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-4828

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 September 19, 2013 The Central Nebraska Public Power and Irrigation District (Petitioner) filed petition VAR-4828 for Leave to File or Consider an Application for a Permit to Appropriate Water within a Moratorium Area or Stay Area. The petition requests leave to file an application for a temporary permit to appropriate water for the purpose of groundwater recharge via the Phelps Canal and Funk Lagoon/Waterfowl Production Area.

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.

7. *Nebraska Revised Statutes* § 46-714(3)(n) allows for new surface water appropriations if the Department grants leave to file an application and subsequently approves a permit for such new use.

8. When filing such a petition, 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 petition to apply for a new water use, in conjunction with an examination of good cause shown.

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.

   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 requests a temporary permit to divert water for the purpose of groundwater aquifer recharge to assist in optimizing water management.

3. Petitioner proposes to divert excess flows after the irrigation season concludes, and possibly prior to the normal irrigation season, if river conditions are such that excess flows are available at the time of desired diversion.

4. 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 at three locations 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.

5. Petitioner is collaborating with PRRIP partners by proposing to take advantage of available excess flows on the Platte River for the purposes of groundwater recharge in Phelps Canal and Funk Lagoon/Waterfowl Production Area. Petitioner also indicated that any recharge which may result from this temporary recharge project may have an additional benefit of assisting Tri-Basin NRD in offsetting some post-1997 new uses, as required by the BWIMP and Tri-Basin NRD's IMP.

6. Petitioner addressed the potential effects on other appropriators and pointed out that the time at which diversions would occur under the proposed project would be during the non-irrigation season.

7. The expected benefits from projects such as this are (a) mitigating post-1997 new depletions by replacing groundwater that was withdrawn for irrigation and (b) retiming excess flows when such flows are available, thereby enhancing base flow returns to the Platte River by way of aquifer recharge. Quantified estimates of recharge potential have not been offered for this temporary project.

CONCLUSIONS

1. Petitioner has demonstrated there may be unappropriated water in the Platte River during the non-irrigation season.

2. The temporary diversion project proposed on the attached draft application is in cooperation with PRRIP partners and is in conformity with the intent of PRRIP Water Action Plan projects, which propose to divert excess flows and retime the return flows to increase the frequency at which target flows and state-protected flows are satisfied.

3. No adverse impacts on existing water users are expected by Petitioner, 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 is allowed to be filed and is ultimately granted.

4. The potential benefits of recharge of the groundwater aquifer that Petitioner expects to result from the proposed project outweigh the potential effects of any stream depletions from temporarily diverting the water for the proposed temporary permit during times of unappropriated streamflow availability.

5. Conditions are such that excess flows, as defined above, may be available during the next year.

6. For these reasons, Petitioner should be granted leave to file a temporary application to divert excess flows for groundwater recharge.

ORDER

IT IS HEREBY ORDERED:

1. Petition VAR-4828 meets the requirements of *Department of Natural Resources Rules of Surface Water, Title 457 Neb. Admin. Code* Chapter 23, §§ 001.03, has shown sufficient good cause, and is GRANTED.

2. This order granting leave to file or consider an application for a new surface water appropriation within a moratorium or stay area pursuant to petition VAR-4828 shall be in effect for one year from the date this order is signed.

3. 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

May 1, 2014

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 May 1, 2014, to the following:

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