

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 came on for consideration upon the Nebraska Department of Natural Resources's (Department) Order to Show Cause dated May 22, 2019. The Director finds and orders as follows:

I. Procedural History

1. After receiving a variance from the Department, the Central Nebraska Public Power and Irrigation District (Central) and the Platte Republican Diversion Interlocal Agreement Partners (PRD) (collectively, Applicants) filed surface water application A-19594 (Application) on April 4, 2018. Application A-19594 is for an interbasin transfer that proposes 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. (E1, 1-95).
2. Upon careful examination of the Application as required under Neb. Rev. Stat. § 46-233(3) (c), the Department found that the Application did not set forth all of the facts necessary to enable it to determine the nature and amount of the proposed appropriation. The Application was therefore returned to the Applicants as defective along with a statement of the corrections required. (E1, 96-98).
3. A corrected application was timely filed by the Applicants on July 3, 2018. (E1, 97-147).
4. 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) and that further review of the Application was warranted. On July 19, 2018, the Department gave notice of the Application pursuant to Neb. Rev. Stat. § 46-233 (5) and (6). (E1, 148; 150-151).
5. Among the many filings the Department received in response to the public notice, the following entities filed formal objections and requests for hearing under Title 454 Neb. Admin. Code Ch. 7, §§ 001.08B, 001.11A: (1) North Platte Natural Resources District; (2) Nebraska Public Power District; (3) Cozad Ditch Company; (4) Loup River Public Power District; (5) Central Platte Natural Resources District; (6) Lower Loup Natural Resources District; and (7) Audubon Society (collectively, Objectors).
6. 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.

7. The Applicants timely filed a Motion to Dismiss Objections and Requests for Hearing on September 26, 2018. The parties were given time to brief the objections and the motion to dismiss.
8. The Department has not yet ruled on the Motion to Dismiss Objections and Requests for Hearing.
9. 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 Applicants must show cause why Application A-19594 should not be dismissed on its face for the following reasons:
 - a. Central is not a proper applicant because the Application does not specify any beneficial use for Central.
 - b. If Central is not a proper applicant, the Application does not include any agreement between PRD and Central for use of the Central facilities.
 - c. The Application requests only an appropriation for natural flow, yet describes water being stored in Elwood Reservoir and released from Elwood Reservoir, which would require additional applications for storage and storage use.
10. On June 28, 2019, a hearing was held on the Department's Order to Show Cause. Applicants were represented by their attorney, David Bargen. Objector, North Platte Natural Resources District, was represented by its attorney, Adam Hoelsing. Objectors, Audubon Society, Central Platte Natural Resources District, Lower Loup Natural Resources District, Loup River Public Power District, and Cozad Ditch Company, were all represented by their attorney, Vanessa Silke. Objector, Nebraska Public Power District, was represented by its attorney, Stephen Mossman. The Applicants and Objectors all filed post-hearing briefs.
11. Two exhibits were entered into the record at the hearing. Exhibit 1 was the specific Application documents referred to throughout the hearing. (E1, 1-151). Exhibit 2 was the Water Service Agreement (E2, 4-29) between Central and the "Platte to Republican High Flow Diversion Project" and the Interlocal Cooperation Agreement that formed an entity called "Platte to Republican Basin High Flow Diversion Project." (E2, 23-29).

II. Department's Authority to Summarily Act on the Application Beyond It's Review Under Neb. Rev. Stat. § 46-233 (3) (c)

1. Before resolving the issues set forth in the Department's Show Cause Order, the Department must address its authority to act on the Application at this stage of the contested case proceeding. The Department is an executive agency that has been granted exclusive and original jurisdiction to hear and adjudicate "... all matters pertaining to water rights for irrigation, power, or other useful purposes except as such jurisdiction is specifically limited by statute." Neb. Rev. Stat. § 61-206 (1). Applicants argue that Neb. Rev. Stat. § 46-233 (3)(c) represents a limitation on the

Department's jurisdiction in that the Department needed to raise and determine the issues set forth in its Show Cause Order during the initial 90-day review period of the Application under Neb. Rev. Stat. § 46-233 (3)(c), and is currently foreclosed from doing so now. (9:2-6; 13: 2-7).

2. As referenced in the procedural history above and as articulated by Applicants at the hearing, the Department reviewed the Application as required under Neb. Rev. Stat. § 46-233 (3)(c) and found that the Application was incomplete, and therefore, deficient, because it omitted required information related to Neb. Rev. Stat. § 46-289 (5) and it was missing page 11. (E1, 96) (10: 10-23). The Applicants corrected such deficiencies in a timely manner and the Department determined that the completed application should be publically noticed. (E1, 97-151) (10:24-11:14).
3. However, such initial completeness review and determination of the Application during this 90-day period does not foreclose the Department from making further review and determinations on the Application at this stage in the proceeding as an exercise of its quasi-judicial powers.¹ At most, the Department's review under Neb. Rev. Stat. § 46-233 (3)(c) is relegated to determining whether an application is complete. That is, whether the Application sets forth all of the facts necessary to determine "the nature and amount of the appropriation" so that it may be publically noticed and subject to further review by the public and the Department. Applicants were afforded their statutory right to correct the Application as instructed by the Department, and they did so. They cannot now invoke Neb. Rev. Stat. § 46-233 (3)(c) at this stage in the proceeding as a mechanism to further correct the Application or claim it as some bar on the Department's ability to act on the Application.
4. The Department's Show Cause Order and Notice of Hearing were issued pursuant to its authorities under Neb. Rev. Stat. § 61-206 (1) and was an exercise of its quasi-judicial powers. The Show Cause Order addresses key threshold issues identified by the Department that need to be determined before proceeding with the Application on the merits. Namely, that the Application has the proper applicants, the proper agreements in place, and all of the potentially necessary applications to complete the project. Ignoring these issues with the Application and going forth as is would circumvent the Department's broad authorities over the appropriation and use of the surface waters of the State, and contradict principles of judicial economy, a concept especially important when it comes to contested transbasin diversion cases before the Department.²

¹ *Farmers Canal Co. v. Frank*, 72 Neb. 136, 151-52 (1904); *Dawson Cty. Irr. Co. v. McMullen*, 120 Neb. 245, 249-50 (1930); *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, 435 (1962); *Bond v. Neb. Pub. Power Dist.*, 283 Neb. 629, 649 (2012).

² *In re Application A-15738 of Hitchcock & Red Willow Irrigation Dist.*, 226 Neb. 146, 148 (1987) (commenting on the magnitude of the record generated by a transbasin diversion contested case); *Catherland Reclamation District v. Lower Platte North Natural Resources Dist.*, 230 Neb. 580, 585-87 (1988) (transbasin diversion contested case that went through three appeals to the Nebraska Supreme Court and was ultimately dismissed because the

III. Central as a Co-Applicant and Ultimate Owner of the Appropriation if Approved

1. It is important to note at the outset that the Department is not disputing that "interstate compact compliance" is an appropriate beneficial use of water for an interbasin transfer as set forth in Neb. Rev. Stat. § 46-288 (2) and as stated in the Application. Nor is the Department disputing the fact that Central may be the proper holder of an appropriation on its own or on behalf of third parties for beneficial purposes within their statutory authorities.
2. However, upon a facial examination of the Application, the Department has determined that Central cannot be a co-applicant or ultimate owner of the appropriation, if approved. Instead, 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). This is consistent with previous transbasin diversion applications before the Department where Central's facilities were planned to be used for the diversion of surface water for ultimate beneficial use by a Natural Resources District (NRD).³
3. In addition, Central cannot be a valid applicant or appropriator under the Application because neither Central nor any of its customers will be making beneficial use of the water for compact compliance purposes in the Republican River Basin (Basin). At the hearing, Central stated that the appropriation "...is not for Central's irrigators, it is not for Central's power production purposes, but it is for Central to fulfill contractual requirements it has to the PRD to provide a water service for a beneficial use." (34: 21-25). Central also stated that it had an interest in the Application so that it can operate in an efficient and profitable manner to support its public obligations. (58:19-60:13).
4. However, such interests are not sufficient for Central to be an applicant or owner of the requested appropriation, if approved. Nor is fulfilling contractual requirements and receiving funds to deliver water a recognized beneficial use of surface water under state law. The owner of an appropriation acquires a right to use surface water only for beneficial purposes and only for those purposes stated in the Application.⁴
5. The PRD is the proper applicant and owner of the appropriation, if approved, because it will solely be making beneficial use of the water for compact compliance purposes in the Republican River Basin. (E1, 97-147). The appropriation will be used by PRD to increase the water supply in the Basin as an additional water management tool in conjunction with the water management actions

applicant improperly assigned its interest to an entity that had no standing to pursue the applications).

³ *Little Blue Nat. Res. Dist. v. Lower Platte N. Nat. Res. Dist.*, 206 Neb. 535, 538-39 (1980) (transbasin diversion application where Little Blue Natural Resources District (NRD) was the sole applicant and Central was the owner and operator of the facilities to be used by the NRD).

⁴ *Cent. Platte Nat. Res. Dist. v. Wyoming*, 245 Neb. 439, 446 (1994); *Hostetler v. Depart. of Nat. Res.*, 203 Neb. 776, 781 (1979).

currently implemented by the Tri-Basin and Lower Republican NRDs through their Integrated Management Plans (IMPs). (E1, 106). Specifically, the PRD appropriation will be used in conjunction with groundwater and surface water controls such as moratoria, transfer provisions, groundwater recharge, augmentation, and well-metering requirements currently applied across the NRDs. (E1, 106). The PRD appropriation "...will be one of the many tools in the toolbox that will provide flexibility and reliability to the water management actions available for use by the NRDs to meet the requirements of their IMPs and the [Republican River Compact]." (E1, 106).

6. This is consistent with the provisions of the Ground Water Management and Protection Act (GWMPA) that places the burden of Republican River Compact compliance on the Department and the NRDs through their joint IMPs and the Republican River Basin-Wide Plan, as well as the water users in the Basin regulated by the Department and the NRDs.⁵
7. In contrast, the Application materials are silent as to how Central will be beneficially using the water in the Republican River Basin for its stated purpose—Compact compliance. Central's operations and appropriations are in the Platte River Basin and it has no statutory obligation to enter into an IMP or Basin-wide Plan with the Department that ensures State compliance with the Republican River Compact. Neb. Rev. Stat. §§ 46-715 (4)(b); 46-755 (4)(b). (E1, 101; 119). Yet, as set forth in the Water Service Agreement, Central will control and be the sole owner of the appropriation, if approved. (E2, 4-29).
8. Again, this is contrary to how Central's role in transbasin diversion applications has been characterized in the past as the carrier or "owner or operator" of the facilities that transports water from the basin-of-origin for the applicant that will ultimately be making beneficial use of the water in the new Basin. In addition, Central's stated interests in the Application are not recognized beneficial uses nor will they be making any beneficial use of the water under the appropriation for Compact compliance in the Republican River Basin.
9. As PRD will be the only applicant making beneficial use of the water for the Application's stated purpose and as PRD is one set of the Department's partners in managing the State's water in the Basin for Compact compliance, they are the proper applicant and holder of the appropriation, if approved. Therefore, Central should be dismissed from the Application.

⁵ The Nebraska Legislature promulgated a statutory framework, as part of the GWMPA, in order to manage the Basin's hydrologically-connected water supplies for Republican River Compact compliance. See Neb. Rev. Stat § 46-701 *et seq.* Specifically, the Department in conjunction with the Basin's NRDs have adopted IMPs and a Basin-wide Plan. These negotiated planning documents provide the framework for sustainable, adaptive water management in the Basin. See Neb. Rev. Stat §§ 46-715; 46-755. Importantly, the Basin IMPs and Basin-wide Plan are required to ensure that the State will remain in compliance with any applicable interstate water compact or decree. Neb. Rev. Stat. §§ 46-715 (4)(b); 46-755 (4)(b).

IV. Proceeding with PRD as the Sole Applicant

1. In order to proceed with the Application with PRD as the sole Applicant, the Department needs to resolve an inconsistency that exists involving the name of the entity that was created in the interlocal agreement between the Lower Republican Natural Resources District and Tri-Basin Natural Resources District and the name of the applicant listed on the Application. The interlocal agreement created an entity called "Platte to Republican Basin High Flow Diversion Project." (E2, 23). However, the applicant that is currently listed on the Application is "Platte Republican Diversion Interlocal Agreement Partners." (E1, 92). At the hearing, it was indicated that the entity created by the interlocal agreement should be the Applicant. (36:24-37:4). Therefore, PRD should submit an amended application with "Platte to Republican Basin High Flow Diversion Project" as the applicant entity.
2. In addition, the Water Service Agreement required pursuant to Neb. Rev. Stat. § 46-234 (1) is improper given Central's dismissal from the Application because the Agreement submitted with the Application makes Central the sole owner of the appropriation. (E2, 7). Therefore, in order to proceed with the Application, PRD should file a new agreement between Central and PRD that allows PRD to use Central's facilities and that PRD will be the owner of the appropriation.

V. Application A-19594 is for a Natural Flow Appropriation

1. The Department understands this Application to be for a natural flow appropriation to divert surface water from the Platte River-through facilities owned and operated by Central-for delivery to Turkey Creek for beneficial use in the Basin for compact compliance purposes by PRD. However, the application materials contemplate use of Elwood Reservoir for the project. (E1, 101-102; 114).
2. In proceeding with the Application, the Application, if approved, shall be for a natural flow appropriation only. Therefore, no water would be authorized to be pumped into Elwood Reservoir for storage and release for delivery to the Republican River Basin.
3. However, if PRD intends to use storage facilities for the project, PRD should consult with the Department so that additional applications can be filed for storage and storage use as required pursuant to state statute and the Department's regulations.⁶

⁶ Neb. Rev. Stat. §§ 46-241, 46-242; Title 457 Neb. Admin. Code Ch. 2, § 001.

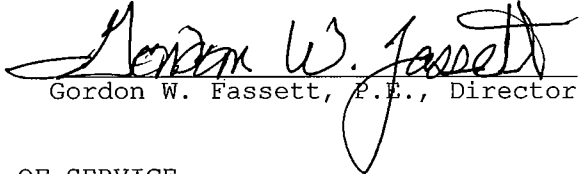
It is therefore ORDERED:

1. Central Nebraska Public Power and Irrigation District is hereby DISMISSED as an applicant under Application A-19594.
2. The remaining applicant, PRD, shall have up to 120 days from the date of this Order to:
 - a. File an amended application in the name of "Platte to Republican Basin High Flow Diversion Project" to be consistent with the interlocal agreement.
 - b. File a new water service agreement that allows PRD to use Central's facilities and that PRD will be the owner of the appropriation.
 - c. If PRD intends to use storage facilities for the project, PRD shall consult with the Department on additional applications for storage and storage use.

If the Department does not receive the foregoing within 120 days from the date of this Order, Application A-19594 will be dismissed.

DEPARTMENT OF NATURAL RESOURCES

February 20th, 2020


Gordon W. Fassett, P.E., Director

CERTIFICATE OF SERVICE

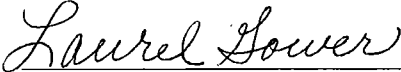
I, Laurel Gower, hereby certify that a copy of this Order was sent by first class mail to each of the following on February 26, 2020:

Steven C. Smith
Adam A. Hoelsing
Megan A. Dockery
Simmons Olsen Law Firm, P.C., L.L.O
1502 Second Avenue
Scottsbluff, NE 69361-3174

Stephen D. Mossman
Mattson Ricketts Law Firm
134 S 13th Street, Suite 1200
Lincoln, NE 68508-1901

Vanessa A. Silke
Baird Holm LLP
1700 Farnam Street, Suite 1500
Omaha, NE 68102-2068

David Bargaen
Rembolt Ludtke LLP
3 Landmark Centre
1128 Lincoln Mall, Suite 300
Lincoln, NE 68508



Laurel Gower, Clerk