

Dear Senator Louden:

I am writing this letter in response to the testimony regarding LB 314 offered by Dave Cookson at the Natural Resources Committee hearing yesterday. I would like this letter to be included in the hearing record if possible.

It is my opinion and that of the Department's staff and attorneys that the bill as written will not cause any problems for Nebraska with regard to complying with the Republican River Compact and Decree. In fact, it is our opinion that this bill is necessary to ensure compliance with both the Republican River Compact and Decree and the Platte River Cooperative Agreement Nebraska has entered into with the states of Colorado and Wyoming and the United States Fish and Wildlife Service. The passage of LB 314 will allow the Department and the natural resources districts to enforce moratoriums on the use of ground water against all ground water users—not just those who pump ground water from typical ground water wells.

First, Mr. Cookson expressed concern with how LB 314 treats pre-existing pits in the Republican River basin. Nothing in the bill affects pre-existing pits. The bill only addresses what happens when someone puts a pump into a pit and uses it to pump ground water for irrigation. Right now, the law regards as wells **only** those pits dug expressly for the purpose of extracting ground water. Pits dug for any other reason are not wells even when a pump is later placed in the pit and water extracted for irrigation.

Similarly, Mr. Cookson's concern about the bill's affect on the moratorium on the construction of new ground water wells in the Republican River basin is unfounded. LB 314 will give the natural resources districts the authority they need to enforce the moratorium by including all these "pit wells," if you will, as irrigation wells and make them subject to the moratorium and other restrictions.

In order for me to address Dave's concerns about the "legal issues with regards to takings" on a "closed class of wells" it is necessary to point out again that the bill does not have anything to do with when a pit was dug. It has only to do with the insertion of a pump into a pit. If the pit was dug for the intention of extracting ground water it is already considered a well under existing law. If the pit was dug for another reason and the pump inserted later in order to extract ground water for irrigation there is nothing in the present law that prevents or restricts this consumptive use of ground water. LB 314 will close that loophole.

It is my opinion and that of the Department's attorneys that there is no unconstitutional taking if the effect of LB 314 is to end the practice of using sand pits to irrigate in areas where there is a moratorium. If it were a taking then so would be the imposition of allocations on existing ground water wells. However, it is our opinion that if LB 314 is passed, and the owner can prove to the pertinent natural resources district's satisfaction that the "pit well" existed before the moratorium, the owner will be able to register it as a well and get the acres it is used to irrigate certified in accordance with the district's rules. If the natural resources district doesn't believe it meets the criteria for well registration

and/or certified acres as a ground water use did not exist before the moratorium went into effect, the permits will be denied and it will become an illegal well subject to the appropriate enforcement action. To register a pit well as a new well, the owner will need to provide an offset just like any new water use in the Republican River Basin.

Right now, these pit wells are unregulated so even though Nebraska is supposed to account for all consumptive water use in the Republican River basin every year, the water pumped from these pit wells have not been included unless the owner volunteered the information. Passage of LB 314 will require these pit wells to be registered as wells and allow the natural resources districts to restrict their use to irrigation of only certified acres, require flow meters and annual reports just like all other ground water well users in the Basin. This will enhance Compact compliance. Additionally, if LB 314 becomes law, it will authorize the natural resources districts and the Department to prosecute pit well owners who are using ground water to irrigate in violation of the moratorium and the Republican River Compact and Decree. This too will enhance Compact compliance. Furthermore, it is unfair to the other irrigators in the Basin if these pit wells are allowed to continue to pump ground water without any restrictions or allocations.

This is also true in other areas of the state where there are moratoriums on new water wells. If LB 314 is passed, the natural resources districts have all the legal authority they need to force the pit well to be registered, the acres it is used to irrigate certified, or to stop the use of the pit well if the owner cannot prove the pit well was in existence on the day the moratorium began and otherwise meets the district's criteria. The natural resources districts can use the same process they used to identify which more typical unregistered ground water wells were pre-existing uses in moratorium areas. If the pit well does not meet the criteria, it will have to be registered as a new well and an offset provided if the owner wants to use it. If it is used without being registered, LB 314 will give the districts the authority to stop the illegal use of ground water.

Again, I would like to reiterate that the passage of LB 314 will assist the State of Nebraska in its efforts to comply with the Republican River Compact and Decree by empowering the Department and the natural resources districts with the authority to regulate the use of ground water for irrigation by pumping it from pits originally dug for other purposes. There is no need to amend its present form.

Sincerely,

Ann Salomon Bleed, Ph.D.
Director