

## Ann Diers

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**From:** Peter and Ann Bleed [pbleed@neb.rr.com]  
**Sent:** Wednesday, October 26, 2005 4:10 AM  
**To:** Kent Miller; Duane Hovorka; Duane Woodward; Butch Koehlmoos; John Thorburn; John Turnbull; Ron Bishop; Don Kraus; Dean E. Edson; Jim Cannia  
**Cc:** Steve Gaul; Ann Diers; Ann Bleed DNR; Andrea Kessler  
**Subject:** [Spam????]

Enclosed are my notes from the Instream Flow Subcommittee meeting. Would you please review these and let me know if I correctly captured the discussion. Thanks.

Andrea would you please forward this e-mail to Kirk Nelson, Chad Smith, Gloria Erickson, Galen Frenzen, and Russ Callan and Lloyd Nellor.

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Notes from Water Policy Task Force Instream Flow Subcommittee Meeting  
October 25, 2005

Attendees:

Kirk Nelson	Butch Koehlmoos	Jim Nelson
Kent O. Miller	John Thorburn	Galen Frenzen
Duane Hovorka	John Turnbull	Russell Callan
Chad Smith	Ron Bishop	Don Kraus
Duane Woodward	Gloria Erickson	Dean Edson
Nate Jenkins	Lloyd Nellor	

Ron Bishop passed out a copy of a pertinent section of the instream flow law pertaining to the criteria the Director of Natural Resources must use to grant an instream flow right and a copy of part of a court opinion pertaining to the law (see attached). Under the instream flow law, the flow does not have to be for an instream flow right more than 20% of the time in order for a right to be granted. Bishop explained that before LB 962, an instream flow permit could not be used as a reason to regulate ground water, but that under LB 962, a basin can be designated as fully appropriated if a junior irrigation right did not receive sufficient water because the right was being regulated for a senior instream flow right. Bishop showed a graph of flows from 2001 at Louisville pointing out the flow that was available 20% of the time compared to the actual stream flow variations. He pointed out that if this graph were based on average flows over a longer period of time, the variability of the flow would be less, but that even then, a junior water right would be regulated 80% of the time if the permitted flow rate were only available 20% of the time. In response to a question it was pointed out that not all instream flow rights are for flow rates that occur only 20% of the time. Bishop stated that his proposal and the proposal passed by the Nebraska Association of Resources Districts was to put instream flow rights on par with other surface water rights and require that water must be available at least 85% of the time for a flow right to be granted. The basic problem is that when the instream flow right was granted, the water was not there.

Bishop's presentation was followed by a general discussion. Below are some of the highlights from that discussion.

Kirk Nelson stated that from the Game and Parks Commission perspective, the instream flow law was the result of negotiations and that the Commission believed they had already made enough compromises. Flows are not adequate for the pallid sturgeon but that maybe if we looked at the data in a bigger context we could come to some agreement. Nelson also pointed out that the Commission did not get any benefits from LB 962. Kent Miller disagreed stating that LB 962 will significantly impact flows for wildlife on the Platte River. Nelson state that the Cooperative Agreement will require flows be made available and that LB 962 is a moot point.

When asked whether the NRDs had concerns about the instream flow law before LB 962 was changed so that the instream flow law affected the regulation of ground water, Bishop stated that there were concerns but for the most part they were dealt with, for example there was an exemption for flood control dams.

Duane Hovorka stated that the standard for granting surface water rights was based on use and that during the instream flow hearings, the Commission had to justify the use. If the water provides a beneficial use, when the flow is available, we need to protect it. He also stated that asking what the impacts of declaring a basin as fully appropriated is a fair question, especially when the designation requires moratoriums on new uses but that we need to look beyond the initial impact. The final outcome depends on how the integrated management plan is crafted. Others pointed out that when a basin is fully appropriated, finding water for additional development will be difficult.

In response to another question Russel Callan indicated he was concerned with the fact that the Department regulated junior water rights for instream flows whenever flows were below the permitted right even when the flows are only available 20% of the time.

Galen Frenzen was concerned that a designation of being fully appropriated would limit an irrigator's ability to be creative and John Turnbull stated that people are really afraid that if their basin is declared fully appropriated, all development will simply be turned off. Jim Nelson pointed out that flow on the Loup and Elkhorn Rivers has not declined but that these basins could be declared fully appropriated not because of development in those basins but because of development and permits elsewhere.

Chad Smith asked if the NARD was intent on introducing their proposal as a bill in the legislature and whether there was any point in having more discussion to try to develop a more acceptable solution. The group agreed that they wanted to keep talking and try to develop a better solution, but that we were only one year away from another determination of which basins were fully appropriated so that we do not have a lot of time.

The group was asked what could we look at to try to resolve the issue. The following tasks were discussed.

1. Brian Barels suggested we review the way that the instream flow permits are used when determining whether a basin is fully appropriated. Ann Bleed agreed to share the comments provided to the negotiated rule making committee with the instream flow subcommittee. If any subcommittee members have other ideas on how to treat the instream flow permits when making a designation, they are to share those with the subcommittee.
2. Bleed agreed to review the record from the instream flow hearing and provide the flow records that were presented in that hearing.
3. Bleed pointed out that in regulating juniors for an instream flow permit, the Department does not wait for a call for regulation, as is often done for irrigation and other permits. Kirk Nelson agreed to look into what the Game and Parks Commission and others would suggest could be done so that the Department did

automatically have to regulate for instream flows whenever the flows were not available.

The next meeting of the subcommittee was set for 1:00 December 14 in Kearney, hopefully at NPPD.