

STATE OF NEBRASKA

DEPARTMENT OF NATURAL RESOURCES

In the Matter of the 2007 Administration ) Case 001-07CC  
of the Waters of the Niobrara River )  
Water Division 2-C )  
 ) **FINAL ORDER**

INTRODUCTION

This case was remanded on October 3, 2012, to the Department of Natural Resources (Department) by the Nebraska Supreme Court (Court). Previously a hearing had been held in this matter before the Department on July 27 and 28, 2010. In its opinion, 283 Neb. 629, 820 N.W.2d at 44 (2012), the Court directed the Department “to determine whether NPPD’s appropriations have been abandoned or statutorily forfeited in whole or in part.” *Id.* at 658, 820 N.W.2d at 67. The Court also stated: “The junior appropriators therefore bear the burden of proof to establish the allegations contained in their petition.” *Supra.*

Additionally, the Court stated: “An appropriation’s priority date is the date when the Department approves the appropriator’s right to divert water.” *Id.* at 632, 820 N.W.2d at 51. The Court provided no authority for its position on that point. It is in direct conflict with *Neb. Rev. Stat.* § 46-205 which has been the law of Nebraska for over 100 years. It also is in conflict with *Neb. Rev. Stat.* § 46-235(1). It is unclear how the Court can legislate this change, which would require likely changing the priority date of every water right maintained in the records of the Department. Although the Department acknowledges that the Court is the final authority for interpreting and applying the laws adopted by the legislature, without some further explanation of this statement by the Court, the Department is unclear how to implement this apparent change in the law.

The junior appropriators’ petition entitled “Request for Hearing Concerning May 1, 2007 Closing Notices and Stay of Issuance of Future Closing Notices” (Request for Hearing) was filed with the Department on May 11, 2007. Paragraph 5 of the Request for Hearing states:

5. NPPD obtained its appropriations for purposes of manufacturing hydroelectric power. However, NPPD has failed to exercise the full extent of its claimed appropriations for multiple, consecutive five year periods. On information and belief, the records of the DNR demonstrate that NPPD has never before requested regulation of other water users who acquired subsequent appropriations for irrigation. . . . The records of the DNR also indicate that NPPD never objected to applications for the appropriation of water by the Appropriators and the numerous other water users. The records of the DNR show NPPD violated state requirements regarding lease payments for its claimed appropriations. NPPD has also failed to take independent action to prevent the diversion of water by the

Appropriators. All of the foregoing evidence NPPD's intent to abandon all or a portion of its rights.

Paragraph 11 of the Request for Hearing states:

11. At the hearing conducted pursuant to this request, the Appropriators will present evidence and points of law supporting their claim that NPPD's rights under A-3574 (and any other right associated with the Facility) has been completely or partially abandoned or statutory forfeited and that any call on the Appropriators in satisfaction of those right(s) would be futile in any case.

The parties were ordered to submit a brief identifying the elements of abandonment and the elements of statutory forfeiture and for each specifying the legal authority upon which the party relies. The junior appropriators in relation to abandonment stated as follows:

As defined by the Court in *State v. Oliver Bros.*, 119 Neb. 302, 228 N.W. 864, 865 (1930), "Abandonment is the relinquishment of a right by the owner thereof, without any regard for the future possession by himself or any other person, but with the intention to forsake or desert the right."

Intent to abandon has been identified by "unequivocal acts showing a clear intention to abandon and terminate the right, or ... by acts in pais without deed or other writing[.] [Intent may be proved] by an infinite variety of acts. It is a question of fact to be ascertained from all the circumstances of the case." (citations omitted)

The burden of proving abandonment is on the party alleging it. (citations omitted)

Rights to property may also be abandoned or otherwise lost due to non-use within the period of statutory limitations. (citations omitted)

Under *Neb. Rev. Stat.* § 25-202, the period of statutory limitations relating to real estate is ten years. . . .

The junior appropriators in relation to forfeiture stated as follows:

Under *Neb. Rev. Stat.* § 46-229.02(1)(a), the Department makes a preliminary determination, based upon the results of a field investigation or other information, however obtained, on whether an appropriation has not been put to a beneficial use, in whole or in part, for five or more consecutive years.

...

The Department must provide notice (in accordance with *Neb. Rev. Stat.* § 46-229.03) of its preliminary determination and allow thirty days for the rights-holder to contest such determination. *Neb. Rev. Stat.* § 46-229.02(1)(b).

...  
The Department has made no determination under *Neb. Rev. Stat.* § 46-229.02(1)(a). It is not clear where the Department stands on the forfeiture issue in this proceeding, or what the Department's "preliminary determination" is under the statutes.

The parties entered into a stipulation filed with the Department on December 13, 2012. In part it states:

The undersigned parties hereby stipulate as follows:

To expedite the hearing in the above-captioned matter, the parties will offer the previously admitted testimony and exhibits, but reserve all previous objections and the right to object on the basis of relevance and materiality with respect to the issues now before the Department of Natural Resources (DNR).

At the March 27, 2013, hearing held in this matter, the original testimony and exhibits were offered and received subject to specific objections (26:13-14). (Hereafter the testimony in the original proceedings will be referenced as 2010 followed by a comma, then the page number and a colon followed by line numbers.) In addition, in the December 2012 stipulation the parties identified the testimony from the proceeding in 2010 upon which they relied to support their relative positions. The junior appropriators identified specific pages and lines of testimony of three witnesses and seven exhibits. The exhibits relied upon were of varying length. Thus, exhibit 1 contains 181 pages, exhibit 2 contains 727 pages, exhibit 3 contains 254 pages, exhibit 18 contains 244 pages, and exhibit 26 contains 257 pages. Exhibit 27 was only 8 pages in length. At no point did the junior appropriators ever identify what evidence in exhibits 1, 2, 3 or 27 supports the claims in their "Request for Hearing" that NPPD has either abandoned or statutorily forfeited all or any portion of any of its water rights at issue in this matter.

Upon motion Weinreis Brothers Partnership was added as a party due to the assignment to it of the following water appropriations from Jack Bond:

A-11815, A-18084, A-18183, A-18424, A-18434, A-18436 and A-18437.

Two days prior to the evidentiary hearing in this matter a motion was filed and Jack Bond subsequently was withdrawn as a party.

A water right application was filed for the "Joe McClaren Ranch Co." (Exhibit 16, p. 1) on April 20, 2006, and signed by its legal counsel, Don Blankenau. The application was approved on January 25, 2007 (Exhibit 16, pp. 6-7). In the file is a letter from the "McClaran Ranch Company." (Exhibit 16, p. 9) Also in the file is the Return of Appraisers in the County Court of Boyd County in the case of Jack Bond and Joe McClaren Ranch, LLC vs. NPPD. (Exhibit 16, pp. 18-19). On March 1, 2013, the Hearing Officer at a prehearing conference noted the

discrepancies and requested counsel to specify the nature of that entity's existence. (Order, March 5, 2013) In a filing dated March 18, 2013, counsel stated:

McClaren is a Nebraska Corporation and has been duly registered with the Nebraska Secretary of State since 1968 as "The Joe McClaran Ranch Company."

When asked if Joe McClaren Ranch was doing business as if it was an unorganized association or what it was, counsel claimed they were the same entity with different spellings (35:15-36:13). Thus, there is no legal entity or corporation by the name of Joe McClaren Ranch Co.

The evidentiary hearing of the issues remanded to the Department by the Nebraska Supreme Court was scheduled for March 27 and 28, 2013. Other than offering the testimony presented in the original hearing in 2010 and the exhibits offered at that time, the junior appropriators in their case offered no new exhibits and called no witnesses. (14:15-25; 36:14-20; 40:25-41:2) In neither the 2010 or the current proceedings have any of the partners, shareholders or individuals comprising junior appropriators appeared or testified.

Initially the junior appropriators took the position that their claims should be considered as of the date of their initial filing (May 11, 2007) (32:10-16). Subsequently, objections were made to evidence relating to items subsequent to 2007 but not to evidence including years up to and including all of 2007. (61:16-23; 65:21-24). However, when Exhibit 46 was originally offered on July 27, 2010, by the junior appropriators the justification was that ". . . it's an ongoing call from 2007. . . ." (2010, 73:3-10) Also, counsel for the junior appropriators asked NPPD's witness about actions taken by NPPD subsequent to the filing of its Request for Hearing and up to the hearing in July 2010 (2010, 27:25-28:11). Additionally, counsel for the junior appropriators did not object to exhibits 39 and 45 (2010, 211:12-17; 212:19-22) which reflected information regarding flows at the Spencer facility through May 1, 2010.

#### RULINGS ON OBJECTIONS RESERVED AT THE MARCH 27, 2013 HEARING

Junior appropriators offered exhibits 17, 18 and 26. Exhibit 17 is a 640-page document entitled "2006 Annual Evaluation of Availability of Hydrologically Connected Water Supplies." It is stated on the cover page that it was published by the Nebraska Department of Natural Resources and is dated December 30, 2005. Exhibit 18 is a 244-page document entitled "Nebraska Department of Natural Resources 2007 Annual Evaluation of Availability of Hydrologically Connected Water Supplies" published by the Nebraska Department of Natural Resources dated December 13, 2006. Exhibit 26 is a 257-page document entitled Nebraska Department of Natural Resources 2008 Annual Evaluation of Availability of Hydrologically Connected Water Supplies, Determination of Fully Appropriated," published by the Nebraska Department of Natural Resources dated October 16, 2007.

At the time of the offer (14:15-25), objection was made by counsel for the Department to all three exhibits (22:21-23:7) and to the 2008 Evaluation (Exhibit 26) by NPPD (23:8-11). Junior appropriators responded (23:14-20) and at the time of closing argument offered to submit a post hearing document identifying the specific pages they believed demonstrated abandonment by

NPPD in the three exhibits, which are annual reports prepared by the Department (136:23-137:13). The post hearing filing was made which contained those references.

The junior appropriators in their closing argument (132:6-133:1) argued that development occurred in the basin in the form of new water rights issued over an indefinite period of years and that NPPD had not placed a call until the one which precipitated this case. Exhibits 17 and 18 contain some indication of the issuance of appropriations subsequent to some if not all of the appropriations associated with NPPD's rights associated with the Spencer facility. To some extent the evidence in those exhibits is cumulative of the stipulation of the parties (Exhibit 27, p. 3, II. 1, 2, 4) but it potentially could be relevant. Exhibit 26 is dated October 16, 2007, and its conclusions relative to the Niobrara River were set aside by the Nebraska Supreme Court in *Middle Niobrara NRD v. DNR*, 281 Neb. 634, 799 N.W.2d 305 (2011). Thus, in addition to being inconsistent with the junior appropriator's initial position that their case is based upon the circumstances that existed when their case was filed, some of the information in the report is cumulative, much of it is irrelevant in that most of the report discusses topics unrelated to this matter and river basins other than the lower Niobrara and portions of it was set aside by the Supreme Court. However, all three exhibits are admitted and any relevant evidence that they contain is considered in this decision.

Exhibits 50, 51, 52, 65, and 67 were each offered by NPPD. Each contains information regarding NPPD's gross generation, costs, employees, power lease receipts, and flows through the turbines at Spencer prior to 2007, the year 2007 and subsequently. Objection was made only to information in each regarding what each contains that occurred subsequent to 2007. These exhibits will be admitted and the objected to portions are considered separately only for the purpose of considering the junior appropriators claims to the extent they are considered regarding facts that occurred after 2007.

Exhibit 62 is the legislative history of LB 302 passed in 1993. The junior appropriators objected to the hearing officer taking official notice of this exhibit (33:20-34:24). See Objection to Legislative History, dated March 18, 2013, filed with the Department by the junior appropriators. The Legislative History relates to the amendment of *Neb. Rev. Stat. § 46-229* and was not in evidence and thus available to the Department or the Supreme Court when this matter was previously before the Department. It is relevant, reflects the intent of the Legislature and is admitted.

#### FINDINGS OF FACT

1. NPPD is a public corporation and a political subdivision of the State of Nebraska (Stipulation, Exhibit 27, p. 1).
2. NPPD is the owner of record of three surface water appropriations for hydropower generation and two permits to raise the head for power at the Spencer Hydropower Plant. The NPPD surface water appropriations are senior in time to junior appropriators' surface water appropriations for irrigation and domestic use (Exhibits 1, 2, 3, and 27). NPPD's appropriations and permits are described below.

- A. A-359R with a priority date of September 12, 1896, for 35 cubic feet per second (cfs) from the Minnechaduzza Creek for the Pierce Milling Plant in Cherry County (Exhibit 1). On January 29, 1996, NPPD applied for a transfer in location of use (T-433) of the appropriation from Minnechaduzza Creek to the Niobrara River for the Spencer Hydropower Plant (Exhibit 1, pp. 108-109, 117-119). In allowing the transfer, the Department specified that NPPD may not request administration of appropriations that would not have been administered for A-359 prior to June 6, 1997 (Exhibit 1, pp. 118-119). At no time has the Department or its predecessors ever requested power lease payments for this appropriation which was issued prior to the adoption of the statute in 1921 that requires applicants for water power to enter into a contract with the State of Nebraska to lease the use of the water and pay specified fees. *Neb. Rev. Stat.* § 46-236.
  - B. A-1725 with a priority date of October 30, 1923, for 1450 cfs (Exhibit 2, pp. 51-52). There is a lease agreement between NPPD and the State of Nebraska dated February 5, 1973, for the lease of the water for power purposes (Exhibit 2, pp. 513-514). NPPD is current on its annual payment for this lease (Exhibit 2).
  - C. A-3574 with a priority date of June 8, 1942, for 550 cfs (Exhibit 3). There is a lease agreement between Consumers Public Power District, a predecessor of NPPD, and the State of Nebraska for the lease of water dated April 3, 1944, and this lease was renewed on February 14, 1975, by NPPD (Exhibit 3, pp. 32-33 and 122-123). NPPD is current on its annual payment for this lease (Exhibit 3).
  - D. A-1777 to raise the dam height to increase head (Exhibit 4).
  - E. A-1955 to raise the dam height to increase head (Exhibit 5).
3. The junior appropriators appear to be a corporation or perhaps an unincorporated association and a partnership which apparently own certain real property along the Niobrara River and are the owners of record of water appropriations for irrigation and domestic use, as reflected in Department records that are located upstream and junior in time to the Spencer Hydropower Plant (Exhibits 6-8, 11, 12, 14-16, 27, and 53-59).
    - A. The Joe McClaren Ranch Co. purportedly is located approximately 145 river miles upstream from the Spencer Hydropower Plant (Exhibit 27, paragraph 6). The Joe McClaren Ranch Co. holds surface water appropriation A-18390 to divert water from the Niobrara River for irrigation use in an amount not to exceed 7.16 cfs with a priority date of April 20, 2006 (Exhibit 27, paragraph 6, and Exhibit 16, pp. 31-35).
    - B. Weinreis Brothers Partnership appropriates water from the Niobrara River approximately 145 river miles upstream from the Spencer Hydropower Plant (Exhibit 27, paragraph 5). It holds the following surface water appropriations. All are from the Niobrara River except for the two noted that are from tributaries to the Niobrara River.

- (1) A-11815 for irrigation purposes with a priority date of October 10, 1969, for a maximum amount of 1.31 cfs (Exhibit 6, pp. 45-46).
  - (2) A-18084 for irrigation purposes with a priority date of June 10, 2002, for a maximum amount of 2.29 cfs (Exhibit 7).
  - (3) A-18183 for irrigation purposes with a priority date of August 7, 2003, for a maximum amount of 8.00 cfs (Exhibit 8, p. 12).
  - (4) A-18424 for domestic purposes with a priority date of September 22, 2006, for a maximum amount of 0.02 cfs (Exhibit 11).
  - (5) A-18434 for irrigation purposes with a priority date of December 14, 2006, for a maximum amount of 0.44 cfs from a tributary of the Niobrara River (Exhibit 12).
  - (6) A-18436 for irrigation purposes with a priority date of December 14, 2006, for a maximum amount of 0.98 cfs from a tributary to the Niobrara River (Exhibit 14).
  - (7) A-18437 for domestic purposes with a priority date of December 14, 2006, for a maximum amount of 0.011 cfs (Exhibit 15).
4. Prior to the 2007 irrigation season, DNR records do not indicate that any owner of the Spencer Facility had placed a written call for water administration on the Niobrara River in over 50 years (Exhibit 27, p. 3, 1).
  5. On March 2, 2007, NPPD sent to the then Director of the Department a letter requesting the Department administer water rights for the benefit of the water rights associated with the Spencer Hydropower Plant (Exhibit 27, p. 3, 4; Exhibit 19).
  6. On May 11, 2007, Junior Appropriators filed a "Request for Hearing . . ." ". . . pursuant to *Neb. Rev. Stat.* § 62-206 [sic § 61-206]."
  7. On May 17, 2007, and June 26, 2007, NPPD sent letters to the Department requesting that the administration of the Niobrara River be delayed until July 1, 2007, and August 1, 2007, respectively, so that NPPD could obtain subordination agreements with any junior appropriator upstream of the Spencer Hydropower Plant that NPPD was able to obtain (Exhibit 27, paragraphs 11-12).
  8. On March 12, April 3, April 5, and April 23, 2007, Department staff measured the flow of the Niobrara River to determine whether Spencer Hydropower Plant was receiving flows sufficient to satisfy its appropriations. Sufficient water was in the river at the time of the March 12, April 3, and April 23 measurements. The April 5 measurement did not

result in regulation because of the pending shutdown of the Spencer Hydropower Plant for maintenance (Exhibit 31, paragraph 3; and Exhibit 33, paragraphs 10-15).

9. On April 30, 2007, a stream measurement was taken on the upstream side of the Highway 11 bridge near Butte, Nebraska, which indicated the total discharge to be 1,993.73 cfs, which was insufficient for the permits associated with the Spencer Hydropower Plant (Exhibit 33, paragraphs 16-17). The location of the Highway 11 bridge in relation to the Spencer Hydropower Plant is shown on Exhibit 47 and is approximately ten miles upstream of the Spencer facility (2010, 76:23-25).
10. The Department and its predecessor agencies have issued approximately 400 appropriations upstream of the Spencer facility subsequent to the date of priority of appropriation A-3574. (Exhibit 27, p. 3:2)
11. The Water Resources Manager for NPPD has worked for NPPD since fall 1976 (2010, 14:5-12, 14:20-15:1). He has held various positions with NPPD including the FERC (Federal Energy Regulatory Commission) relicensing project manager for the North Platte (River) Hydro Keystone Diversion Project (15:10-21).
12. NPPD holds water rights in the Platte River Basin for hydropower, fossil fuel generation, storage of water, irrigation, and storage water use (2010, 17:17-20). The North Platte hydropower facility has appropriations from the South Platte River, Lake McConaughy, Sutherland Reservoir, and Lake Maloney (2010, 18:3-22).
13. NPPD's Water Resources Manager placed a "call" on behalf of NPPD pursuant to the prior appropriation statutes for administration of water rights in the Niobrara River Basin relative to the permits associated with the Spencer Hydropower facility (2010, 22:3-11). The manager was somewhat familiar with Department administration of the Platte River on a regular and routine basis (2010, 22:22-23:5). He was also aware of regular administration on the Big and Little Blue Rivers and Republican River (2010, 25:8-25). The manager also learned through conversations with the Department in 2006 that such administration was not occurring in the lower portion of the Niobrara River on a regular basis and if NPPD wanted administration for its water rights, it had to place a written request (2010, 23:11-22). Subsequent to placing the call NPPD was not notified by the Department when administration of junior rights was occurring on the Niobrara River (2010, 235:10-24). The manager was not aware of any actions by NPPD that would evidence an intention on the part of NPPD to forsake or desert the right to generate power through the Spencer Hydropower (2010, 213:13-17).
14. The Spencer facility, like the two other hydropower facilities operated by NPPD in the Platte River Basin, produces power twenty-four hours/day seven days/week under normal operating conditions and has done so since 1927, except when damaged or when shut down for maintenance (2010, 53:11-55:5).
15. Based upon research conducted at some indefinite time, NPPD's Water Resources Manager learned that the predecessor to NPPD that owned the Spencer facility did make

a “call” on the river in the 1940’s but the predecessor to the Department responded that it did not have the staff to administer the river (2010, 216:1-217:9).

16. From the date when NPPD was formed in 1970, it has expended funds to maintain and upgrade the facilities associated with the Spencer Hydropower facility, including over \$1.2 million since 1996 (2010, 205:6-206:14).
17. The Department administers the Platte River Basin differently than the other river basins due to a variety of complicating factors such as a U.S. Supreme Court Decree and the presence of storage water (2010, 163:11-164:4; 165:12-166:11; 173:7-174:14; 178:8-180:14; 184:17-186:13; 187:18-188:12). Administration in the Platte Basin occurs automatically (2010, 165:5-11). Administration has been aided by a computer program, a tool, the Platte River (sic) [Water] Accounting Program (PWAP), to assist in tracking water. Water has been tracked in the Platte Basin by the state since at least the entry of the North Platte Decree (1945) (2010, 165:12-166:11).
18. As reflected in Exhibit 39, for a number of days during 2006 (January 1-9, 12-13, 15; February 24-25; March 28-31; April 1-10; June 20; and December 21, 25), the total amount of flow granted by the appropriations for the Spencer Hydropower Plant was taken through the power plant facilities. That same exhibit reflects that the total amount of flow granted by the appropriations for the Spencer Hydropower Plant was taken through the power plant facilities on various dates in 2005, 2007 and 2008. See also Exhibits 45 and 67.
19. The evidence reflects that NPPD made power lease payments when requested by the Department and was current for water rights A-3574 (Exhibit 3, pp. 179-241; Exhibit 65, p. 1), and A-1725 (Exhibit 2, pp. 530-536, 539-560, 575-582, 589-598, 602-603, 617-627, 631-633, 639-641, 651, 658, 662, 664, 666-671, 676-682; Exhibit 65, p. 1).
20. The evidence reflects that NPPD and its predecessors generated electricity for many years (Exhibit 50; Exhibit 66), expended significant funds to operate and maintain the facility (Exhibit 51), and employed a varying number of people over the years to operate the facility (Exhibit 52).
21. In the lower Niobrara River Basin (Exhibit 17, p. 391) as of October 1, 2005, there existed over 750 appropriations (Exhibit 17, p. 394; Findings of Fact, 21). In the Big Blue Basin there are approximately 1,500 surface water appropriations (Exhibit 17, p. 50), and 650 in the Little Blue River Basin (Exhibit 17, p. 64), 550 in the Elkhorn River Basin (Exhibit 17, p. 129), 1,200 in the Loup River Basin (Exhibit 17, p. 202), 350 in the Missouri River Tributaries Basin (Exhibit 17, p. 286), 800 in the Nemaha River Basin (Exhibit 17, p. 349), and 550 in the lower Platte River Basin (Exhibit 17, p. 461).
22. As noted in the initial hearing when a call is placed by the owner of a surface water right, a field office employee of the Department goes to the location of the appropriation diversion to determine if adequate water is present (2010, 64:7-20; 66:6-22; 73:15-74:22). In the area serviced by the Ord Field Office, which includes the Loup River Basin

as well as a portion of the Niobrara River Basin (2010, 62:8-21), there is a supervisor and three other employees (2010, 80:3-4). The field office oversees water administration, dam inspections, streamgaging, canal gaging (2010, 62:13-16), and field investigations (2010, 92:7-93:2). Gaging as one of the duties is a detailed and complicated process which takes a significant amount of time to complete. (See the description of the process to perform a measurement as well as the measurement notes contained in Exhibit 33).

23. As stated in *Mader v. Mettenbrink*, supra, intention to abandon is a question of fact to be ascertained from all of circumstances of the case. Based upon all of the foregoing facts that are supported by evidence only through 2007, it is found that NPPD did not intend to abandon all or any portion of any of its appropriations associated with its Spencer Hydropower facility through the end of 2007.
24. Based upon all of the foregoing facts that are supported by all of the evidence admitted into the record, it is found that NPPD did not intend to abandon all or any portion of any of its appropriation associated with its Spencer Hydropower facility.

## CONCLUSIONS OF LAW

### Abandonment

1. The Nebraska Supreme Court, quoting from an Idaho case, relative to abandonment of a water right stated: "Abandonment' is the relinquishment of a right by the owner thereof, without regard to future possession by himself or any other person, but with the intention to forsake or desert the right." *State v. Oliver Brothers*, 119 Neb. 302, 228 N.W. 864, 865 (1930). Also, the Supreme Court, in considering whether an easement had been abandoned and quoting from an earlier case, stated in *Mader v. Mettenbrink*, 159 Neb. 118, 130, 65 N.W.2d 334, 343 (1954):

An easement may be abandoned by unequivocal acts showing a clear intention to abandon and terminate the right, or it may be done by acts in pais without deed or other writing. The intention to abandon is the material question, and it may be proved by an infinite variety of acts. It is a question of fact to be ascertained from all the circumstances of the case; and, as a rule, no one case can be authority for another. Time is not a necessary element; it is not the duration of the nonuser, but the nature of the acts done by the dominant owner, or of the adverse acts acquiesced in by him, and the intention which the one or the other indicates, that are important, and a cessation of use for a term less than the prescriptive period, accompanied by acts clearly indicating an intent to abandon the right, will work an extinguishment of the easement.

In this proceeding the evidence relative to abandonment will be considered as of the end of 2007 and as of the date of most recent hearing (March 27, 2013).

A. As of the end of 2007.

The evidence reflects that NPPD made power lease payments when requested by the Department and was current for water rights A-3574 (Exhibit 3, pp. 179-241; Exhibit 65, p. 1), and A-1725 (Exhibit 2, pp. 530-536, 539-560, 575-582, 589-598, 602-603, 617-627, 631-633, 639-641, 651, 658, 662, 664, 666-671, 676-682; Exhibit 65, p. 1; Findings of Fact, 19).

The evidence reflects that at various times NPPD had used the full amount of the flow available up to and including the total of its three appropriations (Exhibit 39, pp. 1-6; Exhibit 45, pp. 1-5; Exhibit 67, p. 2; Findings of Fact, 18).

The evidence reflects that NPPD and its predecessors generated electricity for many years (Exhibit 50; Exhibit 66), expended significant funds to operate and maintain the facility (Exhibit 51), and employed a varying number of people over the years to operate the facility (Exhibit 52; Findings of Fact, 20).

Additionally, the evidence reflects that NPPD's employee responsible for management of water resources believed that the Niobrara River was proactively administered by the Department as the North Platte and Platte River basins were administered without a call being placed. Once the employee became aware of the difference, a written call was placed on behalf of NPPD (Findings of Fact, 13.)

The foregoing evidence demonstrates NPPD's actions to continuously use and maintain its water rights for the Spencer Hydropower facility. The junior appropriators' argument that NPPD did not place a call does not demonstrate any intention to abandon its water right but if anything it reflects NPPD's misunderstanding regarding how the Niobrara River was administered in contrast to how the North Platte and Platte River basins were administered.

Additionally, NPPD's lack of objections to applications by persons or entities that obtained junior water rights does not reflect abandonment of its water rights. As the holder of senior rights, its interests are protected by the State Constitution Article XV, Section 6 and state statutes *Neb. Rev. Stat. §§ 46-203 and 46-204* that establish the prior appropriation system in Nebraska. Moreover, under the current standards for standing as established by the Nebraska Supreme Court, NPPD would not have standing to object to the applications. (*CNPPID v. North Platte NRD*, 280 Neb. 533, 788 N.W.2d 252 (2010))

It is concluded that the evidence regarding abandonment is overwhelmingly favorable to the finding that NPPD did not abandon any of its water rights associated with its Spencer Hydropower facility. The junior appropriators not only failed to carry their burden of proof but offered no credible evidence that would support a finding of abandonment.

In addition to not being supported by the state constitution and state statutes, the junior appropriators' position is meritless in the context of the surface water administrative system. Thus, for example, in the lower Niobrara River Basin (Exhibit 17, p. 391) as of October 1, 2005, there existed over 750 appropriations (Exhibit 17, p. 394; Findings of Fact, 21). The junior appropriators' position is that to avoid abandonment every appropriator would have to object to every new application filed in the Department that was upstream of an existing appropriation. Depending upon the number of applications filed in any year and the location of the proposed point of diversion, hundreds if not thousands of objections would be required every year in the lower Niobrara River Basin. Additionally considering other river basins in Nebraska serves to only further reflect the impracticability of the claim that existing rights have to object to new applications. Exhibit 17 did not specify the number of existing appropriations within the entire state but it did provide the approximate number in the then non-fully appropriated basins. Thus it was stated that in the Big Blue Basin there are approximately 1,500 surface water appropriations (Exhibit 17, p. 50), and 650 in the Little Blue River Basin (Exhibit 17, p. 64), 550 in the Elkhorn River Basin (Exhibit 17, p. 129), 1,200 in the Loup River Basin (Exhibit 17, p. 202), 350 in the Missouri River Tributaries Basin (Exhibit 17, p. 286), 800 in the Nemaha River Basin (Exhibit 17, p. 349) and 550 in the lower Platte River Basin (Exhibit 17, p. 461; Findings of Fact, 21). For these river basins the total is approximately 6,350 and it is not apparent if the numbers consider individual users within irrigation districts and other similar organizations. These numbers exclude other significant basins such as the North, South and Platte Basins as well as the Republican River Basin. The number of objections that would be required to be filed to avoid abandonment under the junior appropriators' theory would be in the tens of thousands.

The junior appropriators' position that a water appropriation owner must place a call for administration in order to avoid abandonment is likewise meritless. As noted in the initial hearing when a call is placed by the owner of a surface water right, a field office employee goes to the location of the appropriation diversion to determine if adequate water is present (2010, 64:7-20; 66:6-22; 73:15-74:22). In the area serviced by the Ord Field Office, which includes the Loup River Basin as well as a portion of the Niobrara River Basin (2010, 62:8-21), there is a supervisor and three other employees (2010, 80:3-4). The field office oversees water administration, dam inspections, streamgaging, canal gaging (2010, 62:13-16) and field investigations (2010, 92:7-93:2). Gaging as one of the duties is a detailed and complicated process which takes a significant amount of time to complete. (See the description of the process to perform a measurement as well as the measurement notes contained in Exhibit 33; Findings of Fact, 22.) Given the magnitude of the area covered by the Ord Field Office (and each of the others) (Exhibit 35, p. 2), the scope of the work performed and the limited number of employees in the field if all of the water rights in the Loup (1,200) and Niobrara River basins (750) had to place calls to preserve their rights against allegations of abandonment, there would not be enough employees to accomplish the critical

functions of the Department. If the junior appropriators' position were required to be followed and existing water right holders not only have to object to new applications but also have to place calls to avoid claims of abandonment, the Department will have to reallocate resources from other critical functions, such as safety of dams. Moreover, as a reflection of the absurdity of the junior appropriators' position, they have never placed a call as reflected in their surface water appropriation files and thus under their own theory their rights could be considered abandoned.

B. Subsequent to 2007.

Subsequent to 2007, NPPD continued to pay the power lease fees for which it was billed by the Department (Exhibit 65, pp. 2-5). It also generated electricity by use of the Spencer facility (Exhibit 50), expended funds for its maintenance (Exhibit 51), and had employees who were assigned to the facility (Exhibit 52). NPPD also, at various times, passed through its hydropower turbines the full rate of its diversion or use quantity (Exhibit 39, Exhibit 67). Thus as a finding of fact, and conclusion therefrom, subsequent to 2007 there is no credible evidence that NPPD abandoned any of its water rights associated with its Spencer Hydropower facility.

#### Statutory Forfeiture

Statutory forfeiture is governed by *Neb. Rev. Stat.* §§ 46-229 through 46-229.05. Initially if the Department either based upon a field investigation or based upon other information, however obtained, makes a preliminary determination that an appropriation has not been used in whole or in part for a beneficial or useful purpose or has ceased to so be used for more than five consecutive years, if such determination is made then the Department is required to give notice of such preliminary determination. *Neb. Rev. Stat.* §§ 46-229.02(1)(a) and (b). Upon giving notice, the Department is required to allow an owner of the appropriation 30 days to contest the preliminary determination. *Neb. Rev. Stat.* § 46-229.02(1)(b).

The junior appropriators in their December 21, 2012, filing (p. 5) acknowledged that the Department has made no preliminary determination under *Neb. Rev. Stat.* § 46-229.02(1)(a). At the hearing they offered no evidence that the Department had made the required preliminary determination or that the Department had provided notice in accordance with *Neb. Rev. Stat.* § 46-229.03 as required by *Neb. Rev. Stat.* § 46-229.02(1)(b).

The junior appropriators in their opening and closing arguments asserted that NPPD forfeited its appropriations because it failed to place a call. (28:8-17; 132:6-133:1). As noted in the preceding review of the controlling statute, not placing a call is not a basis for statutory forfeiture. Based upon the record in this proceeding the junior appropriators, despite their claim made on May 11, 2007, offered no evidence that statutory forfeiture has occurred relative to NPPD's appropriations associated with the Spencer facility.

Exhibit 62 is the legislative history of LB 302 adopted in 1993 by the Nebraska Legislature. One of the changes it made was to *Neb. Rev. Stat.* § 46-229. Specifically it made the following change:

1. Insert the following new sections:

“Sec. 2. That section 46-229, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

46-229. All appropriations for water must be for some beneficial or useful purpose, and, except as provided in sections 46-290 to 46-294, when the appropriator or his or her successor in interest ceases to use it for such purpose for more than three consecutive years, the right ceases may be terminated only by order of the Director of Water Resources following a hearing pursuant to sections 46-229.02 to 46-229.04. . . .”

Exhibit 62, p. 42.

Thus the change removed the general term “ceases” and replaced it with the provision specifying that a right may be terminated only following a hearing pursuant to *Neb. Rev. Stat.* §§ 46-229.02 to 46-229.04. The bill’s sponsor and sponsor of the amendment, Senator Wickersham, an attorney, explained the purposes of his bill. He stated:

Now, there are cases that are cited in support of that proposition. I think one of the earliest ones is *State. . . State v. Nielsen* (phonetic), there are other cases that are also cited for that proposition, *North Port v. Jess* is sometimes cited for that proposition, and there are others. I think those cases are wrong. I do not believe you lose a water right without an adjudicatory process. . . . So the amendment I have passed around to you is submitted for the express purpose of overruling, legislatively, any suggestion in *Nielsen*, *North Port*, or other cases of that kind, that you automatically lose a water right without an adjudicatory hearing. And the language that you see to be appended to 46-229, I believe does that. It very simply states that you will lose a water right only following . . . by order of the director of Water Resources, following a hearing. Now, one other aspect of how you can lose a water right. The Nebraska Supreme Court has indicated in cases that you can lose water rights through abandonment, and you can also lose water rights for non-user, for a period greater than 10 years, under what we normally say are the prescriptive right statutes, it’s 25-202, I believe, is a 10-year statute of limitations applicable to real estate. I think it would be better policy for the State of Nebraska to have one procedure clearly set out in statute for the cancellation of water rights, and I believe in addition to making clear that you can’t automatically lose a water right under the forfeiture statutes, I am also intending that this amendment make clear that you do not lose water rights through the prescriptive period, statute of limitations, nor do you lose them through abandonment. You lose them only through the statutory procedure that is set out in 46-229 et sequence. That is . . .

I believe that is desirable for purposes of clarity, and comprehension of what the policies of the State of Nebraska are.

Exhibit 62, pp. 5-6. (emphasis added)

This explanation by Senator Wickersham demonstrates the intent of the Legislature to eliminate abandonment as a basis for losing a water right and that such rights may be lost in whole or in part only through the procedures established in *Neb. Rev. Stat.* §§ 46-229.01 through 46-229.04. As noted by Senator Wickersham, the result is the creation of one procedure, providing clarity and comprehension. Subsequent to its adoption and effective date, LB 302 has been implemented and interpreted by the Department so that not only will certainty be provided to water users but so will a clearly defined and understandable sequence of steps. Thus water right holders through these statutes know that until the Department makes a preliminary determination that an appropriation has not been used and gives notice (*Neb. Rev. Stat.* § 46-229.02(1)), its water rights are not subject to cancellation. As allowed by the statutes, the Department does accept information from the public which can be the basis for initiating a statutory forfeiture proceeding (“If, based upon the results of a field investigation or upon information, however obtained, the department makes a preliminary determination . . . (emphasis added) *Neb. Rev. Stat.* § 46-229.02(1)). However, as a result of the Department utilizing the Legislatively prescribed procedures established in *Neb. Rev. Stat.* § 46-229.01, statutory forfeiture cases are initiated only after the Department has sufficient information to justify such a proceeding and gives notice to the water right holder.

In the present matter the junior appropriators offered no evidence justifying a statutory forfeiture or abandonment proceeding.

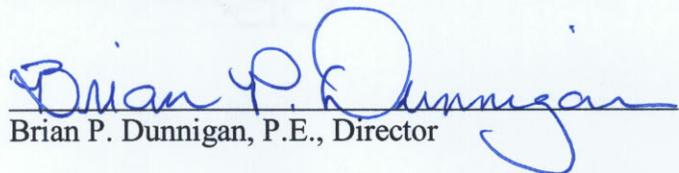
#### ORDER

Based upon the credible evidence admitted, the findings of fact and the conclusions of law it is ORDERED:

The junior appropriators’ claims that the water rights held by NPPD associated with the Spencer Hydropower facility have been abandoned or forfeited are DENIED.

DEPARTMENT OF NATURAL RESOURCES

Date: July 31, 2013

  
Brian P. Dunnigan, P.E., Director

CERTIFICATE OF SERVICE

A copy of this Order was posted on the Department's website. A copy of this Order was hand delivered to Tom O'Connor and provided to the Department's field office in Ord, Nebraska. A copy of this Order was mailed on July 31, 2013, to the following:

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