STATE OF NEBRASKA

DEPARTMENT OF NATURAL RESOURCES

ORDER GRANTING LEAVE TO FILE AN APPLICATION FOR A NEW SURFACE WATER APPROPRIATION WITHIN AN AREA SUBJECT TO A MORATORIUM, BY PETITION VAR-2070

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 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.

3. 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 Natural Resources Districts (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.

4. 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."

5. On March 25, 2011, Curtis Sargent, Manager, on behalf of South Side Irrigation Company (Petitioner), filed petition VAR-2070 for Leave to File or Consider an Application for a Permit to Appropriate Water within a Moratorium Area (variance petition). The petition requests leave to file an application for a temporary permit to appropriate water from the Platte River via the Orchard Alfalfa Canal for the purpose of flood control, groundwater recharge and monitoring.

6. For the purpose of this order, "excess flows" will be those streamflows that are in excess of the U.S. Fish and Wildlife Service target flows and other state protected appropriations that are in priority.

ANALYSIS

1. The formal moratorium issued by the Department in 2004 has been continued in the surface water controls included in the individual NRD IMPs adopted by the Platte River Basin NRDs and the Department. The Department's July 14, 2004, order and the provisions of *Neb. Rev. Stat.* § 46-714(3)(n) allow for new surface water diversions 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 of 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 requirements of 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.

2. Petitioner provided information that indicates the presence of unappropriated water in the South Platte River, North Platte River and the Platte River below the confluence of the North and South Platte Rivers. The information shows that 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 are likely to be exceeded during the spring of 2011 and perhaps later in 2011. Predictions of significant flows in these rivers and even flood forecasts all indicate that there is excess water in these streams and that condition will continue at least until the beginning of the 2011 irrigation season, and potentially after the irrigation season, as well. Petitioner has addressed the potential effects on other appropriators and has pointed out that existing storage is satisfied, and the time at which diversions would occur under the proposed project would be before commencement of the irrigation season. In addition, Petitioner indicated that the consumptive use resulting from diverting excess flows is not expected to be significant over the duration of the proposed temporary project. Therefore, no adverse impacts are expected, and the prior appropriation system will protect other appropriators. Petitioner acknowledges that protection of target flows must be maintained throughout the year, and Petitioner expects such to be a condition of any permit approval, if a permit was allowed to be filed and was ultimately granted.

3. Petitioner is collaborating with key integrated management and PRRIP partners by proposing to take advantage of excess flows that currently exist in the Platte River Basin for the purposes of potential flood mitigation, groundwater recharge and monitoring the effects of diversions on groundwater recharge. The canal operations and recharge effects will be monitored by Petitioner, NRD and Department staff and the results used to plan for future projects that are intended to achieve IMP and PRRIP goals.

4. The expected benefits from projects such as this are (a) to mitigate post-1997 new depletions by replacement of groundwater that was withdrawn for irrigation and (b) the enhancement of base flow returns to the Platte River Basin by way of aquifer recharge and, therefore, retiming excess flows so that they will augment streamflow when it is more necessary to help satisfy target flows and State-protected flows. This is in conformity with projects contemplated by integrated management partners and projects proposed under the Water Action Plan. Quantified estimates of recharge potential have not been offered for this temporary project; however, the recharge component will be monitored in order to better plan for this type of project in the future. The information gathered from this project will assist in verifying these concepts.

5. Petitioner proposes to divert excess flows prior to the normal irrigation season and possibly after the irrigation season concludes, if the river conditions are such that excess flows are still available.

CONCLUSIONS

1. Petitioner has demonstrated there is likely to be unappropriated water in the near future in the Platte River Basin prior to and possibly after the 2011 irrigation season because of excess flows.

2. The temporary diversion project proposed on the attached draft application is in cooperation with key integrated management and PRRIP partners and is in conformity with integrated management plan goals and potential conjunctive management projects. Information and data obtained from the proposed temporary project will be valuable in existing conjunctive management studies currently being undertaken in the Platte River Basin. Such data may be incorporated in the design of future projects intended to help the State meet its obligations under PRRIP. In addition, recharge from this project will assist NRDs in meeting their offset responsibilities under the BWIMP and individual NRD IMPs.

3. There is a potential for flooding in the Platte River Basin during spring 2011, and the temporary diversion of these excess flows may mitigate the potential effects of flood flows. Furthermore, these temporary diversions provide a greater benefit to the river in the long run than simply letting the excess flows pass downstream, with all the potential costs in flood damage attendant on anticipated flood flows.

4. The potential benefits of groundwater recharge and flood mitigation that Petitioner expects to result from the proposed project outweigh the effects of any stream depletions from temporarily diverting the water during times of excess flows.

5. For these reasons, Petitioner should be granted leave to file a temporary application to divert excess flows for flood control, groundwater recharge and monitoring.

ORDER

IT IS HEREBY ORDERED:

1. Petition VAR-2070 meets the requirements of *Department of Natural Resources Rules of Surface Water, Title 457, Neb. Admin. Code* Chapter 23, §§ 001.03 and 001.05, has shown sufficient good cause, and is GRANTED.

2. This decision shall not bind the Director to approve any application to which it relates, or in any way be used as evidence of prejudice for the Director's future decisions concerning the specific approval requirements of such an application.

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:

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c/o Curtis Sargent, Manager
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