

Memorandum

To: Programs, Projects and Operations Subcommittee

Subject: Lower Platte River Instream Flows

Date: January 29, 2007

By: Gerry Bowen

In 1998, the Nebraska Department of Natural Resources (NDNR), then called the Department of Water Resources, granted the Nebraska Game and Parks Commission (NGPC) an instream flow water right for fish on the Lower Platte River. Current state law allows for a review of the right every 15 years ensuring that the water right is still being used for the intended purpose. This review also allows the NGPC the opportunity to make changes in the water right, if they so desire. In preparation for a review in 2013, the NGPC and the NDNR are contemplating a cooperative work group consisting of various governmental entities and other groups that have an interest in the Lower Platte River whose function is to review this instream flow water right.

The District has been approached to join this group through the attached Memorandum of Agreement. Parties to the agreement include 11 NRDs, 4 power districts, MUD, and 2 state agencies (NDNR & NGPC). The purpose of the effort is to prepare a scope of services, budget, and schedule for study to review NGPC's instream flow water right on the Platte. It is proposed that NGPC Staff prepare these items and present them to the work group when completed. The term of the agreement is one year.

The agreement does not call for a financial contribution at this time. It is hoped that this work group with its varied and, at times, oppositional views could attract funding from a variety of sources to conduct the instream flow studies. If funding were required in the future, an Interlocal Cooperation Act agreement would need to be executed.

Mr. Kirk Nelson with the NGPC will attend the Subcommittee meeting to explain this effort in more detail. Information on Nebraska's Instream Flow Laws is also attached.

Management recommends that the Subcommittee recommend to the Board that the General Manager be authorized to execute the proposed Memorandum of Agreement Relating to a Lower Platte River Basin Instream Flow Work Group.

**MEMORANDUM OF AGREEMENT
RELATING TO LOWER PLATTE RIVER BASIN
INSTREAM FLOW WORK GROUP**

This Memorandum of Agreement (“Agreement”) relating to the Lower Platte River Basin Instream Flow Work Group (“Work Group”) is made by and among the following parties: Central Platte Natural Resources District (“CPNRD”), Lower Loup Natural Resources District (“LLNRD”), Upper Loup Natural Resources District (“ULNRD”), Upper Elkhorn Natural Resources District (“UENRD”), Lower Elkhorn Natural Resources District (“LENRD”), Lower Platte North Natural Resources District (“LPNNRD”), Lower Platte South Natural Resources District (“LPSNRD”), Papio-Missouri River Natural Resources District (“PMNRD”), Twin Platte Natural Resources District (“TPNRD”), Tri-Basin Natural Resources District (“TBNRD”), Upper Big Blue Natural Resources District (“UBBNRD”), Nebraska Public Power District (“NPPD”), Central Nebraska Public Power and Irrigation District (“CNPPID”), Loup Public Power District (“LPPD”), Twin Loup Power District (“TLPD”), City of Fremont (“Fremont”), City of Kearney (“Kearney”), City of Lincoln (“Lincoln”), Metropolitan Utilities District (“MUD”), City of Grand Island (“Grand Island”), Nebraska Game and Parks Commission (“NGPC”), and Nebraska Department of Natural Resources (“NDNR”). Collectively, the parties to this Agreement may be referred to as the “Parties,” and individually as a “Party.”

The purposes of this Agreement are to provide a mechanism for the Parties to collaborate to (1) determine the appropriate scope and costs of any studies concerning the instream flow requirements needed for the beneficial purposes of instream flow permits A-17330 and A-17331 to “maintain all species which interact and make up the Platte River fish community”; (2) to implement a good faith effort among the Parties to avoid conflicts over the instream flow statutes Neb. Rev. Stat. §§ 46-2,107 through 46-2,119; and (3) to provide for a specific time frame during which such collaboration and study may occur. Results of this effort will also provide information that could be used by the Parties should there be a request for review (15 year review) of the permits in accordance with Neb. Rev. Stat 46-2,112. Although this document sets forth a cooperative process, all signatories to this Agreement recognize that they each have statutory responsibilities that cannot be delegated, and that this Agreement does not and is not intended to abrogate any of their responsibilities.

The premise behind this Work Group stems from the Nebraska Game & Parks Commission proposing a review of its instream flow appropriations in the Lower Platte River Basin. A goal of the effort is a determination if modifications to spring and summer instream flow appropriations would be biologically justified.

The NDNR, pursuant to Neb. Rev. Stat. § 46-713, is charged with completing an annual evaluation and report on the state’s river basins. The NGPC holds certain instream flow appropriations that have the potential to affect the conclusions reached by the NDNR in its annual evaluation and report. The conclusions reached by the NDNR in such annual

evaluations and reports have the potential to require natural resources districts to enter into a joint integrated management planning process with the NDNR, pursuant to Neb. Rev. Stat. § 46-715. Modifications to the instream flow appropriations could reduce the likelihood of new *fully appropriated* determinations by the Nebraska Department of Natural Resources pursuant to LB962.

In consideration of the mutual covenants expressed, the Parties agree as follows:

1. Administration: The NGPC will take the lead of the aforementioned Parties in developing a scope of study, budget, and schedule for future activities.

Objective: The Parties to this Agreement hereby adopt the following objective:

- a. Develop a scope, budget, and schedule for the study of the instream flow requirements for the beneficial purposes of instream flow permits A-17330 and A-17331 to "maintain all species which interact and make up the Platte River fish community" This objective shall be referred to in this Agreement as the Developmental Work, and shall be completed within one year of the effective date of this Agreement, unless the time for completion of the Developmental Work is extended by agreement of the Parties pursuant to 2.

2. Following completion of the Developmental Work, the Parties will make a determination of whether to proceed with the study as scoped and budgeted.

3. Effective Date: This Agreement shall become effective upon execution by all Parties.

4. Term of Agreement: This Agreement shall be effective for an initial term ending one year from its effective date, unless extended by mutual agreement of the majority of the parties to complete the purpose and scope of this Agreement. If the members of the Work Group determine to proceed with the study, as set forth in 1, a new agreement will be executed.

5. This Agreement may be executed in any number of counterparts, each of which shall be an original, but all such counterparts shall constitute one and the same instrument of agreement.

This Agreement is hereby approved and executed by the following Parties on the dates shown below.

Central Platte Natural Resources District

Date

Lower Loup Natural Resources District

Date

Upper Loup Natural Resources District

Date

Upper Elkhorn Natural Resources District

Date

Lower Elkhorn Natural Resources District

Date

Lower Platte North Natural Resources District

Date

Lower Platte South Natural Resources District

Date

Papio-Missouri Natural Resources District

Date

Twin Platte Natural Resources District

Date

Tri-Basin Natural Resources District

Date

Upper Big Blue Natural Resources District

Date

Nebraska Public Power District

Date

Central Nebraska Public Power and Irrigation District

Date

Twin Loup Power District

Date

Loup Public Power District

Date

City of Fremont

Date

City of Kearney

Date

City of Lincoln

Date

Metropolitan Utilities District

Date

City of Grand Island

Date

Nebraska Game and Parks Commission

Date

Nebraska Department of Natural Resources

Date

Instream Flows in Nebraska

The Law

Nebraska surface water law dates back to 1895 and is based on the “doctrine of prior appropriation.” Under this Western Water Law doctrine, the first person to put water to use has the first right, or “first in time is first in right”. On any particular stream or river, this means that the earliest dated or senior water right user is entitled to water before other junior water right holders can take advantage of it.

Prior to 1984, Nebraska surface water law required water in streams and rivers to be diverted from its natural channel, be conveyed to an off stream location, and put to a beneficial use such as irrigation. In 1984, after 89 years of experience with the above doctrine, the Nebraska Legislature enacted an instream flow law. This expanded the first in time is first in right concept to allow the State of Nebraska (via Nebraska Game and Parks Commission and/or any Natural Resource District) to hold a surface water right for instream flows. Essentially, this means leaving some amount of flow in a stream or river for specific purposes.

The 1984 law recognized flows left in streams and rivers for fish, recreation, and wildlife to be beneficial uses of water. These beneficial uses did not change Nebraska’s longstanding, traditional water law system. Instead it recognized that natural streams and rivers are important to the natural heritage of present and future Nebraska citizens.

Instream flows benefit all Nebraska citizens either directly or indirectly. Healthy streams and rivers not only support a diversity of flora and fauna, but they benefit anglers, bird-watchers, sight-seers, hikers, backpackers, campers, swimmers/sun-bathers, canoers, boaters, hunters, bait-dealers, commercial anglers, as well as helping to keep riparian property values up and recharging groundwater levels as they flow downstream. When left in streams and rivers, instream flows are crucial to channel maintenance and other ecosystem functions. Instream flows are also extremely important to local and municipal water users and maintenance of water quality. Flows in streams and rivers also are used for livestock watering and are

important to local communities.

Questions and Answers

Q 1. What is an instream flow water right?

- An instream flow water right is an appropriation from the Department of Natural Resources (formerly the Department of Water Resources) for some specified amount of water to be left in a stream or river, or a segment thereof, for a particular purpose. In Nebraska, there are four legally recognized instream flow purposes: fish, recreation, wildlife, and for induced ground water recharge of municipal well fields.

Q 2. How does it differ from other surface water rights?

- An instream flow water right (appropriation) essentially protects a specific amount of water so it can be left in a stream or river according to the first in time first in right doctrine. Other surface water rights essentially divert/remove water from a stream for some another beneficial purpose (i.e. irrigation).

Q 3. Who can apply for an instream flow water right?

- According to state law, only the Nebraska Game and Parks Commission and Natural Resource Districts may apply for instream flow rights. Municipalities were subsequently added to allow for recharge of municipal well fields. The law does not automatically reserve or designate any amount of water for instream flows in any stream or river.

Q 4. Does an instream flow water right reduce the amount of water available for other uses?

- Yes and no. An instream flow water right has a priority date just like any other surface water right perfected under the doctrine of prior appropriation. When the instream flow right is in priority, the State via the Game and Parks Commission or a Natural Resource District may call for water. A request for regulation to satisfy an instream flow water right may prevent an upstream junior user from reducing the stream flow and may limit upstream senior users to their statutory water rights.

Q 5. Do instream flows tie up all the remaining water in a stream?

- It depends on the amount of instream flow right and where the segment lies within any particular basin. Instream flow water rights are based on specific studies that, according to the law, identify the minimum amount of water needed to maintain the designated purpose (fish, wildlife, or recreation). It is important to recognize that appropriations to divert water away from Nebraska streams and river were underway for 89 years before an instream flow law was even passed in 1984. Consequently, many if not most streams and rivers are over appropriated. Since 1984, only segments of two streams

and rivers have been protected- Long Pine Creek and the Platte River.

Q 6. Do instream flows prevent future water development?

• Certainly not downstream of the instream flow segment. An instream flow water right, like any other water right for any other purpose, could limit future water development upstream in the drainage. In some cases, State-approved instream flow water rights can facilitate the Federal permitting process for water development projects. Such development projects generally must minimize or avoid environmental impacts which often means providing instream flows.

Q 7. How many streams and rivers have been protected with instream flows in Nebraska to date?

• Between 1984 through 2002, only segments of two have been protected - Long Pine Creek and the Platte River. There are many other rivers and streams that have no instream flow protection.

Q 8. Of what value are instream flows to our society?

• Streams and rivers have been of tremendous value to the development of agriculture, manufacturing, and tourism. However, there is a limit to the amount of flow which can be diverted unless we as a society decide to lower our quality of life environment. Generally, the more affluent a society becomes the more awareness there is to manage natural resources for sustainability. Streams and rivers are also used extensively for generating hydropower as well as being a source of cooling water for coal and gas-fired electric generating facilities.

Q 9. Why should instream flows be protected in streams and rivers of Nebraska?

• Compared to many other states, Nebraska is blessed with an abundance of surface water as well as an abundance of ground water. Because it is part of our Natural Heritage and one of the natural resources held in trust for the people, it is important that it be managed in the best interest of all citizens for the long term. Legislation in 1993 subsequently authorized municipalities to apply for instream flows for the purpose of induced ground water recharge of municipal well fields.

For more information about the instream flow law or its application, contact:

- Nebraska Department of Natural Resources 402 - 471- 2363
- Nebraska Game and Parks Commission 402 - 471- 0641