

Niobrara River Memorandum of Understanding

~ *Know The Facts* ~

Niobrara River MOU

The Niobrara River Memorandum of Understanding (MOU) was created to transfer Spencer Dam and associated water rights from NPPD to the Natural Resources Districts and Nebraska Game and Parks Commission. This will allow for protection of all existing uses and ensure a sustainable balance between existing and future demands.

This transfer will maintain the functioning river system and protect all water users including fish, wildlife, recreation, agriculture and domestic uses.



Niobrara River

MOU Highlights

- Protects all existing uses including domestic, municipal, surface and groundwater irrigation.
- River flows will be protected to meet the needs of recreation, fish and wildlife.
- Allow for greater public opportunities to develop management plans to protect existing water supplies.
- All current subordination agreements will be honored.
- Additional subordination agreements may be entered into.

Future Supply and Demand

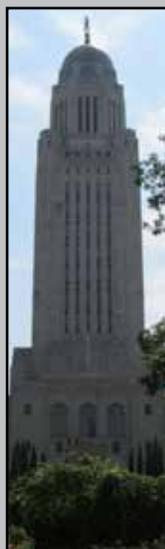
Future water supply and demand changes will be addressed in the Niobrara Basin Plan and individual NRD Integrated Management Plans (IMP)

- Basin-wide plan will protect current and future supplies and uses.
- All NRDs have or are working on an IMP.
- All IMPs will include public input, review and comment.

The old hydro facility will be jointly held and managed by the NRDs and NGPC.

- Public access where applicable.
- Future operation of Spencer Dam and gates will be evaluated.
- Other options exist through development of IMPs and basin plan.

Legislation



Legislation is needed to transfer all ownership of non-consumptive hydropower use to non-consumptive instream basin management use. It assures existing subordination agreements will be honored.

- Senior priority date of water right is needed to protect existing uses.
- Legislation will maintain water preferences of domestic, ag., manufacturing and other uses.
- Instream basin management will maintain same preference categories.
- Instream basin appropriation will be held jointly by NRDs and NGPC.

Federal Threat Avoided

The Niobrara MOU provides Nebraska an opportunity to avoid federal intervention in State water issues.

- The National Park Service and US Fish and Wildlife Service have expressed sincere interest in seeking a federal reserve water right which could limit all use of the river.
- A federal reserve water right impacts all hydrologically connected surface and groundwater including severe regulations on all existing uses.
- Court challenges can take 10 - 15 years to resolve.
- Challenging the federal government would easily cost \$7 - \$10 million with no guarantee of the outcome.

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Background

The Niobrara River starts near Lusk, Wyoming and extends approximately 500 miles across northern Nebraska where it empties into the Missouri River near the town of Niobrara. Average annual river flow increases from 3 cubic feet per second (cfs) at the state line to over 1,700 cfs at its mouth. The majority of the inflow is from groundwater.

The Nebraska Public Power District (NPPD) holds three water rights for the operation of the Spencer Dam hydro-electric facility. These total 2,035 cubic feet per second and have water right priority dates of 1896, 1923 and 1942. In 2006, the Nebraska Game and Parks Commission (NGPC) Board of Commissioners passed a resolution directing staff to develop an instream flow recommendation for the Niobrara River. Following this resolution the Commission conducted multiple studies that considered fish, wildlife, recreation, agriculture, economic impacts and the hydrology of the Niobrara River.

In October 2007, the Department of Natural Resources (DNR) made a preliminary determination that the Niobrara Basin from the Dunlap Diversion to the Spencer Hydro was fully appropriated. In 2008, following public meetings and three public hearings, DNR issued an order that finalized the Department's preliminary determination of fully appropriated. The Department conceded that the fully appropriated designation was based on NPPD's call on the river. That determination was reversed by the Nebraska Supreme Court in 2011.

In 2013, the Lower Niobrara, Middle Niobrara, Upper Elkhorn, Upper Loup and Upper Niobrara-White Natural Resources Districts entered into an interlocal agreement to form the Niobrara River Basin Alliance (NRBA) for the purpose of formally and collectively addressing management of common resources within the Basin. In September 2015, the Memorandum of Understanding was signed.

Common Questions and Answers

Q. Why are the Nebraska Game and Parks Commission and the Niobrara River Basin Alliance working with Nebraska Public Power District to purchase and transfer the assets at Spencer dam?

A. In Nebraska, water rights are appropriated on a first in time, first in right basis. With NPPD having senior water rights, any application submitted after these would be junior and subject to administration. The transfer of NPPD's facilities and water rights to the NRDs and NGPC will provide the ability to manage the river for fish and wildlife, recreation, irrigation and all other uses. An example of potential future management options is the capture of high flows and re-timing the releases when river levels are typically lower.



Q. How much will this cost and how is it being funded?

A. NPPD established the value of the Spencer facility and water rights at \$12 million. The NRDs and the NGPC will secure \$9 million to purchase the assets and NPPD will provide an in-kind contribution of \$3 million. The NGPC and NRDs plan to seek funding from the Water Sustainability Fund, the Nebraska Environmental Trust and other sources that may include bonds, occupation tax or general levy increases.

Q. Can the water right be transferred under the current laws, rules and regulations?

A. No. Current statutes do not allow for the transfer of a manufacturing water right to a multi-use right and still maintain the priority date and preference. The NRDs and NGPC will be working with the Nebraska Legislature to amend statutes to allow a transfer to occur. Once complete a portion of the flow will be identified for the protection of fish, wildlife and recreation.

Q. How will irrigators be impacted?

A. Currently, there are approximately 63,500 surface water irrigated acres and 505,000 groundwater irrigated acres. Subordination agreements for surface water already in place will be honored and additional agreements may be entered into. Currently, the two largest irrigation districts in the basin have subordination agreements that allow for the storage of water for use during the irrigation season. Through the development of a basin plan, the NRDs will be able to determine if there is additional water available for irrigation development where in the past this was not an option.

Q. Will this put any more water into the River?

A. No, not initially. Since 1965 annual average flows at the United States Geological Survey's Sparks gage near Valentine and the Verdel gage near Verdel have shown an upward trend. Because of this, the NGPC, Nebraska Department of Natural Resources (DNR) and NRDs have indicated there is sufficient water in the river to meet all needs. The agreement will protect these flows and allow for greater flexibility for future management of the basin to provide water when it is needed by users.

Q. What will happen to the property?

A. NPPD will continue to operate the facility and generate electricity until funding is acquired, legislation is passed and the DNR approves the transfer of the water right. The NRDs and the NGPC are working on a management agreement to allow public access for hunting, fishing and other activities where appropriate. It is likely the generators will be decommissioned and the gates opened to allow for the river to run freely. A two-year timeline has been set for the transition to be completed.