

STATE OF NEBRASKA

DEPARTMENT OF WATER RESOURCES

In the Matter of the Applications
A-17004 through A-17009 for Permits
to Appropriate Water for Instream
Flows on the Platte River.
Water Division 1-A.

ORDER

This matter came on for consideration before the Director of the Department of Water Resources. The Director FINDS:

1. On July 2, 1992, the Director issued an order granting A-17004, A-17008, and A-17009; granting in part A-17007; denying A-17006; and dismissing A-17005.
2. The State of Wyoming appealed the granting of the applications to the Nebraska Court of Appeals and subsequently to the Nebraska Supreme Court.
3. On March 25, 1994, the Nebraska Supreme Court entered an Order that affirmed in part and reversed in part the July 1992 Order of the Director (246 Neb. 439, 513 N.W.2d 847 (1994)). The Court remanded the matter to the Department to consider solely the possible effect of the Prairie Bend II Project on the instream flow applications. All other parts of the Director's order were affirmed.
4. On August 29, 1994, after issuing notice to all parties of record, the Department held a hearing pursuant to the directive from the Court. At that hearing, evidence was received from the Applicant and from the City of Fremont. No other parties appeared.

It is CONCLUDED:

1. In its Order, the Supreme Court found, "...that the record does not support the director's conclusion that Prairie Bend will divert water as if it were junior to, not senior to, the instream flows" Id. at 448 and 856. At the hearing on remand, the Applicant offered ample evidence to demonstrate that the Prairie Bend II Project will be operated as if it were junior to the instream flows. (This, of course, assumes that the Prairie Bend II applications will ultimately be approved by the Department.)

Exhibit 179 is a partial copy of the Applicant's September 23, 1993, meeting of its Board of Directors. That exhibit clearly indicates that the Board intended to take action to have the Prairie Bend II project administered in a junior capacity to the instream flows.

Exhibit 180 is a resolution of the Applicant, duly adopted by its Board of Directors on April 28, 1994. That resolution clearly requires the Prairie Bend II project to operate in a junior capacity to the instream flows. The resolution further adopts, as binding upon the Applicant, the testimony given by Ron Bishop at the instream flow hearings conducted in July and September of 1991.

Consistent with the resolution (E180) is the testimony of Bishop (E181 and E182) and the Applicant's Board Chairman, Arlond Garrett (E183). The testimony of Bishop and Garrett was given at the recent Prairie Bend II hearings. The testimony of both persons plainly requests that the Department condition its approval of the Prairie Bend II applications such that the instream flows will be administered in a senior capacity.

Finally, Bishop testified at the August 29, 1994, hearing that he had conducted an analysis of how the Prairie Bend II project would affect the availability of water for the instream flow applications. Bishop's analysis concluded that the Prairie Bend II project would have no impact on water availability for the instream flows. No evidence to the contrary was presented.

Accordingly, the initial findings and conclusions of the Director were correct and are now adequately supported by the record.

It is therefore ORDERED:

1. Applications A-17004a, A-17004b and A-17004c are APPROVED.
2. All of application A-17005 is DISMISSED. J-2 only
3. All of application A-17006 is DENIED. J2 - Elm Creek
4. Application A-17007a, which requests flows from February 15 to February 28 for the initiation of biological activity in wet meadows, is DENIED. Applications A-17007b and A-17007c, which request flows from March 1 to March 31 and from October 1 to October 11, are respectively APPROVED.
5. Applications A-17008a, A-17008b and A-17008c are APPROVED.
6. Application A-17009 is APPROVED.

7. Each approved application shall be so identified and will be administered by the Department in accordance with § 46-2,119. If frequently called upon to administer water, Central Platte NRD may be required to provide measuring devices of a type and at locations specified by the Department.

DEPARTMENT OF WATER RESOURCES



J. Michael Jess, Director

September 23, 1994

A copy of this Order was mailed by first class mail on September 23, 1994, to all parties of record or their attorneys.