

NOTES

DEPARTMENT OF NATURAL RESOURCES

CONCEPT PAPER FOR SURFACE WATER AND GROUND WATER SUBCOMMITTEE

Conversion of Surface Water Appropriations to Ground Water Wells
and from Ground Water Wells to Surface Water Appropriations

April 2007

CONCEPT

In areas that are within a moratorium or stay that does not allow new surface water appropriations, new ground water wells and/or new depletions, persons may have to find offsets or transfer rights to use in order to be able to use water at a new location or for a new use. The question is whether we should allow the offsets or transfer to come from a surface water appropriation for a ground water use or from a ground water use for a surface water appropriation.

There are states where transfers from surface water use to a ground water use do occur. In most situations, these are in mountainous areas where there is an easily defined basin and the wells are relatively close to the surface water stream.

There are also some states where a water well located within an irrigation district can be counted as a transfer in point of diversion where the majority of the amount of water withdrawn from the well is water imported into the area from the surface water diversion, and the land that is irrigated was originally under the surface water permit, or the right to irrigate the land can be obtained from a transfer by the offset of other irrigated land from the surface water diversion within the district. Under Nebraska law it is possible with tweaking the statutes we could use the incidental underground statutes to allow such an idea.

We have had two situations where the applicant requested that we consider a ground water offset for a new surface water appropriation. We have also had two requests to transfer a surface water right to a ground water well located within 50 feet of the stream.

Under current statutes the issues are many. First is that the surface water system operates under a priority system, first-in-time is first-in-right. There is no statutory recognition of a priority date for a ground water use. Therefore, if the proposal is to decommission a water well and discontinue the use for 70 acres and be able to obtain a surface water right for 70 acres, some issues are:

1. The application would obtain a junior priority even if the well and use had been established for 40 years under current law as there is no priority for the ground water use.
2. Do you look at timing of the impacts of the well? Does the well have to be decommissioned for a number of years prior to any diversions from a stream such that the water that the well has intercepted will have reached the stream prior to diversion?

3. If the well and new proposed use is in an area that is fully or overappropriated, existing surface water users or existing ground water users may benefit as there is no easy way to be sure that the water from the well is not used by such existing users and such existing users have the right to the use until their use is satisfied.

If the opposite proposal is made to transfer an existing surface water use to a ground water well, the following questions arise:

1. Who has authority to regulate? DNR? NRD? Both? We have told the persons who have asked for such action that under current laws they would be regulated under both sets of statutes because it is a well, and a surface water right. (Again these were for wells within 50 feet of the stream.)
2. If you maintain the two regulatory authorities, and an existing surface water use is foregone to allow for a ground water use, is the well still in the priority system subject to regulation? If it is not, how do you have any offset as there may not be any foregone use of surface water in an area where administration occurs because any senior right would have the right to demand all waters of the stream.
3. Should this only be allowed, if at all for wells that induce ground water into the well? Does this mean that a full study of the impacts must be completed by the applicant?

Is this worth pursuing ideas for new legislation, or should we maintain a system of ground water to ground water and surface water to surface water as it relates to offsets and transfers?