

# STATE OF NEBRASKA



DEPARTMENT OF NATURAL RESOURCES  
Roger K. Patterson  
Director

April 2, 2003

IN REPLY REFER TO:

Mike Johanns  
Governor

Mike Clements, Manager  
Lower Republican NRD  
P.O. Box 618  
Alma, NE 68920

Dear Mike,

Last week you asked for a letter providing DNR's interpretation of the language in Section 46-602 relative to replacement wells. You also asked whether your district's replacement well definition could be modified to prevent expansion of irrigated acres if the board wants to do that.

As you know the language in Section 46-602, the statute that defines the term "replacement well" for purposes of well registration, is somewhat ambiguous. That statute specifies that the well must be "constructed to provide water to the same tract of land served by the water well being replaced." The ambiguity relates to whether the new well must irrigate **only** the same acres as the original well or whether it is sufficient if it will be used to irrigate **some** of the same acres. If the answer is that only some of the same acres must be irrigated, it must then be asked whether an increase in the total number of acres to be irrigated makes a difference.

DNR does not have an official policy on this issue. To date, however, we have allowed irrigation wells to be registered as replacement wells as long as **some** of the same acres are to be irrigated. Additionally, we have allowed such registration even if the total number of acres irrigated will increase.

Your district is not bound by DNR's historic interpretation of Section 46-602 for at least a couple of reasons. First, while DNR has not done so to date, in my opinion it would not be an unreasonable interpretation of the registration statute to conclude that the legislature's intent is to require that a replacement well irrigate only the same and no additional acres. Secondly, your district's temporary suspension of new well construction is authorized by subsection (16) of Section 46-656.28 of the Nebraska statutes. The subsection provides that "water wells **defined by the district** to be replacement water wells" are exempt from the temporary suspension. That allows your NRD either to utilize the well registration definition that is discussed above or to develop your own definition. The definition of replacement well in your present rules is essentially the same as the well registration definition.

If your board wants to tighten the definition so that increases in irrigated acreage are not permitted when replacement wells are constructed, I think there are at least two ways to do that. The first would be to replace the current definition with the one in Appendix F of the Settlement documents. That definition is as follows:

Replacement well shall mean a water well which (a) replaces a previously abandoned water within one year of the last operation of the abandoned water well or replaces a

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water well that will not be used after construction of the new water well and the original water well will be decommissioned within one year of construction of the new water well; and (b) would not be used in such a way as to result in the consumption of more water than was historically consumed by the water well being replaced.

For purposes of comparing the consumptive use of a proposed new water well for irrigation with the historic consumptive use of an irrigation water well to be replaced, the new water well shall be considered a replacement water well only if the number of acres to be irrigated by that new water well does not exceed the number of acres historically irrigated by the water well being replaced. If either the water well being replaced is or was used for any purpose other than irrigation or the proposed replacement well is to be used for any purpose other than irrigation, the person proposing to construct the proposed replacement well shall provide the district with such information as the district determines necessary to compare the historic consumptive use of the water well being replaced with the anticipated consumptive use of the proposed replacement water well. If construction of the proposed replacement water well is approved by the district, it may impose such conditions on the construction and/or operation of that well as it deems necessary to prevent any increase in consumptive use because of the construction and/or operation of the replacement water well.

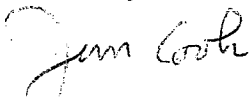
That definition or something close to it may be what all of the Republican districts eventually adopt as part of the joint action plan. In the meantime, other options also would work. The one we talked about on the 25<sup>th</sup> would be to make it clear, at least for now, that for a well to be considered a replacement well, it could be used to irrigate the same, and only the same, acres as were irrigated by the old well. One way to do that would be to revise part (b) of the "replacement well" definition in the December 2, 2002 rules to read as follows:

(b) if for irrigation, is constructed to provide water only to land historically irrigated by the well being replaced.

With that definition, the new well would not have to irrigate all of the acres irrigated by the old well, but no new acres could be irrigated. In other words, it is an even more restrictive definition than the one proposed in the settlement.

Let me know if you have any questions.

Sincerely,



Jim Cook  
Legal Counsel

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