

STATE OF NEBRASKA

DEPARTMENT OF NATURAL RESOURCES

In the Matters of Application A-17846)
for a Permit to Appropriate Water)
from Lost Creek, and Application) ORDER
C-35 for a Permit to Conduct)
Water in a Stream Channel.)
Water Division 1-A.)

These matters came on for consideration before the Director of the Department of Natural Resources (Department) pursuant to Neb. Rev. Stat. § 46-233 (Reissue 2004) which requires any person intending to appropriate any of the public waters of the State of Nebraska to make an application to the Department for a permit to make such appropriation; and Neb. Rev. Stat. § 46-252 (Reissue 2004) and Department rule N.A.C. 21 which require any person intending to conduct quantities of water over and above those already present into or along any natural stream or channel of the state to make an application to the Department. The Director FINDS:

1. On March 27, 2000, the Department issued a closing order to Tri-Basin Natural Resources District (TBNRD) for diverting water from Lost Creek without a permit.
2. On April 20, 2000, the TBNRD filed applications A-17846 and C-35.

Application A-17846 requests diversion of 40 cubic feet per second (cfs) of water from Lost Creek for the purpose of augmenting Platte River flows for wildlife. The existing diversion point from Lost Creek is identified as Lost Creek Diversion #1 which is located in the SW~~1~~⁴/₄ of Section 16, Township 7 North, Range 16 West of the 6th P.M. in Kearney County.

Application C-35 requests protection of the water diverted under A-17846 through a ditch where it will enter North Dry Creek at a point in the NE~~1~~⁴/₄ of Section 9, Township 7 North, Range 16 West in Kearney County. Protection is proposed to continue through North Dry Creek where it will enter the Platte River at a point upstream of the Highway 44 bridge near Kearney. From there, the water will continue within the Platte River to a point in the NW~~1~~⁴/₄ of Section 4, Township 8 North, Range 12 West of the 6th P.M. in Adams County, Nebraska.

Originally, the C-35 application requested continued protection of the flows within the Platte River to a point located in the NW~~1~~⁴/₄ of Section 29, Township 12 North, Range 7 West of the 6th P.M. in Merrick County. However, after issuing public notice of the applications, concerns were raised by the Central Nebraska Public Power and Irrigation District (CNPPID) about protecting water in such an extended streamreach.

To address those concerns, TBNRD filed a letter on February 13, 2003, requesting protection under C-35 be revised from the original, proposed endpoint in Merrick County to a point where water from Dry Creek enters the south channel of the Platte River in the NW~~1~~⁴ of Section 4, Township 8 North, Range 12 West of the 6th P.M. in Adams County, Nebraska. Lost Creek is a tributary to Dry Creek. The revised, requested endpoint is the location where any water from Lost Creek would normally enter the Platte River system.

3. An informal moratorium was in place for all new applications for water appropriations in the Platte River Basin at the time these applications were filed. However, the Department proceeded with A-17846 and C-35 based on the understanding that these applications were for a non-consumptive use of water. On July 14, 2004, the Department declared a formal moratorium on new appropriations for surface water in the Platte River Basin above the mouth of the Loup River. In response to this, TBNRD filed petition V-4, a request for a variance to consider its application. The petition was approved by the Department December 20, 2006.
4. The Department consulted with the Nebraska Game and Parks Commission (NGPC) regarding applications A-17846 and C-35 as required by Neb. Rev. Stat. § 37-807 (Reissue 2004). Due to a concern about adverse impacts to state and federally listed species, NGPC required the TBNRD to submit for review by NGPC and the U.S. Fish and Wildlife Service (USFWS) a management plan for the discharge of water into the Platte River which addressed target flows. Several versions of draft Discharge Management Plans were submitted to both parties and the Department for review and considered part of the application.

Versions of the Discharge Management Plan referred to managing releases from the Funk Waterfowl Production Area (WPA). Department staff determined that due to the structures built in the WPA, it was no longer a natural lake, but a storage facility, and a permit from the Department was needed to impound water in it. Department staff met with representatives from TBNRD, USFWS, and NGPC to discuss this determination and review the language contained in the last draft of the Discharge Management Plan. Department staff requested that any language concerning the management of flows from the WPA be omitted from the final Discharge Management Plan. Subsequently, a final, revised Discharge Management Plan dated December 26, 2006, was agreed upon after review by all entities. On February 5, 2007, the Department received a determination from NGPC that approval of A-17846 and C-35 would not adversely affect threatened and endangered species or their habitat.

The Plan stated that Lost Creek Diversion #1 was initiated as a cooperative effort between TBNRD, CNPPID, and USFWS in order to protect landowners downstream from Lost Creek Diversion #1 from flood damage due to a severe rain event within the Lost Creek watershed, and to augment streamflows in the Platte River for the benefit of federally listed threatened and endangered species and designated critical habitat.

Before diversions from Lost Creek could occur, the following criteria must be satisfied:

- a. A consensus of the members of the North Dry Creek Drainage District (NDCDD) board of directors that the North Dry Creek channel is capable of carrying additional water (applicable only during March to September).
 - b. A 5 cfs minimum flow of water must continue down the original channel of Lost Creek whenever diversions can occur at the Diversion #1 structure. Diversions will not occur until TBNRD personnel determine that flows are sufficient to maintain 5 cfs in Lost Creek at the diversion point.
 - c. The TBNRD will consult with the USFWS prior to any planned diversions to avoid the potential for adverse impacts to listed species and determine target levels in the Platte River.
5. Previous to the final Discharge Management Plan being filed, Department staff met with John Thorburn, Manager of the TBNRD and Mike Drain from CNPPID to discuss concerns about storage in Funk WPA, this storage being relied upon in TBNRD's draft Discharge Management Plan, and questions about the requested diversion rate of 40 cfs in application A-17846. At the meeting, Thorburn stated that the requested 40 cfs is the channel capacity of the connecting ditch between Lost Creek Diversion #1 and North Dry Creek and that amount would only be needed to relieve flooding and for possible augmentation of streamflows in the Platte. He also stated that agreements TBNRD have require that 5 cfs of flow be maintained in Lost Creek at the diversion point. The 5 cfs was not intended as part of the requested 40 cfs.

It is CONCLUDED:

1. Based on Finding No. 4, the actions proposed by applications A-17846 and C-35 will not harm threatened or endangered species or their habitat.
2. Section 46-235 allows for approval of an application to divert water if there is unappropriated water in the source of the supply, if the application is not detrimental to the public welfare, and if denial of the application is not demanded by the public interest.

Finding No. 3 satisfies the public welfare and interest issues in that the project will reduce the intensity of flood events in the Lost Creek watershed. Further, Department records indicate that no other surface water rights exist on Lost Creek, nor are there any on North Dry Creek from the point at which water from Lost Creek will be diverted into it and the point at which the water will enter the Platte River. As such, the applications should not harm downstream appropriators.

Regarding unappropriated water in Lost Creek, the maximum diversion proposed under A-17846 should occur only during severe rain events. Presumably, water should be able to be diverted during these periods.

Based on these conclusions, application A-17846 and C-35 should be approved.

It is therefore ORDERED:

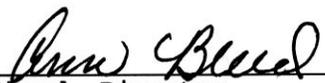
1. Application A-17846 is hereby APPROVED with the following limitations, conditions and notice:
 - a. The source of water is Lost Creek.
 - b. The water shall be used for the purposes of augmenting Platte River flows for wildlife and flood control.
 - c. The priority date is April 20, 2000.
 - d. A map must be filed in the office of the Department by six months past the signing date of this Order, prepared according to Department Rules, Title 457, Chapter 10. This map should show all structures associated with this project including all underground drains and pipe.
 - e. The work of construction has been completed.
 - f. The amount of diversion shall be limited to 40 cfs, not to exceed that amount of water beneficially used by September 1, 2010. During times when water is diverted from Lost Creek through Diversion #1, a 5 cfs baseflow must be maintained in the Lost Creek channel.
 - g. A measuring device, approved by the Department's Bridgeport Field Office, is required.
 - h. Annual reports may be required as provided by Neb. Rev. Stat. §§ 46-261 (Reissue 2004 and 61-206 (Cum. Supp. 2004)).
 - i. Use of water under A-17846 may be denied in order of priority when water supplies do not meet the demands of downstream appropriators.
 - j. This permit must also satisfy all the conditions set out in the applicant's Discharge Management Plan. Any revisions to this plan must be approved by the Department.
2. Application C-35 is APPROVED with the following limitations, conditions and notice:
 - a. The source of water is Lost Creek, such water to be withdrawn under A-17846 at a point located in the NW¼ of Section 16, Township 7 North, Range 16 West of the 6th P.M. in Phelps County. The water will then be conducted north through a ditch where it will enter North Dry Creek at a point in the NE¼NW¼ of Section 9, Township 7 North, Range 16 West of the 6th P.M. in Kearney County. From there, the water will continue

in North Dry Creek until it enters the Platte River along the north boundary of Kearney County in Section 22, Township 8 North, Range 16 West of the 6th P.M. Protection of such water under C-35 will continue within the Platte River until it reaches the point where Dry Creek channel enters the Platte River in the ~~NW~~^{NW} of Section 4, Township 8 North, Range 12 West of the 6th P.M. in Adams County, Nebraska

- b. The maximum amount of water to be conducted in the channels described in paragraph 2a above, shall not exceed a maximum of 40 cfs, diverted under A-17846.
 - c. A map must be filed in the office of the Department by six months past the signing date of this Order, prepared according to Department rule 457 N.A.C. 10. This map should show the points at which protection is to begin and end and the pathway of the protected water under C-35.
 - d. The Department maintains jurisdiction over this matter and retains authority to assess conveyance losses.
 - e. A measuring device, approved by the Department's Bridgeport Field Office, is required.
 - f. The permit holder is liable for any damages resulting from the overflow of the creeks when water conducted contributes to an overflow.
 - g. This permit may be cancelled if the permit holder fails to conduct water for more than five consecutive years.
3. Water use reports for A-17846 and C-35 may be required as provided by Neb. Rev. Stat. § 61-206 (Cum. Supp. 2004).
 4. Failure to comply with the provisions of this Order may cause cancellation of part or all of A-17846 and C-35. If unable to meet the conditions of approval due to an unavoidable and natural cause, a petition for an extension of time may be filed with the Department. Petitions must be filed prior to the deadlines stated in this Order and accompanied by a \$10 filing fee.
 5. Due to the approval of applications A-17846 and C-35, the Department's March 27, 2000, closing order is SET ASIDE.

DEPARTMENT OF NATURAL RESOURCES

May 8, 2007


Ann Bleed, Director

Copies of application Nos. A-17846 and C-35; Department rule 457 N. A. C. 10; Project Map Sample; and a copy of this Order were mailed on May 9, 2007, to John Thorburn, General Manager, Tri-Basin Natural Resources District, 1308 2nd Street, Holdrege, Nebraska 68949. A copy of this Order was also provided to the Department's field offices, Bridgeport, Ord and North Platte, Nebraska.