

STATE OF NEBRASKA

DEPARTMENT OF NATURAL RESOURCES

ORDER OF FINAL DETERMINATION

THAT A PORTION OF THE LOWER NIOBRARA RIVER BASIN IS FULLY APPROPRIATED, THAT THE STAYS ON NEW SURFACE WATER USES AND ON INCREASES IN THE NUMBER OF SURFACE WATER IRRIGATED ACRES SHALL CONTINUE, AND DESIGNATING THE GEOGRAPHIC AREA WITHIN WHICH THE SURFACE WATER AND GROUND WATER ARE HYDROLOGICALLY CONNECTED

Background

1. On October 16, 2007, the Department of Natural Resources (Department) completed the evaluation required by Neb. Rev. Stat. Section 46-713(1)(a) of the expected long-term availability of hydrologically connected water supplies for both existing and new surface water uses and existing and new ground water uses in the river basins which had not previously been determined to be fully appropriated, and issued a report, the 2008 Annual Evaluation of Availability of Hydrologically Connected Water Supplies, (2008 Evaluation) describing the results of its evaluation.
2. The 2008 Evaluation concluded as a preliminary matter that a portion of the Lower Niobrara River Basin is fully appropriated. The fully appropriated portion is located in the Upper Niobrara White Natural Resources District (the "UNWNRD"), the Middle Niobrara Natural Resources District (the "MNNRD"), the Lower Niobrara Natural Resources District (the "LNNRD"), the Upper Loup Natural Resources District (the "ULNRD"), and the Upper Elkhorn Natural Resources District (the "UENRD").
3. On October 17, 2007, pursuant to Neb. Rev. Stat. Section 46-714, notice of the preliminary determination was given to the public, the UNWNRD, the MNNRD, the LNNRD, the ULNRD, and the UENRD, and the licensed water well contractors in the state. The notice identified the portion of the Lower Niobrara River Basin that was preliminarily determined to be fully appropriated and the geographic areas in which the surface water and groundwater are hydrologically connected.
4. Under Department rule, 457 NAC 24.001.02, the hydrologically connected area is the area within which the pumping of a well for 50 years will deplete the river or a baseflow tributary thereof by at least 10% of the amount pumped in that time (the "10/50" area). To make its determination of the "10/50" area, the Department utilized data from the University of Nebraska Conservation and Survey Division and the Jenkins Stream Depletion Factor Analysis, which is the best scientific data and information currently available for determining the hydrologically connected area.
5. The Department issued notice of, and held, three public information meetings and three public hearings on the 2008 Evaluation on December 20, 2007, in Atkinson and Valentine, Nebraska; and December 27, 2007, in Gordon, Nebraska.

6. Public testimony was taken at each public hearing, and the record in each public hearing was held open for at least one full week following the date of the public hearing, in order to allow the receipt of any additional written testimony into the record. A transcript was made for each public hearing.
7. As required by Neb. Rev. Stat. Section 46-714(4) each irrigation district, reclamation district, public power and irrigation district, mutual irrigation company, canal company, or municipality that relies on water from the affected portion of the Lower Niobrara River Basin and other water users and stakeholders deemed appropriate by the Department or the affected natural resources district were consulted.
8. Testimony from 28 witnesses at the hearings on December 20, 2007, and December 27, 2007, and 43 exhibits were presented for the hearing record. A variety of factual and legal arguments were asserted. Some the issues raised related to the economic impacts of the determination the basin would be fully appropriated, stream flow hydrographs and water table elevation data, the difference between the criteria used to administer water rights as opposed to determining a basin is fully appropriated, the need to establish a baseline to determine the availability of water at the time the permit was granted, the determination of the boundary of the ground water area considered to be hydrologically connected to the surface watershed of the Niobrara River and the question of how the preference laws should be integrated with the determination of whether a basin is fully appropriated.
9. The Department has carefully considered the record and based on this review has determined that the preliminary determination should be accepted, except that based on testimony regarding the extent of the hydrologically connected ground water area, the Department determined that Section 6 of Township 29 North, Range 14 West; Sections 20, 28, and 36 of Township 30 North, Range 15 West; Sections 4, 5, and 6 of Township 30 North, Range 16 West; Sections 5 and 6 of Township 30 North, Range 17 West; and Sections 3 and 6 of Township 30 North, Range 18 West that were preliminarily considered to be hydrologically connected to the Niobrara River should not be included in the area considered to be hydrologically connected to the Niobrara River. Accordingly these sections were removed from the area determined to be fully appropriated.
10. As required by the Nebraska Nongame and Endangered Species Conservation Act (Neb. Rev. Stat. Sections 37-801 to 37-811), the Department consulted with the Nebraska Game and Parks Commission regarding whether or not continuing the stays on new and expanded uses of ground and surface water in the fully appropriated Basin would jeopardize the continued existence of any endangered or threatened species or result in the destruction or modification of habitat of any endangered or threatened species that the Commission has determined is critical. The Commission determined that continuing the stays will have no effect on any state listed threatened or endangered species.

Conclusions

After due consideration of the comments received about the 2008 Annual Evaluation of Hydrologically Connected Water Supplies and the Department's preliminary determination that a portion of the Lower Niobrara River Basin is fully appropriated and its preliminary determination of the "10/50" area, and based on information in the 2008 Evaluation, it is CONCLUDED that:

- (1) the portion of the Lower Niobrara River Basin between the Mirage Flats diversion dam and the Spencer Hydropower Plant are fully appropriated;
- (2) it is in the public interest to continue the stays on new surface water uses and on increases in the number of surface water irrigated acres in the fully appropriated area; and,
- (3) the area within which surface water and ground water are hydrologically connected is as shown on the map in Appendix II and the legal description of the land within the "10/50" area in Appendix III.

Order

It is hereby ORDERED that:

1. The Department's preliminary determination that the portion of the Lower Niobrara River Basin between the Mirage Flats Diversion Dam and the Spencer Hydropower Plant is fully appropriated is final.
2. The stays on new surface water uses and on increases in the number of surface water irrigated acres, that took effect as a result of the Department's preliminary determination that the portion of the Lower Niobrara River Basin between the Mirage Flats Diversion Dam and the Spencer Hydropower Plant is fully appropriated shall remain in effect until (a) they are terminated pursuant to law, (b) an integrated management plan for the affected area has been adopted and has taken effect, (c) the Department has completed a reevaluation of the area and has determined that the affected area is not fully appropriated, or (d) the stays expire pursuant to law. The surface water stays are in effect in the area depicted on the map in Appendix I.
3. The geographic area within which the Department has determined ground water to be hydrologically connected to the surface water is as depicted on the map in Appendix II and described in Appendix III.
4. The stays on the construction of new water wells and on increases in acres irrigated with ground water remain in effect unless terminated by the pertinent natural resources districts as authorized in Neb. Rev. Stat. Section 46-714.

DEPARTMENT OF NATURAL RESOURCES

January 25, 2008


Ann Bleed, Director

Any person with sufficient legal interest who has been or may be substantially affected by this order may request a contested case hearing in

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accordance with the Nebraska Administrative Procedures Act (Neb. Rev. Stat., Sections 84-901 et. seq.) and the Department's Rules of Practice and Procedure (454 N.A.C. Chapter 007). The request must be received by the Department at its Lincoln Office (301 Centennial Mall South, 4th Floor State Office Building, Lincoln, NE 68509-4676) within 15 days of the date of this order and be accompanied by a filing fee of \$10.

CERTIFICATE OF SERVICE

A copy of the foregoing ORDER OF FINAL DETERMINATION THAT A PORTION OF THE LOWER NIOBRARA RIVER BASIN IS FULLY APPROPRIATED, THAT THE STAYS ON NEW SURFACE WATER USES AND ON INCREASES IN THE NUMBER OF SURFACE WATER IRRIGATED ACRES SHALL CONTINUE, AND DESIGNATING THE GEOGRAPHIC AREA WITHIN WHICH THE SURFACE WATER AND GROUND WATER ARE HYDROLOGICALLY CONNECTED with Appendices, was mailed to the Upper Niobrara White, the Middle Niobrara, the Lower Niobrara, the Upper Loup, and the Upper Elkhorn Natural Resources Districts, posted on the Department's website and provided to the Department's field offices on January 25, 2008.