

STATE OF NEBRASKA

DEPARTMENT OF NATURAL RESOURCES

ORDER DENYING LEAVE TO FILE APPLICATIONS FOR
NEW SURFACE WATER APPROPRIATIONS WITHIN AN AREA SUBJECT TO A
MORATORIUM, BY PETITIONS VAR-2024 AND VAR-2025
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 water-related activities on streamflows in the Platte River. In addition to a focus on new depletions, 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 supply 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 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 December 22, 2010, the Tri-Basin Natural Resources District (TBNRD or Petitioner) filed variance petitions VAR-2024 and VAR-2025, each of which is a Petition for Leave to File Application for Permit to Appropriate Water. Draft applications and supporting documents were filed along with the variance petitions. Petitioner's proposed project area overlaps the overappropriated and fully appropriated areas of the Platte River Basin.
6. Filing VAR-2024 is a Petition for Leave to File Application for Permit to Appropriate Water. Petitioner proposes to impound 60,000 AF per year of Platte River water in Elwood Reservoir for intentional ground water recharge and reservoir recreation in and under Elwood Reservoir.
7. Filing VAR-2025 is a Petition for Leave to File Application for Permit to Appropriate Water. Petitioner proposes to appropriate up to 60,000 AF from Elwood Reservoir, to be released to the E-65 irrigation canal and lateral system for the purpose of intentional underground water storage along the canal and laterals.
8. Elwood Reservoir is owned and operated by the Central Nebraska Public Power and Irrigation District (CNPPID) and is located in parts of Townships 7 and 8, Ranges 22 and 23 West of the 6th P.M. in Gosper County. Elwood Reservoir currently stores water under CNPPID's 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 CNPPID's Lake McConaughy under A-2374. Department records show that the normal pool capacity of Elwood Reservoir is 37,960 AF. In addition, CNPPID has indicated in its own correspondence with the Department that the "active capacity" of the reservoir is 24,715 AF.
9. The E-65 irrigation canal and lateral system are owned and operated by CNPPID. The canal and laterals are located in parts of Gosper and Phelps Counties. CNPPID releases water from Elwood Reservoir to the E-65 canal system for delivery to irrigated land already permitted under existing appropriations.

ANALYSIS

1. Because VAR-2025 is dependent upon water requested in VAR-2024, the Petitioner must first show that there is a viable unappropriated water supply in order for the Department to grant leave to the Petitioner to file for storage in Elwood Reservoir and for the proposed intentional underground water storage permit. Consequently, these two petitions are interdependent: granting VAR-2025 is dependent upon granting VAR-2024. For the purposes of ruling on Petitioner's filings, these two matters are joined.
2. 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 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 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 in this matter applies 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. Several Water Action Plan projects depend on the availability of unappropriated water. If the permits proposed under VAR-2024 and VAR-2025 were granted, there would be significantly less unappropriated

water available. This could negatively impact the State's ability to achieve PRRIP goals. 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 with several spreadsheets 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. The analysis does suggest there may be unappropriated water during certain years, although the analysis did not examine the availability of unappropriated water if the PRRIP Water Action Plan projects are constructed:
4. The documentation and draft application materials submitted by Petitioner argue for good cause by stating that offsetting depletions to the Platte River resulting from groundwater uses begun after July 1, 1997, is in both Petitioner's and the State's best interests. The petitions also state that the proposed project will assist TBNRD in meeting the goals and objectives of its integrated management plan and of PRRIP. No explanation was offered, however, as to how these goals and objectives will be met by utilizing the proposed appropriations.
5. As part of VAR-2024, Petitioner proposes to store water for underground storage and reservoir recreation in addition to water already stored by CNPPID for both in-reservoir and storage-use purposes, including irrigation and underground water storage. Materials submitted with the variance petition and application do not discuss how Petitioner's uses would be apportioned along with CNPPID's uses, thus precluding an assessment of depletion and consumptive use that would result from granting Petitioner's application.
6. CNPPID's current appropriation for aboveground storage in Elwood Reservoir is for 40,500 AF per year. The normal pool capacity of the reservoir is 37,960 AF, and the "active capacity" is only 24,715 AF. Petitioner offered no explanation as to how an additional 60,000-AF storage appropriation as proposed in VAR-2024 would be managed.
7. Petitioner has not provided sufficient information in VAR-2024 or VAR-2025 and the associated draft application materials to demonstrate that ground water recharge at the proposed rate can be accomplished in the areas apparently intended in petitions VAR-2024 and VAR-2025 and the associated draft applications. The documentation also did not include any explanation why 60,000 AF is a reasonable amount of water to be requested, and no explicit details were offered of how the water is to be beneficially used, beyond the brief statement in the petitions that the proposed project will meet the integrated management plan and PRRIP goals and objectives.
8. Although the petitions do state that the proposed projects would help meet the goals of PRRIP and the Petitioner's IMP, it is not explicitly stated how this would occur. No clear indication was given 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 to be impounded in Elwood Reservoir and to be stored underground. Such broad and undocumented assertions limit the ability of the Department to assess potential conflicts with the goals of the IMPs, BWIMP or PRRIP activities, if the requested applications were allowed to be filed and eventually granted.

9. *Neb. Rev. Stat. § 46-234 states, in part:*

An application may also be refused (1) if existing facilities other than those owned or operated by the applicant are to be utilized and the applicant fails to show, by documentary evidence, agreements with the owner and operator of the facilities to allow the applicant to use such facilities[.]

TBNRD is required to have an agreement with CNPPID for VAR-2024 or VAR-2025 to be considered for approval. A letter dated December 28, 2010, from CNPPID to Petitioner and regarding these petitions, was provided by CNPPID to the Department. In this letter, CNPPID states that it "[does] not believe the approach described in [TBNRD's] letter is workable but we are interested in discussing other options." This letter does not fit the criteria of an agreement for Petitioner to utilize CNPPID's facilities for the purposes proposed in the petitions.

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. Scant evidence was offered to show that impounding and intentionally storing water underground as proposed 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. Although there was mention of potential offsets or credits which could be used to address the State's obligations under PRRIP, the materials presented do not show that any agreement with the Program or PRRIP partners has been made or is being pursued, and there is insufficient information to demonstrate the benefits alleged or to justify the amounts requested.
4. No compelling good cause argument has been advanced to show that granting petitions VAR-2024 and VAR-2025 and, subsequently, the applications for impoundment and 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.
5. Sufficient documentation to satisfy *Neb. Rev. Stat. § 46-234* was not provided to demonstrate agreement between facility owner, CNPPID, and Petitioner to implement the proposed project.

6. For these reasons, variance petitions VAR-2024 and VAR-2025 should be denied.

ORDER

IT IS HEREBY ORDERED:

1. Petitions VAR-2024 and VAR-2025 do not meet the requirements of *Department of Natural Resources Rules for Surface Water, Title 457 Neb. Admin. Code Chapter 23* and are therefore DENIED.
2. This decision shall not preclude the Petitioner from filing related petitions in the future. Future petitions should address the deficiencies referenced above.

April 20, 2011

DEPARTMENT OF NATURAL RESOURCES



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 21, 2011, to the following:

John Thorburn, Manager
Tri-Basin Natural Resources District
1723 N. Burlington Street
Holdrege, Nebraska 68949