

STATE OF NEBRASKA

DEPARTMENT OF NATURAL RESOURCES

APPROVAL OF APPLICATIONS NEX-9432, NEX-9433, NEX-9434 AND NEX-9435

FOR A CHANGE OF APPROPRIATION TO INSTREAM USE

WATER APPROPRIATIONS A-359R, A-1725, A-3574 AND A-18503

WATER DIVISION 2-C

I. PROCEDURAL HISTORY

1. On August 31, 2021, the Nebraska Public Power District (NPPD), pursuant to Neb. Rev. Stat. § 46-290 (1)(a), filed in the Department of Natural Resources (Department) non-expedited transfer applications for NEX-9432, NEX-9433, NEX-9434, NEX-9435, requesting permanent transfers for Appropriations A-359R, A-1725, A-3574, and A-18503, respectively (Appropriations). Department records show that NPPD is the present holder of the Appropriations.
2. The Appropriations listed in **Table 1** below authorize NPPD to divert water in the Niobrara River at a point of diversion in Section 30, Township 33 North, Range 11 West of the 6th P.M., in Boyd County for on-channel hydropower production at the Northern Nebraska Plant No. 1 electric power generation facility (Spencer Hydro).

Appropriation Number	Priority Date	Grant in CFS*
A-359R	09/12/1896	35
A-1725	10/30/1923	1,450
A-3574	06/08/1942	550
A-18503	04/16/2007	425

* CFS = Cubic Feet per Second

3. NPPD's applications proposed to permanently transfer the Appropriations from hydropower production purposes to instream basin-management appropriations for fish, wildlife, and recreation purposes pursuant to Neb. Rev. Stat. § 46-290(3)(e).

4. Upon its examination of NPPD's application documents under Neb. Rev. Stat. §§ 46-291, 46-293, the Department determined that additional documentation was needed in order to determine whether the proposed transfer was consistent with statutory criteria. Therefore, in accordance with Neb. Rev. Stat. § 46-293 (2) the Department requested certain information in a letter to NPPD dated December 2, 2021. On January 24, 2022, NPPD filed amended transfer application documents supplying the information requested by the Department.
5. The Department published notice of NPPD's transfer applications in accordance with Neb. Rev. Stat. § 46-291.
6. Subsequent to the public notice, the Department received seven (7) comment letters from the following entities and individuals: 1) American Fisheries Society, Nebraska Chapter; 2) Platte River Whooping Crane Maintenance Trust; 3) Gene Zuerlein; 4) The Nature Conservancy, Nebraska Chapter; 5) Nebraska Wildlife Federation; 6) Sierra Club, Nebraska Chapter; and 7) the United States Department of Interior (USDI), Fish and Wildlife Service and National Park Service. The first six (6) commentators expressed general support for the proposed transfer. The USDI was supportive of the concept of the transfer, but expressed concerns in six "Comment" sections in their joint letter. No riparian users filed a comment. The Department also did not receive any objections requesting a formal hearing under Neb. Rev. Stat. § 46-291. And the Department finds that a hearing is not necessary on its own motion as contemplated under Neb. Rev. Stat. § 46-292.

II. INSTREAM BASIN-MANAGEMENT TRANSFER STATUTES

1. Nev. Rev. Stat. § 46-290 (3) expressly enumerates certain changes in appropriations that may be approved by the Director including:

...(e) An appropriation for the manufacturing of hydropower at a facility located on a natural stream channel may be permanently changed in full to an instream basin-management appropriation to be held jointly by the Game and Parks Commission and any natural resources district or combination of natural resources districts. The beneficial use of such change is to maintain the streamflow for fish, wildlife, and recreation that was available from the manufacturing of hydropower prior to the change. Such changed appropriation may also be utilized by the owners of the appropriation to assist in the implementation of an approved integrated management plan or plans developed pursuant to sections 46-714 to 46-718 for each natural resources district within the river basin. Any such change under this section shall be subject to review under sections 46-229 to 46-229.06 to ensure that the beneficial uses of the change of use are still being achieved.

2. Also specific to instream basin-management appropriations is Neb. Rev. Stat. § 46-290 (8), which states that:

Any appropriation for manufacturing of hydropower changed under subdivision (3)(e) of this section shall maintain the priority date and preference category of the original manufacturing appropriation and shall be subject to condemnation and subordination pursuant to sections 70-668 and 70-669. Any person holding a subordination agreement that was established prior to such change of appropriation shall be entitled to enter into a new subordination agreement for terms consistent with the original subordination agreement at no additional cost. Any person having obtained a condemnation award that was established prior to such change of appropriation shall be entitled to the same benefits created by such award, and any obligations created by such award shall become the obligations of the new owner of the appropriation changed under this section.

3. In order to approve a changed instream basin-management appropriation, the Director must find that such change is consistent with Neb. Rev. Stat. § 46-294. As set forth in Neb. Rev. Stat. § 46-294 (2), NPPD has the burden of proof to show that the proposed transfer meets the criteria in Neb. Rev. Stat. § 46-294 (1)(a)-(1).
4. The Department has reviewed the transfer application materials and has determined that they comply with the elements of a transfer to an instream basin-management appropriation as set forth in Neb. Rev. Stat. § 46-290 (3)(e). NPPD also met its burden of proof regarding the criteria in Neb. Rev. Stat. § 46-294 (1)(a)-(1) for instream basin-management appropriations for fish, wildlife, and recreation purposes. Therefore, applications NEX-9432, NEX-9433, NEX-9434, and NEX-9435 should be approved subject to the following conditions consistent with Neb. Rev. Stat. § 46-294 (3).

III. THE INSTREAM BASIN-MANAGEMENT APPROPRIATIONS COMPLY WITH NEB. REV. STAT. § 46-290 (3)(E).

1. Changes to appropriations are authorized under Neb. Rev. Stat. § 46-290, which provides for changes or transfers from one use to another use, either temporarily or permanently. Transfer applications NEX-9432, NEX-9433, NEX-9434, and NEX-9435 were filed under Neb. Rev. Stat. 46-290 (3)(e) to permanently transfer the Appropriations to instream basin-management appropriations. The new beneficial use of these appropriations is to maintain the streamflow for fish, wildlife, and recreation that was available from the manufacturing of hydropower prior to the transfers.
2. The Appropriations held by NPPD are currently authorized for the purpose of generating hydropower at the Spencer Hydro located on the Niobrara River-a natural stream channel. The Appropriations are authorized for a non-consumptive purpose.
3. As required by Neb. Rev. Stat. § 46-290 (3)(e), the instream basin-management appropriations will be held jointly by the Nebraska Game and

Parks Commission (NGPC) and the Niobrara River Basin Alliance (NRBA)—a group of Niobrara River Basin Natural Resources Districts.

4. The NRBA was created by a 2013 Interlocal Cooperation Agreement between the Middle Niobrara, Lower Niobrara, Upper Elkhorn, Upper Loup, and Upper Niobrara White Natural Resources Districts; a River Flow Management Agreement between NRBA and the NGPC was signed on September 16, 2015; and an Amended Agreement for the Sale and Purchase of Water Appropriations between NPPD, NRBA, and NGPC was executed on December 10, 2019. (Collectively, Appropriator Agreements).
5. Contingent upon the Department's approval of NPPD's transfer applications, the Appropriator Agreements provide the legal framework for the conversion of NPPD's Appropriations to instream basin-management appropriations, and assignment of these new appropriations to the NRBA and NGPC for the beneficial use of maintaining streamflow for fish, wildlife, and recreation.
6. Although instream basin-management appropriations may also be beneficially used to assist in the implementation of an Integrated Management Plan (IMP), there are no approved IMPs in place that allow for or consider the use of instream basin-management flows. Therefore, the changed appropriations may not be used for this purpose at this time. If the Department and the Niobrara River Basin Natural Resources Districts jointly amend their respective IMPs to allow for this type of use, the NGPC and the NRBA may petition the Department for approval to expand the beneficial uses to include use of the appropriations to assist in the implementation of an IMP(s).
7. The Department finds that the elements of a change from an appropriation for the manufacturing of hydropower at a facility located on a natural stream channel to an instream basin-management appropriation have been met. The Department's analysis now turns to whether such change under Neb. Rev. Stat. § 46-290 (3) (e) is consistent with Neb. Rev. Stat. § 46-294 (1) (a)-(l).

IV. THE INSTREAM BASIN-MANAGEMENT APPROPRIATIONS MEET THE APPLICABLE CRITERIA IN NEB. REV. STAT. § 46-294 (1) (A)-(L)

Neb. Rev. Stat. § 46-294 (1) states that the Director shall approve applications filed pursuant to Neb. Rev. Stat. § 46-290 only if the proposed transfer or change meets the following requirements. However, the Department finds that Neb. Rev. Stat. § 46-294 (1) (g), (h), (j) are not applicable to the transfer applications and were therefore not considered.

(a) The application is complete and all other information requested pursuant to section 46-293 has been provided.

As stated above, the Department received additional information it had requested pursuant to Neb. Rev. Stat. § 46-293 (2). Upon review, the Department determined that the application was complete and complied with Neb. Rev. Stat. §§ 46-291, 46-293.

The requirement under Neb. Rev. Stat. § 46-294 (1) (a) has been met.

(b) The proposed use of water after the transfer or change will be a beneficial use of water.

Neb. Rev. Stat. 46-290 (3)(e) expressly defines instream basin-management appropriations for fish, wildlife, and recreation purposes as a beneficial use of water.

The requirement under Neb. Rev. Stat. § 46-294 (1)(b) has been met.

(c) Any requested transfer in the location of use is within the same river basin as defined in Neb. Rev. Stat. § 46-288.

The reach for the instream basin-management appropriations for fish, wildlife, and recreation purposes was described in three separate short narratives in the supplement to Form 962-10, Box 10 of the application materials. Box 10 requests a description of the reach to which the water appropriations would be transferred. The applications state:

Parasiewicz (see Appendix E) studied the benefits to fish from the Sheridan-Dawes County line to the Niobrara Rivers confluence with the Missouri River. Parasiewicz also studied the benefits to whooping crane roosting habitat, and least tern and piping plover nesting habitat from the Norden Bridge to the Niobrara Rivers confluence with the Missouri River. The benefits to wildlife should be assumed to accrue in that reach. Whittaker and Shelby (see Appendix G) identified recreational flows for floating the Niobrara River from Nenzel to Highway 137 near Newport. The benefits to recreation should be assumed to accrue in that reach.

All of these locations are within the same river basin as the original hydropower use of the Appropriations. The information provided is sufficient to conclude that flows in the Niobrara River upstream of the Spencer Hydro support fish, wildlife, and recreation. The benefits should be recognized above this point.

The requirement under Neb. Rev. Stat. § 46-294 (1)(c) has been met.

(d) The proposed transfer or change...will not diminish the supply of water available for or otherwise adversely affect any other water appropriator..

NPPD's transfer applications indicated a desire to "do no harm within the basin" and "maintain the status quo." The Department has administered on behalf of the Appropriations in the past. Therefore, the Department should constrain future water administration requests to no greater than historical levels of water administration to ensure other appropriators will not be harmed by the transfer and new beneficial use.

The beneficial uses of maintaining streamflow for fish, wildlife, and recreation should be administered from the original diversion location for Spencer Hydro, in Section 30, Township 33 North, Range 11 West of the 6th P.M., Boyd County. There is not currently a measuring capability at that location, so installation and maintenance of a working stream measuring station should be a requirement in approving these transfers. The NGPC and the NRBA should be required to comply with the Department's recommendation for a suitable stream gage location.

A-359R was a hydropower appropriation on Minnechaduza Creek, which was relocated to the Spencer Hydro in 1997. One of the conditions for approval of the relocation petition was that water administration will not be administered on other appropriators that would not have been administered prior to the relocation of the appropriation. This condition should remain in effect in order to not diminish the supply to other appropriators. This was also requested in NPPD's amended application materials submitted on January 24, 2022.

A-18503 was approved in 2016. One of the conditions of approval of A-18503 was that NPPD would not place a call for administration for A-18503 and the Department will not administer for it. This condition was requested by NPPD in its application. The prohibition of administration for A-18503 must continue in order to not diminish the supply to other appropriators. This was also requested in NPPD's amended application materials submitted on January 24, 2022.

An additional constraint on water administration was requested in NPPD's amended application materials submitted on January 24, 2022. NPPD indicated that the following was in concurrence with NRBA and NGPC. "Administration for the appropriations will not occur between the beginning of the historical fall outage (October 1) and end of the historical spring outage (April 18). These dates were determined by examining historical log data." These constraints are reasonable and will minimize negative impacts that could otherwise occur to junior appropriators that were not subject to water administration during the fall and winter period under the Appropriations.

In addition, the applicant cited Neb. Rev. Stat. § 46-290 (8) which requires transferred appropriations under Neb. Rev. Stat. § 46-290 (3)(e) to maintain their priority dates and preference categories. This makes them subject to condemnation and subordination under Neb. Rev. Stat. §§ 70-668, 70-669. The approval of these transfers should require the new instream basin-management appropriations to be held to these statutory requirements.

Furthermore, Neb. Rev. Stat. § 70-669 requires that:

The just compensation to be paid to a holder of an instream-basin-management appropriation that has been changed from a manufacturing of hydropower appropriation pursuant to section 46-290 shall be the cost per acre-foot of water subordinated for the hydropower appropriation at the time of approval of the change.

The approval of these transfers should be accompanied by a statement of the current cost per acre-foot for hydropower interference. Junior appropriators should have the opportunity to continue to enter into condemnation and subordination agreements.

Appendix I of the transfer applications consists of NPPD Board Resolution No. 16-74 adopted December 8, 2016. It provides that the basis for just compensation for future subordination agreements is \$0.32 per acre-foot diverted by junior appropriators. It is the only reference to the actual cost of subordination in the application materials. The "Flat Rate" method based upon an assumed 24 inches of diversion per acre should remain an

option for future subordination agreements. Future subordination agreements may be adjusted under the provisions of Neb. Rev. Stat. § 70-669, which allows for increases no greater than Consumer Price Index increases.

Pre-existing permanent subordination agreements with Mirage Flats Irrigation District and Ainsworth Irrigation District must continue to be honored. Also, any condemnations that have not expired should be honored.

With the preceding conditions and limitations as part of the new instream basin-management appropriations, the requirement under Neb. Rev. Stat. § 46-294(1) (d) has been met.

- (e) The quantity of water that is transferred for diversion or other use at the new location will not exceed the historic consumptive use under the appropriation or portion thereof being transferred...*

Pursuant to Neb. Rev. Stat. § 46-290(3)(e), the transfer applications propose to transfer the full flow amounts for the Appropriations as set forth in Table 1 above. The Appropriations are currently authorized for the purpose of generating hydropower—a non-consumptive purpose and are being transferred to another non-consumptive use—instream basin-management appropriations for fish, wildlife, and recreation. Therefore, no increase in consumptive use will occur.

The requirement under Neb. Rev. Stat. § 46-294 (1) (e) has been met.

- (f) The appropriation, prior to the transfer or change, is not subject to termination or cancellation...*

On March 14, 2019, Spencer Hydro incurred significant damage from ice jam flooding and was unable to continue to generate power since that date. Despite this, NPPD has continued to pay power lease fees annually for A-1725, A-3574 and A-18503. Power lease fees are not required for A-359R.

It has been less than five (5) consecutive years since the Appropriations were last beneficially used to generate hydropower. Therefore, none of the Appropriations are subject to termination or cancellation. It should be noted as well that the Appropriator Agreements were initiated prior to the catastrophic dam failure in March 2019. These agreements indicate NPPD's intent to transfer the Appropriations to NRBA and NGPC to continue their future use for a different purpose.

The requirement under Neb. Rev. Stat. § 46-294 (1) (f) has been met.

- (g) If a proposed transfer or change is of an appropriation that has been used for irrigation and is in the name of an irrigation district, reclamation district, public power and irrigation district, or mutual irrigation or canal company or is dependent upon any such district's or company's facilities for water delivery, such district or company has approved the transfer or change...*

The requirement under Neb. Rev. Stat. § 46-294 (1)(g) is not applicable because the proposed transfer is not of an appropriation for irrigation.

- (h) If the proposed transfer or change is of a storage-use appropriation and if the owner of that appropriation is different from the owner of the*

associated storage appropriation, the owner of the storage appropriation has approved the transfer or change;

The requirement under Neb. Rev. Stat. § 46-294 (1)(h) is not applicable because the proposed transfer is not of a storage use appropriation.

(i) If the proposed transfer or change is to be permanent, either (i) the purpose for which the water is to be used before the transfer or change is in the same preference category established by section 46-204 as the purpose for which the water is to be used after the transfer or change or (ii) the purpose for which the water is to be used before the transfer or change and the purpose for which the water is to be used after the transfer or change are both purposes for which no preferences are established by Neb. Rev. Stat. § 46-204.

NPPD proposes to permanently transfer the Appropriations from hydropower purposes to instream basin-management appropriations for fish, wildlife, and recreation pursuant to Neb. Rev. Stat. § 46-290(3)(e). Also, under Neb. Rev. Stat. § 46-290(8), the new appropriations will maintain the priority date and preference category of the original hydropower manufacturing appropriation.

The requirement under Neb. Rev. Stat. § 46-294 (1)(i) has been met.

(j) If the proposed transfer or change is to be temporary, it will be for a duration of no less than one year and, except as provided in section 46-294.02, no more than thirty years;

The requirement under Neb. Rev. Stat. § 46-294 (1)(j) is not applicable because the proposed transfer is permanent.

(k) The transfer or change will not be inconsistent with any applicable state or federal law and will not jeopardize the state's compliance with any applicable interstate water compact or decree or cause difficulty in fulfilling the provisions of any other formal state contract or agreement; and

Approval of the transfer applications will not be inconsistent with applicable state or federal law, nor will they impact State compliance with an interstate compact or decree or other agreements.

The requirement under Neb. Rev. Stat. § 46-294 (1)(k) has been met.

(l) The proposed transfer or change is in the public interest.

Approval of the transfer applications will include provisions to preclude negative impacts to other appropriators to protect the public interest. The proposed change of purposes of use to instream basin-management appropriations for fish, wildlife, and recreation are beneficial. The Nebraska Legislature has determined the public interest demands the recognition of instream uses for fish, recreation, and wildlife. The transferred appropriations will support those uses.

The requirement under Neb. Rev. Stat. § 46-294 (1)(l) has been met.

V. CONCLUSION

The Department finds that the elements of a change from an appropriation for the manufacturing of hydropower at a facility located on a natural stream channel to an instream basin-management appropriation have been met as set forth in Neb. Rev. Stat. § 46-290(3)(e). Applicant has also met their burden of proof to show that the transfer to an instream basin-management appropriation for fish, wildlife, and recreation is consistent with the applicable criteria in Neb. Rev. Stat. § 46-294 (1)(a)-(1).

ORDER

It is hereby ORDERED that Applications NEX-9432, NEX-9433, NEX-9434, and NEX-9435 are APPROVED subject to the following conditions:

1. Below is **Table 2** of transferred instream basin management appropriations for fish, wildlife, and recreation.

Appropriation Number	Priority Date	Grant in CFS*
A-359R (NEX-9432)	09/12/1896	35
A-1725 (NEX-9433)	10/30/1923	1,450
A-3574 (NEX-9434)	06/08/1942	550
A-18503 (NEX 9435)	04/16/2007	425

* CFS = Cubic Feet per Second

2. Water transferred through NEX-9432, NEX-9433, NEX-9434, and NEX-9435 will be measured at the original diversion location for Spencer Hydro, in Section 30, Township 33 North, Range 11 West of the 6th P.M., in Boyd County or such other location agreed upon by the Department.
3. A stream gage must be installed within twelve (12) months of the date of the Order at a location near the Spencer Hydro facility as approved by the Department's Water Administration Division. No water administration request will be honored until such time as the new gage is operational.
4. The beneficial use of maintaining stream flow for fish, wildlife, and recreation is recognized upstream of the stream gage to be installed as required above. The beneficial use of supporting implementation of IMP(s) was not considered in the Department's evaluation of the applications as requested by NPPD. Therefore, NGPC and NRBA must petition the Department to add this beneficial use to the appropriations. Upon notice pursuant to Neb. Rev. Stat. § 46-291, the Department will issue a new Order either approving or denying the petition for expanded beneficial use.
5. A-359R was a hydropower appropriation on Minnechaduza Creek which was relocated to the Spencer Hydro in 1997. One of the conditions for approval of the relocation petition is that water administration will not be administered on other appropriators that would not have been administered prior to the relocation of the appropriation. This condition remains in effect.

6. A-18503 was approved in 2016. Two of the conditions of approval of A-18503 were that the appropriator would not place a call for administration for A-18503 and the Department will not administer for it. These conditions remain in effect.
7. To ensure protection of junior water uses consistent with the requirements established in Neb. Rev. Stat. §§ 46-290, 46-294, the Department will not carry out water administration activities for these transferred appropriations from October 1 through April 18 of each water year. The appropriator shall be allowed to request administration for the remainder of the water year.
8. These transferred appropriations must continue to be open to subordination through new agreements with junior appropriators pursuant to Neb. Rev. Stat. §§ 70-668 and 70-669. Likewise, the process of condemnation will still be available to junior appropriators.
9. Existing condemnations from junior appropriators must continue to be honored until such time as they expire.
10. The permanent subordination agreements with the Mirage Flats Irrigation District and Ainsworth Irrigation District must be honored.
12. The basis for just compensation for future subordination agreements is \$0.32 per acre-foot diverted by junior appropriators. The 'Flat Rate' method based upon an assumed 24 inches of diversion per acre will remain an option for future subordination agreements. The cost of future subordination agreements may be adjusted under the provisions of Neb. Rev. Stat. §70-669.
13. NPPD must assign the water appropriations to the NRBA and the NGPC in accordance with the Appropriator Agreements and file the assignment document with the Department within six (6) months of the approval date of this Order.
14. Within one (1) year of the approval date of this Order, NGPC and NRBA must file with the Department a document containing specific details on how water administration requests will be handled, how orders of the Department will be followed in a timely manner, and instructions on how correspondence from the Department is to be routed to and among the appropriator entities. The document will be signed by authorized representatives of the appropriator's respective organizations. No water administration request will be honored by the Department until such document is filed with the Department.
15. Nothing in this Order should be construed as defining the specific hydrologic benefits of this transfer for the purpose of meeting Integrated Management Plan and Basin-Wide Plan goals.
16. Failure to comply with all laws and regulations pertaining to surface water appropriations, any orders issued by the Director of the Department, or the provisions of this Order may cause cancellation of part or all of the appropriations, temporary closing of the appropriations, administrative penalties, or any combination thereof.

17. This Order is not a guarantee that water will be available. Nebraska law gives priority to senior appropriations. This appropriation may be closed if there is insufficient water to satisfy senior appropriations.
18. All terms and conditions of A-359R, A-1725, A-3574 and A-18503 remain in effect unless specifically changed by this Order.
19. The appropriator must comply with all relevant statutes, including the following requirements:
 - A. Notify the Department of any change in ownership or address.
 - B. Notify the Department of the name and address of the person responsible for the use of the water appropriations.
 - C. Obtain approval from the Department prior to taking any action that changes the location of the point of diversion, the location of the place of use, the type of use, or the type of the appropriations.
 - D. Failure to use a portion or all of a perfected appropriation for more than five (5) consecutive years may result in cancellation of the appropriation.

DEPARTMENT OF NATURAL RESOURCES



Thomas E. Riley, P.E., Director

October 11, 2022

A copy of this Order was posted on the Department's website, provided to the Department's field offices in Bridgeport, North Platte, and Ord, Nebraska and mailed on to the following:

Nebraska Public Power District
c/o Jeff Shafer
P.O. Box 608
York, Nebraska 68467

Niobrara River Basin Alliance
c/o Marty Graff
303 East Highway 20
Valentine, Nebraska 69201

Nebraska Game and Parks Commission
c/o Tim McCoy, Director
2200 North 33rd Street
Lincoln, Nebraska 68503
INTERAGENCY