

STATE OF NEBRASKA

DEPARTMENT OF NATURAL RESOURCES

REVISED ORDER OF FINAL DETERMINATION

THAT THE LOWER NIOBRARA RIVER BASIN IS NOT FULLY APPROPRIATED

BACKGROUND

1. On October 16, 2007, the Department of Natural Resources (Department) completed the evaluation required by *Neb. Rev. Stat. § 46-713(1)(a)* of the expected long-term availability of hydrologically connected water supplies for both existing and new surface water uses and existing and new groundwater uses in the river basins which had not previously been determined to be fully appropriated, and issued a report, the 2008 Annual Evaluation of Hydrologically Connected Water Supplies (2008 Evaluation) describing the results of its evaluation.
2. The 2008 Evaluation concluded as a preliminary matter that the Lower Niobrara River Basin was fully appropriated. The preliminary fully appropriated portion was located in the Upper Niobrara-White Natural Resources District (UNWNRD), Middle Niobrara Natural Resources District (MNNRD), Lower Niobrara Natural Resources District (LNNRD), Upper Loup Natural Resources District (ULNRD), and Upper Elkhorn Natural Resources District (UENRD).
3. On October 16, 2007, pursuant to *Neb. Rev. Stat. § 46-714*, notice of the preliminary determination was given to the public, UNWNRD, MNNRD, LNNRD, ULNRD, UENRD, and licensed water well contractors in the State. The notice identified the portion of the Lower Niobrara River Basin that was preliminarily determined to be fully appropriated and the geographic areas in which the surface water and groundwater were hydrologically connected. Pursuant to *Neb. Rev. Stat. §§ 46-714(1)* and (2), the notice also described where stays took effect on the issuance of permits for new surface water appropriations and new groundwater wells and stays on increased irrigation with existing permits.
4. The Department issued notice of a hearing, held public information meetings, and held several hearings on the 2008 Evaluation.
5. As required by *Neb. Rev. Stat. § 46-714(4)* each irrigation district, reclamation district, public power and irrigation district, mutual irrigation company, canal company, or municipality that relies on water from the affected portion of the Lower Niobrara River Basin and other appropriate water users and stakeholders were consulted.
6. On February 8, 2008, the MNNRD, LNNRD, ULNRD, and UENRD filed a contested case challenging the final fully appropriated determination. On December 17, 2009, the Director of the Department upheld the determination. On December 31, 2009, the MNNRD, LNNRD, ULNRD, and UENRD filed a notice of appeal with the Department.

FINDINGS

1. In an opinion dated June 3, 2011, the Nebraska Supreme Court held that the Department's 2008 fully appropriated determination was invalid and reversed the December 17, 2009, Order.
2. On June 16, 2011, the Department received the mandate from the Clerk of the Supreme Court.

CONCLUSIONS

It is CONCLUDED that:

1. The 2008 determination having been invalidated and the order of the Department affirming the determination having been reversed, for purposes of *Neb. Rev. Stat. § 46-714(12)* it is concluded that the final determination that the Lower Niobrara River Basin is fully appropriated has been reversed by the Nebraska Supreme Court. It is further concluded that the effect of the Nebraska Supreme Court's decision is that the most recent determination of the status of the Lower Niobrara River Basin is contained in the 2007 Evaluation, which is that it is not fully appropriated. Therefore, the Lower Niobrara River Basin, below Mirage Flats and above the Spencer Hydropower facility, is not fully appropriated.
2. Pursuant to *Neb. Rev. Stat. § 46-714(12)(b)*, a new stay on the issuance of any new natural-flow, storage, or storage-use appropriations in the area of the Lower Niobrara River Basin, below Mirage Flats and above the Spencer Hydropower facility is adopted.
3. Pursuant to *Neb. Rev. Stat. §§ 46-714(12)(b)* through *46-714(12)(f)*, the natural resources districts listed above shall adopt rules and regulations and existing stays shall remain in effect until adoption of those rules and regulations.

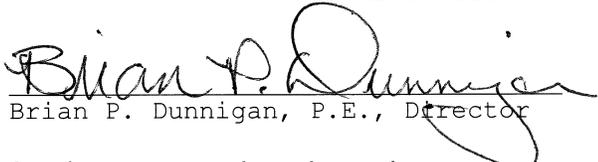
ORDER

It is hereby Ordered that:

1. The Department's final determination is that the Lower Niobrara River Basin is not fully appropriated, and
2. A stay is hereby entered on the issuance of any new natural-flow, storage or storage-use appropriations in the area of the Lower Niobrara River Basin below Mirage Flats and above the Spence Hydropower facility.

DEPARTMENT OF NATURAL RESOURCES

June 29, 2011


Brian P. Dunnigan, P.E., Director

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 (4th Floor Nebraska State Office Building, 301 Centennial Mall South, P.O. Box 94676, Lincoln, Nebraska 68509-4676) within 30 days of the date of the Approval and be accompanied by a filing fee of \$10.

On June 29, 2011, a copy of this Order was posted on the Department's website and mailed to the Department of Natural Resources field offices. A copy of this Order was sent by certified mailed on June 29, 2011 to the following:

Lyndon Vogt
Upper Niobrara-White Natural Resources District
430 East 2nd Street
Chadron, NE 69337

Mike Murphy
Middle Niobrara Natural Resources District
526 E 1st Street
Valentine, NE 69201

Terry Julesgard
Lower Niobrara Natural Resources District
410 Walnut Street
P.O. Box 350
Butte, NE 68722-0350

Anna Baum
Upper Loup Natural Resources District
39252 Highway 2
Thedford, NE 69166

Dennis Schueth
Upper Elkhorn Natural Resources District
301 North Harrison Street
O'Neill, NE 68763