

STATE OF NEBRASKA

DEPARTMENT OF NATURAL RESOURCES

In the Matter of)	Case No. 2024-2-CC-1
Appropriation A-9284,)	
)	ORDER OF CANCELLATION
)	
Division 2-B.)	

This matter came on for consideration before the Director of the Department of Natural Resources (Department) following a hearing held pursuant to Neb. Rev. Stat. §§ 46-229 to 46-229.04. The Director finds and orders as follows:

I. Procedural History

- Based on the results of the Department's verified field investigation report (E4), on February 6, 2024, the Department issued a Notice of Preliminary Determination of Nonuse (PDNU) for a portion of land appurtenant to Surface Water Appropriation A-9284 (Appropriation) to the landowners of record, Hastings Family Holdings, LLC pursuant to Neb. Rev. Stat. §§ 46-229.02(1), 46-229.03. (Exs.5,7,10)
- The Appropriation owned by Hastings Family Holdings has a priority date of March 4, 1957, to divert 0.71 cubic foot per second (cfs) of water from Rawhide Creek at points of diversion located in the NW¼ of Section 16 and NW¼ of Section 21, both in Township 16 North, Range 10 East of the 6th P.M. in Douglas County, for irrigation of the following described land:

<u>Township 16 North, Range 10 East of the</u>		
<u>6th P.M. in Douglas County</u>		<u>Acres</u>
Section 21:	NW¼NW¼	38.0
	NE¼NW¼	<u>12.0</u>
	TOTAL	50.0

- Hastings Family Holdings timely filed a contest to the Department's PDNU on February 22, 2024, pursuant to Neb. Rev. Stat. § 46-229.02 (1). (Ex. 8)
- The Department reviewed Hastings Family Holdings stated reasons for contesting the PDNU and in accordance with Neb. Rev. Stat. § 46-229.02 (5) sent a Notice of Hearing to Hastings Family Holdings on April 12, 2024, for the purpose of taking testimony and evidence on whether the Appropriation is subject to cancellation under Neb. Rev. Stat. §§ 46-229 to 46-229.06.
- On May 28, 2024, a hearing regarding the Appropriation was held. The Department was represented by its attorney Isabella Peterson and Hastings Family Holdings was represented by its attorney David Domina. At the hearing, the Department entered several exhibits into the record including the verified field investigation report. (Ex. 4) (10:1-11:18)

II. Hastings Family Holdings did not meet its burden of proof to establish either that the Appropriation was used during the previous five consecutive years or that there was a sufficient cause for nonuse.

1. Surface water rights not beneficially used for five consecutive years are subject to cancellation by the Department pursuant to proceedings brought under Neb. Rev. Stat. §§ 46-229 to 46-229.04. Beneficial use in the context of a surface water right for irrigation like the Appropriation at issue means "actual application of the water to the land for the purpose of irrigation." *In re Appropriation A-7603*, 291 Neb. 678, 687 (2015).
2. At hearings on the cancellation of an appropriation, the Department bears the initial burden of proof in establishing nonuse for the statutory period of five years. Neb. Rev. Stat. § 46-229.04 (1). The Department's verified field investigation report shall be prima facie evidence that the water right should be cancelled. *Id.* Once this report is presented at the hearing, the burden of proof shifts to the appropriator to establish through evidence and testimony that the appropriation has either been put to beneficial use during the prior five consecutive years contrary to the verified field investigation report or that a statutorily recognized excuse for nonuse exists as set forth in Neb. Rev. Stat. § 46-229.04. *In re Appropriation A-7603*, 291 Neb. 678, 691 (2015).
3. At the hearing, the verified field investigation report by Department employee Austyn Houser was entered into the record and Mr. Houser testified as to the contents of the report. (10:1-11:18) The report and testimony showed that Hastings Family Holdings' predecessor in title, Fralyn Farms Inc., had not irrigated the land under the Appropriation in approximately the last fifteen years and that only groundwater had been used to irrigate the associated acres under the Appropriation. (Exs. 4, 5 6; 15:6-16:17)
4. Taking the report and Mr. Houser's testimony together, the Department established nonuse of the Appropriation for the statutory five-year period, and the burden of proof shifted to Hastings Family Holdings to show cause why the Appropriation should not be cancelled.
5. Hastings Family Holdings' contest argued that it used the Appropriation by virtue of its "pumping of the interrelated groundwaters that are coextensive with Rawhide Creek's visible flowing surface. This constitutes a good faith justification for preservation of [the Appropriation]." (Ex.8) Thomas Hastings, President of Hastings Family Holdings, testified that he did not know whether the Appropriation had been used during the previous five years after they acquired the land under the Appropriation. (37:23-38:4) He testified as to future plans for the Appropriation to irrigate timber ground and stated that he did not intend to use the Appropriation to grow crops. (46:14-20)
6. However, such testimony and evidence does not refute the findings of the Department's verified field investigation report or establish a sufficient cause for nonuse. Hastings Family Holdings admits that they did not have any evidence to contest the findings of nonuse in the field report and they did not contend that the Appropriation had been used for the previous five consecutive years. (9:4-6; 44:14-19; 55: 19-22). In addition, groundwater use is not relevant to a surface water cancellation proceeding as it does not establish use of surface water nor is ground water use a sufficient cause for nonuse as enumerated in Neb. Rev. Stat.

§ 46-229.04. And although interconnected, surface and groundwater are allocated and administered separately. Further, the Appropriation must be used in accordance with the terms and conditions of the permit and its point of diversion is on the west bank of Rawhide Creek, not a groundwater well approximately 700 feet away. (Exs. 1-3) Hastings Family Holdings is also bound by the nonuse of the Appropriation by Fralyn Farms Inc. *In re Water Appropriation*, 203 Neb. 776, 782 (1979) (held that an appropriator is bound by an unexcused nonuse of its predecessor in title).

7. The Department finds that Hastings Family Holdings did not meet its burden of proof to show cause why the Appropriation should not be cancelled. As a result, the Department finds that the Appropriation has not been beneficially used for irrigation purposes for more than fifteen consecutive years, that there is no sufficient cause for such nonuse, and that the Appropriation should be cancelled as provided by Neb. Rev. Stat. § 46-229.04. This Order of Cancellation does not prevent Hastings Family Holdings from applying for a new surface water right for beneficial use on its lands.

It is therefore ORDERED:

Surface water appropriation A-9284 in the amount of 0.71 cfs from Rawhide Creek for irrigation of land described in Paragraph I.2. is hereby CANCELLED.

Department of Natural Resources



July 31, 2024

Tom Riley, P.E., Director

CERTIFICATE OF SERVICE

I, B.J. Green, hereby certify that a copy of this Order was emailed on July 31, 2024, to the Department's Norfolk Field Office and counsel for the Department. A copy of this Order was also emailed and mailed by first class mail on July 31, 2024, to:

Hastings Family Holdings, LLC
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B.J. Green, Clerk