

12-13-07
8:06 AM

December 10, 2007

Ann Bleed, Director
Department of Natural Resources
PO Box 94676
301 Centennial Mall South
Lincoln, NE 68509-4676

Dear Ms. Bleed:

I will not be able to attend the public hearing for the preliminary determination that the lower portion of the Lower Niobrara River Basin, the entirety of the Lower Platte River Basin, the Missouri Tributary Basins, and the Blue River Basins are not fully appropriated to be held on Wednesday, December 19th, 2007.

It is my understanding that this preliminary determination was made according to the guidelines set forth in LB 962, and I am very disturbed by the Nebraska Game and Parks request that the areas be declared fully appropriated on the basis of some other criteria.

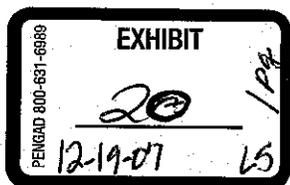
I am a lifelong resident of Antelope County and began farming in 1978. This fall my wife, my sister, my brother in-law and I formed a partnership, Cottonwood Ridge LLC. The partnership purchased 120 acres adjoining my farm. An irrigation well was completed on the property in November. The irrigation system has been purchased and tree clearing has been done. These are significant investments. (The total cost of this project will be approximately \$200,000.) It is very important that we be able to use this well. The decision to make these investments was based on the guidelines set forth in LB 962.

It is my opinion that the preliminary determination of 'not fully appropriated' for this area was based on the proper guidelines and should stand. A change based on new or different guidelines could jeopardize the use of our irrigation well. This would create financial hardship not only for our partnership, but for many other farmers in similar situations.

Sincerely,



Greg Walmer, Manager
Cottonwood Ridge LLC
51756 Hwy 20
Royal, NE 68773
(402) 893-2036
amsroyal@frontiernet.net



December 17, 2007

Ann Bleed
Department of Natural Resources
PO Box 94676
Lincoln, NE 68509

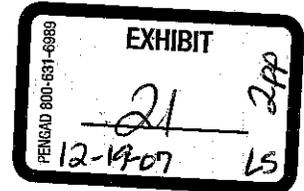
Re: Status of Platte River Basin

Dear Dr. Bleed:

This letter is submitted on behalf of the City of Fremont and the League of Nebraska Municipalities (collectively referred to herein as "Municipalities"). The Municipalities support the preliminary determination by the Department of Natural Resources ("DNR") concluding the Lower Platte Basin is not fully appropriated. The Municipalities do, however, harbor grave concerns regarding both procedural and substantive defects surrounding this hearing.

First, with respect to the fatal procedural defect, Nebraska law does not authorize a hearing to adduce information following a preliminary determination by DNR that a basin is NOT fully appropriated. Hearings of this nature are reserved for preliminary determinations that a basin IS fully appropriated. Moreover, Nebraska law does not authorize DNR to change its preliminary determination that a basin not fully appropriated until the following annual preliminary determination is to be made. Accordingly, DNR is without authority to alter its preliminary determination until October of 2008, a year following this preliminary determination.

In addition to this procedural defect, the Municipalities further believe that the DNR and/or the Nebraska Game and Parks Commission ("Commission") misunderstand the law governing the designation of a basin as fully appropriated. Specifically, both the DNR and the Commission apparently look to Neb. Rev. Stat. § 46-713(3) as the basis upon which a basin can be declared fully appropriated with respect to the impact to state or federally listed species. Section 46-713(3) states, in pertinent part, "A river basin, subbasin, or reach shall be deemed fully appropriated if the department determines based upon its evaluation . . . that then-current uses of hydrologically connected surface and ground water in the river basin, subbasin, or reach cause or will cause *noncompliance by Nebraska* with an . . . applicable state or federal laws." (Emphasis Added). Section 46-713(3) therefore looks to interstate obligations by the state of Nebraska to provide certain streamflows. We submit that it is impossible for *Nebraska* to be in noncompliance with the laws identified by either the Commission or DNR. While individual agencies may violate the Nebraska Non-Game and Endangered Species Conservation Act, NEB. REV. STAT. § 37-801 *et seq.* ("Act") by failing to consult on projects subject to the Act, the Act does not require the state of Nebraska to protect all habitat for listed species. If the Act did so require, road construction, timber harvesting and farming itself could be regulated or even



BLACKWELL
SANDERS
LLP

Ann Bleed
December 17, 2007
Page 2

prohibited to maintain or enhance species habitat. Nothing in the language of the Act or case law interpreting the Act supports such a notion.

The Act also contains enforcement mechanisms to ensure compliance if a violation ever occurs at the hands of a state agency, political subdivision or individual. If a state agency or individual should violation the Act, compliance is assured through those enforcement provisions. Accordingly we believe *Nebraska* is, and will continue to be, in compliance with the Act.

With regard to the federal Endangered Species Act ("ESA"), it is undisputed that no state has EVER been found to be in noncompliance for failing to regulate hydrologically connected ground and surface waters. There is simply no precedent to allow the DNR to conclude Nebraska is or will be in noncompliance with the ESA. Moreover, if a political subdivision of a state undertakes some action believed to be in noncompliance with the ESA, the federal government has enforcement authority to assure compliance. Noncompliance with the ESA is governed by the ESA itself and no such enforcement authority has been conveyed to the DNR, Commission or other state body.

Finally, we note that nothing in the legislative history of LB962 (the legislation creating § 46-713(3)), suggests that the words "applicable state or federal laws" was ever intended to be used as contemplated by the Commission. Certainly had the legislature considered the use of either the Act or ESA as triggers for a fully appropriated designation, a thorough discussion of such a change to the law would have been had. An examination of the record reveals no such discussion or debate. In short, neither the plain language of the law nor the legislative history supports the use of § 46-713(3) as contemplated by the Commission.

We appreciate the opportunity to be heard in this matter and ask that the director act in conformance with the law and decline to designate the Lower Platte Basin as fully appropriated.

Sincerely,



Donald G. Blankenau

DGB



Little Blue Natural Resources District

"Serving The Public Since 1972"

December 27, 2007

Ann Bleed, Director
Nebraska Department of Natural Resources
301 Centennial Mall South, 4th Floor
P. O. Box 94676
Lincoln, Nebraska 68509-4676

Dear Ann,

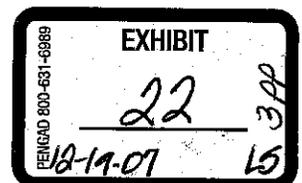
The Little Blue Natural Resources District herewith provides written testimony regarding the Preliminary Fully Appropriated Basins Report for which a public hearing was offered on December 19, 2007. Please accept and consider our comments in your evaluation for the final determination and report.

Also, my Board of Directors would like to have a copy of the testimony and exhibits from the hearing if that is possible.

Thank you.

Sincerely,

Michael Onnen
Manager



**TESTIMONY BEFORE THE DEPARTMENT OF
NATURAL RESOURCES
RE: PRELIMINARY REPORT OF FULLY APPROPRIATED BASINS**

**BY MIKE ONNEN, MANAGER OF
THE LITTLE BLUE NATURAL RESOURCES DISTRICT**

On behalf of the Little Blue NRD Board of Directors, I would like to convey our agreement with and support for the Department's findings provided in the Preliminary Determination Report for Fully Appropriated Basins indicating that the Little Blue River Basin is not fully appropriated.

The Little Blue NRD continues an extensive groundwater monitoring program throughout our District to track seasonal water level changes and annual trends. Two years ago the Little Blue NRD voluntarily imposed a stay on well drilling and new irrigated acres on approximately 100,000 acres of land in southern Thayer and Jefferson Counties. Our Board took that action to preserve a narrow and fragile aquifer where trend lines showed a very slow but steady decline, uncharacteristic of the rest of our District. A hydrologic study of the area, just completed by CSD, will give our board additional guidance for addressing irrigation management and long-term aquifer protection in this area. We have also expanded well monitoring and data gathering for two additional smaller areas of our district where seasonal drawdown appears greater than the rest of the District.

The District does question the reason for this hearing, especially in light of the fact that no fully appropriated designations are proposed. We believe the Department's examination of all available data from which to make an informed decision about hydrologically connected ground and surface water has been accomplished. Therefore, conducting this hearing appears, on the surface, to grant opportunity for the introduction of information that may not be science-based and certainly does not allow adequate time for the Department to evaluate such information within the time constraints of the law.

We would also like to express our concern for a recommendation offered by the Nebraska Game and Parks Commission in an October 10, 2007 letter to the Department which recommends that the lower Platte River Basin should be declared fully appropriated based on a draft Biological Opinion. We understand that peer reviewers have questioned scientific methodologies and assumptions used in that opinion and it has yet to be accepted by all parties.

Regarding this issue, we believe your Department has evaluated all hydrologic data necessary to make the determination whether the Lower Platte is fully appropriated, and you have issued your statement based on those facts. Secondly, we don't believe that Nebraska State statutes allow for the use of blanket environmental reports of this nature in making a fully appropriated designation on any basin. Such reports may be offered "for information purposes only" in the Department's annual report (Sec. 46-713(1)(c)). Similarly, State statutes, Section 46-713(1)(d) calls for the Department's report to be based on "the best scientific data, information, and methodologies readily available to ensure that the conclusions and results contained in the report are reliable." If indiscriminate draft reports from any source are considered as evidence of "the best scientific data available", we believe it opens the door for significant misuse of the Department's authorities for future declarations under this statute and reduces the state's credibility for science-based evidence in administering the program.

Frankly we are concerned that if reports of this nature are allowed to dictate fully appropriated status when the use of the best science and hydrologic criteria outlined in State statutes do not reflect the need for such a designation, then every corner of the state is in jeopardy.

State statutes already exist which provides a process for the Game and Parks Commission or any NRD to apply for an instream flow right on a reach of the river if proof can be provided that such a right is warranted. The laws to determine fully appropriated basins based on hydrologic connectivity are not designed for that purpose.

For the sake of sound science and credibility of the process identified in LB962, we encourage the Department not to consider the draft Biological Opinion on the Platte River or any other unapproved report as evidence for making fully appropriated determinations. Let the hydrologic sciences govern the designations as we believe the law demands. Again, we support your approval of the preliminary report as written.

Thank you for this opportunity to respond to issues associated with the Preliminary Determination Report.

*The Good Life
Means Wildlife!*



December 27, 2007

Ann Bleed, Director
Nebraska Department of Natural Resources
301 Centennial Mall South
Lincoln, NE 68509

State of Nebraska
Department of
Natural Resources
Filed in the Department of
Natural Resources at 4:20
O'clock P M. this 27th
day of DECEMBER 20 07
S. Gowen

Director Bleed,

This letter provides comments of the Nebraska Wildlife Federation on the Department's proposed determination that the Lower Platte River is not fully appropriated at this time.

We believe the Department's evaluation of the situation with respect to the Lower Platte River is not correct. We believe that the Department should, in fact, declare the Lower Platte River as fully appropriated in line with Nebraska law.

We believe, as we argue below, that the basin is clearly at the tipping point in terms of its water supplies and water uses. Given the uncertainties in the analysis, the need to protect existing water rights, and the obligation for the decision to comply with state and federal law, we believe the Department should come down on the side of taking a cautious approach that protects the public resource. In our view, that means protecting the resource unless and until it can be determined that additional development in the basin can be done without eroding other water rights and without leading to violations of state or federal law.

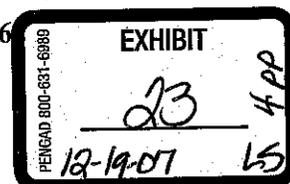
Declaring the river basin 'fully appropriated' would put in place a planning process that could, if done correctly, provide a long-term water management plan that would protect the many beneficial uses of water in the Lower Platte for the future, while still allowing some flexibility to provide for new uses of water in the basin.

Protecting Water Rights

We understand the Department's use of the Net Corn Crop Irrigation Requirement test, and the numbers included in the evaluation indicate how close the watershed is to fully appropriated, just considering that test. Considering just the water uses in place to date, and the future lag effect on the river of those uses already in place, the Department's analysis showed an average of 29.7 days available for diversion above North Bend (and 31.7 days above Louisville), while 28.3 days are necessary to meet the NCCIR¹ in the heart of the irrigation season. Using the

¹ REPORT: 2008 Annual Evaluation of Availability of Hydrologically Connected Water Supplies, Nebraska Department of Natural Resources, Pg. 111-112.

Nebraska Wildlife Federation • 4547 Calvert Street, Suite 12, Lincoln, NE 68506
(402) 477-1008 • www.NebraskaWildlife.org



Department's analysis, in only 9 of the 20 years included was the 28.3 day requirement met² (in the analysis at Louisville, the NCCIR was met 10 years, and not met 10 years).

In estimating future development, the Department's analysis uses a 10-year average of 403 wells per year³, while noting that in 2007 it expected 1,800 new wells to be developed⁴ -- more than 4 times the rate of development that the Department assumes for the future. The Department's estimate that the Platte at North Bend could be depleted by 550 cfs in ten years⁵ (at 403 new wells per year) could in fact occur in just over two years at the 2007 level of well development. We see no reason to assume that well development in 2008 and beyond will fall markedly from the 2007 level without regulatory action to put in place additional moratoriums.

In its assessment of whether the Game & Parks in-stream flow appropriation right has eroded, the Department compares the expectation at the time the right was granted, based on the previous 20 years of flow records, and the current performance based on the most recent 20 years of hydrologic records. This produced some strange results, including that for some months the in-stream flow right was actually met more often after recent water development (since 1993) than before that development. We don't doubt that this might occur in a few cases, due to the re-timing of river flows, but in general if you are taking more water out of the river and out of the system, it should translate into reduced river flows. We believe the differences in the Department's analysis are more likely the result of differences in rainfall and water supply conditions between the two periods used.

A more valid comparison would seem to be between the days per month when the right is met under 1993 development conditions, and the days per month when the right is met under current development conditions (including the lag effects of that new development), measured over a common period of hydrologic records. That way, we could tell if, in a year of similar water supply conditions, post-1993 development has actually eroded the number of days that the Commission's rights would be satisfied.

We believe, in this case, that the Department's conclusion that the Commission's in-stream flow rights are not being eroded by continued development are not supported by appropriate analysis.

Of course, satisfying those Commission in-stream flow rights also provides the ability for junior surface water appropriators to continue to divert, so an erosion in the Commission's water right translates directly into an erosion in the rights of those surface water users junior to the in-stream flow right.

Protecting Rare Species

We were surprised to learn that the Department of Natural Resources apparently did not formally consult with the Nebraska Game & Parks Commission in issuing its evaluation of this watershed, especially given the long history relating to Interior least terns, piping plovers, and

² Ibid, Pg. 110.

³ Ibid, Pg. 113

⁴ Ibid, Pg. 94.

⁵ Ibid, Pg. 114

pallid sturgeon -- all species protected by the state and federal government -- in this reach of the Platte.

As we understand the decision-making with respect to a 'fully appropriated' status, the Department's decision must ensure that Nebraska does not fail to comply with federal and state law. In this case, we understand the Nebraska Game & Parks Commission provided information to the Department of Natural Resources indicating the Commission's opinion that from April 1st through June 30, the current frequency, timing and duration of 8100 cfs must be protected from future depletions in the lower Platte River from the confluence of the Elkhorn River east to the confluence with the Missouri River. We recognize the state is now restricting the issuance of surface water rights in the basin to comply with that opinion, but a state decision such as this that allows Natural Resource Districts to continue to issue well permits that could have the same net result would seem to violate the Nebraska Nongame and Endangered Species Conservation Act.

We believe state law requires that the Department of Natural Resources formally consult with the Nebraska Game & Parks Commission on development of the evaluation it uses to reach a conclusion of fully appropriated or not fully appropriated, and on the decision itself.

We would also note that Middle and Lower Platte River fails to meet state water quality standards, and is polluted by high levels of e. coli and fecal coliform, among other pollutants. We recognize that the cause of that pollution is not at issue here, but note that allowing further depletions in stream flows in the river will reduce the dilution effect on the pollutants. The net result would likely be an increase in the concentration levels of the pollutants, especially in the summer when irrigation demands are the highest, stream flows tend to be the lowest, and recreational use of the river is highest. We believe this is yet another argument for limiting further development of water in the basin, until those pollutants can be brought under control.

Broad-Based Solutions Are Needed

As we noted in our comments on the Niobrara River decision, there are many beneficial uses for the Platte's water, including irrigation, livestock, industry, municipal use, drinking water wells, recreation, fish and wildlife, and support for wet meadows fed by the river and its tributaries. Unfortunately, many of those beneficial uses do not have specific water appropriations attached to them at this time, and therefore the local businesses that depend upon those unprotected flows are at risk.

Should the watershed be declared fully appropriated, we strongly urge the Department of Natural Resources and the Natural Resource Districts involved to establish broad-based stakeholder groups charged with developing a management plan that reflects, and protects, the various beneficial uses that Lower Platte River water is now being used for. That includes water-based recreation, hunting and fishing guides, fish and wildlife experts, the Game & Parks Commission, along with groundwater and surface water irrigators, municipalities, and others who depend upon the river's waters.

If a management plan is developed that only protects the users with current, quantified water rights, then we believe the result could be considerable risk of economic dislocation and environmental degradation.

If the Department issues a final determination that the Lower Platte River is *not* fully appropriated, then we still support the Director's stated intent of attempting to begin the process of doing an Integrated Management Plan for the basin. We believe Nebraska should be proactive in developing the information and systems needed for an Integrated Management Plan, and should be prepared to put in place a plan to protect the Lower Platte's waters for future generations.

We also urge the Department to continue to cooperate with the Nebraska Game & Parks Commission as it develops information on the biological implications of water development in the Platte River. We believe that the substantial increases in knowledge about the river and its rare species since the Game & Parks in-stream flow water right was granted warrant taking a fresh look at the adequacy of river flows for those uses. We encourage the Game & Parks Commission to press ahead, and the Department of Natural Resources to continue to cooperate, in the development of a new in-stream flow water right application for the Platte River. That work should continue to provide useful information as an Integrated Management Plan is developed, and would, we hope, ultimately result in an additional in-stream flow appropriation that would provide more long-term certainty that the fish, wildlife and recreation benefits will be protected for future generations.

We thank you for the opportunity to provide comments.

Yours in Conservation,



Duane Hovorka, Public Policy Chair



LOUP POWER DISTRICT

"SERVING YOU ELECTRICALLY"

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State of Nebraska
Department of
Natural Resources
Filed in the Department of
Natural Resources at 10:32
O'clock A M. this 27th
day of DECEMBER 20 07
J. Lower

December 26, 2007

Dr. Ann Bleed, Director
Nebraska Department of Natural Resources
301 Centennial Mall South
Lincoln, NE 68509-4676

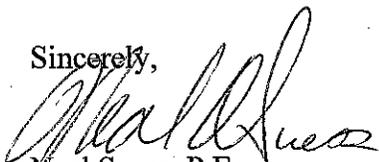
Dear Dr. Bleed:

Subject: Public Hearing on Lower Platte River Determination of Not Fully Appropriated

Enclosed please find a letter sent to the Nebraska Game and Parks Commission from Loup River Public Power District stating our concerns regarding the Draft Biological Opinion submitted to the DNR by the NGPC. The District would like this letter included as public testimony in regard to the hearing held December 19, 2007, in Lincoln, NE, at the Nebraska State Capital, Room 1525.

Should you have any question regarding this letter, please feel free to contact me at your convenience.

Sincerely,


Neal Suess, P.E.
President/C.E.O.

NS:ar

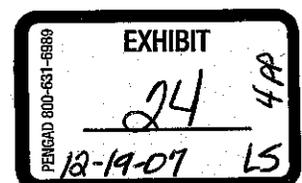
Enc.

C: R. Ziola

J. Frear

G. Waldow-HDR

P. Engelbert-HDR



November 8, 2007

Mr. Kirk Nelson, Assistant Director
Nebraska Game and Parks Commission
2200 N. 33rd St.
PO Box 30370
Lincoln, NE 68503-0370

Re: Draft Biological Opinion – Surface Water Appropriations and Threatened and
Endangered Species in the Lower Platte River

Dear Mr. Nelson:

The Loup River Public Power District (District) received a copy of the above referenced Draft Biological Opinion (DBO) prepared by the Game and Parks Commission (NGPC). The District has reviewed the Draft Biological Opinion dated October 19, 2007 and feels compelled to submit the enclosed comments. These comments are offered with the sincere goal of bringing more focus and better balance to the document. We trust that others will correct misspellings and other typos before the final document is issued.

Comments:

1. The stated purpose of the DBO is to conclude, “whether continued issuance of surface water appropriation...will likely jeopardize the continued existence of endangered and/or threatened species in Nebraska, result in the destruction or adverse modification of critical habitat or promote the conservation of endangered or threatened species in the lower Platte River.” Since the issue of hydrocycling is entirely unrelated to this purpose, it should be addressed in a separate venue where the District is fully engaged and has every opportunity to formally participate, review and comment.
2. The DBO states that it is concerned only with effects of continued issuance of surface water appropriations that would affect the hydrology of the Lower Platte River (p.2). However, nearly five pages of the DBO are devoted to describing the District’s hydropower operations and speculating on their impacts to protected species in Lower Platte River. Further, almost all of the discussion about the Loup River’s contribution to the Lower Platte River is about the District’s hydropower operations.

3. The District holds one of the most senior water rights in the basin – allowing it to utilize water for power generation. The diversion facilities cannot pass more water than the 3,500 cubic feet per second appropriation. Therefore there is no nexus between the stated concern of the DBO and operation of the District’s generation facilities. Furthermore, the 100 percent “pass through” of the water used for power generation does not represent in any way a removal of water from the basin.
4. There are many studies referenced in the DBO. Some, such as the Peters and Parham 2007 report, need to be attached to the DBO or the material that is pertinent to the DBO needs to be attached. Without this information, it is impossible to understand how some of the findings were determined.
5. The DBO concludes that the current hydrograph needs to be protected because sandbar habitat is limiting the populations of terns and plovers. Data within the DBO suggests otherwise. For instance, the high flows that occurred in 1993 presumably resulted in a substantial increase in sandbar habitat. However, in the three years that followed both tern and plover populations declined. This clearly indicates that something other than sandbar habitat is limiting populations of these birds. To conclude that sandbars are the limiting factor without additional analysis that considers other variables that could explain these population declines is arbitrary.
6. Similarly, the DBO concludes that the current hydrograph must be protected in order to preserve the deep water habitat for pallid sturgeon. While the DBO documents the use of this type of habitat by pallids, there is no data presented on how much of this habitat is currently available compared to how much was used by sturgeon per sampling. Further, pallids were found at a wide range of velocities and depths, there was no evidence presented that these velocities and depths could not sustain a reproducing population, if other habitat requirements were present. Without this context, it is arbitrary to conclude that the entire habitat needs to be protected.
7. The DBO suggests that invertebrates also limit reproduction of the listed species. The discussion of fluctuating stages was provided as one of the factors impacting invertebrates. The DBO presented no evidence that invertebrates are a limiting factor. Again, referring to the high flows in 1993; following these flows, invertebrate habitat would have been expected to increase. Since the populations of terns and plovers actually declined, invertebrate habitat doesn’t appear to be a limiting component of the habitat. To conclude that it is critical without some specific data to support this conclusion, and that explains these declining populations, is arbitrary.
8. The DBO describes the nesting behavior of both terns and plovers, including when they begin nesting. The dates provided are earlier than what could have historically occurred based on the historic hydrograph. The DBO does not explain this change in behavior. Further, the DBO discounts non-river habitat and calls it detrimental. The population data presented does not support this contention. Neither is this contention supported by the historic distribution of the plovers. As an example, the DBO shows that historically plovers nested in the sandhills.

9. The DBO presents information on tern and plover population surveys that were conducted in 2005 and 2006. These surveys show that both species have exceeded their recovery populations. The DBO needs to consider the fact that the birds may not require additional extraordinary means to sustain their recovery.

The District has a number of specific comments to the DBO and plans to present these at the appropriate time. Taken together, these comments may impact the conclusion that further appropriation of water from the lower Platte River would jeopardize the continued existence of these species. We would ask that you take these comments into consideration before finalizing the DBO, and would like to meet with you to further explain these, and other comments that we have. Please contact us to schedule a meeting at the appropriate time.

Sincerely,

Neal D. Suess, P.E.
President/CEO

cc: Ann Bleed, Nebraska DNR
Kristal Stoner, NGPC

Ann Bleed, Director
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Kristal Stone, Environmental Analyst Supervisor
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