STATE OF NEBRASKA

DEPARTMENT OF NATURAL RESOURCES

DENIAL OF PETITIONS V-18 (VAR-1978) AND V-20 (VAR-1980) FOR LEAVE TO FILE APPLICATIONS FOR PERMITS TO APPROPRIATE SURFACE WATER

WATER DIVISION 1-A

BACKGROUND

1. On July 14, 2004, the Department of Natural Resources (Department) issued a formal moratorium on all new surface water appropriations in the Platte River Basin upstream of the confluence with the Loup River near Columbus, Nebraska. The moratorium included all tributary streams above the Loup River confluence including the North and South Platte Rivers and tributaries.

2. On September 15, 2004, the Department designated the Platte River Basin upstream of the Kearney Canal diversion, including areas determined by the Department to be hydrologically connected to the basin, as overappropriated, pursuant to *Neb. Rev. Stat.* § 46-713(4)(a). As part of the overappropriated designation, the Department continued the moratorium on issuing new surface water appropriations in the overappropriated area of the Platte River Basin. In order to manage the overappropriated reaches of the Platte River Basin, the Department and the natural resources districts (NRDs) affected by the overappropriated designation initiated a basin-wide planning process, as required by *Neb. Rev. Stat.* § 46-715(5)(a).

3. In two separate orders, the first on September 30, 2004, and the second on April 21, 2006, the Platte River Basin upstream of the confluence with the Loup River and downstream of the overappropriated area, including all areas determined by the Department to be hydrologically connected to the basin, was finally determined to be fully appropriated. As part of this determination, the Department continued the moratorium on issuing new surface water appropriations.

4. On January 1, 2007, work officially commenced on the Platte River Recovery and Implementation Program (PRRIP or Program). PRRIP's goals include reducing shortages to U.S. Fish and Wildlife Service target flows and providing additional land habitat for endangered species in the Lexington to Chapman reach of the Platte River. In order to meet these goals, each signatory to PRRIP has adopted depletions plans to address the mitigation of the adverse impacts of certain new water-related activities on streamflows in the Platte River. In addition to focus on new depletion, Nebraska's New Depletion Plan provides that the State of Nebraska will mitigate existing surface water and groundwater uses in order to return to a July 1, 1997, level of water-use development. Portions of the shortages to target flows are intended to be offset through water conservation and water supply projects identified by the PRRIP Governance Committee in the Water Action Plan, which provides guidance in implementing the water component of the

Program. A goal of the first thirteen-year increment of the Program is to attempt to retime and improve flows in the central Platte River so as to reduce shortages to target flows by an average of 130,000 to 150,000 acre-feet (AF) per year, as measured at Grand Island.

5. On April 12, 2007, the Central Nebraska Public Power and Irrigation District (Petitioner) filed Petition for Leave to File an Application for a Permit to Appropriate Water V-18, Petition for Leave to File an Application to Impound Water V-19, and Petition for Leave to File an Application for a Permit to Appropriate Water V-20 (variance petitions), which were subsequently designated VAR-1978, VAR-1979, and VAR-1980, respectively, in conformity with current Departmental filing nomenclature. The petitions will be referenced in this order with both the old and the new filing designations. Draft applications and support documents were filed along with each of the variance petitions.

6. Filing V-19 (VAR-1979) is not ruled upon in this Order. It is referenced here to give context to the ruling on V-18 (VAR-1978) and V-20 (VAR-1980). Filing V-19 (VAR-1979) is a Petition for Leave to File an Application to Impound Water. The Petitioner proposes to store an additional 60,000 AF per year in Elwood Reservoir for recreation, fish and wildlife, irrigation, and intentional underground water storage. Elwood Reservoir is an off-channel facility that receives its water supply from Petitioner's canal system, and it is located in parts of Townships 7 and 8, Ranges 22 and 23 West of the 6th P.M. in Gosper County. Petitioner currently stores water in Elwood Reservoir under appropriation A-2374R, obtained under Relocation Petition 403. This allowed for storage of up to 40,500 AF of water per year in lieu of storing water in Lake McConaughy under A-2374. Elwood Reservoir is located in the overappropriated area of the Platte River Basin.

7. Filing V-18 (VAR-1978) is a Petition for Leave to File an Application for a Permit to Appropriate Water, in which the Petitioner requests further appropriation of 60,000 AF of water stored in Elwood Reservoir for fish and wildlife purposes within the reservoir itself. The source of the proposed storage-use appropriation would be water intended to be impounded in Elwood Reservoir under the draft application associated with V-19 (VAR-1979).

8. Filing V-20 (VAR-1980) is a Petition for Leave to File an Application for a Permit to Appropriate Water, in which the Petitioner requests further appropriation of 60,000 AF of water stored in Elwood Reservoir for recreation within the reservoir itself. As with V-18 (VAR-1978), the source of the proposed storage-use would be water impounded in Elwood Reservoir under the draft application associated with V-19 (VAR-1979).

9. On August 13, 2009, integrated management plans (IMPs) were adopted by order of the Department, pursuant to *Neb. Rev. Stat.* § 46-718(2) for the following NRDs: the North Platte NRD, the South Platte NRD, the Twin Platte NRD, the Central Platte NRD, and the Tri-Basin NRD. As part of the surface water controls adopted by the Department pursuant to *Neb. Rev. Stat.* § 46-716(1)(b), the moratorium on issuing new surface water appropriations was continued.

10. On September 11, 2009, a Basin-Wide Integrated Management Plan (BWIMP) for the overappropriated area of the Platte River Basin was adopted by

order of the Department. The BWIMP was also adopted by the following NRDs: the North Platte NRD, the South Platte NRD, the Twin Platte NRD, the Central Platte NRD, and the Tri-Basin NRD. These NRDs are collectively referred to in the BWIMP as the "Platte River Basin NRDs."

ANALYSIS

1. At the time of Petitioner's filing, variance petitions V-18 (VAR-1978) and V-20 (VAR-1980) were subject to both the formal moratorium issued by the Department in 2004 and the provision for stays and moratoriums under subsections (1) and (8) of *Neb. Rev. Stat.* § 46-714. The moratorium has been continued in the surface water controls included in the individual NRD IMPs adopted by the Platte River Basin NRDs and the Department.

2. The Department's July 14, 2004, order and the provisions of *Neb. Rev. Stat.* § 46-714(3)(n) allow for new surface water appropriations and increases in irrigated acres if the Department grants a variance and subsequently approves a permit for such new use. When filing a variance request, a project proponent must offer a clearly stated basis for such request and must offer sufficient good cause shown. *Department of Natural Resources Rules for Surface Water, Title 457 Neb. Admin. Code* Chapter 23 lists six circumstances that may be put forward as justification for granting a variance to apply for a new water use, in conjunction with an examination of good cause shown.

   In addition to *Department of Natural Resources Rules for Surface Water, Title 457 Neb. Admin. Code* Chapter 23 regarding variances, the following useful definition is found in *Neb. Rev. Stat.* § 46-706(29), which states:

   > *Variance means (a) an approval to deviate from a restriction imposed under subsection (1), (2), (8), or (9) of § 46-714 or (b) the approval to act in a manner contrary to existing rules or regulations from a governing body whose rule or regulation is otherwise applicable[.]*

   In determining the intent and scope of good cause the Department will apply the definition supplied by *Neb. Rev. Stat.* § 46-706(23), which states:

   > *Good cause shown means a reasonable justification for granting a variance for a consumptive use of water that would otherwise be prohibited by rule or regulation and which the granting agency, district, or organization reasonably and in good faith believes will provide an economic, environmental, social, or public health and safety benefit that is equal to or greater than the benefit resulting from the rule or regulation from which a variance is sought[.]*

   Furthermore, consumptive use is defined in *Neb. Rev. Stat.* § 46-706(20) as follows:

   > *Consumptive use means the amount of water that is consumed under appropriate and reasonably efficient practices to accomplish without waste the purposes for which the*

appropriation or other legally permitted use is lawfully made[.]

Because the Platte River Basin is currently undergoing integrated management for the purposes of reducing depletions to streamflow, any new consumptive use must be examined for its potential effects on extant surface and groundwater users and upon all matters of significant public interest and concern. This includes assessing both positive and negative impacts on the State's ability to comply with interstate agreements, programs, decrees and compacts, including PRRIP. Thus, any proposed project must be scrutinized to prevent conflict with (a) the goals and actions necessary to implement the IMPs adopted by the Platte River Basin NRDs and the Department and (b) the water needs of Water Action Plan projects that will be implemented under PRRIP. Applications for potential beneficial uses that are not clearly non-consumptive will be presumed to be at least partially consumptive. Therefore, an analysis of the effects of a proposed new diversion on these existing uses and responsibilities is required in order to determine whether sufficient good cause exists to grant a variance to apply for a new use.

3. Petitioner provided a document and digital spreadsheet titled "Platte River Hydraulic Analysis," which was intended to demonstrate the presence of unappropriated water in the Platte River by comparing gaged stream records against U.S. Fish and Wildlife Service target flows and State-protected instream flow appropriations held by the Central Platte NRD and the Nebraska Game and Parks Commission. An additional hydrologic analysis was done at the request of the Department to include the demand from all of the Nebraska Game and Parks Commission's instream flow appropriations on the Platte River, including those held downstream of Columbus and the fully appropriated area of the Platte River. Both analyses do suggest there may be unappropriated water during certain years. Neither analysis examined the availability of unappropriated water if the PRRIP Water Action Plan projects were to be constructed. The analysis is not particularly relevant to V-18 (VAR-1978) and V-20 (VAR-1980), because these petitions request applications for storage-use of water that would already be stored in Elwood Reservoir under a separate appropriation. A more appropriate analysis for these petitions would have addressed the consumptive use of the proposed storage uses expected from evaporation associated with the intended appropriations.

4. As part of V-19 (VAR-1979), Petitioner proposes a number of uses for water that would be stored if V-19 (VAR-1979) were approved and its associated draft application for storage were subsequently granted. In addition to fish and wildlife and recreation, other purposes proposed for the stored water relative to V-19 (VAR-1979) include irrigation and intentional underground water storage. Each of the four proposed storage-use applications would appropriate 60,000 AF of water that would already be stored in the reservoir, which has a normal-pool capacity of approximately 37,960 AF. In addition, Petitioner has indicated to the Department that the "active capacity" of Elwood Reservoir is 24,715 AF. Only the proposed 60,000 AF storage-use permits for irrigation and intentional underground storage would result in water releases from Elwood Reservoir. Petitioner offered no explanation as to how the four proposed 60,000-AF storage-use appropriations would be managed in relationship to each other.

5. *Department of Natural Resources Rules for Surface Water, Title 457 Neb. Admin. Code* Chapter 2 § 001.02 states, in part, "Storage is considered as a use and an impoundment with multiple purposes only requires one application." A typical list of in-reservoir purposes for the same body of water may include flood control and recreation. No reason was offered for proposing to file multiple in-reservoir storage use applications, each for 60,000 AF, from the same 60,000 AF storage application.

6. In its filings, Petitioner asserts there may be potential harm to the fishery established by the Nebraska Game and Parks Commission and to recreational interests when Petitioner declines to fill Elwood Reservoir under its current appropriation. Although Elwood has not been filled in some recent years, no evidence was included with the filing documents to describe actual or imminent harm that did occur, or could have occurred, under such conditions.

CONCLUSIONS

1. Petitioner has shown there may be unappropriated water in the section of the Platte River below the Tri-County Diversion Dam during some years.

2. No evidence was offered to show the proposed additional uses of water would result in a benefit to the State that outweighs the considerable responsibilities the State has in meeting its obligations to the Platte River Recovery and Implementation Program, overappropriated Basin-Wide Integrated Management Plan and individual NRD integrated management plans.

3. No compelling good cause argument has been advanced to show that granting the petitions and, subsequently, the applications would have an "economic, environmental, social, or public health and safety benefit that is equal to or greater than the benefit" from the requirements of IMPs, the BWIMP and the PRRIP.

4. Although potential harm to the fishery and recreation is mentioned in one of the documents filed with the variance petitions, no evidence was provided in the petition materials to suggest there is a need for additional storage-use permits for in-reservoir fish and wildlife and recreation uses. In addition, no mention was made of benefits to threatened or endangered species, which could be viewed as a positive impact on PRRIP objectives. Consequently, the Department cannot conclude that specific benefits would accrue to those species, if the variance petitions and associated applications were to be granted.

5. Multiple-purpose reservoirs have been permitted all over the State under storage appropriations. Flood control, recreation and fish and wildlife are similar in-reservoir uses that utilize water already in the reservoir. These are activities that are ancillary to managing the stored water, and, if those purposes are mentioned in the storage permit, then such mention is sufficient for the formal acknowledgement of those purposes under the storage appropriation.

6. The Department concludes that the storage-use applications proposed by V-18 (VAR-1978) and V-20 (VAR-1980) are for purposes that would already

be permitted if the application proposed by V-19 (VAR-1979) were to be granted. A reservoir project that has a storage appropriation that lists fish and wildlife and recreation among the authorized purposes relative to stored water, has no need of additional appropriations for the same purposes. Thus, V-18 (VAR-1978) and V-20 (VAR-1980) are not necessary.

7. For these reasons, petitions V-18 (VAR-1978) and V-20 (VAR-1980) should be denied.

ORDER

IT IS HEREBY ORDERED:

Petitions V-18 (VAR-1978) and V-20 (VAR-1980) do not meet the requirements of *Department of Natural Resources Rules for Surface Water, Title 457 Neb. Admin. Code* Chapter 23, are not necessary for their intended purpose, and are therefore DENIED.

DEPARTMENT OF NATURAL RESOURCES

April 7, 2011

Brian P. Dunnigan, P.E., Director

A copy of this Order was posted on the Department's website. A copy of this Order was provided to the Department's field office in Bridgeport, Nebraska.

A copy of this Order was mailed on April 7, 2011, to the following:

Don Kraus, General Manager
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