

**Effect of LB962
On
Integrated Management Planning
In The
Tri Basin NRD
4-22-04**

Note: the following was prepared using the final reading version of LB962. References below to pages and to bill section numbers are to that final reading version. Also, LB962 has the emergency clause, but, in accordance with section 114 of the bill, the portions of LB962 relevant to this analysis will not become operative until July 16, 2004. That date serves as the basis for many of the dates noted below.

1. **General.** Because the Tri Basin NRD includes land in three different river basins, and because future integrated management planning and implementation likely will proceed differently in each of those basins, the LB962 impacts for the Tri Basin NRD will also vary by river basin as described below.

2. **Republican River Basin Portion of the Tri Basin NRD.** In July of 1996, the Tri Basin NRD and the other NRDs in the Republican River Basin sent letters to the Department of Natural Resources (DNR) to initiate joint action planning processes pursuant to section 46-656.28. Those processes began almost immediately and, on September 6, 1996, DNR made a preliminary determination pursuant to subsection (2) of section 46-656.28 that there was "reason to believe that the use of hydrologically connected ground water and surface water resources is contributing to or is in the reasonably foreseeable future likely to contribute to disputes over the Republican River Compact." Studies were begun thereafter but were put on hold because of the Compact litigation filed in 1998. They were completed in 2003 after successful negotiation of a settlement. Pursuant to subsection (2) of section 46-656.28, DNR then issued its Report of Preliminary Findings, dated May 20, 2003. Hearings were held in each of the four NRDs in June, 2003 and on July 21, 2003, the Director informed the NRDs that the conclusions in the Report were then deemed final. Those conclusions were consistent with the preliminary determination made by DNR in 1996. On August 12, 2003, the board of directors of the Tri Basin NRD adopted an order pursuant to subsection (4) of section 46-656.28; that order indicated the Tri Basin NRD's intent to proceed to develop a joint action plan for integrated management in that portion of the NRD that is in the Republican River Basin. With the concurrence of DNR, preparation of a joint action plan began thereafter, but that plan has not yet been completed. As long as DNR does not change its current position by determining, prior to July 16, that a joint action plan should not be prepared for the Republican portion of the Tri Basin NRD (page 114, lines 26 to 28), that portion of the NRD will be considered "fully appropriated" on July 16, 2004. That is because section 60 of LB962 converts all **active** joint action planning processes to planning processes for integrated management under LB962 and because, pursuant to that section, any geographic area subject to an active .28 process for which preliminary determinations have been made by DNR under .28(2) will be treated the same as if that area had preliminarily been designated as "fully appropriated" in one of DNR's annual basin evaluation reports. (*Note: such*

conversions are needed because section 46-656.28 will be repealed by LB962; if there were no provision for such a conversion, each .28 planning process underway on the effective date and any temporary suspension or other rules in effect because of that process would terminate on July 16). What happens in the Republican Basin portion of the Tri Basin NRD as a result of that conversion will depend upon where in the .28 process the NRD and DNR are on July 16; the alternatives are outlined as follows:

- **If the .28 joint action plan has not been completed by July 16**, subsection (3) of section 60 (pages 114 to 117) will govern what happens as a result of the conversion. LB962 is not specific as to what constitutes a completed joint action plan, but it is reasonable to assume that the plan would be considered complete only if the NRD and DNR concur in that regard. The NRD does not now have a temporary suspension on the construction of new wells in that or any other portion of the NRD. Unless a temporary suspension is adopted by the NRD prior to July 16, the stays that apply to fully appropriated basins will take effect in **all** of the Republican portion of the NRD sometime between July 16 and August 1 (subdivision (b) of subsection (3) of section 56 on pages 115 and 116). Should the NRD adopt a temporary suspension prior to July 16, the stays that take effect on July 16 will apply only in the geographic area subject to that temporary suspension (page 115, lines 18 to 24) unless the director of DNR determines that inclusion of additional area within that portion of the district is necessary because ground water and surface water are hydrologically connected in such additional area (page 115, line 24 to 27). Whatever area is subject to the stays, they will be on the issuance of new surface water rights, on the construction of new wells and on any increase in acres irrigated with surface water or ground water, except that the stay on water well construction will not apply to wells for which the NRD has issued permits for construction prior to July 16 as long as the well is constructed in accordance with that permit (line 27, page 115 to line 4, page 116). Also, it is important to note that there are a number of exceptions to the stays; they are found in subsection (3) of section 54 on pages 90 to 92 of LB962. Whether exceptions (h), (j), (k), and (l) will actually be made available in this portion of the Tri Basin NRD will depend upon decisions by the NRD. NRD determinations will also be required when the application of exceptions that require factual determinations is being sought, e.g. exceptions (g) and (i).

The NRD could terminate the stay on new previously unpermitted wells and/or the stay on increases in ground water irrigated acres after a hearing on either or both of such proposals. Any such hearing would have to be held within 90 days of July 16 and the decision to terminate the stay or stays would have to be made within 45 days thereafter (subsections (7) and (8) of section 54, page 94). However, if new wells or new uses of existing wells are allowed, the integrated management plan (IMP) developed for this portion of the NRD will have to include provisions to protect surface water appropriators, and any ground water users who depend on stream recharge, from streamflow depletions caused by those new wells or new uses (page 98, line 20 to page 99, line 7).

The completion, adoption and implementation of the integrated management plan itself will occur under the applicable provisions of LB962 (sections 55 to 59, pages 97 to 112). In other words, when the plan is adopted it must be consistent

with the stated goals and objectives for such plans; also, if necessary, the IWRB will be convened to finish preparation of and to adopt the plan.

- **If preparation of the .28 joint action plan has been completed by July 16, but has not yet been adopted**, the LB962 stays will **not** take effect on July 16. However, if the NRD, between now and that date, adopts a temporary suspension on the construction of new wells, that temporary suspension will remain in place until the integrated management plan has been adopted and has taken effect (subsection 4 of section 60, pages 117 and 118).

Adoption and implementation of the integrated management plan will occur in accordance with the provisions of LB962. Before the plan deemed complete under section 46-656.28 can be adopted, it will have to be reviewed for its compliance with the LB962 requirements for integrated management plans for “fully appropriated” basins and will have to be modified if and as necessary to achieve that compliance (page 117, lines 12 to 22). If necessary, the IWRB will be convened to resolve disputes.

- **Though it appears unlikely at this time that a joint action plan could be completed and adopted before July 16, that possibility does exist.** If that were to occur, LB962 provides that the plan adopted is to be considered an integrated management plan adopted pursuant to the provisions of LB962 and that it thereafter is to be subject to enforcement, implementation and revision in accordance with the provisions of that bill (subsection (5) of section 60, page 118). Because an IMP plan would already exist, no stays would be imposed pursuant to LB962.

3. **Platte River Basin Portion of the Tri Basin NRD.** The Platte River Basin portion of the Tri Basin NRD will itself be divided into up to four separate geographic areas along the following lines: (a) the geographic area where ground water is hydrologically connected to the Platte River upstream of Elm Creek; (b) the remainder of the Platte River portion of the NRD that is subject to the New Depletion Plan for the Cooperative Agreement, i.e. within at least a 28% in 40 year depletion line; (c) any additional portion of the basin that at some future date may be designated as “fully appropriated” pursuant to the proactive portions of LB962; and (d) any portion of the NRD’s territory that is within the Platte River Basin but is not included in (a), (b), or (c). How LB962 will effect planning and implementation in each such area is discussed separately below:

- (a) **The area where ground water is hydrologically connected to the Platte River upstream of Elm Creek.** This portion of the Tri Basin NRD is likely to be designated as “over appropriated” by DNR by September 15, 2004. For that to be possible, the DNR Director, prior to July 16, 2004, will have to officially request that the NRD establish either a moratorium or a temporary suspension on new well construction in that area. For the NRD to respond affirmatively to that request, it would have to adopt new rules. For it to impose a temporary suspension rather than a moratorium, the NRD also would first have to make a timely request that DNR initiate a joint planning process under existing section 46-656.28 for at least that portion of the NRD. **However, it is not necessary that the NRD respond affirmatively to the**

Director's request. The request itself is what provides the basis for later designation of the area as "over appropriated" (page 88, line 20 to page 89, line 3).

When the designation of the "over appropriated" basin is made, it will have to include "a description of the geographic area within which the department has determined that surface water and ground water are hydrologically connected and the criteria used to make such determination." (page 89, lines 6 to 10). LB962 is not specific as to whether the area designated as "over appropriated" could include area beyond that identified in the Director's pre-July 16 request. To avoid any potential problems in that regard, that request should include all of the area that might be included in the "over appropriated" basin designation when that designation is made.

Once this portion of the NRD is designated as "over appropriated", stays applicable to such basins will take effect (subsections (9) and (10) of section 54, pages 94 and 95). As in the Republican Basin portion of the district, those stays will be on new surface water uses, new ground water wells, and increases in acres irrigated with either surface water or ground water. Unlike the other NRDs that are likely to have geographic area designated as "over appropriated", none of this portion of the Tri Basin NRD will be subject to a moratorium or temporary suspension prior to that designation unless the NRD adopts rules to impose such a moratorium or temporary suspension prior to July 16. Therefore, the stays will bring about a greater change in this NRD than in those portions of the other districts where the construction of new wells is already restricted. Also, as noted for the Republican portion of this NRD, there are a number of exceptions to the stays; they are found in subsection (3) of section 54 on pages 90 to 92 of LB962. Whether exceptions (h), (j), (k), and (l) will actually be made available in this portion of the Tri Basin NRD will depend upon decisions by the NRD. NRD determinations will also be required when the application of exceptions requiring factual determinations is being sought, e.g. exceptions (g) and (i). Also, the NRD could terminate entirely the stays on new wells and/or on increases in ground water irrigated acres if it first holds a hearing on such a proposal within 90 days after the designation of the area as "over appropriated" (subsection (11) of section 54, page 96). However, if new wells or new uses of existing wells are allowed, the IMP that is later developed has to include provisions that will protect surface water appropriators and ground water users who depend on stream recharge from streamflow depletions caused by those new wells or new uses (page 98, line 20 to page 99, line 7).

Preparation, adoption and implementation of the IMP for the over appropriated portion of this NRD and for the other NRDs involved will be in accordance with the provisions of LB962 that apply to such areas. That means that a basin wide plan and each of the individual IMPs will be developed concurrently (page 99, lines 14 to 17); that specified stakeholders must be given the opportunity to be involved in the planning process (page 99, lines 13 and 14 and page 99, line 22 through page 100, line 9); and that the IMP for that geographic area must be consistent with the statutory requirements for such plans (page 100, line 20 to page 103, line 6). If

necessary, the IWRB will be convened to finish preparation of and to adopt the plan.

Also, because the New Depletion Plan for the Platte River Cooperative Agreement applies in some or all of the geographic area that is expected to be designated as "over appropriated", the plan for this area will have to be compatible with and no less protective of Platte River flows than the New Depletion Plan if the Cooperative Agreement is later approved (refer to section (b) below).

(b) The remainder of the Platte River Basin portion of the NRD that is subject to the New Depletion Plan for the Cooperative Agreement.

Whether a New Depletion Plan is to be implemented in this portion of the NRD (and as applicable also in the "over appropriated" portion discussed in (a) above) depends on decisions yet to be made by the Governor, the Legislature, this NRD and six other NRDs; those decisions will probably need to be made in 2005. For the purposes of this section of this analysis, the assumption is that such a plan will be implemented.

The current draft of the New Depletion Plan is dated January 22, 2004. That draft provides that by September 1, 2005, the Tri Basin NRD and the other NRDs that have geographic area within the Platte River Basin upstream of Chapman, Nebraska will have designated an integrated management area and will have begun placing conditions, in the manner required by that plan, on permits for wells to be constructed on or after January 1, 2006. The NRD will also establish baseline consumptive amounts for groundwater uses that exist on December 31, 2005 and, commencing May 1, 2006, will also require that increases in those baseline consumptive uses be subject to prior NRD approval and be consistent with the plan.

LB962 has no provisions that will require changes in that New Depletion Plan. However, the bill does include some revisions in existing legislation that are necessary to allow full implementation of that plan (see, for example, the changes on page 132, lines 19 to 22; and the authorization for incentive programs on page 138, lines 5 to 17). It also includes other provisions important to implementation of other possible Platte River Program activities (see for example, the authorization for NRD approval of transfers of ground water off the overlying land for environmental purposes, pages 151 to 153).

Much of the land area that is to be subject to the New Depletion Plan in other NRDs is already subject to an active joint action planning process under section 46-656.28. In those NRDs that land area will be considered to be within a "fully appropriated" basin when LB962 becomes operative (section 60 on pages 113 to 118). That will not be the situation in this segment of the Platte River Basin portion of the Tri Basin NRD unless the NRD takes action to initiate a joint action planning process in this portion of the NRD prior to July 16. Therefore, in this segment of the NRD, no stays will be automatically triggered by the operative date of the bill unless the NRD has taken that action and unless the DNR Director, also prior to July 16, has made a preliminary determination that there is a conflict between surface water appropriators and ground water users in this portion of the NRD. However,

the fact that this portion of the NRD is not considered to be “fully appropriated” under LB962 will not prevent the limitations on new water use that are to be imposed through implementation of the New Depletion Plan to be put into effect in the manner and by the dates described in that plan.

Until such time that DNR, pursuant to section 53, has released an annual basin evaluation report in which the department has preliminarily concluded that all or part of the Platte River portion of the Tri Basin NRD not designated as “over appropriated” has become “fully appropriated”, that portion of the NRD will not be subject to the proactive integrated management sections of LB962. The first time that such a conclusion could be reached would be as part of the first basin evaluation report due to be released by January 1, 2006. That first annual evaluation report therefore will be released at about the same time as full implementation of the New Depletion Plan is to begin. If a “fully appropriated” conclusion were to be reached, either as part of the first or any later annual report, the stays that are to follow such preliminary conclusions would be imposed and the planning process required by LB962 would commence and would be brought to conclusion by either the NRD and DNR or by the IWRB. Whether the imposition of the stays or the completion of the planning process would cause any additional limitations on water users beyond those already in effect as a result of the New Depletion Plan would have to be determined at the time.

- (c) **Any additional portion of the Platte River Basin part of the NRD that is at some future date is designated as fully appropriated pursuant to the proactive provisions of LB962.** It is possible that the New Depletion Plan and the IMP for the “over appropriated” portion of the Tri Basin NRD will not include all of the Platte River Basin portion of the NRD. It is also possible that at some future date additional portions of the Platte Basin in that NRD will be preliminarily designated as “fully appropriated” in accordance with the proactive sections of LB962. In that event, the stays that follow such preliminary designations would be imposed and the planning process required by LB962 would commence and would be brought to conclusion either through agreement between the NRD and DNR or by the IWRB.
- (d) **Any portion of the Platte River Basin that is within the Platte River Basin but is not included in (a), (b) or (c).** It may be that portions of the Platte River Basin part of the Tri Basin NRD will never be designated as “over appropriated” or “fully appropriated” or be included within the geographic area subject to the New Depletion Plan. Any such area will not be affected by the enactment of the proactive portions of LB962. However several revisions that are made to the other sections of the Ground Water Management and Protection Act could affect NRD planning for and implementation of ground water management areas in this part of the NRD. In general, those revisions provide the NRD with additional authority and flexibility in the way it proceeds with that planning and implementation.

- 4. **The Little Blue Basin portion of the Tri Basin NRD.** The Little Blue Basin portion of the NRD will not be designated as “over appropriated” and does not currently have an ongoing joint action planning process in effect under 46-656.28. Therefore it will not be considered as “fully appropriated” when LB962 takes effect on July 16

unless, before that date, the NRD has initiated such a joint action planning process and DNR has made an affirmative preliminary determination pursuant to subsection (2) of section 46-656.28. An option available to the NRD is to initiate the joint action planning process prior to July 16. If, following that initiation, DNR did not make a preliminary determination pursuant to subsection (2) of section 46-656.28 prior to that date, the joint action planning process initiated would simply terminate on July 16. However, any temporary suspension adopted by the NRD before July 16 would continue in effect until 30 days after the first annual DNR basin evaluation report (subsection (2) of section 60, pages 113, line 19 to page 114, line 19).

Until such time, if ever, that DNR concludes in an annual report that this portion of the Tri Basin NRD is "fully appropriated", the only other impacts of LB962 on this portion of the NRD will be those described under item 3(d) above, i.e. those that result from revisions to the Ground Water Management and Protection Act beyond those relating to the proactive provisions.