

STATE OF NEBRASKA

DEPARTMENT OF NATURAL RESOURCES

In the Matter of Application) Case No. 2018-3-CC-1
A-19382 for a Permit to Appropriate)
Natural Flow for Induced Groundwater) ORDER OF DENIAL
Recharge,)
Division 1-F.)

This matter came on for consideration before the Nebraska Department of Natural Resources (Department). The Director of the Department finds and orders as follows:

I. Procedural History

1. The City of Auburn Board of Public Works (Applicant) filed application A-19382 (Application) on July 22, 2015 for a permit to appropriate natural flow from the Little Nemaha River for induced ground water recharge for municipal ground water wells. (E1, 1-161).
2. Upon the Department's initial review of the Application, it was determined that additional information was necessary in order to proceed with the Application and such information was requested in a letter to the Applicant dated August 31, 2017. (E1, 622-625).
3. An amended Application was received by the Department on December 4, 2017. (E1, 162-581). The amended Application requested a permit to appropriate 40 cubic feet per second (cfs) of natural flow from the Little Nemaha River for 11 of its municipal ground water wells (Wells) located in Sections 15, 16, 23, 24, 25, and 26, all in Township 5 North, Range 15 East of the 6th P.M. in Nemaha County, Nebraska. (E1, 162-581). The Application also requested that the appropriation receive a priority date of June 27, 1963 based on Neb. Rev. Stat. § 46-233(4)(a). (E1, 162-581).
4. The Department examined the amended Application and determined that it should be accepted as a completed application under Neb. Rev. Stat. § 46-233 (3)(c). And in accordance with Neb. Rev. Stat. § 46-233 (5), the Department publically noticed the Application. (E1, 582-583; 589; 592; 594-613).
5. Twenty-nine (29) appropriators holding natural flow and storage appropriations from the Little Nemaha River upstream and downstream of the appropriation timely filed objections and requests for hearing pursuant to Title 454 Neb. Admin. Code Ch. 7, §§ 001.08A, 001.11B. (collectively, Objectors) (E203) (Stipulation of Facts, ¶¶ 42, 43). The Objectors challenged the Application on the basis that it would restrict the quantity of water available under their appropriations for irrigation purposes. Objectors also raised issues of the constitutionality of the induced ground water recharge statutes, Neb. Rev. Stat. §§ 46-233, 46-235.01, 46-235.02, and 46-235.04.
6. On February 7, 2018, in accordance with 454 Neb. Admin. Code Ch. 7, § 006, the Department served the Applicant with a copy of the

objections and requests for hearing received from each of the Objectors.

7. On March 9, 2018, the Applicant timely filed a "Response to Objections, Motion to Dismiss Objections, and Motion to Dismiss Requests for Hearing."
8. On March 15, 2018, Metropolitan Utilities District of Omaha (MUD) filed a Petition for Intervention pursuant to 454 Neb. Admin. Code Ch. 7, § 008. MUD holds three Department-issued induced ground water recharge permits for appropriations from the Platte River. (E16) (E18) (Stipulation of Facts, ¶ 40). MUD requested intervention in the proceeding on the limited issues of "...the constitutionality of Neb. Rev. Stat. §§ 46-233, 46-235.01, 46-235.02, and 46-235.04 and the issue of administration relative to those statutes."
9. After briefing, the Department issued an Order denying Applicant's "Motion to Dismiss Objections, and Motion to Dismiss Requests for Hearing" on May 24, 2018.¹
10. On June 27, 2018, the City of Lincoln filed a Petition for Intervention pursuant to 454 Neb. Admin. Code Ch. 7, § 008. The City of Lincoln holds one Department-issued induced ground water recharge permit for an appropriation from the Platte River. (E15) (Stipulation of Facts, ¶ 41). The City of Lincoln requested intervention in the proceeding on the same grounds as MUD.
11. On August 24, 2018, the Department issued an Order granting both MUD's and the City of Lincoln's Petitions for Intervention pursuant to 454 Neb. Admin. Code Ch. 7, §§ 008.02, 008.04 for the limited issue of the constitutionality of the induced ground water recharge statutes, not on any substantive factual component of the Application.
12. On August 31, 2018, the Department received three "Withdrawals of Objection" from Objectors Charles D. Grotrian and Judy A. Grotrian, Scott Teten, and Marvin Biere. On September 11, 2018, the Department issued an Order that granted the Objector's "Withdrawals of Objection."
13. In accordance with Neb. Rev. Stat. § 46-233(6), the Department properly noticed and held a hearing on the Application on May 20 and 21, 2019 in Auburn, NE, a location within reasonable proximity to where the Wells are located. The Applicant was represented by its attorneys, Vanessa Silke and Steven Davidson. The Objectors were represented by their attorneys, Stephen Mossman and Ryan McIntosh. Intervenor, MUD was represented by its attorney Don Blankenau. Intervenor, City of Lincoln was represented by its attorney Steven Huggenberger.
14. Neb. Rev. Stat. § 46-233(6) provides that at a hearing held for an induced ground water recharge application, "...the applicant shall present all hydrological data and other evidence supporting its

¹ Subsequent to this Order, on June 22, 2018, the Department dismissed Objectors, Mike and Gail Ross, as they were not the record owners of appropriations A-15951, A-15719, and A-15844, and therefore, did not have standing to object to the Application.

application. All interested parties shall be allowed to testify and present evidence relative to the application." The Applicant and Objectors entered into a Stipulation of Facts and the Department received into evidence all of the exhibits referenced within the stipulation. (21:9-24:19). The Department also received additional exhibits offered by the parties at the hearing. On behalf of the Applicant, testimony was given by Karen Griffin, a geologist, and Dr. Jim Schneider, a senior scientist, both from Olsson and Associates, and David Hunter, the General Manager of Auburn Board of Public Works. On behalf of the Objectors, testimony was given by Dr. Robert Kalinski, a civil engineer and hydrogeologist from RDG Geoscience and Engineering, and Objectors, Richard Andrew, John Hawley, Derek McGinnis, and Kent McGinnis.

II. Induced Ground Water Recharge Statutes

1. An appropriation for induced ground water recharge can only be held by a public water supplier as defined in Neb. Rev. Stat. § 46-226.03 (6), and is characterized as an appropriation of natural flow within a specific stream reach for the purpose of aquifer recharge to sustain municipal wellfield operation. Neb. Rev. Stat. §§ 46-226.03 (4); 46-233 (2), (4); 46-235 (2), (3), (4).
2. Such an appropriation is unique in the context of Nebraska's system of surface water allocation, the prior appropriation doctrine, because as requested by the Applicant, the appropriation can be given a statutorily-created priority date based on the date that the wells were constructed rather than the date the application was filed with the Department. Neb. Rev. Stat. §§ 46-233 (4); 46-205. In effect, the induced ground water recharge appropriation can be retroactively inserted into the prior appropriation system ahead of existing users.² Such existing users may then be subject to regulation by the Department on behalf of the newly-senior induced ground water recharge appropriator's call for water.³
3. Therefore, the statutory framework promulgated by the Nebraska Legislature, while recognizing the importance of protecting the sustainability of public water supply wells, also imposes a heightened and distinct burden of proof on applicants for induced

²Under the prior-appropriation system, each appropriator's right to divert unappropriated waters from a stream for a beneficial purpose receives a date of priority. *In re 2007 Administrations of Appropriations of Water of the Niobrara River*, 283 Neb. 629, 631-32 (2012). An appropriator's priority date is the date when the appropriator files their permit application with the Department. Neb. Rev. Stat. § 46-205. 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 Administrations*, 283 Neb. at 632.

³ "A call by a senior appropriator, meaning an appropriator with an earlier-in-time right to use water, is a request that the Department close the rights to divert water belonging to junior appropriators upstream of the senior appropriator. Closures require junior appropriators to stop diverting water from a river or stream for the benefit of a senior appropriator." *Middle Niobrara Natural Resources Dist. v. Dep't of Natural Resources*, 281 Neb. 634, 636 (2011).

ground water recharge when compared to other appropriations of surface water.⁴ Neb. Rev. Stat. §§ 46-235 (1), (2), (3).

4. Before approving an appropriation for induced ground water recharge, the Department must make express statutory findings. Specifically, under Neb. Rev. Stat. § 46-235 (2)(a):

An application for an induced ground water recharge appropriation for public water supplier wells constructed and placed in service before September 9, 1993, shall be approved by the director if he or she finds that:

- (i) The appropriation is necessary to maintain the well or wells for the use or uses for which the appropriation has been requested;
 - (ii) The rate and timing of the flow is the amount reasonably necessary to maintain the well or wells for the uses for which the appropriation has been requested; and
 - (iii) The application is in the public interest and is not detrimental to the public welfare. There shall be a rebuttable presumption that wells which are the subject of an application pursuant to subdivision (2)(a) of this section are in the public interest and are not detrimental to the public welfare.
5. The statutory framework also has a separate set of criteria for applications for wells constructed on or after September 9, 1993. Neb. Rev. Stat. § 46-235 (3). However, the foregoing threshold findings in Neb. Rev. Stat. § 46-235 (2)(a) are also applicable to these applications. See Neb. Rev. Stat. § 46-235 (3).
 6. For the reasons set forth below, the Department has determined that the Applicant did not meet its burden of proof regarding the required findings in Neb. Rev. Stat. § 46-235 (2)(a)(i)-(ii), and therefore, the Application should be denied. Because the Department is denying the Application based on Neb. Rev. Stat. § 46-235 (2)(a)(i)-(ii), and because these threshold findings are required for all applications for induced ground water recharge regardless of when the wells were constructed, the Department makes no further findings or conclusions regarding public interest, the Applicant's requested priority date, or the siting and placement of the Wells to take advantage of aquifer conditions, as they are not relevant to the Department's disposition of this matter.

III. The Applicant did not Meet its Burden of Proof Under Neb. Rev. Stat. § 46-235 (2)(a)(i)

The record supports a positive finding that the Applicant's Wells are constructed in an alluvial aquifer that has a hydrologic connection to the Little Nemaha River (Stipulation of Facts, ¶¶ 1-4) (E1, 240; 443). Although this connection exists, the following evidence and testimony in

⁴ "An applicant bears the burden of providing the director with enough evidence on which to base a decision." *Ponderosa Ridge LLC v. Banner County*, 250 Neb. 944, 972 (1996). See also Neb. Rev. Stat. § 61-206 (1).

the record support a finding that the appropriation is not necessary to maintain the Wells for the uses for which the appropriation has been requested.

a. **The Applicant's Current Water Use is Declining and Future Water Demands are not Projected to Increase**

1. In evaluating the necessity of the appropriation under Neb. Rev. Stat. § 46-235 (2)(a)(i), the Department must consider the Applicant's current and future water use for which the appropriation is requested. The record shows that the Applicant's current water use is declining and that no significant future water demands are anticipated.
2. The Application states that the appropriation is for "drinking water to the nearly 3,350 citizens of Auburn, Nebraska" and that the purpose of the appropriation is to ensure that an adequate supply of water is provided to the citizens of Auburn now and into the future. (E1, 173).
3. The Application and testimony presented by the Applicant indicates that the appropriation would be to support Auburn's current domestic and public safety water uses. (E1, 232; 682-683) (65:15-18) (101:2-13) (243: 9-244:13). However, the record shows that such uses have been decreasing over the last decade. David Hunter, General Manager of the Auburn Board of Public Works (ABW) testified that Auburn "...pumped a little over a hundred million gallons for the 2018 year. And that number has been declining for the last, probably 10 years. I could go back 10 years, maybe 13 years, and that number would have been up around 150 million gallons per year. So, we've lost about 50 million gallons worth of—and that's sales. That's not pumping capacity; that's actual water sales." (E1, 682-685) (157: 4-11). The Applicant attributes this decrease to its customers being more conservative in their water usage. (E1, 684) (157: 16-17) (158: 19-22).
4. In terms of future water use by the Applicant, the record shows that Auburn's population has been stagnant. (E1, 681)(E325, 3; 5)(159: 9-14). In addition, there are no large industrial users in Auburn and no new additional large water users are predicted. (E1, 682)(159:15-21)(217:6-218:12). And although the Applicant considered developing a regional water supply to serve other surrounding communities, this hypothetical expanded water use is not contemplated under this appropriation, as such an option would require development of a new wellfield adjacent to the Missouri River. (E1, 244) (E205) (Stipulation of Facts, ¶ 35)(105:6-106:11)(196:6-200:9).
5. In addition, it was indicated at the hearing that Auburn was temporarily providing the City of Peru with drinking water due to 2019 flooding events. (189:8-19) (238:7-239:12). However, David Hunter testified that such use was temporary and that the water use calculated for the appropriation did not include providing water to the City of Peru. (243:5-8) (265:25-266:5) (267: 2-10). Also, when questioned about

Auburn's future water use needs, although recognizing that they would like to provide water to an industrial consumer, the appropriation is only asking for what Auburn is using right now. (295: 19-296:17). And such usage needs are currently being met by the Applicant's Wells. (63:23-64:1).

b. The Water Supply for the Applicant's Wells is not Decreasing

1. In determining the necessity of the appropriation to support the current and future water use for which the appropriation is requested, the Department should also consider whether Applicant's water supply is in jeopardy due to a decreasing water supply. The record shows that the water supply for the Applicant's Wells has historically been sufficient and is not decreasing, which further supports a finding under Neb. Rev. Stat. § 46-235 (a) (i) that the appropriation is not necessary.
2. At the hearing, David Hunter testified that since he has been employed with the ABW, Auburn gets yearly high flow events that provide sufficient recharge for the Wells. "...I've been here since 2006, and every year since 2006, we've had a high-water even [sic] in the Nemaha River. I don't know that the river has ever gotten below 40 cfs through the summer months. But we've always seemed to, for some reason, get these high-water events and we get an aquifer recharge for our wells. And that seems to hold our static wells for about -- static in our wells or the aquifer level in our wells for about one year. And as long as we get those high-water events, we seem to be okay with our recharge." (249: 12-21). Information provided in Figure 4 of the Application also shows that these high flow events in the Little Nemaha River correlate with the rise in the static water level of a nearby observation well. (E1, 180) (Stipulation of Facts, ¶ 16) See also (E407, 10).
3. The Applicant did not provide any information that indicates streamflow water supplies have been diminishing. Instead, upon the Department's review and analysis, the Department determined that the streamflow data utilized by the Applicant from the United States Geological Survey's (USGS) Little Nemaha River streamflow measuring station for the years 1999 - 2018 demonstrates that streamflow supplies have remained stable. (E416).
4. In addition, the record shows that the Applicant's water supply is sufficient to meet the needs of Auburn because ABW has not implemented limitations on water use since May of 2000, even though flows in the Little Nemaha River have periodically fallen below the requested appropriation amount (40 cfs). (E9) (E201) (E311) (E416) (375: 12-385: 12). David Hunter testified that in the year 2000, ABW created an emergency drought contingency plan known as "Water Watch." (184:24-188:14) (E421). The plan includes several steps, but as David Hunter explains, implementation begins when static ground water levels drop below normal seasonal conditions:

Q: Have conditions ever yet, in your term running BPW, progressed to the point where those mandatory restrictions (water watch) have become necessary?

A: No, we—since I've been here, we've only come close one year to asking the board to implement Water Watch, and that was just basically Stage 1. (188: 6-11).

5. Also, David Hunter testified that he can recall only two instances, during dry periods of weather, once in the early 2000s, and once in the early 1970s, when they had to take steps to either turn the Wells off or reduce capacity to keep the Wells operational. (174: 24-175:15). Only two times, despite the Department's determination that the streamflow data from the USGS Little Nemaha River station indicated that flows have periodically fallen below the requested 40 cfs amount during July and August. (E416). See also (E9) (E201) (375: 12-385: 12).

c. **The Operational Capacity of the Wells is Impacted by Aquifer Chemistry Not Lack of Streamflow**

1. In evaluating the necessity of the appropriation under Neb. Rev. Stat. § 46-235 (2)(a)(i), the Department may also consider other factors unrelated to streamflow that impact the operational capacity of the Applicant's Wells. The record shows that the Applicant's Wells continually experience operational deficiencies due to the general chemistry of the aquifer that they are constructed in.
2. David Hunter testified that "Capacity with the wells, because of the iron and the magnesium, has always been a high-maintenance item. The wells constantly plug with iron bacteria, which makes them high maintenance. Generally, puts a couple wells out of service each year while we rehab those trying to get our capacity back up." (156:8-13). Hunter further testified that "Over the years, even our 1, 2, 3, 4, 5, 6 wells, because of the iron plugging, the magnesium, the maintenance, we constantly lose capacity and we have to go back and rehab wells. And, over the years, we haven't been real successful on getting these wells back to original pumping capacity. It seems like we're always constantly fighting that, trying to get those wells' pumping capacity back up." (172:10-17).
3. In addition, the Application indicates that the actual pumping capacity of Wells 5, 6, 13, 19, and 20 is significantly less than the design capacity. (E1, 200, footnote 7). And the Applicant's witness, Karen Griffin, testified that this was due to iron bacteria and other maintenance issues. (130:4-131:3).
4. David Hunter also testified that the Applicant experiences operational capacity issues with the Wells "... every six months, depending on what type of iron and iron bacteria is

starting to build up in those wells. We've seen the capacity of a well drop off as fast as a month, and then some of them may take several months." (191: 15-22). This then requires maintenance activities to bring the operational capacity back up in the Wells, which ABW hasn't been successful with. (191:23-25) (172: 13-15).

5. Further, the record shows that Well 18 is currently plugged with iron and is not in service with no immediate plans of replacement.⁵ (E1, 181) (172: 18-173: 2)(240:7-14)(298:18-24)(299: 12-16). In fact, the record indicates that the Applicant has not replaced or brought online any of their Wells, with the exception of Well 13, since the 1980's when the east wellfield was brought into service. See (E431 - E443).
6. The operational capacity of the Wells are related to water quality maintenance demands due to aquifer chemistry rather than streamflow availability, which supports a finding under Neb. Rev. Stat. § 46-235 (2)(a)(i) that the appropriation is not necessary to maintain the Wells.

IV. The Applicant did not Meet its Burden of Proof Under Neb. Rev. Stat. § 46-235 (2) (a) (ii)

The Applicant requested to appropriate 40 cfs of natural flow from the Little Nemaha River. (E1, 163). However, as required under Neb. Rev. Stat. § 46-235 (2)(a)(ii), the Applicant failed to demonstrate that 40 cfs is the amount "reasonably necessary" to maintain the Wells for the uses for which the appropriation has been requested due to the following evidence and testimony in the record.

a. Well 7 and Figure 5 are not Reliable to Establish that 40 CFS is Reasonably Necessary

1. In order to demonstrate that 40 cfs is reasonably necessary to maintain the Wells, the Applicant relied on observational ground water aquifer levels data from Well 7 as presented in Figure 5 of the Application. (E1, 228-229). The Applicant stated that they used Well 7 and Figure 5 to show that when Little Nemaha River flows drop below 40 cfs, Well 7 experiences operational deficiencies, which in turn, they conclude, is an indicator that other Wells will be similarly impacted. (E1, 228-229).
2. On behalf of the Applicant, Karen Griffin explained the reasoning behind using Well 7 and Figure 5 to show that 40 cfs was reasonably necessary. "We did use Well No. 7 for this because of the fact that the operations team uses Well No. 7 in their operations, knowing that, when Well No. 7 is compromised, that is going to be—they need to begin operating differently to ensure that they can maintain operations. It's

⁵ At the hearing, the Applicant testified that Well 18 was inactive and that it was not registered as such with the Department, thus making it an illegal well under Neb. Rev. Stat. §§ 46-706 (5)(c) and 46-602(7). (291:19-292:6).

basically the canary in the coal mine for their operations. Once they see the Well 7 water level reaching a certain level, they know that the other wells will begin to have that same operational capacity loss." (94: 20-95:3). The Applicant also presented testimony from David Hunter and Dr. Jim Schneider regarding Well 7 and Figure 5 and how Well 7 was used in the ABW's operations. (173: 18-174:10) (205: 7-11) (245: 14-247:11) (247:15-22) (315:1-317:12).

3. Figure 5 indicates that on July 1, 2012, when Little Nemaha River flows were below 40 cfs, the static water level of Well 7 fell below the top of the well screen, which reduced the operational capacity of Well 7. (E1, 228-229). However, the Applicant's use of Well 7 and Figure 5 to establish that 40 cfs is "reasonably necessary" is not credible.
4. Evidence over a short period of time, from only Well 7, a Well that was not operational at the time of the filing of the Application, was noted as "not a good producer" with "poor site geology," and has since collapsed, is not a reliable benchmark for the other Wells, let alone proving that 40 cfs is reasonably necessary.⁶ (E1, 181; 229; 445; 651) (96:9-97:25) (173:2-4) (240:9-19) (247:23-248:19) (372:16-373:11). In addition, Figure 5 is contradictory because it shows that on December 1, 2012, when Little Nemaha River flows were also below 40 cfs, the static water level of Well 7 was above the top of the screen. (E1, 229) (371:7-372:15). Therefore, the Department finds that there is not a reliable relationship between Little Nemaha River flows and Well 7 water levels as depicted in Figure 5.

b. The Applicant's Use of the Darcy's Law Equation Was Based on the Flawed Premise that 40 cfs is Reasonably Necessary

1. As set forth above, the Applicant's reliance on observational ground water levels data of Well 7 in Figure 5 was not credible. In the Applicant's original filing, they solely relied on Figure 5 and Well 7 to demonstrate that 40 cfs was reasonably necessary. (E1, 1-161). However, the Department indicated in the initial review letter dated August 31, 2017, that more information was needed from the Applicant "...in order to justify the requested 40 cubic feet per second (cfs) as the minimum flow necessary to sustain satisfactory wellfield operations." (E1, 622-625). The Department also met with the Applicant on September 8, 2017, to discuss its request for further information. (E1, 626) (204: 2-205:2) (244:20-245:13).
2. In response to this, the Applicant submitted data and calculations based on Darcy's Law, an equation used to describe how water flows through porous media, such as an aquifer. (E1, 228-230) (E8) (98:24-99:19) (317: 13-318:10).

⁶ At the hearing, the Applicant testified that Well 7 was collapsed and therefore, inactive and that it was not registered as such with the Department, thus making it an illegal well under Neb. Rev. Stat. §§ 46-706 (5) (c) and 46-602(7). (291:4-18).

3. While Darcy's Law is a recognized calculation in the field of hydrology, Dr. Jim Schneider's testimony indicated that the equation was used to "compute the amount of water flowing from the stream into the aquifer under the conditions that exist when the stream is flowing 40 cubic feet per second." (320: 14-17). In other words, Darcy's Law was not applied as an independent evaluation. Rather, Dr. Schneider started with a result, 40 cfs, which was based on the flawed use of Well 7 and Figure 5, and worked to prove that it could be reasonable given the various assumptions that he made. (320: 18-22) (321: 3-326:14).
4. Use of Darcy's Law in this manner does not validate that 40 cfs is reasonably necessary because it was based on Well 7 and Figure 5, which as set forth above, the Department determined was not reliable. In other words, the primary basis for the Applicant's use of Darcy's Law rests on the flawed assumption that Well 7 is an appropriate benchmark. However, this approach fails to provide an adequate basis upon which the Department can determine that 40 cfs is reasonably necessary.

V. Applicant's Ownership Issues Related to Wells 1-7

1. Although the Department is denying the Application based on Neb. Rev. Stat. § 46-235 (a)(i)(ii), it is appropriate for the Department to address issues related to the Applicant's apparent lack of ownership interests in the land overlying Wells 1-7.
2. At the hearing, when questioned about the Applicant's ownership interests related to Wells 1-7, David Hunter testified: "I don't know exactly how we got there. We've we have access but I don't—I mean, I've dug through the deeds and we don't even have easement rights, technically, but we've been there for—since the 80s. Nobody's complained. And so, I can't—if I was to relocate wells there, I would have to negotiate with the property owners trying to acquire property for the wells." (290: 7-17).
3. "The right to use ground water is a derivative right immediately dependent on ownership of the surface over a source of ground water. Thus, the right to use ground water does not float in a vacuum of abstraction but exists only in reference to and results from ownership of the overlying land." *Sorensen v. Lower Niobrara Nat. Res. Dist.*, 221 Neb. 180, 191 (1985).
4. Based on David Hunter's testimony above, and consistent with *Sorensen*, the Applicant does not appear to have the requisite ownership interests (i.e. fee simple title, easement) related to the land overlying Wells 1-7, and therefore, the Department cannot grant a permit to appropriate water under an induced ground water recharge appropriation without the Applicant acquiring such proper ownership interests.

VI. Conclusion

Based on the foregoing, the Department concludes that the Applicant did not meet its burden of proof under Neb. Rev. Stat. § 46-235 (a)(i)(ii).

Although there is an identified hydrologic connection between the Little Nemaha River and the adjacent aquifer where the Applicant's Wells are constructed, the following evidence and testimony in the record supports a finding that the appropriation is not necessary to maintain the Wells for the uses for which the appropriation is requested under Neb. Rev. Stat. § 46-235 (a)(i).

- (1) The Applicant's water use needs under the requested appropriation are solely for the City of Auburn, which have historically been met without a disruption of supply to its customers.
- (2) The Applicant's water use needs are declining and are not projected to increase and trends in streamflow supplies indicate that supplies are stable.
- (3) The Applicant's Wells often receive sufficient high-flow events to recharge the Wells, and the Applicant has only once implemented water restrictions, even as streamflows have historically fallen below 40 cfs.
- (4) The operational capacity of the Wells are related to water quality maintenance demands due to aquifer chemistry rather than streamflow availability.

In addition, the Department concludes that the Applicant did not meet its burden of proof in showing that 40 cfs is "reasonably necessary" under Neb. Rev. Stat. § 46-235 (a)(ii) because the Applicant's sole reliance and use of Well 7, Figure 5, and the application of Darcy's Law were not credible.

Therefore, it is hereby ORDERED that Application A-19382 is DENIED.

DEPARTMENT OF NATURAL RESOURCES

February 28, 2020


Gordon W. Fassett, P.E., Director

A copy of this Order of Denial was posted on the Department's website and provided to the Department's field office in Lincoln, Nebraska. A copy of this Order of Denial was mailed on February 28, 2020, to the following:

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Laurel Gower, Clerk