

STATE OF NEBRASKA  
DEPARTMENT OF NATURAL RESOURCES

ORDER GRANTING LEAVE TO FILE AN APPLICATION FOR  
A NEW SURFACE WATER APPROPRIATION WITHIN A MORATORIUM OR STAY AREA  
UNDER TITLE 457 N.A.C. CHAPTER 23 BY PETITION VAR-2047  
WATER DIVISION 2-D

BACKGROUND

1. On November 3, 2004, the Nebraska Department of Natural Resources (Department) issued an order of final determination that the following areas of hydrologically connected ground water and surface water within the Upper Niobrara White Natural Resources District (District) were fully appropriated: the Hat Creek Basin, the White River Basin, the portion of the Niobrara River Basin above the Mirage Flats Diversion Dam, the Box Butte Creek Subbasin, and the Snake Creek Subbasin. Temporary stays on the issuance of new surface water appropriations and increases in surface-water irrigated acres went into effect at that time.
2. On January 25, 2008, the Department issued an order of final determination that the areas of hydrologically connected ground water and surface water within the Lower Niobrara River Basin, below the Mirage Flats Diversion Dam and upstream of the Spencer Hydropower dam, were fully appropriated. This determination included lands within the District, in Box Butte, Dawes, and Sheridan counties, which had not previously been determined to be fully appropriated.
3. On May 14, 2009, the Department issued an order adopting the integrated management plan (IMP) for the Upper Niobrara White Natural Resources District and surface water controls. The surface water controls continued the stays on the issuance of new surface water appropriations and increases in surface-water irrigated acres that had gone into effect at the time of the original fully appropriated determination in 2004. The Department and District consulted and collaborated on the development of the IMP with the District's Citizen Advisory Committee. This IMP was developed in accordance with the *Groundwater Management and Protection Act*, particularly *Neb. Rev. Stat. §§ 46-715, 46-716, 46-717, 46-718 and 46-720.*
4. On February 18, 2011, Thomas E. Riley, P.E., on behalf of Conley Thornhill (Petitioner), filed a Petition for Leave to File or Consider an Application for a New Surface Water Appropriation within a Moratorium or Stay Area. The draft application provided with Variance VAR-2047 is for the purpose of appropriating water from a Tributary of White Clay Creek for a trout pond. The petition gives detailed supplemental information regarding a proposal to offset the expected consumptive use resulting from the proposed project. The area for the proposed water appropriation pursuant to VAR-2047 is at a location

within the area determined to be fully appropriated and subject to the surface water controls under the IMP.

5. On July 14, 2011, the Department and the District adopted a revised IMP. The surface water controls in the revised IMP continued the moratoriums and stays on the issuance of new surface water appropriations and increases in surface-water irrigated acres.

#### ANALYSIS

1. Provisions of *Neb. Rev. Stat. § 46-714(3)(n)* allow for new surface water appropriations if the Department grants a variance and subsequently approves a permit for such new use. When filing a variance request, a project proponent must offer a clearly stated basis for such request and must offer sufficient good cause shown. *Department of Natural Resources Rules of Surface Water, Title 457, Neb. Admin. Code Chapter 23* lists six circumstances that may be put forward as justification for granting a variance to apply for a new water use, in conjunction with an examination of good cause shown.

The proposed project is within an area that is currently subject to integrated management for the purpose of not increasing depletions to streamflow, and any new consumptive use must be examined for its potential effects on extant surface and ground water users and on all matters of significant public interest and concern. This includes assessing impacts on the State's ability to comply with interstate agreements, programs, decrees and compacts. Additionally, any proposed project must be scrutinized to prevent conflict with the goals and objectives of the IMP adopted by the District and the Department and the actions necessary to achieve those goals and objectives. Applications for potential beneficial uses that are not clearly non-consumptive will be presumed to be at least partially consumptive.

2. Petitioner provided a document entitled, "Offset Plan for Evaporation Mitigation of the Proposed Conley Thornhill Private Trout Pond in Sheridan County near Rushville, NE." The offset plan included an evapo-transpiration analysis indicating that Petitioner has converted, or intends to convert, approximately 10.43 acres of alfalfa to a wheat/fallow rotation. The analysis estimated that the offset volume due to the conversion would be 0.25 acre-foot and that the minimum number of acres needed to obtain this offset volume is 0.8 acre. Land-cover modification has not been recognized by the Department as an acceptable offset method for a water-use project. Offsets must consist of a reduction in the direct use of water, such as a curtailment of ground water pumping or surface water diversion.

#### CONCLUSIONS

1. Fish culture is recognized as a beneficial use, and, in theory, the development of this type of project could be demonstrated to be in the public interest and may provide a positive economic or social impact to the State of Nebraska. However, a private-use operation does not, on its face, appear to carry a direct benefit for the local economy within the fully appropriated area. Neither does a private fish pond appear to have a local social benefit. Any application filed will need to address these issues.

2. Petitioner has demonstrated that there may be possible methods to offset the consumptive use of the project. Petitioner has asserted that the conversion of over ten acres of alfalfa adjacent to the proposed pond may offset any consumptive use of water from pond evaporation. Petitioner has provided enough analysis to suggest the project might be offset, although the method proposed is not acceptable.
3. The petition indicates there is flow in the Tributary to White Clay Creek. However, Variance VAR-2047 and associated draft application has not provided evidence of an adequate water supply on the Tributary to White Clay Creek to provide for this project without harm to downstream users. Any offset plan must address quantity and timing of water supply impacts.

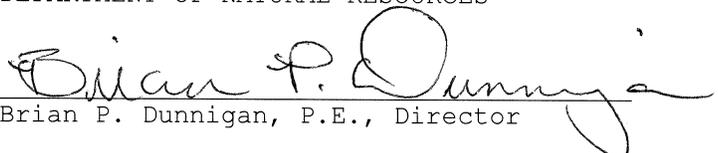
ORDER

IT IS HEREBY ORDERED

1. Petition VAR-2047 minimally meets the requirement of *Department of Natural Resources Rules of Surface Water, Title 457, Neb. Admin. Code Chapter 23*, and is GRANTED.
2. This decision shall not bind the Director to approve any application to which it relates, or in any way be used as evidence of prejudice for the Director's future decisions concerning the specific approval requirements of such an application.
3. An application filed pursuant to this Order must address all matters described herein.

DEPARTMENT OF NATURAL RESOURCES

June 13, 2012

  
Brian P. Dunnigan, P.E., Director

A copy of this Order was posted on the Department's website. A copy of this Order was provided to the Department's field office in Bridgeport, Nebraska. A copy of this Order was mailed on June 13, 2012, to the following:

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