

STATE OF NEBRASKA

DEPARTMENT OF NATURAL RESOURCES

APPROVAL OF PETITION VAR-2155 FOR LEAVE TO FILE AN APPLICATION FOR A NEW
SURFACE WATER APPROPRIATION WITHIN AN AREA SUBJECT TO A MORATORIUM

WATER DIVISION 1-B

BACKGROUND

1. On July 14, 2004, the Department of Natural Resources (Department) issued an Order declaring a formal moratorium in the Republican River Basin on the issuance of all new surface water appropriations.
2. On December 16, 2004, an integrated management plan (IMP) was adopted by Order of the Department, pursuant to *Neb. Rev. Stat. § 46-718(2)* for the Middle Republican Natural Resource District (MRNRD). As part of the surface water controls adopted by the Department pursuant to *Neb. Rev. Stat. § 46-716(1)(b)*, the moratorium on issuing new surface water appropriations was continued.
3. On September 20, 2010, a revised IMP was adopted by Order of the Department. The moratorium on issuing new surface water appropriations was continued.
4. On August 24, 2011, Don Felker, Manager of Frenchman Valley Irrigation District (Petitioner), filed petition VAR-2155 in the Department for Leave to File or Consider an Application for a New Surface Water Appropriation within a Moratorium Area (petition). The draft application and documentation attached to the petition is for a temporary permit to appropriate water from Frenchman Creek for the purpose of groundwater aquifer recharge via the Culbertson Canal.
5. *Nebraska Revised Statutes § 46-714(3)(n)* allows for new surface water appropriations if the Department grants leave to file an application and subsequently approves a permit for such new use.
6. When filing such a petition, a project proponent must offer a clearly stated basis for such request and must offer sufficient good cause shown. *Department of Natural Resources Rules for Surface Water, Title 457 Neb. Admin. Code Chapter 23* lists six circumstances that may be put forward as justification for granting a petition to apply for a new water use, in conjunction with an examination of good cause shown.

ANALYSIS

1. The formal moratorium issued by the Department in 2004 has been continued by the surface water controls included in the September 20, 2010, IMP adopted by the Middle Republican Natural Resources District and the Department.

2. Petitioner requests a temporary permit to divert water for the purpose of studying the potential for groundwater aquifer recharge to assist in optimizing water management.
3. Petitioner provided information that indicates the project would largely be non-consumptive because water would be diverted at such a rate that the water will seep into the groundwater aquifer without spilling out of the canal system. Petitioner has studied the canal losses and provided information that supports the amount requested.
4. The presence of unappropriated water is indicated by stream flow measured by the United States Geologic Survey on Frenchman Creek near Palisade, Nebraska with the proviso that the storage needs of Harlan County Reservoir are satisfied; Nebraska is within its Compact allocation; and forecast projections do not indicate a Compact Call Year. Petitioner has provided a table of expected values of unappropriated water.
5. The Department recognizes that the Final Settlement Stipulation of the Republican River Compact lawsuit does not preclude issuance of new appropriations. However, Nebraska must not exceed its allocation; therefore, careful consideration must be given before approving new appropriations. It is expected that water diverted and recharged into the aquifer during periods of plentiful supply will return as stream flow in the future and may increase stream flows in years when water is limited.
6. The expected benefits from projects such as this are (a) to assist in the study and understanding of retiming stream flows to the Republican River Basin, (b) to assist a joint conjunctive management study that is being implemented within the Republican River Basin and (c) to provide data to assess potential permanent sites for recharge projects.
7. Petitioner proposes to use this diversion prior to the normal irrigation season and after the irrigation season has concluded.

CONCLUSIONS

1. Petitioner has indicated the project is largely non-consumptive and there is likely to be unappropriated water in the Republican River Basin prior to and after the normal irrigation season. The benefits expected from the project outweigh the minimal consumptive use from evaporation before the diverted water seeps into the groundwater aquifer. Petitioner acknowledges that diversion may not occur if other appropriators could be harmed or if Compact constraints occur.
2. The temporary diversion project described in the draft application attached to the petition is in cooperation with and support of local natural resources districts, irrigation districts and the State. Information and data obtained from the proposed project will be valuable in conjunctive management studies being implemented within the Republican River Basin. Such data may be incorporated in the design of future projects intended to help the State fully utilize its annual allocation available under the terms of the Republican River Compact and the Final Settlement Stipulation. In addition, recharge from this project is expected to return as stream flow in the future and may result in increased flows when water is limited.

3. For these reasons, Petitioner should be granted leave to file an application to temporarily divert water from Frenchman Creek for the purpose of groundwater aquifer recharge.
4. According to the Final Settlement Stipulation, Section III.C., Nebraska may issue new surface water appropriations as long as "such use can be made within the State's Compact Allocation."

ORDER

IT IS HEREBY ORDERED:

1. Petition VAR-2155 meets the requirements of *Department of Natural Resources Rules for Surface Water, Title 457 Neb. Admin. Code Chapter 23, §§ 001.01 and 001.03*, has shown sufficient good cause, 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. An application filed pursuant to this ORDER must include a specific analysis and recommendation of conditions of operation that would assure the proposed use can be made within Nebraska's compact allocation.

DEPARTMENT OF NATURAL RESOURCES

September 21, 2011



Brian P. Dunnigan, P.E., Director

The applicant and any person with sufficient legal interest who has been or may be substantially affected by this order may request a contested case hearing in accordance with the *Neb. Admin. Procedures Act §§ 84-901 et. seq. RRS* and the Department's *Rules of Practice and Procedure 454 Neb. Admin. Code Chapter 7*. The request must be received by the Department at its Lincoln office (Nebraska State Office Building, 4th Floor, 301 Centennial Mall South, P.O. Box 94676, Lincoln, Nebraska 68509-4676) within 30 days of the date of the order and be accompanied by a filing fee of \$10.

A copy of this approval was posted on the Department's website and provided to the Department's field office in Cambridge, Nebraska. A copy of this approval was mailed on September 21, 2011, to the following:

Frenchman Valley Irrigation District
Don Felker, Manager
P.O. Box 297
Culbertson, Nebraska 69024