

STATE OF NEBRASKA
DEPARTMENT OF NATURAL RESOURCES

In Re the Matter of the Contest of)	Case 005-10CC
Preliminary Determination of)	
Nonuse of A-13591)	ORDER OF CANCELLATION
)	IN PART OF WATER RIGHT
)	APPROPRIATION A-13591
Water Division 2A)	

BACKGROUND

On April 8, 2010, the Department of Natural Resources ("DNR") staff conducted a field investigation regarding beneficial use of A-13591. On June 30, 2010, a Preliminary Determination of Nonuse ("PDNU") was issued by DNR indicating non-use of a portion of the appropriation for more than five years and preliminarily cancelling the non-used portion.

FINDINGS OF FACT

1. Records on file in the DNR show that surface water appropriation A-13591 is held by Kent Tibbetts. (Exhibits 1,2,3)
2. A search of the records of the Nance County Assessor indicates the land appurtenant to appropriation A-13591 includes the names as owners Rodney Kent Tibbetts and Patricia Tibbetts. (Exhibit 4)
3. Appropriation A-13591 with a priority date of May 27, 1975, authorizes the use of water for irrigation of the 170.0 acres of land described below. The water may be diverted from the Loup River at points of diversion located on the left bank of the stream in the N $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 7, Township 15 North, Range 7 West of the 6th P.M. in Nance County. The rate that water may be diverted shall not exceed one cubic foot per second (cfs) for every 70 acres irrigated at a maximum rate of 2.43 cfs.

<u>Township 15 North, Range 7 West of the</u>		
<u>6th P.M. in Nance County</u>		<u>Acres</u>
Section 7:	NW $\frac{1}{4}$ NW $\frac{1}{4}$	18.0
	NE $\frac{1}{4}$ NW $\frac{1}{4}$	19.0
	SW $\frac{1}{4}$ NW $\frac{1}{4}$	40.0
	SE $\frac{1}{4}$ NW $\frac{1}{4}$	40.0
	NW $\frac{1}{4}$ SW $\frac{1}{4}$	27.0
	NE $\frac{1}{4}$ SW $\frac{1}{4}$	<u>26.0</u>
	TOTAL	170.0

(Exhibit 1)

4. The Department has received information concerning the use of surface water appropriation A-13591 that indicates a portion of the appropriation has not been used for its required purpose for more than five consecutive years. On April 8, 2010, the Department conducted a field investigation regarding beneficial use of appropriation A-13591. (Exhibit 7)
5. On June 30, 2010, the Department issued a Notice of Preliminary Determination of Nonuse that the following portion of land authorized for irrigation under appropriation A-13591 had not been irrigated for at least five years:

<u>Township 15 North, Range 7 West of the</u>		
<u>6th P.M. in Nance County</u>		<u>Acres</u>
Section 7:	NW $\frac{1}{4}$ NW $\frac{1}{4}$	18.0
	NE $\frac{1}{4}$ NW $\frac{1}{4}$	19.0
	SW $\frac{1}{4}$ NW $\frac{1}{4}$	40.0
	SE $\frac{1}{4}$ NW $\frac{1}{4}$	38.7
	NW $\frac{1}{4}$ SW $\frac{1}{4}$	22.5
	NE $\frac{1}{4}$ SW $\frac{1}{4}$	<u>24.5</u>
	TOTAL	162.7

(Exhibit 6)

6. The Notice was displayed on the Department's website for over 30 days and was delivered by certified mail to Rodney Kent and Patricia Tibbetts, 15993 Valley Road, Palmer, Nebraska 68864. (Exhibit 6)
7. A contested hearing of this matter was requested by Mr. Tibbetts. The hearing was held at Department headquarters, December 17, 2010, and a record made of the hearing and determination.
8. A 162.7 acre portion of A-13591 was not irrigated at any time during the five years prior to the April 8, 2010, field report. (Exhibit 7)
9. Stream flow data for the five years preceding the PDNU measured at stream gages immediately above and immediately below the A-13591 diversion point on the Loup River indicated flow quantities that exceeded the total amount authorized for irrigation under A-13591. (Exhibit 13)
10. The land subject to A-13591 was not listed on the Nance County tax role as irrigated land at any time during the prior five year period. (Exhibit 14)
11. Mr. Tibbetts testified that land farmed by him immediately adjacent to the A-13591 lands but not included in A-13591 lands was irrigated by him with water from the Fullerton Irrigation Canal every year during the prior five year period. (Record: p. 23, l. 11-16)
12. During the five years prior to the April 8, 2010, field report, Mr. Tibbetts irrigated only 7.3 acres of the lands eligible for irrigation under terms of A-13591. (Exhibit 7; Record: p. 25, l. 8-24)

13. Mr. Tibbetts' testimony was that there was not enough water close to the bank of the stream to use a larger pump necessary to irrigate the full area covered by A-13591. (Record: p. 25, l. 8-24; p. 35, l. 12-24; Exhibit 10)
14. Evidence was presented of rainfall in the location in the prior five year period. (Exhibit 9)

CONCLUSIONS OF LAW

1. The verified field report was prima facie evidence of nonuse of a portion of the appropriation under Section 46-229.03.
2. DNR met its burden of proof for nonuse and the burden of proof shifted to Mr. Tibbetts on the question of legal sufficiency of nonuse under Section 46-229.04.
3. Evidence presented by Mr. Tibbetts for the excuse of unavailability of water did not meet his burden of proof for excuse when weighed against evidence presented showing that the stream flow of the Loup River immediately upstream and downstream of A-13591 exceeded the total amount authorized for irrigation under A-13591 for the five-year period preceding the PDNU.
4. Mr. Tibbetts' testimony regarding the location of the flow within the Loup River does not excuse nonuse due to unavailability of water. An adequate diversion structure is the responsibility of the appropriator and an inadequate diversion structure does not excuse nonuse. Section 46-229.02 (7)
5. The evidence regarding rainfall does not meet the burden of proof for nonuse due to principles of good husbandry based upon sufficient rainfall because of (1) Mr. Tibbetts' irrigation of other fields every year during the preceding five-year period and (2) Mr. Tibbetts' testimony that if he would have irrigated the land under A-13591 he would have improved its yield of grass for grazing.
6. The Preliminary Determination of Nonuse of A-13591 issued by DNR June 30, 2010, is sustained based upon the evidence admitted at the hearing.

It is therefore Ordered as follows:

1. Part of appropriation A-13591 at the rate of 2.32 cfs for use upon the land described below is CANCELLED.

Township 15 North, Range 7 West of the		
<u>6th P.M. in Nance County</u>		<u>Acres</u>
Section 7:	NW ¹ / ₄ NW ¹ / ₄	18.0
	NE ¹ / ₄ NW ¹ / ₄	19.0
	SW ¹ / ₄ NW ¹ / ₄	40.0
	SE ¹ / ₄ NW ¹ / ₄	38.7
	NW ¹ / ₄ SW ¹ / ₄	22.5
	NE ¹ / ₄ SW ¹ / ₄	<u>24.5</u>
	TOTAL	162.7

2. Appropriation A-13591 now authorizes the appropriator to divert water from the Loup River to irrigate the 7.3 acres of land described below and depicted on map number 17654 which is made a part of this Order. The water may be diverted from the Loup River at a point of diversion located on the left bank of the stream in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 7, Township 15 North, Range 7 West of the 6th P.M. in Nance County. The rate that water may be diverted shall not exceed one cfs for every 70 acres irrigated at a maximum rate of 0.11 cfs (49 gallons per minute).

Township 15 North, Range 7 West of the 6 th P.M. in Nance County		Acres
Section 7:	SE $\frac{1}{4}$ NW $\frac{1}{4}$	1.3
	NW $\frac{1}{4}$ SW $\frac{1}{4}$	4.5
	NE $\frac{1}{4}$ SW $\frac{1}{4}$	<u>1.5</u>
	TOTAL	7.3

3. All terms and conditions of appropriation A-13591 remain in effect unless specifically changed by this Order.
4. The appropriator must comply with all relevant statutes. This includes, but is not limited to, the following:
- A. Notify the Department of any change in ownership or address.
 - B. Notify the Department of the name and address of the person responsible for the use of the water appropriation (this may include farm managers, tenants, or relatives that actually apply the water to the approved use).
 - C. Obtain approval from the Department prior to taking any action that changes the location of the point of diversion, the location of the place of use, the type of use, or the type of appropriation.

ADDITIONAL INFORMATION

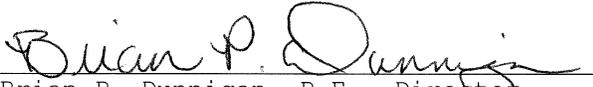
Failure to comply with all laws and regulations pertaining to surface water appropriations and any orders issued by the Director of the Department of Natural Resources may result in the cancellation of the appropriation, temporary closing of the appropriation, administrative penalty, criminal prosecution, or any combination thereof.

Nebraska law provides that failure to use a portion or all of a perfected appropriation for more than five consecutive years may result in cancellation of the appropriation.

This appropriation is not a guarantee that water will be available. Nebraska law gives priority to senior appropriations. This appropriation may be closed if there is insufficient water to satisfy senior appropriations. If you are not able to divert sufficient amounts of water, you may call for water by contacting your local field office.

DEPARTMENT OF NATURAL RESOURCES

June 1, 2011


Brian P. Dunnigan, P.E., Director

A copy of this Order was posted on the Department's website. Copies of this Order and map number 17654 were provided to the Department's field office in Ord, Nebraska. Copies of this Order and map number 17654 were mailed on June 1, 2011, to the following:

Rodney Kent and Patricia Tibbetts
15993 Valley Road
Palmer, Nebraska 68864