

STATE OF NEBRASKA

DEPARTMENT OF NATURAL RESOURCES

In the Matter of Application) Case No. 2018-16-CC-1
A-19594 For An Interbasin Transfer)
From the Platte River to the) ORDER
Republican River Basin.)
Division 1-A, 1-B.)

This matter comes before the Department of Natural Resources ("Department") upon the Platte to Republican Basin High Flow Diversion Project's ("PRD" or "Applicant") Motion to Dismiss Objections and Requests for Hearing of North Platte Natural Resources District; Nebraska Public Power District; Central Platte Natural Resources District; Cozad Ditch Company; Lower Loup Natural Resources District; Loup River Public Power District; and National Audubon Society d/b/a Audubon Nebraska. On July 19, 2021, a hearing was held before the Department for this matter. PRD was represented by their attorney, David Bargen. Objector, North Platte Natural Resources District ("NPNRD"), was represented by its attorney, Adam Hoelsing; objectors, Audubon Society ("Audubon"), Central Platte Natural Resources District ("CPNRD"), Lower Loup Natural Resources District ("LLNRD"), Loup River Public Power District ("LRPPD"), and Cozad Ditch Company ("Cozad"), were all represented by their attorney, Vanessa Silke; and objector, Nebraska Public Power District ("NPPD"), was represented by its attorneys, Stephen Mossman and Andrew Spader (collectively, "Objectors"). The parties submitted briefs and further arguments were made, and the matter was taken under advisement.

Now on December 12th, 2022, this matter came on for decision after the Department's review of the briefs and applicable law. After consideration of PRD's Motion to Dismiss, the Director finds and orders as follows.

I. The Record

The Department takes judicial notice of the pleadings in this matter, which include:

1. Application A-19594, dated April 4, 2018.
2. Corrected Application A-19594, dated July 3, 2018.
3. Notice of Application, dated July 19, 2018.
4. Objection of NPNRD, dated August 14, 2018.
5. Objection of Audubon, dated August 16, 2018.
6. Objection of CPNRD, dated August 16, 2018.
7. Objection of LLNRD, dated August 16, 2018.
8. Objection of Cozad, dated August 16, 2018.
9. Objection of LRPPD, dated August 16, 2018.
10. Objection of NPPD, dated August 16, 2018.
11. Notice of Objections and Requests for Hearing, dated August 27, 2018.
12. Motion to Dismiss Objections, dated September 26, 2018.
13. Order to Respond to Motion to Dismiss Objections, dated September 28, 2018.
14. Joint Stipulation and Motion for Extension of Deadlines, dated October 4, 2018.
15. Order Granting Continuance, dated October 5, 2018.
16. Department Notice, dated March 8, 2019.
17. Notice of Filing Replacement Exhibit A, dated March 12, 2019.

18. Correction to Department Notice, dated March 20, 2019.
19. Documents Produced Based on March 8, 2019 Notice, dated April 2, 2019.
20. Response to Notice of Department Regarding Offer of Records and Documents, dated April 30, 2019.
21. Applicant's Motion for Clarification Regarding Proposed Hearing, dated May 21, 2019.
22. Show Cause Order, dated May 22, 2019.
23. Order, dated February 26, 2020.
24. Amended Application A-19594 and Amended Water Services Agreement, dated June 24, 2020 ("Amended Application A-19594").
25. Supplement to Amended Application A-19594, dated June 25, 2020.
26. Amendment to Amended Water Service Agreement, dated October 8, 2020 ("Second Amended WSA").
27. Notice and Order, dated October 29, 2020.
28. Objection of NPPD, dated December 22, 2020 ("NPPD Objection").
29. Objection of Audubon, dated December 28, 2020 ("Audubon Objection").
30. Objection of LLNRD, dated December 28, 2020 ("LLNRD Objection").
31. Objection of LRPPD, dated December 28, 2020 ("LRPPD Objection").
32. Objection of CPNRD, dated December 28, 2020 ("CPNRD Objection").
33. Objection of Cozad, dated December 28, 2020 ("Cozad Objection").
34. Objection of NPNRD, dated December 29, 2020 ("NPNRD Objection").
35. Notice of Service, dated January 21, 2021.
36. Motion to Dismiss, dated March 19, 2021. ("Motion to Dismiss")
37. Briefing Schedule and Notice of Hearing, dated April 2, 2021.
38. LLNRD Brief in Opposition of Motion to Dismiss, dated May 3, 2021.
39. LRPPD Brief in Opposition of Motion to Dismiss, dated May 3, 2021.
40. Cozad Brief in Opposition of Motion to Dismiss, dated May 3, 2021.
41. Audubon Brief in Opposition of Motion to Dismiss, dated May 3, 2021 ("Audubon Brief").
42. CPNRD Brief in Opposition of Motion to Dismiss, dated May 3, 2021.
43. NPNRD Brief in Opposition of Motion to Dismiss, dated May 3, 2021.
44. NPPD Brief in Opposition of Motion to Dismiss, dated May 3, 2021.
45. Applicant's Reply Brief in Support of Motion to Dismiss, dated June 2, 2021.

Pursuant to its authority under Neb. Rev. Stat. § 84-914(5) and the Notice provided to the parties on July 16, 2021, the Department has also considered and makes part of the evidentiary record the following documents:

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| Exhibit 1: | Notice dated July 16, 2021 (received at the hearing). |
| Exhibit 2: | Department Statement of Corrections (May 4, 2018). |
| Exhibit 3: | Department Letter (July 9, 2018). |
| Exhibit 4: | Department Letter (August 17, 2020). |
| Exhibit 5: | Order of Final Determination of River Basins, Subbasins, or Reaches as Fully Appropriated, and Describing Hydrologically Connected Geographic Areas (September 30, 2004). |
| Exhibit 6: | Order of Final Determination of River Basins, Subbasins, or Reaches as Fully Appropriated, and Describing Hydrologically Connected Geographic Areas (April 21, 2006). |

- Exhibit 7: Order Designating Overappropriated River Basins, Subbasins, or Reaches, and Describing Hydrologically Connected Geographic Area (September 15, 2004).
- Exhibit 8: Order Declaring Formal Moratoriums (July 14, 2004).
- Exhibit 9: Platte Basin-Wide Plan for Joint Integrated Water Resources Management of Overappropriated Portions of the Platte River Basin, Nebraska (September 11 & 17, 2019).
- Exhibit 10: CPNRD and the Department's Integrated Management Plan (September 11, 2019).
- Exhibit 11: NPNRD and the Department's Integrated Management Plan (September 11, 2019).
- Exhibit 12: Order Adopting the Second Increment Basin-Wide Plan for Joint Integrated Water Resources Management of Overappropriated Portions of the Platte River Basin, Nebraska (August 9, 2019).
- Exhibit 13: Order Adopting the Second Increment Integrated Management Plan, and Associated Surface Water Controls, Jointly Developed by the Central Platte Natural Resources District and the Nebraska Department of Natural Resources (August 9, 2019).
- Exhibit 14: Order Adopting the Second Increment Integrated Management Plan, and Associated Surface Water Controls, Jointly Developed by the North Platte Natural Resources District and the Nebraska Department of Natural Resources (August 9, 2019).
- Exhibit 15: Nebraska New Depletion Plan for the Platte River Recovery and Implementation Program (June 2, 2009).
- Exhibit 16: Platte River Recovery and Implementation Program Cooperative Agreement (October 24, 2006).
- Exhibit 17: Addendum to the Final Platte River Recovery Implementation Program First Increment Extension (June 7, 2017).
- Exhibit 18: LLNRD Voluntary Integrated Management Plan (May 9, 2016).
- Exhibit 19: Order of Approval for CPNRD's Application A-18922 (March 19, 2015).
- Exhibit 20: Order of Approval for CPNRD's Application A-18924 (March 13, 2015).
- Exhibit 21: Order of Approval for CPNRD's Instream Flow Rights A-17004a, A-17004b, A-17004c, A-17007b, A-17007c, A-17008a, A-17008b, A-17008c, and A-17009 (July 2, 1991).
- Exhibit 22: Department and NPNRD Contract #985 (August 24, 2017).
- Exhibit 23: Order of Approval for LLNRD's Application A-19548 (May 24, 2022).
- Exhibit 24: List of all existing water rights and pending applications in the Platte River Basin (Water Division 1-A) from Department Database in downstream order (October 18, 2022).
- Exhibit 25: NPPD's pending Application A-19315 (filed December 15, 2014).
- Exhibit 26: NPPD's pending Application A-19316 (filed December 15, 2014).
- Exhibit 27: NPPD's Federal Energy Regulatory Commission License (July 29, 1998).
- Exhibit 28: LRPPD's Federal Energy Regulatory Commission License (May 22, 2017).

- Exhibit 29: Order of Approval for LRPPD's Application A-2287 (March 23, 1934).
- Exhibit 30: Lease and Management Agreement between Cozad and CPNRD (July 28, 2011).
- Exhibit 31: Charter of the Central Nebraska Public Power and Irrigation District (October 18, 2004).

II. Procedural History

1. After receiving a variance from the Department, the Central Nebraska Public Power and Irrigation District ("Central") and PRD¹ filed Application A-19594 on April 4, 2018. Application A-19594 was for an interbasin transfer that proposed to divert 275.00 cubic feet per second ("cfs") of surface water out of the Platte River and into Central's Supply Canal (also known as Tri-County Canal) for delivery of 100 cfs of that water to Turkey Creek, a tributary to the Republican River, for beneficial use in the Republican River Basin for compact compliance purposes.
2. Upon examination of Application A-19594 as required under Neb. Rev. Stat. § 46-233(3)(c), it was returned to the Applicants as defective along with a statement of the corrections required. (Ex.2). A corrected application was timely filed by the Applicants on July 3, 2018.
3. The Department examined the corrected application and determined that it should be accepted as a completed application under Neb. Rev. Stat. § 46-233(3)(c). (Ex.3). On July 19, 2018, the Department gave notice of the Application pursuant to Neb. Rev. Stat. § 46-233(5) and (6).
4. Among the many filings the Department received in response to the public notice, the following entities filed formal objections and requests for hearing under 454 Neb. Admin. Code Ch. 7, §§ 001.08B & 001.11A: (1) NPNRD; (2) NPPD; (3) Cozad; (4) LRPPD; (5) CPNRD; (6) LLNRD; and (7) Audubon.
5. On August 27, 2018, in accordance with 454 Neb. Admin. Code Ch. 7, § 006, the Department served the Applicants with a copy of the objections and requests for hearing received from each of the Objectors.
6. The Applicants timely filed a Motion to Dismiss Objections and Requests for Hearing on September 26, 2018.
7. On May 22, 2019, the Department issued an Order to Show Cause and Notice of Hearing to the Applicants under Neb. Rev. Stat. § 61-206(1). The Order to Show Cause stated that the Applicants must show cause why Application A-19594 should not be dismissed.
8. On June 28, 2019, a hearing was held on the Department's Order to Show Cause.
9. The Department issued an Order on February 26, 2020 that dismissed Central as an applicant under Application A-19594 and gave the remaining applicant, PRD, the opportunity to file an amended

¹PRD is an entity created by an interlocal agreement between Tri-Basin Natural Resources District and Lower Republican Natural Resources District.

application in the name of "Platte to Republican Basin High Flow Diversion Project" to be consistent with the interlocal agreement; file a new water service agreement that allowed PRD to use Central's facilities and that PRD would be the owner of the appropriation; and file additional applications for storage and storage use if PRD intended to use storage facilities for the project.

10. On June 24, 2020, PRD filed an Amended Application A-19594 and amended Water Service Agreement ("WSA") and stated that it did not intend to use storage facilities for the project and therefore, it did not need additional applications for storage and storage use. The main substantive changes to Amended Application A-19594 were that it reduced the requested diversion amount to 150 cfs, removed Central as an applicant, and removed references to the use of storage facilities for the project.
11. On June 25, 2020, PRD filed a supplement to Amended Application A-19594 to provide for the correct signatures on Form APA-001. Upon review of the Amended Application and supplement, and the amended WSA, the Department determined that the amended WSA did not comply with the Department's Order dated February 26, 2020. (Ex.4). PRD subsequently amended the amended WSA and filed it with the Department on October 8, 2020.
12. On October 29, 2020, the Department issued a Notice and Order stating that the Amended Application A-19594 and Second Amended WSA superceded the original application that was noticed by the Department on July 19, 2018 and the original WSA; and that the previously filed objections, requests for hearing, and motion to dismiss on the original application and WSA were mooted. The Order also gave the Objectors the opportunity to refile new objections and requests for hearing.
13. All seven (7) of the original objectors each filed formal objections and requests for hearing under 454 Neb. Admin. Code Ch. 7, §§ 001.08B, 001.11A.
14. On January 21, 2021, in accordance with 454 Neb. Admin. Code Ch. 7, § 006, the Department served the Applicant, PRD, with a copy of the objections and requests for hearing received from each of the Objectors.
15. On March 19, 2021, the PRD filed a Motion to Dismiss objections and Requests for Hearing of North Platte Natural Resources District; Nebraska Public Power District; Central Platte Natural Resources District; Cozad Ditch Company; Lower Loup Natural Resources District; Loup River Public Power District; and National Audubon Society d/b/a Audubon Nebraska.
16. On July 16, 2021, the Department provided notification to the parties that it intended to take official notice pursuant to Neb. Rev. Stat. § 84-914(5) of certain documents embraced by the application and objections.
17. On July 19, 2021, a hearing was held on PRD's Motion to Dismiss. Applicant, PRD, was represented by its attorney, David Bargen. Objector, NPNRD, was represented by its attorney, Adam Hoelsing. Objectors, Audubon, CPNRD, LLNRD, LRPPD, and Cozad were all represented by their attorney, Vanessa Silke. Objector, NPPD, was

represented by its attorneys, Stephen Mossman and Andrew Spader. (6:2-20).

18. One exhibit was entered into the record at the hearing, the Department's Notice issued on July 16, 2021. (Ex.1). The parties did not object to the contents of the Notice. (7:14-24).
19. On October 18, 2022, an entry of appearance was filed on behalf of PRD by its attorneys Paul J. Peter, Brenna M. Grasz, and Remington S. Slama.
20. Now on December 12th, 2022, this matter came on for decision. The Director finds and orders as follows.

III. Preliminary Matters

A. An Objector Must State an Injury In Fact

The granting of a water rights application is an exercise of the Department's quasi-judicial powers², and therefore, objectors to such action must meet certain jurisdictional prerequisites. Under Department rules, 454 Neb. Admin. Code Ch. 7, § 001.09, a proper party in a contested case, which includes an objector, means "an interested person who is recognized by the Department as having standing. . ." and an "interested person" is defined as:

A person who or an entity which has a specific legally protectable interest in the applicability of a statute, rule, or order, as distinguished from a general interest such as may be the concern of the public at large. An interested person is one who is or could be adversely affected in a legally cognizable way by the outcome of a proceeding.

454 Neb. Admin. Code Ch. 7, § 001.07.

The Nebraska Supreme Court, in its most recent review of the Department's determination of standing to object to a water rights application under the foregoing rules, applied the common-law standard of standing.

The primary issue on appeal in this case is whether the [Department] was correct in concluding that the appellants lacked standing. A party has standing to invoke a court's jurisdiction if it has a legal or equitable right, title, or interest in the subject matter of the controversy. A party must have standing before a court can exercise jurisdiction, and either a party or the court can raise a question of standing at any time during the proceeding.

Under the doctrine of standing, a court may decline to determine merits of a legal claim because the party advancing it is not properly situated to be entitled to

²*Farmers Canal Co. v. Frank*, 72 Neb. 136, 151-52 (1904); *State ex rel. Cary v. Cochran*, 138 Neb. 163, 168-69, (1940); *N. Loup River Pub. Power & Irrigation Dist. v. Loup River Pub. Power Dist.*, 162 Neb. 22, 25-26 (1956); *Hickman v. Loup River Pub. Power Dist.*, 173 Neb. 428, 434-35 (1962); *Middle Niobrara Nat. Res. Dist. v. Dep't of Nat. Res.*, 286 Neb. 611, 615 (2013) (Hereafter, "Middle Niobrara II").

its judicial determination. The focus is on the party, not the claim itself. And standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify exercise of the court's remedial powers on the litigant's behalf. Thus, generally, a litigant must assert the litigant's own rights and interests, and cannot rest a claim on the legal rights or interests of third parties.

Specifically, a litigant first must clearly demonstrate that it has suffered an injury in fact. That injury must be concrete in both a qualitative and a temporal sense. The complainant must allege an injury to itself that is distinct and palpable, as opposed to merely abstract, and the alleged harm must be actual or imminent, not conjectural or hypothetical. Second, the litigant must show that the injury can be fairly traced to the challenged action and is likely to be redressed by a favorable decision.

Middle Niobrara II, 286 Neb. at 615-16.

This is consistent with previous Nebraska Supreme Court holdings that the term "interested person" or "interest" denotes the common-law standard of standing.³

Objectors argue that the Department's definition of "interested person" is broader than the common-law standard of standing and urge the Department to follow the dissent in *Middle Niobrara II*, which argued the same. *Middle Niobrara II*, 286 Neb. at 636-37. However, the majority in *Middle Niobrara II* applied the common-law standard when determining whether an objector had standing to object to a water rights application pursuant to Department rules, and it is controlling precedent. *Id.* at 615-16. The majority in *Middle Niobrara II* rejected the dissent's notion that the Department supplanted common-law standing doctrine via regulation.

In addition, broad construction of the term "interested person" would lead to an absurd result in the context of water application cases. The Nebraska Constitution provides that "the use of water of every natural stream within the State of Nebraska is hereby dedicated to the people of the state for beneficial purposes..." Neb. Const. art. XV, § 5. "If mere interest in the outcome of an application was all that was necessary for standing, then every citizen of the state would have standing to object to an application." *MUD*, 250 Neb. at 451.

³*Metro. Utils. Dist. v. Twin Platte Nat. Res. Dist.* 250 Neb. 442, 450-51 (1996) (Hereafter, "MUD") (the term "interest" as it is used in Neb. Rev. Stat. § 46-233 defines the common-law standard of standing and an objector did not state an injury in fact sufficient to object to a water rights application); *Middle Niobrara Nat. Res. Dist. v. Dep't of Nat. Res.*, 281 Neb. 634, 646 (2011) (Hereafter, "Middle Niobrara I") (to be an "interested person" under Neb. Rev. Stat. § 46-713(2), a litigant must demonstrate an injury in fact sufficient to confer common-law standing); *Frenchman-Cambridge Irrigation Dist. v. Dep't of Nat. Res.*, 281 Neb. 992, 998-1001 (2011) (the Department and an objector irrigation district stipulated that it was an "interested person" for standing purposes. However, the Nebraska Supreme Court rejected this and found that "the requirement of standing is fundamental to a court's exercising jurisdiction, and litigants cannot confer subject matter jurisdiction on a judicial tribunal by either acquiescence or consent").

The Department also rejects Objectors' arguments that the "great public concern" exception to the injury in fact requirement of common law standing is applicable. The "great public concern" exception is another name for the "public interest" exception⁴ and the Nebraska Supreme Court has rejected past attempts by objectors to represent the public interest as a means to establish standing.⁵

Further, the interbasin transfer statutes do not confer standing to any of the Objectors. In some cases, the Legislature provides by statute who has standing to pursue relief, and when it does so, stating an injury in fact is not required.⁶ Objectors argue that they have interests related to the statutory factors the Department must consider in evaluating a water rights application that involves an interbasin transfer, and that such interests are sufficient to confer standing. Neb. Rev. Stat. § 46-289. (NPNRD Objection, ¶ 1; NPPD Objection, ¶¶ 6, 7, 10-15).

However, there is nothing in the language of Neb. Rev. Stat. § 46-289 indicating that the Legislature intended to confer standing on parties to challenge water rights applications involving an interbasin transfer. Due to the unique impacts of an interbasin transfer, the Legislature recognized the need to specifically define factors that the Director must consider to determine whether denial is demanded by the public interest. Neb. Rev. Stat. § 46-289 is a directive to the Department on how to evaluate interbasin transfer applications. It does not provide a means to challenge Department action based on mere interest and circumvent the injury in fact requirement. Nor does it prescribe that the public interest must be represented by a certain party.⁷

Based on the preceding, the Department applied the common-law standard of standing in its disposition of PRD's Motion to Dismiss.

B. Unappropriated Excess Flow Appropriations in the Platte River Basin

As stated in the procedural history above, PRD petitioned the Department for Variance VAR-6600 for Leave to File or Consider an Application for a Permit to Appropriate Water within a Moratorium Area or Stay Area. 457 Neb. Admin. Code Ch. 23, § 001. A variance was needed to proceed with Amended Application A-19594 due to the regulatory scheme in place for the Platte River Basin, which is summarized below. Also explained is how unappropriated excess flow appropriations at issue are administered in the Platte River Basin. The

⁴ *Thompson v. Heineman*, 289 Neb. 798, 818 (2015).

⁵ *Middle Niobrara II*, 286 Neb. at 620 ("...the fact that the granting of an application might not be in the public interest says nothing about whether the [objectors] have standing in this case. This court has specifically held that [NRDs] cannot assert the public interest. Nor can [an individual appropriator]. The right and injury asserted in order to establish standing must be the litigant's own: '[I]t is not sufficient that one has merely a general interest common to all members of the public.'" (citing *Waste Connections of Neb., Inc. v. City of Lincoln*, 269 Neb. 855, 862 (2005)); *MUD*, 250 Neb. at 449 ("Not only is the power to represent the public interest in litigation in which a [NRD] does not otherwise have standing not expressly granted by [Neb. Rev. Stat. § 2-3201], neither is it implied in or incident to any express powers, nor indispensably essential to the declared objects and purposes of a [NRD]").

⁶ *Schauer v. Grooms*, 280 Neb. 426, 437 (2010) (finding that the Open Meetings Act confers standing for the limited purpose of challenging meetings in violation of the Act).

⁷ See *MUD*, 250 Neb. at 449-50 (Neb. Rev. Stat. § 46-235(4)(b) provides that the Director must take into consideration certain factors in determining whether an application for an appropriation for induced ground water recharge is in the public interest, it does not state that the public interest must be represented by a particular party. Thus, an NRD does not have the power to represent the public interest in litigation in which it does not have standing).

Department's examination of unappropriated excess flow appropriations as they relate to Objectors' claims regarding standing necessarily implicates the regulatory context in which such appropriations operate.

i. Platte River Basin Regulatory Framework

On July 14, 2004, the Department issued a moratorium for all new surface water appropriations in the Platte River Basin upstream of the confluence with the Loup River near Columbus, Nebraska. (Ex.8). After the moratorium was issued, pursuant to the Ground Water Management and Protection Act ("Act"),⁸ the Department designated the Platte River Basin upstream of the Kearney Canal diversion, the North Platte River Basin including Pumpkin Creek, and the South Platte River Basin including Lodgepole Creek as overappropriated. (Ex.7). Portions of the NPNRD, South Platte Natural Resources District, Twin Platte Natural Resources District, CPNRD, and Tri-Basin Natural Resources District were designated as overappropriated. (Ex.7).

As a result of this designation, the Department and impacted NRDs were required under the Act to commence incremental water planning efforts including individual Integrated Management Plans (collectively, "Basin IMPs") between the Department and each NRD, as well as a Platte Basin-Wide Plan ("Basin-Wide Plan").⁹(Exs. 9-11). The Basin IMPs and the Basin-Wide Plan are required to include, among other things, goals and objectives for sustaining a balance between water uses and supplies for the long term and must "be sufficient to ensure that the state will remain in compliance with applicable state and federal laws and with any applicable interstate water compact or decree..." Neb. Rev. Stat. §§ 46-715(2), (4)(b)-(c), & 46-755(4). Additionally, the Basin IMPs are required to protect existing water users and implement surface and groundwater controls.¹⁰

On August 9, 2019, the second increments to the Basin-Wide Plan and Basin IMPs were adopted.¹¹ (Exs. 9-14). Pursuant to Neb. Rev. Stat. § 46-716(1)(b), the Department adopted, via order, surface water controls for each of the Basin IMPs, which included a continuation of a moratorium on new surface water appropriations unless a variance is granted by the Department according to its rules. (Exs. 10-11,13-14).

⁸ Neb. Rev. Stat. § 46-701 *et seq.*

⁹ Neb. Rev. Stat. §§ 46-715(1)(a); 46-755. The Basin IMPs and the Basin-Wide Plan are negotiated planning documents that provide the framework for sustainable, adaptive water management in the Platte River Basin.

¹⁰ Surface water controls are enforced through the Department's statutory authorities as the agency "...responsible for regulation of surface water related activities which contribute to conflicts between ground water users and surface water appropriators or to water supply shortages in fully appropriated or overappropriated river basins..." Neb. Rev. Stat. § 46-703(5). Groundwater controls are implemented pursuant to an NRD's statutory authorities under the Act, Neb. Rev. Stat. §§ 46-701 to 46-756, as the NRDs are the "...preferred entities to regulate, through ground water management areas, ground water related activities which are contributing to or are, in the reasonably foreseeable future, likely to contribute to conflicts between ground water users and surface water appropriators or to water supply shortages in fully appropriated or overappropriated river basins..." Neb. Rev. Stat. § 46-703(3).

¹¹ The first increment Basin-Wide Plan and Basin IMPs were implemented pursuant to Neb. Rev. Stat. § 46-715(5) for a ten-year period. Subsequently, the parties commenced the consultative and collaborative process in Neb. Rev. Stat. § 46-715(5)(d)(iii)-(iv) to adopt the second ten-year increment Basin IMPs and Basin-Wide Plan.

In addition to the foregoing water planning done at the state level, stakeholders in the Platte Basin engaged with federal partners on the Platte River Recovery and Implementation Program ("PRRIP"). (Exs. 15-17). PRRIP's goals include reducing shortages to U.S. Fish and Wildlife Service Target Flows ("Target Flows") and providing additional land habitat for endangered species in the Lexington to Chapman reach of the Platte River. (Exs. 15-17). To meet the goals of this federal agreement, 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. (Ex. 15). The State, through the Department, alongside the Basin NRDs, utilize the IMP process to achieve the goals of PRRIP.

ii. Unappropriated Excess Flow Appropriations

As discussed above, despite the moratorium on new surface water appropriations in the Platte Basin, the Department can grant variances if it determines that there may be unappropriated water available for use. Neb. Admin. Code Ch. 23. § 001.03. These appropriations are referred to as "unappropriated excess flow appropriations." (Exs. 19-20; Amended Application A-19594). The Department has granted such appropriations—including to the Objectors—to support water management activities outlined in the Basin IMPs and Basin-Wide Plan when consistent with the goals and objectives of these plans. (Exs. 19-20).

Unappropriated excess flow appropriations are distinct from other appropriations the Department issues in various ways. First, they are often issued on a temporary basis for a period of up to twelve (12) months. Second, in order to divert surface water under an unappropriated excess flow appropriation, the Department must determine that hydrologic conditions are such that the diversion will not harm any State-Protected Flows and that U.S. Fish and Wildlife Service Target Flows are satisfied. (Ex. 15: p.3-4; Ex. 19: p. 2-3; Ex. 20: p. 2-3). The Department evaluates the hydrologic conditions on the Platte Basin by looking at the Desired Minimum Discharge ("DMD")¹², and only those flows in excess of the DMD may be considered by the Department as available for use, i.e., unappropriated water. (Ex. 19: p. 2-3; Ex. 20: p. 2-3; Amended Application A-19594: p. 11-12). If the previous day's 24-hour average flow of the Platte River, as measured at a Department-specified stream gage, exceeds the DMD, diversion may occur under an unappropriated excess flow appropriation. (Ex. 19: p. 2; Ex. 20: p. 2; Amended Application A-19594: p.11-12). Prior to diversion, written permission from the Department must also be obtained by the appropriation holder in the form of an opening notice. (Ex. 19: p. 3; Ex. 20: p. 3).

Additionally, the way the Department administers unappropriated excess flow appropriations as against other holders of such appropriations is distinct. The Department may reduce or deny diversion if there is not enough available unappropriated water to satisfy all holders of unappropriated excess flow appropriations and the Department determines that there are optimal beneficial uses for the limited water supply that are in the public interest. (Exs. 19-20). The Department relies significantly on the Basin IMPs and the Basin-Wide Plan's goals and objectives to determine whether diversion under an unappropriated excess flow appropriation is in the public interest. However, as discussed below, PRD's unappropriated excess flow permit, if approved, would not be

¹² The DMD is the discharge required to meet State-Protected Flows and Target Flows. The current hydrologic condition of wet, normal, or dry as determined by PRRIP, informs the appropriate DMD value. (Ex. 19: p. 3; Ex. 20: p. 3; Amended Application A-19594: p. 11-12).

subject to the preceding public interest analysis in times of shortage. Instead, as requested by PRD, it would be administered as perpetually junior to all current and future holders of appropriations in the Platte River Basin. Meaning, PRD would not be able to appropriate water unless *all* other appropriations were already satisfied, no matter their date of priority.

C. Amended Application A-19594's Condition to be Perpetually Junior

In addition to the conditions associated with unappropriated excess flow appropriations discussed above, PRD requests that if approved, their appropriation would be further conditioned so that it would have a permanent junior status as against all other current and future appropriation holders in the Platte Basin. (Amended Application A-19594: p. 11-13). PRD explained that the reasoning behind this requested condition is:

...to avoid that concern that [the appropriation] would somehow be a drain on the Platte River Basin, that this would somehow cause concern for appropriators. The reason being that the intent of this is only to use excess flows when available. And, to the extent that they're not, it would not be used. And that's why it would be perpetually junior to other uses. If there is insufficient water for other uses, they will get served and the PRD appropriation would not.

(21:4-12).

As per Neb. Rev. Stat. § 46-205, unappropriated excess flow appropriations receive a priority date of the date when they are filed in the Department.¹³ However, such appropriations are conditioned so that the Department not only evaluates the priority of the appropriation, but may also consider public interest factors when determining whether diversion is appropriate. PRD proposes that if unappropriated water is available, and all other conditions precedent to diversion are met as set forth above, the Department's *only* consideration in determining whether PRD could divert under its permit would be whether all other Platte River Basin users holding appropriations are receiving their requested flows for their respective projects. (Amended Application A-19594: p. 11-13; 21:4-12).

Determinations related to priority and amount of an appropriation rest with the Department as the executive agency that has been granted exclusive and original jurisdiction to hear and adjudicate all matters pertaining to water rights. Neb. Rev. Stat. §§ 46-226(1); 61-206(1). The Department is authorized to place reasonable conditions on permits as deemed appropriate to protect the public interest. Neb. Rev. Stat. § 46-226.02(3).

The Department finds that PRD's proposed condition is relevant to its standing analysis of Objectors' claims and disposition of PRD's Motion to Dismiss.

¹³ Under the prior-appropriation doctrine, Nebraska's system of surface water allocation, each appropriator's right to divert unappropriated waters from a stream for a beneficial purpose receives a date of priority. *In re 2007 Admin. of Appropriations of Water of the Niobrara River*, 283 Neb. 629, 631-32 (2012). This is often referred to as "first in time, first in right." *Id.* at 632 (citing Neb. Rev. Stat § 46-203). See also Neb. Const. art XV, § 6. In situations where a conflict arises over the use of surface water, the "senior appropriator with an earlier priority date has the right to continue diverting water against a junior appropriator with a later appropriation date." *In re 2007 Admin.*, 283 Neb. at 632.

Therefore, in proceeding with Amended Application A-19594, the Department does so with the understanding that PRD has specifically requested permanent junior status against all other current and future appropriation holders in the Platte River Basin.

D. The Department's Standard of Review

In the Department's review of Objectors' claims it must "...accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the pleader's conclusions." *Cent. Neb. Pub. Power & Irrigation Dist. v. N. Platte Nat. Res. Dist.*, 280 Neb. 533, 538 (2010) (Hereafter, "Central").

For purposes of a motion to dismiss, threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. A court is not obligated to accept as true a legal conclusion couched as a factual allegation. A pleader's obligation to prove the grounds of its entitlement to relief requires more than labels and conclusions. Nor does a pleading suffice if it tenders naked assertion, devoid of further factual enhancement.

Id. at 544 (citing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)).

Only a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged--but it has not 'show[n]'-'that the pleader is entitled to relief.'

Ashcroft, 556 U.S. at 679.

IV. None of the Objectors Have Standing to Object to Amended Application A-19594

The Nebraska Supreme Court in a series of cases has determined when objectors pursuant to Department rules and statutes have standing to object to Department action and when they do not. The Court found that an objector, such as an NRD, lacks standing when they do not hold a water right that could be adversely affected by a new water rights application. *MUD*, 250 Neb. at 448-51. "The fact that the water rights of the constituents of a natural resources district may be affected by an application to appropriate waters does not confer standing upon such natural resources district to object to the application." *Id.* at 449. Objectors do not have standing to object if they assert the rights or interests of third parties, rather than their own rights or interests. *Id.* See also *Ponderosa Ridge, LLC v. Banner Cty.*, 250 Neb. 944, 947-49 (1996); *Central*, 280 Neb. at 542-43.

Further, an objector does not have standing to object to Department action for threatened injury or conjectural claims, they must state an injury in fact. *Middle Niobrara II*, 286 Neb. at 618. And an injury in fact does not mean claims

that less water will be available for use as a result of approval of an application. "It is axiomatic that any use of a limited resource necessarily results in marginally less availability of that resource for potential use by others. An injury in fact, for standing purposes, requires a more particularized harm to a more direct, identified interest." *Central*, 280 Neb. at 543-44.

An appropriation's priority also impacts whether or not an appropriator objector has standing to object. Appropriators do not have standing to object to a water rights application that would be junior to their appropriation. *Middle Niobrara II*, 286 Neb. at 619. Such appropriators would not sustain an injury in fact due to approval of a junior water rights application because such application if approved would not take priority over senior water rights in times of scarcity. *Id.*

The Nebraska Supreme Court carved out a limited exception to the holding that objectors must assert their own rights and interests for purposes of standing in *Middle Niobrara I*. *Id.* at 644-647. The Court reviewed a Department order that newly designated portions of the Niobrara River Basin as fully appropriated. *Id.* at 635-36. Although the NRD objectors did not claim to have water rights adversely affected by the fully appropriated designation, the Court found that they had standing to challenge the Department's action because of the new designation. *Id.* at 644-47. The Court reasoned that NRDs were "interested persons" under Neb. Rev. Stat. § 46-713(2) of the Act and concluded that "...because the NRDs have fiduciary duties with regard to the public funds that they are charged with raising and controlling, they have standing to challenge state action that requires them to spend those funds." *Id.* at 647. As a result of the fully appropriated designation, the NRDs would have been required to adopt an IMP containing goals and objectives, establish a map of the area subject to the IMP, and adopt one or more groundwater controls. Neb. Rev. Stat. § 46-715.

For the reasons set forth below, the Department finds that each of the Objectors lack standing to object to Amended Application A-19495. The Objectors did not present plausible claims because the facts alleged, based on conclusory statements and bare assertions, failed to establish that approval of Amended Application A-19594 would cause an injury in fact to a legally cognizable right or interest held by Objectors. Therefore, the Department has no jurisdiction to determine the merits of the Objections and the PRD's Motion to Dismiss should be granted.

A. Natural Resources Districts

The NRD Objectors' claims are insufficient to establish standing because *Middle Niobrara I* is inapplicable; the claims are conjectural and allege threatened injury, not an injury in fact; and the alleged harms to NRD Objectors' current and any future appropriations fail because they would be administered as senior to PRD's appropriation, if approved.

i. Middle Niobrara I is Inapplicable Under the Facts Alleged

NRD Objectors hinge their standing claims on the applicability of *Middle Niobrara I*. As discussed above, in that case, the Nebraska Supreme Court held that NRDs had standing to challenge the Department's new designation of portions of the Niobrara River Basin as fully appropriated because it would trigger duties previously not required under the Act. *Middle Niobrara I*, 281 Neb. at 644-647. Because CPNRD and NPNRD are under a similar regulatory scheme in the Platte Basin and raise the same arguments regarding the applicability of *Middle*

Niobrara I, the Department will address their claims together. In addition, although LLNRD makes the same arguments as CPNRD and NPNRD, it is under a different regulatory framework, and therefore, LLNRD's claims will be addressed separately as they relate to *Middle Niobrara I*.

a. CPNRD and NPNRD

CPNRD and NPNRD's claims are distinguished from *Middle Niobrara I*. The Court's narrow holding regarding standing in *Middle Niobrara I* centered on whether NRDs were interested persons under Neb. Rev. Stat. § 46-713(2) of the Act, a statute that is not applicable to any of CPNRD and NPNRD's claims. *Middle Niobrara I*, 281 Neb. at 645. Neb. Rev. Stat. § 46-713(2) allows "interested persons" to petition the Department to re-evaluate a fully appropriated designation. The Court concluded that the NRDs had standing to challenge the validity of the Department's new designation as "interested persons" because it would trigger duties previously not required under Neb. Rev. Stat. § 46-715(1)(a). *Middle Niobrara I*, 281 Neb. at 657. Specifically, the Act mandated the Department and impacted NRDs to commence new water planning efforts, including adopting an IMP with corresponding surface and groundwater controls, and establishing a map of the area covered by the new IMP. Neb. Rev. Stat. § 46-715.

Here, there is no such new designation on the Platte River Basin that would trigger regulatory duties previously not required under Neb. Rev. Stat. § 46-715(1)(a) that the Court found established standing. The Platte River Basin was declared either over or fully appropriated nearly two decades ago. (Exs. 5-7). The first increment Basin IMPs and Basin-Wide Plan and associated controls and maps have been in place since 2009, and the parties, including CPNRD and NPNRD, adopted the second increment to these plans in 2019 as mandated by the Act. (Exs. 9-14). Neb. Rev. Stat. § 46-715(5)(d)(iii)-(iv). As a result of the over-appropriated designation, CPNRD, NPNRD, and the Department have and will continue to spend public funds to administer and implement surface and groundwater management and IMP activities in fulfillment of their duties under the Act.

CPNRD and NPNRD attempt to link approval of Amended Application A-19594 to the obligations in Neb. Rev. Stat. § 46-715(1)(a). (CPNRD Objection, ¶¶ 21, 43; NPNRD Objection, ¶ 2). However, the duties placed upon CPNRD and NPNRD under Neb. Rev. Stat. § 46-715(1)(a) are the result of the past over and fully-appropriated designations and have been incurred by CPNRD and NPNRD for many years. Further, NPNRD and CPNRD's claims that Amended Application A-19594 will be adverse to the Basin IMPs and Basin-Wide Plan, and thus new additional planning efforts will be triggered under the Act, are not plausible. (CPNRD Objection, ¶¶ 9, 13-15, 19-22, 43; NPNRD Objection, ¶¶ 2, 3). In fact, unappropriated excess flow appropriations must operate in a manner consistent with the Basin IMPs and Basin-Wide Plan to ensure that the requirements for these Plans as set forth in Neb. Rev. Stat. § 46-715 are met. Therefore, the Department places terms and conditions on unappropriated excess flow permits so that any diversions under such permits "...must not be to the detriment of achieving the goals of the [Basin-Wide Plan] and [Basin IMPs] in the most effective manner as determined by the Department." (Exs. 19, 20: p. 1). And such permits impose administrative and hydrologic conditions to "...ensure compliance with the [Basin-Wide Plan] and the [Basin IMPs]." (Exs. 19, 20: p. 2). If approved, PRD's appropriation would similarly be required to be consistent with the goals and objectives of the Basin IMPs and Basin-Wide Plan.

Also, CPNRD and NPNRD's claims do not state with any specificity what additional spending can be fairly traced to approval of Amended Application A-19594 that

is distinct from the planning and spending that is already occurring as a result of the fully and over appropriated designations on the Platte Basin. (CPNRD Objection, ¶¶ 39-43; NPNRD Objection, ¶ 2). CPNRD and NPNRD's allegations of harm mainly point to the spending that has been incurred to date due to such designations, not what additional spending will be imminent upon approval of Amended Application A-19594. (CPNRD Objection, ¶¶ 39-41; NPNRD Objection, ¶ 2; 30:6-31:16; 36:12-20). The Objectors argue that because Amended Application A-19594 hasn't been approved, they cannot specify what additional spending would be necessary. (30:15-31:2; 42:23-43:6). However, all facts supporting an allegation of an injury in fact to CPNRD and NPNRD should already be known to CPNRD and NPNRD, and there is no basis to believe that discovery would reveal evidence of the how approval of Amended Application A-19594 will require any new IMP or Basin-Wide planning efforts requiring an expenditure of public funds. See *Central*, 280 Neb. at 544-45.

Middle Niobrara I is inapplicable under the facts alleged in CPNRD and NPNRD's Objections, and therefore, does not support standing for any of their claims.

b. LLNRD

Middle Niobrara I is also distinguished from the facts alleged in LLNRD's Objections. First, LLNRD does not claim to be an "interested person" under Neb. Rev. Stat. § 46-713(2) challenging the validity of the Department's fully- or overappropriated designation. Second, there is no new fully- or overappropriated designation mandating that LLNRD undertake the obligations set forth in Neb. Rev. Stat. § 46-715(1)(a), which the Nebraska Supreme Court in *Middle Niobrara I* found conferred standing. In fact, the Department reversed its previous decision that the Lower Platte River Basin, which includes LLNRD, was fully appropriated and determined that it was *not* fully appropriated. (LLNRD Objection, ¶ 9). Therefore, LLNRD was not mandated to enter into an IMP with the Department under Neb. Rev. Stat. § 46-715(1)(a) as in *Middle Niobrara I*. Instead, LLNRD *voluntarily* entered into an IMP and chose to adopt associated ground water controls under the provisions of Neb. Rev. Stat. § 46-715(1)(b), not Neb. Rev. Stat. § 46-715(1)(a), which was the statute at issue in *Middle Niobrara I*. (LLNRD Objection, ¶ 12; Ex. 18). Third, LLNRD's allegations of harm related to any additional regulatory burdens and spending as a result of the Lower Platte River Basin-Wide Plan, its IMP, and its rules, are similar to those that were rejected by the Nebraska Supreme Court in *Central* because they are essentially claims that less water will be available for LLNRD's use as a result of approval of Amended Application A-19594. *Central*, 280 Neb. at 543-44. (LLNRD Objection, ¶ 28). Fourth, LLNRD does not specifically identify what additional spending, distinct from the planning and spending that is already occurring due to its IMP and the Lower Platte River Basin-Wide Plan, which will be imminent upon potential approval of Amended Application A-19594. (LLNRD Objection, ¶¶ 24-27; 46:13-23). LLNRD's claims merely focus on what spending has occurred to date. *Id.* Such facts supporting their allegations of harm regarding spending should already be known to LLNRD, and there is no basis to believe that discovery would reveal evidence of how approval of Amended Application A-19594 will require any new IMP or Lower Platte Basin-Wide planning efforts requiring an expenditure of public funds. See *Central*, 280 Neb. at 544-45.

Middle Niobrara I is inapplicable to the allegations in LLNRD's Objection, and therefore, does not support standing for LLNRD's claims.

ii. NRD Objectors' Allegations of Harm are not Actual or Imminent Upon Approval of Amended Application A-19594

In order to have standing a litigant must clearly demonstrate that it has suffered an injury in fact, which means that the alleged harm is actual or imminent, not conjectural or hypothetical. *Middle Niobrara II*, 286 Neb. at 615-16. Threatened injury of a new water rights application does not confer standing. *Id.* In addition, the allegations must state a plausible claim for relief, and in determining plausibility, the Department may draw on its expertise as the agency with exclusive jurisdiction of all matters regarding water rights in this State and its common sense. *Ashcroft*, 556 U.S. at 679.

None of NRD Objectors' asserted injuries as a result of approval of Amended Application A-19594 are sufficiently actual or imminent to state an injury in fact because numerous contingencies need to occur before PRD would be able to divert under their permit. *If* Amended Application A-19594 is approved, and *if* conditions on the Platte River are such that excess flows are available above U.S. Fish and Wildlife Service Target Flows and State-Protected Flows, and *if* that amount determined by the Department is enough that every other holder of an unappropriated excess flow appropriation—whether junior or senior—is satisfied before PRD takes water, *then* PRD may be authorized to divert water through the Department's subsequent action of issuing an opening notice. (Amended Application A-19594).

An injury in fact requires that upon approval of Amended Application A-19594, *all* of NRD Objectors' alleged injuries would be *imminently* triggered. Due to the unique nature of unappropriated excess flow permits, none of NRD Objectors' alleged injuries are imminent. In order for PRD to divert under its permit, the Department will have to determine it can do so if specific conditions so warrant, and through the subsequent action of the Department issuing an opening notice. In fact, the conditions on the Platte Basin may be such that PRD will *never* be able to divert water under their appropriation.

Further, NRD Objectors' injuries linked to approval of Amended Application A-19594 are conjectural and fail to state a plausible claim for relief. CPNRD and NPNRD's injuries all turn on their allegation that Amended Application A-19594 will be *adverse* to their IMPs, the Basin-Wide Plan, PRRIP, the Nebraska New Depletion Plan for PRRIP, U.S. Fish and Wildlife Service Target Flows, and State-Protected Flows. (CPNRD Objection, ¶¶ 9, 13-15, 19-22, 43; NPNRD Objection, ¶¶ 2, 3). However, the Platte Basin regulatory reality—which the Department cannot ignore—renders these claims meaningless.

Unappropriated excess flow appropriations, like PRD's if approved, must not conflict with the Basin IMPs and the Basin-Wide Plan. Neb. Rev. Stat. § 46-715. (Exs. 19, 20: p. 1-2). Therefore, the Department places terms and conditions on such appropriations so that diversions "...must not be to the detriment of achieving the goals of the [Basin-Wide Plan] and [Basin IMPs] in the most effective manner as determined by [the Department]." (Exs. 19, 20: p. 1). And the permit imposes administrative and hydrologic conditions to "...ensure compliance with the [Basin-Wide Plan] and the [Basin IMPs]." (Exs. 19, 20: p. 2). Also, in order to divert water under an unappropriated excess flow appropriation, the Department must determine that the diversion will not harm all State-Protected Flows and that U.S. Fish and Wildlife Service Target Flows under PRRIP and the Nebraska New Depletion Plan, are satisfied. (Ex. 15: p.3-4; Ex. 19: p. 2-3; Ex. 20: p. 2-3; Amended Application A-19594: p. 11-12). Therefore, any diversions under PRD's permit, if approved, would not have a negative impact on such flows.

CPNRD and NPNRD's claims related to offsets are also speculative and not plausible. NRD Objectors argue that approval of Amended Application A-19594

will require an offset and will harm compliance with Target Flows and the Nebraska New Depletion Plan for PRRIP. (CPNRD Objection, ¶¶ 13, 14; NPNRD Objection, ¶ 2; Ex. 15). However, as discussed above, unappropriated excess flow appropriations operate in a manner consistent with the Platte Basin regulatory scheme. As set forth in the Nebraska New Depletion Plan for PRRIP:

To the extent that the [Department] has jurisdiction over new uses of surface water (presently includes all diversions from natural streams except those for instream livestock watering and all on-stream storage reservoirs greater than 15AF), new uses to be begun on or after January 1, 2006 (including any for which the purpose is to increase the water supply in any river basin other than the Platte River Basin) will not be allowed by the department unless any adverse effects on state-protected flows and target flows are either prevented or are offset.

(Ex.15: p. 2) (emphasis supplied). It is not a plausible claim that Amended Application A-19594 will require an offset because if approved, it will not have any adverse effect on State-Protected Flows or Target Flows. The Department places terms and conditions on unappropriated excess flow appropriations so that diversion cannot occur unless and until State-Protected Flows and Target Flows are satisfied. (Ex. 15: p.3-4; Ex. 19: p. 2-3; Ex. 20: p. 2-3; Amended Application A-19594: p. 11-12).

Additionally, the foregoing language in the Nebraska New Depletion Plan for PRRIP expressly contemplates new uses that involve an interbasin transfer, like Amended Application A-19594. It states that new uses "...including any for which the purpose is to increase the water supply in any river basin other than the Platte River Basin" are not allowed "...unless any adverse effects on State-Protected Flows and Target Flows are either prevented or offset." (Ex. 15: p. 2). Therefore, under PRRIP, the Department is required to place numerous terms and conditions on unappropriated excess flow permits to prevent any adverse effects to Target Flows and State-Protected Flows, i.e., no diversion can occur unless such flows are satisfied. This is expressly why an offset is not required when the Department approves an unappropriated excess flow appropriation, and PRD's permit, if approved, would be no different. (Amended Application A-19594: p. 11-12).

None of NRD Objectors' asserted injuries are sufficiently actual or imminent to state an injury in fact, and therefore, standing cannot be established for any of their claims.

iii. None of NRD Objectors' Current or Future Appropriations Would Be Harmed by Amended Application A-19594

The case law is clear on how the priority of an appropriation impacts standing to object to a water rights application. A holder of a senior appropriation cannot establish an injury in fact as against a junior water rights application, and therefore, does not have standing to object to said application. *Middle Niobrara II*, 286 Neb. at 619. Moreover, the fact that a water rights application may result in less water overall in the Platte River Basin for NRD Objectors' use does not state an injury in fact because such claims are not a sufficiently "particularized harm to a more direct, identified interest." *Central*, 280 Neb. at 544.

Further, how the Department administers unappropriated excess flow appropriations bears directly on the Department's determination of standing as it relates to the NRD Objectors' alleged harms to their water rights. As discussed above, PRD's unappropriated excess flow permit would not be able to divert unless and until all State-Protected Flows are satisfied, which includes many of the water rights held by NRD Objectors. PRD's permit would also be conditioned to be perpetually junior to all current and future appropriations in the Platte River Basin.

NRD Objectors' allegations regarding an adverse impact to their existing appropriations and pending applications for appropriations are insufficient to confer standing because under Nebraska's prior appropriation system, and the way in which unappropriated excess flow appropriations are administered, there would be no injury in fact to their use interests if Amended Application A-19594 was approved. The following addresses each of the NRD Objectors' alleged harms to their water use interests and rights.

a. CPNRD's Water Rights

CPNRD alleges harm regarding their permanent unappropriated excess flow appropriations A-18922 and A-18924 for groundwater recharge projects. (CPNRD Objection, ¶¶ 21, 32-35; Exs. 19, 20). CPNRD claims that Amended Application A-19594 would harm such appropriations because its approval would eliminate water that could be used by CPNRD for PRRIP, IMP, and Basin-Wide Plan Projects. (CPNRD Objection, ¶¶ 20, 34, 35). Further, CPNRD states:

Although [CPNRD's] permits to access excess flows have a priority date that is senior to the Application, the Department imposes specific conditions on these rights which ignore the relative priority dates and points of diversion among holders of excess flow rights in the over and fully appropriated reaches of the Platte River.

Specifically, the Department conditions access to water for A-18922 and A-18924 on its case-by-case determination of the availability of excess flows, and the relative beneficial uses of such flows for competing projects. This means that regardless of the permanent status, senior priority date, and Central Platte NRD's use of flows for Program, Basin Plan and IMP compliance purposes, the Applicants can access water instead of, ahead of, or in addition to A-18922 and A-18924, thus limiting Central Platte NRD's access to excess flows and harming its water rights.

(CPNRD Objection ¶, 33, 34). As set forth above, determinations related to priority rest with the Department, and it is authorized to place reasonable conditions on permits to protect the public interest. Here, PRD has specifically requested a condition to be administered as perpetually junior in priority, meaning it would not appropriate water unless all other appropriations were satisfied. Therefore, if Amended Application A-19594 is approved, the Department would condition the permit in such a way so that it would be junior to CPNRD's current and any future appropriations it may obtain. As a result, CPNRD cannot state an injury in fact for its senior permanent unappropriated excess flow appropriations A-18922 and A-18924 based on a potential approval of Amended

Application A-19594. *Middle Niobrara II*, 286 Neb. at 619. Further, CPNRD's alleged harms to their water rights fail to state an injury in fact because they merely amount to claims that Amended Application A-19594 may result in less water overall in the Platte River Basin for CPNRD's use and the Nebraska Supreme Court has rejected such claims as a means to establish standing. *Central*, 280 Neb. at 543-44.

CPNRD also alleges that potential approval of Amended Application A-19594 would harm their instream flow rights. (CPNRD Objection, ¶¶ 44-48; Ex. 21). However, CPNRD cannot state an injury in fact because all of their instream flow rights would be administered as senior to PRD's appropriation. *Middle Niobrara II*, 286 Neb. at 619. In addition, CPNRD's instream flow rights are by definition, State-Protected Flows, and like all other unappropriated excess flow appropriations, PRD's permit, if approved, cannot divert unless all State-Protected Flows are satisfied. (Ex. 15: p.3-4; Ex. 19: p. 2-3; Ex. 20: p. 2-3; Amended Application A-19594: p. 11-12).

The term State-Protected Flows is defined in the Nebraska New Depletion Plan for PRRIP and covers "Nebraska instream flow appropriations above Chapman and in effect when a new use is proposed." (Ex. 15: p. 3). Each and every instream flow appropriation held by CPNRD would be included in this definition of State-Protected Flows. (Ex. 15: p. 3; Ex. 21). As stated above, unappropriated excess flow appropriations are those appropriations that are determined to be in excess of U.S. Fish and Wildlife Service Target Flows and State-Protected Flows. (Ex. 15: p.3-4; Ex. 19: p. 2-3; Ex. 20: p. 2-3; Amended Application A-19594: p. 11-12). Also, as a result of Neb. Rev. Stat. § 46-715, the Department places terms and conditions on unappropriated excess flow permits so that diversions can only occur under conditions "...such that no adverse impacts to existing water users are expected." (Exs. 19, 20: p.2) Therefore, potential approval of Amended Application A-19594 would have no harmful impact on CPNRD's instream flow appropriations because it would be administered to prevent diversion unless and until CPNRD's instream flow rights are satisfied.

b. NPNRD's Water Use Interests Under Department Contract # 985

NPNRD does not currently hold any unappropriated excess flow appropriations, and they would be required to hold such an appropriation for any future diversion. Instead, NPNRD holds a water use interest that the Department has recognized under Department Contract # 985, which NPNRD alleges would be harmed by potential approval of Amended Application A-19594. (NPNRD Objection, ¶ 1; 29:2-30:5; Ex. 22). Under this contract, NPNRD is allowed to utilize the unappropriated excess flow permits of participating irrigation districts and canal companies "to divert excess flows in the North Platte River Basin to North Platte Valley irrigation canals for intentional groundwater recharge" to meet NPNRD's obligations under its IMP and the Basin-Wide Plan. (NPNRD Objection, ¶ 1; Ex. 22). NPNRD argues that because it does not have a formal unappropriated excess flow appropriation, and instead, a water use interest via contract, it has an unprotected interest that will be harmed by potential approval of Amended Application A-19594. (NPNRD Objection, ¶ 1; 29:2-30:5). However, PRD's proposed condition to be perpetually junior to all Platte Basin appropriations would be applicable to the permits associated with Contract # 985. (Ex. 22). The underlying unappropriated excess flow permits held by the participating irrigation districts and canal companies and utilized by NPNRD via contract would be administered as senior to PRD's applied-for permit. (Ex. 22). Therefore, an injury in fact cannot be established for NPNRD's claims related to Contract # 985. *Middle Niobrara II*, 286 Neb. at 619.

In addition, NPNRD's allegations of harm to its water use interest under Contract # 985 fail because they merely amount to allegations that Amended Application A-19594 may result in less water overall in the Platte River Basin for NPNRD's use, which does not rise to the level of an injury in fact under the holding in *Central*. "It is axiomatic that any use of a limited resource necessarily results in marginally less availability of that resource for potential use by others. An injury in fact, for standing purposes, requires a more particularized harm to a more direct, identified interest." *Central*, 280 Neb. at 543-44.

c. LLNRD's Water Rights

LLNRD alleges harm regarding their "pending instream flow application, A-19548, which [LLNRD] filed with the Department on July 28, 2017." (LLNRD Objection, ¶¶ 23, 28A.). LLNRD claims that approval of Amended Application A-19594 will limit or preclude LLNRD's ability to obtain an instream flow right. (LLNRD Objection, ¶¶ 23, 28A.). However, such claims fail at the outset because water rights applications are not a sufficient legally cognizable interest for standing purposes. To have standing, one must have a legal or equitable right, title, or interest in the subject matter of the controversy. *MUD*, 250 Neb. at 447. The Nebraska Supreme Court has found that an application to divert water is only a request for permission to appropriate public waters of the State and is not a property right.¹⁴ Therefore, alleged injuries relating to pending applications before the Department cannot confer standing.

It should be noted that during the pendency of PRD's Motion to Dismiss, on May 24, 2022, the Department granted LLNRD's instream flow application A-19548 for the full requested amount. (Ex. 23). Therefore, LLNRD's alleged harm that approval of Amended Application A-19594 will limit or preclude its ability to obtain an instream flow right is rendered moot.

iv. NRD Objectors' Remaining Claims

NRD Objectors' remaining claims are legal conclusions couched as factual allegations, and as such, are disregarded by the Department. *Central*, 280 Neb. at 544 (citing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)).

The NRD Objectors do not have standing to object to Amended Application A-19594, and therefore, each of their Objections should be dismissed.

B. Nebraska Public Power District

NPPD has failed to allege facts sufficient to state an injury in fact to a legally cognizable interest. NPPD's Objection claims an interest to its various surface water appropriations and its Federal Energy Regulatory Commission ("FERC") license. (NPPD Objection, ¶¶ 3-5). However, NPPD does not specifically allege how any of its enumerated interests will in fact suffer harm by approval of Amended Application A-19594. (NPPD Objection, ¶¶ 3-5). The remaining allegations in NPPD's Objections are merely legal conclusions, which fail to support NPPD's standing. (NPPD Objection, ¶¶ 5-15). The Department's review of NPPD's Objection is guided by the following:

¹⁴ *In re Applications A-16027 et al.*, 242 Neb. 315, 334-35 (1993); *In re Applications A-15145 et al.*, 230 Neb. 580, 587 (1988); *Saunders Cty. v. Metro. Utilities Dist.-A*, 11 Neb. App. 138, 154 (2002).

...threadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice. A Court is not obliged to accept as true a legal conclusion couched as a factual allegation. A pleader's obligation to provide the grounds of its entitlement to relief requires more than labels and conclusions. Nor does a pleader suffice if it tenders naked assertion, devoid of further factual enhancement.

Central, 280 Neb. at 544. NPPD has not adequately pled an injury in fact, and on that basis alone, its Objection should be dismissed by the Department.

Even assuming a proper pleading, NPPD still cannot establish standing for any of its claims. NPPD's allegations of harm regarding its interests to its water rights and its FERC license are not plausible and are conjectural because they turn on the claim that PRD's appropriation, if approved, will be adverse to PRRIP and Target Flows, as well as the Basin-Wide Plan and Basin IMPs. (NPPD Objection, ¶¶ 4-5). The way that unappropriated excess flow appropriations operate in this regulatory context render these claims meaningless. Such appropriations do not impact Target Flows, and in turn, the State's compliance with PRRIP, because diversion cannot occur unless Target Flows are exceeded—this is the same for all State-Protected Flows. (Ex. 15: p.3-4; Ex. 19: p. 2-3; Ex. 20: p. 2-3; Amended Application A-19594: p. 11-12). In addition, pursuant to Neb. Rev. Stat. § 46-715, PRD's unappropriated excess flow appropriation must not conflict with the Basin IMPs and the Basin-Wide Plan. (Exs. 19, 20: p.1-2). Therefore, the Department places terms and conditions such that any diversions "...must not be to the detriment of achieving the goals of the [Basin-Wide Plan] and [Basin IMPs] in the most effective manner as determined by the Department." (Exs. 19, 20: p. 1). And the permit sets forth administrative and hydrologic conditions to "...ensure compliance with the [Basin-Wide Plan] and the [Basin IMPs]." (Exs. 19, 20: p. 2). If approved, PRD's appropriation would also be required to operate in a manner consistent with the goals and objectives of the Basin IMPs and the Basin-Wide Plan.

NPPD's allegations that "...its numerous surface water appropriations from the North Platte, South Platte, and Platte Rivers" will be harmed by approval of Amended Application A-19594 fail because such appropriations are all senior to PRD's appropriation.¹⁵ (NPPD Objection, ¶ 3; Ex. 24). A senior water rights holder cannot assert an injury in fact as against a junior water rights application. *Middle Niobrara II*, 286 Neb. at 619. NPPD's surface water rights are also considered State-Protected Flows as they relate to the administration of unappropriated excess flow appropriations. NPPD's surface water rights are covered under the definition of State-Protected Flows in the Nebraska New Depletion Plan for PRRIP. (Ex. 15: p. 3; Ex. 24). As discussed above, unappropriated excess flow appropriations are conditioned by the Department so that diversion cannot occur unless all State-Protected Flows are satisfied. (Ex. 15: p.3-4; Ex. 19: p. 2-3; Ex. 20: p. 2-3; Amended Application A-19594:

¹⁵ Again, NPPD's Objection has failed to identify the specific water rights it holds in the Platte River Basin that would be harmed by approval of Amended Application A-19594. However, the Department identified NPPD's water rights from the list of all of the existing water rights and pending applications in the Platte River Basin (Water Division 1-A) that was officially noticed by the Department in its Notice dated July 16, 2021, and determined that all of NPPD's surface water rights would be administered as senior to PRD's appropriation, if approved. (Ex. 24).

p. 11-12). Therefore, potential approval of Amended Application A-19594 does not impact any of NPPD's surface water rights.

In addition, NPPD alleges that Amended Application A-19594 "...threatens NPPD's current use of unappropriated waters... both for storage under [Neb. Rev. Stat. § 46-241(1)] and for compliance with [PRRIP] and NPPD's [FERC] license for the Sutherland project." (NPPD Objection, ¶ 3; Exs. 24,27; 33:10-22). First, threatened injury does not establish standing. *Middle Niobrara II*, 286 Neb. at 618. Further, Amended Application A-19594 would have a permanent junior status as against current and future appropriations in the Platte River Basin, including NPPD's. (Amended Application A-19594: p. 11-12). As a result, NPPD cannot state an injury in fact for any of its appropriations based on a potential approval of Amended Application A-19594. *Middle Niobrara II*, 286 Neb. at 619.

NPPD also has pending applications A-19315 and A-19316 before the Department for a permit to appropriate water from the Platte River for ground water recharge. (Exs. 25, 26). However, water rights applications are not a legally cognizable right sufficient to confer standing.¹⁶ It should be noted that even if NPPD's applications were approved, such permits would be senior to PRD's appropriation, and thus NPPD is unable to establish standing on that basis as well. *Middle Niobrara II*, 286 Neb. at 619.

In addition, NPPD's alleged harms to all of its water rights generally fail to state an injury in fact because they merely amount to claims that Amended Application A-19594 may result in less water overall in the Platte River Basin for NPPD's use and the Nebraska Supreme Court has rejected such claims as a means to establish standing. *Central*, 280 Neb. at 543-44.

NPPD also alleges that its "...interests are directly tied to the [PRRIP's] success as related to ESA compliance in its Federal Energy Regulatory Commission (FERC) license for the Sutherland Project." (NPPD Objection, ¶ 4; Ex. 27). And that Amended Application A-19594 "...puts Nebraska at risk of non-compliance with PRRIP." (NPPD Objection, ¶ 9). However, such allegations do not state a plausible claim for relief because PRD's unappropriated excess flow permit, if approved, will not be able to divert unless and until U.S. Fish and Wildlife Service Target Flows are satisfied. (Ex. 15: p.3-4; Ex. 19: p. 2-3; Ex. 20: p. 2-3; Amended Application A-19594: p. 11-12). Therefore, there is no "risk" of noncompliance with the ESA or PRRIP's goals and objectives. Furthermore, claims alleging "risk" of harm are speculative and merely allege threatened harm, which does not establish standing. *Middle Niobrara II*, 289 Neb. at 618. NPPD also does not allege that Amended Application A-19594 will cause streamflows to "[fall] short of what was required or even desirable" to maintain compliance with its FERC license, and therefore, has failed to assert a particularized harm to a direct, identified interest for standing purposes. (NPPD Objection, ¶ 4). *Central*, 280 Neb. at 543-44.

Also, it should be noted that NPPD is not a signatory to PRRIP, the Basin-Wide Plan, or any IMP, nor is it responsible for compliance with any of the foregoing, and thus, any claims alleging harms related to these "interests" amounts to asserting the interests of third parties, which cannot establish standing. *MUD*, 250 Neb. at 448-51. Further, the Department reiterates its determination in Section IV.A.ii. that all of NPPD's alleged injuries are not sufficiently imminent due to the various contingences and subsequent actions of the

¹⁶ *MUD*, 250 Neb. at 447; *In re Applications A-16027 et al.*, 242 Neb. at 334-35; *In re Applications A-15145 et al.*, 230 Neb. at 587; *Saunders Cty*, 11 Neb. App. at 154.

Department that need to occur before PRD can even divert under its permit, if approved.

The remaining claims contained in NPPD's Objection are legal conclusions couched as factual allegations, and as such, are disregarded by the Department. (NPPD Objection, ¶¶ 7-15). *Central*, 280 Neb. at 544 (citing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)).

NPPD does not have standing to object to Amended Application A-19594, and therefore, its Objection should be dismissed.

C. Loup River Public Power District

LRPPD's Objection alleges that potential approval of Amended Application A-19594 will alter Platte River flows "...upon which it must rely for the operation of the Project, and expose [LRPPD] to the risk of re-initiated formal consultation with [the U.S. Fish and Wildlife Service] to maintain its FERC license." (LRPPD Objection, ¶¶ 13, 27; Ex. 28). LRPPD's alleged harms are insufficient to confer standing because they are not actual or imminent, are based on conjecture, and cannot be fairly traced to approval of Amended Application A-19594.

LRPPD's allegations are substantially similar to those that the Nebraska Supreme Court found failed to establish standing in *Central*. In that case, Central Public Power and Irrigation District (Central) challenged an upstream NRD's regulations that reduced ground water allocations in the Pumpkin Creek Basin, which Central alleged caused a reduction in streamflows to Lake McConaughy, thereby harming Central's operations including its "system of reservoirs, canals, and laterals used for several purposes, including irrigation, recreation, environmental protection, and powerplant cooling," and "...its hydroelectric facilities that use the waters of Lake McConaughy and the North Platte River." *Central*, 280 Neb. at 536. Central also alleged harm related to Endangered Species Act compliance regarding its FERC license. *Id.* at 543.

The Court found that Central failed to state an injury in fact because it did not allege a direct injury—it failed to connect its alleged injuries to the challenged action. *Id.* at 544-45. Such an "attenuated connection" between the NRD's regulations and Central's alleged injuries was too remote and did not establish causation of an injury in fact. *Id.* at 545. The Nebraska Supreme Court stated that:

...even if we infer that less water is available to the U.S. Fish and Wildlife Service for endangered species, Central did not allege that the reduced amount of water fell short of what was required or even desirable for that purpose. Nor did Central allege that reduced water delivery to canal operators impaired the operation of their canals. Similarly, although Central alleges that it has its own interest in generating power with water from the North Platte River and Lake McConaughy, it did not allege that it was less able to generate power as a result of the NRD's conduct, nor did it allege that less power was available to its customers. It is axiomatic that any use of a limited resource necessarily results in marginally less availability of that resource for potential use by others. An injury in fact, for standing purposes, requires a more

particularized harm to a more direct, identified interest.

Id. at 543-44.

Similarly, LRPPD has failed to allege that approval of Amended Application A-19594 will alter streamflows such that they will "fall short of what was required or even desirable" to maintain the production of hydropower, i.e. the Project, and compliance with its FERC license. *Id.* LRPPD's allegation related to noncompliance with its FERC license states that:

...if annual stage and discharge differences in the flow of the Platte River at the North Bend, Nebraska USGS gage, or at the Louisville Nebraska USGS gage are greater than that identified in the FERC license, regardless of [LRPPD's] conformance with the Restrictions, then FERC will reinitiate formal consultation with the [U.S. Fish and Wildlife Service] and impose necessary restrictions on [LRPPD's] operation of the Project to support habitat as required by the ESA.

(LRPPD Objection, ¶ 25; Ex. 28). LRPPD fails to connect this allegation describing when a formal consultation is required under its FERC license to approval of Amended Application A-19594. LRPPD does not allege that upon approval of Amended Application A-19594, the annual stage and discharge differences in the flow amounts will be greater than that identified in its FERC license. Instead, LRPPD merely alleges that Amended Application A-19594 will alter stream flows that will expose it to "risk" of a formal consultation. (LRPPD Objection, ¶ 27). This fails to rise above the level of conjecture and speculation and does not show causation of an injury in fact. LRPPD cannot claim to be harmed by a potential appropriation simply because there will be less water available for LRPPD's use. *Central*, 280 Neb. at 543-44. An injury in fact requires a more particularized harm to a direct, identified interest. *Id.* Also, LRPPD's claims related to "risk" of re-consultation under its FERC license are speculative and merely allege threatened harm, which does not establish standing. *Middle Niobrara II*, 289 Neb. at 618. (LRPPD Objection, ¶ 27).

LRPPD's allegation that Amended Application A-19594 will risk a re-consultation of its FERC license is not a plausible claim for relief. LRPPD alleges that its FERC license imposes restrictions to protect habitat for certain threatened and endangered species in the Lower Platte and that Amended Application A-19594 will be adverse to such restrictions. (LRPPD Objection, ¶¶ 20,21; Ex. 28). However, Amended Application A-19594 cannot harm State-Protected Flows, which includes several instream flow rights held by the Nebraska Game and Parks Commission that provide flow protection for the Lower Platte downstream of LRPPD's diversion. (Ex. 9: p. 3; Ex. 24). Therefore, LRPPD's claims related to harm to its FERC restrictions are speculative and do not state an injury in fact. In addition, LRPPD's claim related to offsets fail for the same reasons as stated in Section IV.A.ii. above. (LRPPD Objection, ¶ 28).

LRPPD's allegations of harm regarding A-2287 and its operations for hydropower similarly fail under *Central*. LRPPD alleges that Amended Application A-19594 will "alter streamflows upon which it must rely for the Project." (LRPPD Objection, ¶ 27; Ex. 29). However, LRPPD does not allege that approval of Amended Application A-19594 will cause streamflows that "fall short of what was required or even desirable" for operation of its hydropower facilities. *Central*,

280 Neb. at 543-44. LRPPD also does not allege that "it was less able to generate power as a result of [approval of Amended Application A-19594], nor did it allege that less power was available to its customers." *Id.* Thus, LRPPD has failed under *Central* to assert a particularized harm to a direct, identified interest. *Id.* LRPPD's claims regarding A-2287 and its operations for hydropower are merely allegations that a water rights application might result in less water overall for LRPPD's use, which does not confer standing. *Id.* at 543-44.

The Department also restates its determination in Section IV.A.ii. that all of LRPPD's allegations fail because they are not sufficiently imminent due to the numerous contingencies and subsequent Department actions that need to occur before PRD can divert under its permit.

Further, LRPPD is not a signatory to PRRIP or responsible for compliance with PRRIP, nor is it a signatory to any IMP or Basin-Wide Plan, and thus, any claims alleging harms related to these "interests" amounts to asserting the interests of third parties, which cannot establish standing. *MUD*, 250 Neb. at 448-51. (LRPPD Objection, ¶ 29).

The remaining claims in LRPPD's Objection are legal conclusions couched as factual allegations, and as such, are disregarded by the Department. (LRPPD Objection, ¶¶ 31-38). *Central*, 280 Neb. at 544 (citing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)).

LRPPD does not have standing to object to Amended Application A-19594, and therefore, its objection should be dismissed.

D. Audubon

Audubon alleges that it owns and operates the Rowe Sanctuary and associated land within certain threatened and endangered species' habitat ("Target Species"), and that Amended Application A-19594 will reduce Platte River flows that support the Target Species. (Audubon Objection, ¶¶ 9,10,18). However, such allegations do not state a plausible claim for relief.

First and foremost, unappropriated excess flow appropriations, like PRD's if approved, cannot divert under their permit unless the Department determines that all U.S. Fish and Wildlife Service Target Flows are satisfied. (Ex. 15: p. 3; Exs. 19, 20: p. 2-3; Amended Application A-19594: p. 11-12). Under PRRIP and the Nebraska New Depletion Plan, such flows are for the reach of the Platte River from Lexington to Chapman, NE needed to improve and maintain habitat for the Target Species. (Exs. 15, 16; Audubon Objection, ¶¶ 7, 8). In order to determine that hydrologic conditions are such that Target Flows are satisfied, the Department uses the Desired Minimum Discharge (DMD) as the benchmark, which is the minimum discharge required by State-Protected Flows, and greater than Target Flows. (Exs. 19, 20: p. 2-3; Amended Application A-19594: p. 11-12). The current hydrologic condition of wet, normal, or dry as determined by PRRIP, informs the appropriate DMD value. *Id.* Only those flows in excess of the DMD may be considered by the Department as available for use under an unappropriated excess flow appropriation. *Id.*

All of Audubon's allegations of harm related to any adverse impacts Amended Application A-19594 may have on the Target Species and their habitat fail because the Department places terms and conditions on such permits so that diversions cannot adversely impact Target Flows. The PRRIP-associated habitat reach and accompanying Target Flow requirements falls squarely within the land and habitat that Audubon supports and operates. (Audubon Objection, ¶¶ 9,10;

Exs. 15-17). Therefore, Audubon's lands and habitats for the Target Species directly benefit from such Target Flow requirements, which Amended Application A-19594 would maintain.

Audubon's allegations of harm also fail because they do not state an injury in fact. Audubon alleges that Amended Application A-19594 will eliminate flows necessary to its operations. (Audubon Objection, ¶¶ 18,22,25-29). Much like the claims in the *Central* case, "...even if we infer that less water is available...for endangered species," Audubon does not allege that Amended Application A-19594 will imminently cause streamflows to "[fall] short of what was required or even desirable for that purpose." *Central*, 280 Neb. at 543-44. Audubon's objection contains no allegations of the specific flow amounts that are required for Audubon's purposes. However, in their brief, Audubon argues that "...the existence of flows in excess of Target Flows... upstream of Rowe Sanctuary are necessary to support and maintain habitat for the [Target Species]." (Audubon Brief: p. 2). But as stated above, Target Flows are not adversely impacted by potential approval of Amended Application A-19594, and therefore, such allegations are based on conjecture, which does not rise to the level of an injury in fact. Also, it should be noted that the U.S. Fish and Wildlife Service has designated that the Target Flows are sufficient to protect the Target Species and its associated habitat. (Exs. 15-17). As PRD's permit would have no adverse impact on Target Flows, Audubon cannot state an injury in fact for any of its claims.

Audubon also alleges that they rely on "...central Platte River stakeholders and water managers to store and retime flows in the central Platte River to support [Target Species'] associated habitat on the Audubon Parcels." (Audubon Objection, ¶¶ 22, 30). First, such allegations fail at the outset because they assert the rights of third parties and not Audubon's own. *MUD*, 250 Neb. at 448-51. Second, these allegations fail because any Central Platte River stakeholder or water managers holding an unappropriated excess flow permit for a project to support PRRIP, IMP, Basin-Wide Plan goals, etc. will be administered as senior to PRD's permit if approved. (See Section III.C; Amended Application A-19594: p. 11-12). Therefore, an injury in fact cannot be established for such claims.

Audubon's allegations that the granting of Amended Application A-19594 will increase their operational costs are speculative, and as such, are insufficient to confer standing.

The Department reiterates its determination above in Section IV.A.ii. that all of Audubon's allegations are not sufficiently imminent because of the various contingences and subsequent Department actions that need to occur before PRD is able to divert under its permit.

Also, Audubon does not allege it holds a surface water right that will be harmed by Amended Application A-19594, and although Audubon is a member of various committees for PRRIP, it is not a signatory to PRRIP, nor is it a signatory to any IMP or Basin-Wide Plan, and thus, any claims alleging harms related to these "interests" amounts to asserting the rights of third parties, which cannot establish standing. *MUD*, 250 Neb. at 448-51. (Audubon Objection, ¶¶ 17, 22, 30, 32, 33).

The remaining claims in Audubon's Objection are legal conclusions couched as factual allegations, and as such, are disregarded by the Department. (Audubon Objection, ¶ 21). *Central*, 280 Neb. at 544 (citing *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)).

Audubon does not have standing to object to Amended Application A-19594, and therefore, its Objection should be dismissed.

E. Cozad Ditch Company

As discussed above, CPNRD is the record owner of unappropriated excess flow appropriation A-18922 and pursuant to an agreement with Cozad under Neb. Rev. Stat. § 46-234(1), CPNRD utilizes Cozad's canals and associated works for the project under CPNRD's appropriation. (Cozad Objection, ¶¶ 4-8; CPNRD Objection, ¶¶ 31C.i, 32; Exs. 19, 30; 43:18-23). Cozad states that its Objection is "...as to A-18922 only to the extent the Application harms any interest Cozad may have in A-18922 by virtue of owning the underlying real estate..." (Cozad Objection, ¶ 11). Based on the allegations in its Objection, Cozad does not have the requisite legally cognizable interest to establish standing to object to Amended Application A-19594.

It is a well-established tenet of standing doctrine that:

... a court may decline to determine merits of a legal claim because the party advancing it is not properly situated to be entitled to its judicial determination. The focus is on the party, not the claim itself. And standing requires that a litigant have such a personal stake in the outcome of a controversy as to warrant invocation of a court's jurisdiction and justify exercise of the court's remedial powers on the litigant's behalf. Thus, generally, a litigant must assert the litigant's own rights and interests, and cannot rest a claim on the legal rights or interests of third parties.

Middle Niobrara II, 286 Neb. at 615. Cozad's interests are quintessentially third-party interests and are not sufficient to confer standing. Cozad is not the record owner of A-18922 and therefore, does not have standing to object to Amended Application A-19594 based on alleged harms to A-18922. Cozad is merely the carrier or "owner and operator of the facilities" that will be utilized by CPNRD. Neb. Rev. Stat. § 46-234(1). However, even if Cozad was the record owner of A-18922, Cozad would still not be able to establish standing for alleged harms to A-18922, because such appropriation would be administered as senior to Amended Application A-19594, if approved. (See Section IV.A.iii.a. above).

Cozad does not have standing to object to Amended Application A-19594, and therefore, its Objection should be dismissed.

V. Public Interest

Based on the preceding, the Objectors' alleged injuries are insufficient to confer standing to object to Amended Application A-19594. As such, any claims by Objectors that Amended Application A-19594 goes against the public interest are rendered irrelevant as a means to confer standing. An objector "does not have the power to represent the public interest in litigation in which it does not have standing." *MUD*, 250 Neb. at 450. In addition, none of the Objectors can claim to represent the public interest to establish standing. The Nebraska Supreme Court found in *Middle Niobrara II* that:

the fact that the granting of an application might not be in the public interest says nothing about whether

the [objectors] have standing...This court has specifically held that [NRDs] cannot assert the public interest. Nor can [an individual appropriator]. The right and injury asserted in order to establish standing must be the litigant's own: '[I]t is not sufficient that one has merely a general interest common to all members of the public.'

Middle Niobrara II, 286 Neb. at 620 (citing *Waste Connections*, 269 Neb. at 862).

Neb. Rev. Stat. § 46-289 also does not confer standing to any of the Objectors to challenge applications involving an interbasin transfer. Neb. Rev. Stat. § 46-289 provides the factors the Department must consider to evaluate interbasin transfer applications. It does not constitute a means to challenge Department action based on allegations of interest related to such factors, nor does it prescribe that the public interest must be represented by a certain party.

VI. Central as an Owner and Operator of the Facilities for PRD's Project

As set forth in the procedural history above, Central was initially a co-applicant with PRD on Application A-19594. However, the Department determined in its Order dated February 26, 2020 that Central was not a valid applicant or appropriator under the Application because neither Central nor any of its customers would be making beneficial use of the water for compact compliance purposes in the Republican River Basin. Instead, the Department determined that Central should be characterized as a carrier or "owner and operator of the facilities" that will be utilized by PRD for the project. Neb. Rev. Stat. § 46-234(1). As a result of the Order that removed Central as a co-applicant, PRD filed a Second Amended WSA between Central and PRD as required under Neb. Rev. Stat. § 46-234(1), which allowed PRD to use Central's facilities for the project and referenced PRD as the sole owner of the appropriation, if approved. The Department determined that such Second Amended WSA complied with the Department's Order dated February 26, 2020, and that it could proceed with Amended Application A-19594.

CPNRD, LRPPD, and LLNRD's Objections and at oral argument raised additional issues regarding the Second Amended WSA and Central's authority to enter into the Second Amended WSA. (CPNRD Objection, ¶¶ 52,53,55; LRPPD Objection, ¶¶ 33,34; LLNRD Objection, ¶¶ 31,32; 63:8-67:13; Ex. 31). However, because the Department has determined that the Objectors do not have standing in this matter, it will not reach the question of whether Central has authority to enter into the Second Amended WSA. The Department finds that Amended Application A-19594 and the Second Amended WSA complies with the Department's Order dated February 26, 2020, and will proceed in its review with these filings.

It is therefore ORDERED:

PRD's Motion to Dismiss is GRANTED and the Objections filed by North Platte Natural Resources District; Nebraska Public Power District; Cozad Ditch Company; Loup River Public Power District; Central Platte Natural Resources District; Lower Loup Natural Resources District; and Audubon Society are hereby DISMISSED.

DEPARTMENT OF NATURAL RESOURCES

December 12th, 2022


Thomas E. Riley, P.E., Director

CERTIFICATE OF SERVICE

I, Cheryl Byler, hereby certify that a copy of this Order was sent via email and by first class mail to each of the following on December 12th, 2022:

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