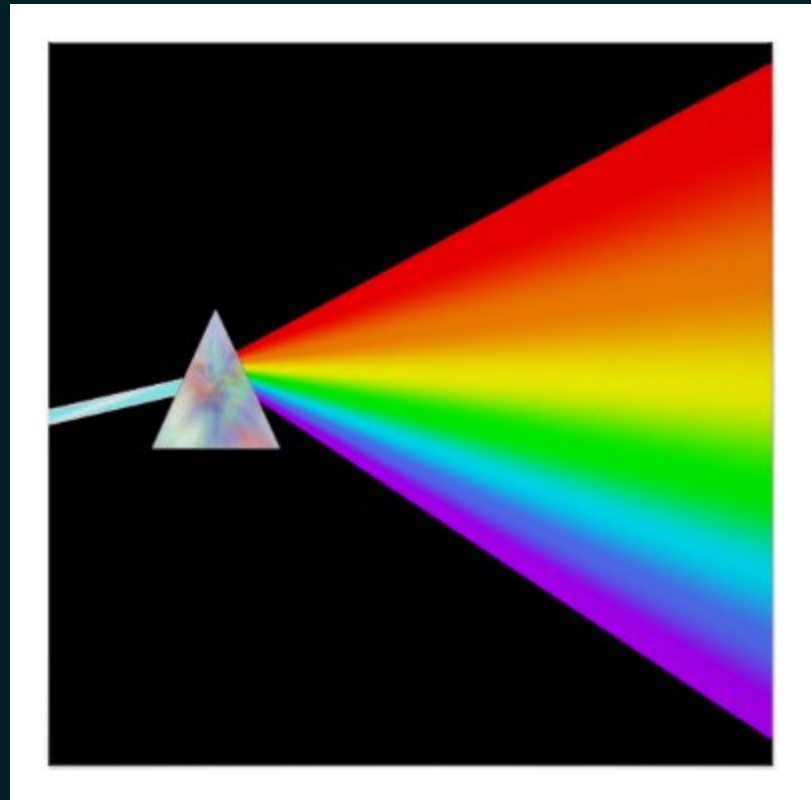
Summary

Three Things You Should Remember

- ❑ **We have had more success with a frank and thorough discussion with landowners prior to entering into a formal Preliminary Determination of Nonuse (PDNU)**
- ❑ **Many people who would have felt compelled to contest the cancelation now understand the process and what our role and their roles are, so they relinquish voluntarily**
- ❑ **Each contested case we stave-off saves much staff time and expense, even though it is difficult to matriculate**

Thank You

There will be time for
discussion after the second
presentation on cancelations



Statutory Cancellation Details Below

- ❑ The presentation at the AWSE 2015 Spring Conference stopped before this slide
- ❑ The following slides are provided for those who like more detail

Cancelation / Adjudication

Neb. Rev. Stat. 46-229.02

- ❑ Field Investigation and Report (and other information)
 - ❑ Eyewitness Account from a Department Employee visiting the site
 - ❑ DNR records of inspection from frequent site visits (new program)
 - ❑ Annual Water Use Reports
 - ❑ Interview of Land Owner and any Operator
 - ❑ Author of field report will relate statements or admissions made
 - ❑ Aerial photography marked to show areas irrigated, if any
 - ❑ Typed, signed, notarized Report of Field Investigation is produced
- ❑ Certification of Title Review
 - ❑ Visit County Clerk / Register of Deeds – Owner of Record & Liens
 - ❑ Further investigation if land in probate, divorce, court order etc
 - ❑ Author of the title report will sign and date

Cancelation / Adjudication

Neb. Rev. Stat. 46-229.03

☐ Preliminary Determination of Non-Use (PDNU)

- ☐ Department determines the water right is subject to cancelation
- ☐ Notice is given to Land Owner, Lien Holders etc
- ☐ 30 Days are given to Respond, which is optional

☐ Notice Elements

- ☐ Appropriation number, purpose, priority, diversion point, land list
- ☐ Description of Information Used to make determination including a copy of the Report of Field Investigation
- ☐ Description of owner/lien holders options for a response
- ☐ Contact Information at the Department, including telephone number
- ☐ Form provided for filing a contested case to challenge cancelation

Cancelation / Adjudication

Voluntary Relinquishment

- ❑ Before a Notice of Preliminary Determination of Non-Use (PDNU) is prepared we do the following:
 - ❑ Send a simple letter to owner(s) asking them to call a specific person at the Department
 - ❑ Telephone discussion with the owner(s) reviewing the situation and the Department's findings and what might happen next
 - ❑ If no response via telephone, another more strongly worded letter
- ❑ We have about 30 – 40% success rate obtaining voluntary relinquishments.
- ❑ Significantly reduces time and expense to try this first

Cancellation / Adjudication

Options to Respond to PDNU Notice

- ❑ Recipient of the Notice is provided with 3 options
 - Take No Action
 - Fill out and return contest form
 - Have all responsible parties sign a voluntary relinquishment

- ❑ If No Contest to the Notice of PDNU or it's Relinquished
 - ❑ Department staff prepares an Order of Cancellation for part or all of the appropriation

Contest of PDNU

Neb. Rev. Stat. 46-229.02

- ❑ If Water Right holder wishes to contest the PDNU
 - ❑ They file a contest with the basis for their complaint and any supporting documentation
 - ❑ Department reviews and may agree to dismiss the proceeding, proceed with only a partial cancelation based upon new information or may continue with original cancelation intention
 - ❑ Hearing is scheduled and Notice of Hearing is sent to all interested parties and published on the DNR website
 - ❑ Hearing is held and the Director rules on the matter by Order
 - ❑ The ruling may be appealed

Neb. Rev. Stat. 46-229.04

“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.”

Excusable reasons

Neb. Rev. Stat. 46-229.04

- ❑ Excusable Reasons for Non-Use of an Appropriation
 - ❑ Inadequate water supply
 - ❑ Federal, State or Local rules temporarily prevented such use
 - ❑ Use was unnecessary because of climatic conditions
 - ❑ Good husbandry would not have dictated water use
 - ❑ Diversion works or facilities were destroyed
 - ❑ Owner of Appropriation was in active military service
 - ❑ Legal proceedings prevented or restricted use of water
 - ❑ Land is in government set-aside program
 - ❑ In designated overappropriated basin unavailability of water may be used as an excuse for up to 30 years

Excusable reasons

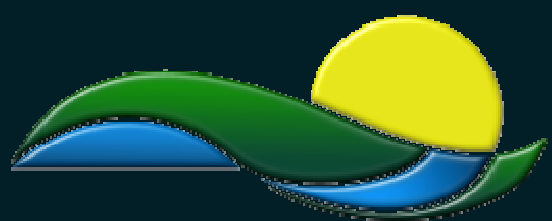
Neb. Rev. Stat. 46-229.04(5)

- ❑ Non-Use of an Appropriation held by an Irrigation District, Canal Company or Mutual Irrigation Company may be **reassigned** within 5 years of cancelation.
- ❑ These same entities may voluntarily relinquish and either reassign to different acres or file a transfer to a different type of appropriation or purpose of use

Cancellation / Adjudication

- ❑ If a final decision is to cancel the water appropriation after the contested case hearing, the appropriator may file an appeal.
- ❑ Appeals must be filed with the Nebraska Court of Appeals within 30 days of the Department's Order of Cancellation





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THANK YOU

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