

STATE OF NEBRASKA

DEPARTMENT OF NATURAL RESOURCES

DENIAL OF PETITION V-22 (VAR-1982) FOR LEAVE TO FILE AN APPLICATION

FOR A PERMIT FOR INTENTIONAL UNDERGROUND WATER STORAGE

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' 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 for Intentional Underground Water Storage V-22 (variance petition). This variance petition was subsequently designated as VAR-1982 in conformity with Departmental filing nomenclature and will hereby be referenced in this order with both the old and the new filing designations.
6. Filing V-22 (VAR-1982) is a Petition for Leave to File an Application for a Permit for Intentional Underground Water Storage. Accompanying this petition was a draft application and additional support documentation. This petition requests approval to divert 700 cubic feet per second (cfs) from the Platte River, not to exceed 170,000 acre-feet per year, for the purpose of intentional underground water storage. The draft application indicates the intentional underground storage of water would occur along Petitioner's E-65 Canal and Phelps Canal. These canals and their lateral systems are located in parts of Gosper, Phelps and Kearney Counties. The location of the intended project referenced in the petition is in an overappropriated and/or fully-appropriated area of the Platte River Basin.
7. 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.
8. 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 petition V-22 (VAR-1982) was 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. Therefore, Petitioner must first show there is a viable unappropriated water supply in the Platte River in order for the Department to grant leave to file for the proposed intentional underground water storage permit. Petitioner must also show a need for such new appropriation that outweighs potential adverse impacts to other water users and to the State's obligations.

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. Petitioner acknowledged the lack of inclusion of these potential projects in the analyses.
4. Petitioner has not provided sufficient information to demonstrate that underground water storage at the proposed rate can be accomplished in the area apparently intended in petition V-22 (VAR-1982) and its associated draft application. The documentation also did not include any explanation why 170,000 acre-feet is a reasonable amount of water to be requested or how this water is to be beneficially used.
5. Although the IMPs and BWIMP were adopted after Petitioner's filing of V-22 (VAR-1982), the documentation and draft application materials submitted by Petitioner to accompany these variance petitions are not sufficient in themselves to distinguish whether the intended water use is in conflict with PRRIP, the BWIMP, or individual IMPs. No clear indication was given as to whether the proposed water use would result in a new depletion that would need to be mitigated, or whether the new use would provide a benefit by reducing overall depletions at critical periods. The submitted documents merely request additional water for intentional underground water storage. This limits the ability of the Department to assess potential conflicts with the goals of the IMPs, BWIMP or PRRIP activities, if the requested application was to be allowed and eventually granted.

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 that intentionally storing water underground would result in a benefit to the State that outweighs the State's considerable responsibilities in meeting its obligations to the Platte River Recovery and Implementation Program, the 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 petition V-22 (VAR-1982) and, subsequently, the application for intentional underground water storage 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. For these reasons variance petition V-22 (VAR-1982) should be denied.

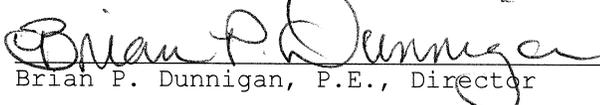
ORDER

IT IS HEREBY ORDERED:

1. Petition V-22 (VAR-1982) does not meet the requirements of *Department of Natural Resources Rules for Surface Water, Title 457 Neb. Admin. Code Chapter 23* and is therefore DENIED.
2. This decision shall not preclude the Petitioner from filing a related petition in the future. Future petitions should address the deficiencies referenced above.

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
The Central Nebraska Public Power and Irrigation District
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Holdrege, Nebraska 68949-0740