

To: Republican River Natural Resources Districts
From: Justin Lavene, Assistant Attorney General
Ann Bleed, Director, Department of Natural Resources

Date:

Subject: Nature of the Controls and Rules and Regulations Required In an Integrated Management Plan

There has been some debate on what is required regarding compliance measures in an integrated management plan. In particular there have been questions on whether the rules governing compliance must be part of the Integrated Management Plan and if so, what rules and regulations are required to be in the integrated management plan. This document describes the Attorney General's Office and the Department of Natural Resources view of what types of controls and or rules and regulations are required in an integrated management plan.

Basic Principles

Under State Statute § 46-715 the natural resources district and the Department of Natural Resources (Department) shall jointly develop an integrated management plan for river basins, subbasins, or reaches that are determined to be fully appropriated or overappropriated. The plan shall contain one or more ground water controls authorized for adoption under §46-739 and one or more surface water controls authorized under §46-716.

Statute § 46-715(3) states the ground water and surface water controls in the plan shall, when considered together with any applicable incentive programs, be consistent with the goals and objectives of the plan, be sufficient to ensure that the state will remain in compliance with applicable state and federal laws and with any applicable interstate water compact or decree or other formal state contract or agreement pertaining to water supplies, and protect the ground water users whose water wells are dependent on recharge from the river or stream and the surface water appropriators on such river or stream from streamflow depletion caused by surface water uses and ground water uses begun after the date affected area was determined to be fully or overappropriated.

In order to ensure that the integrated management plan is likely to comply with the laws and compacts, decrees or agreements, all details necessary to ensure compliance must be clearly stated in the integrated management plan. Thus, the plan must contain controls and/or controls and rules and regulations that are spelled out in sufficient detail to meet this requirement. Furthermore the adoption of, or change in any portion of the required controls and/or rules and regulations in the integrated management plan must be jointly approved by the natural resources district and the Department.

There are several ways the details on how a control will be integrated management plan can be included in an integrated management plan. The integrated management plan could contain only the adopted controls, with no inclusion of or reference to additional

rules and regulations. In this case, the control itself must be stated in sufficient detail to ensure compliance with §46-715(3). Any additional rules and regulations enacted by the natural resources district or the Department that are not part of integrated management plan must be compatible with the control, but would not require agreement by both the natural resources district and the Department to be enacted or changed. Alternatively, the details for enforcing the control may be included in the plan as rules and regulations. The rules may either be described as part of the main body of the planning document, in an appendix to the plan, or by reference to rules in a ground water management plan. In all cases, even if the rules are included in the plan as an appendix or by reference, all rules in the appendix or included by reference shall be considered as an integral component of the integrated management plan and as such could not be adopted or changed without joint approval by the Department and the natural resources district.

There are two types of controls or rules and regulations that would meet the requirements of §46-715(3). The control or rule and regulation could be included either as a compliance standard or as a set of descriptive protocols. If a compliance standard is used, the details of how the compliance is measured must be spelled out in the plan. In this case, however, the rules and regulations by which the natural resources district or the Department achieves compliance to meet this standard would not need to be considered as part of the integrated management plan and could be adopted or changed without joint approval by the natural resources district and the Department. If a compliance standard is adopted, a violation of the plan would be any measurement done according to the protocols of the compliance standard spelled out in the plan that shows that the standard was not met.

For example, an natural resources district could choose to use a comprehensive compliance standard that would state the amount of the groundwater depletions to the stream that could not be exceeded over a certain period of time as measured by an established set of runs made with the Republican River Compact Administration model and accounting procedures. The plan would have to include detailed protocols on how the input data for the model would be collected and what model runs and analyses would be used to determine compliance. The natural resources district could then independently promulgate rules and regulations to insure compliance with this standard. As long as the model runs and analyses prescribed by the plan showed that the depletions by either surface water users or ground water users did not exceed the established standard, there would be no violation of the plan.

Alternatively, the plan could list the rules and regulations for how much water could be pumped per acre, how the pumpage would be measured, whether the allocation of pumpage could be carried forward or transferred etc.

Required Components of an Integrated Management Plan for the Republican River Natural Resources Districts

If descriptive protocols are used, in our opinion the joint integrated management plan must include controls and rules and regulations that will ensure compliance with the

Republican River Compact, other state laws, and any other required integrated management plan goals. In this case the integrated management plan itself would need detailed jointly accepted controls or rules and regulations prescribing allowable management activities in the following areas:

- Allocations over a given period of time or the number of acres that can be irrigated along with any related rules pertaining to allowable carryover and pooling activities;
- Protocols for determining the amount of ground water pumped or acres irrigated
- Moratorium on new uses along with protocols for certifying irrigated acres
- Criteria that must be met if a transfer of water use is allowed
- Any other protocols that are necessary to ensure that the plan meets the required goals in § 46-715.

Similar types of controls or rules and regulations would have to be jointly established for surface water uses.

If you would like to discuss these issues please contact us.