September 7, 2005

Dear_____,

The purpose of this letter is to provide clarification regarding DNR's position provided in the August 20, 2005, letter from Senator Langemeier. The~~At an August 30, 2005, meeting, NRD managers sought clarification of an August 20, 2005,~~ letter ~~that~~ was intended ~~sent~~ to be~~you by Senator Langemeier and was co-signed by me. The letter was~~ a summary of the discussion ~~that occurred~~ at a meeting called by Senator Langemeier. The discussion focused on how to treat ~~to address concerns over the uncertainty of how~~ irrigation wells drilled but not used before January 1, 2006, in the event that~~would be treated by an NRD if~~ a basin is~~were to be~~ designated as fully appropriated. The letter also included a potential~~was sent only to those who attended the meeting with the intention that it could be used by the NRD managers as they and their boards discussed possible~~ options ~~of~~for providing ~~greater~~ certainty for affected well owners. ~~The letter recommends that before the NRD advertises what, if anything, the board proposes to do, they should provide a copy of the proposal to the Department to make sure the proposal fits with the Department's interpretation of the law to avoid any potential misunderstandings.~~ My primary reason for signing Senator Langemeier's letter was to indicate ~~in a timely manner~~ the Department's willingness to assist the NRDs as they ~~struggle to~~ deal with this issue. Unfortunately, this letter has caused some confusion regarding the DNR's position.~~was read outside of the context for which it was intended and rather than increasing understanding, has caused greater confusion~~. ~~The purpose of this correspondence is to provide the clarification requested at the August 30, 2005, meeting.~~

The August 20, 2005 letter sets forth one option for dealing with this issue. The proposed option also suggested an additional time frame for addressing this group of wells. My signature on the letter was not intended to suggest that this option was the required method for dealing with these wells or that it was the only option. My intent was to signal DNR's acceptance of this option should a NRD choose to go that route. DNR does believe that this can be done within the statutory framework as long as all parties involved are aware that dealing with wells in this manner does not relieve the NRD and DNR of the responsibility to adopt an integrated management plan that complies with Section 46-715 of the Nebraska Groundwater Management and Protection Act. Specifically, if adding new irrigated acres results in not meeting the integrated management plan goals or objectives or results in streamflow depletions that adversely impact groundwater and surface water users dependant on streams for their water supply, the integrated management plan will have to address that situation. ~~primary subject of the August 17, 2005, meeting was to identify options that could be used by the NRDs to decrease the uncertainty on whether an irrigation well that was permitted and/or drilled but unused this fall would be allowed to be used if a basin was designated to be fully appropriated before January 1, 2006. As required by Section 46-713(1)(a), by January 1 of each year beginning in 2006 the~~

Department of Natural Resources shall complete an evaluation of the expected long-term availability of hydrologically connected water supplies for both existing and new surface water uses and existing and new ground water uses in each of the state's river basins and shall issue a report that describes the results of the evaluation. In that report, the Department will evaluate the state's river basins that are NOT currently subject to a fully appropriated determination or an overappropriated designation. When that report is released, it could include a preliminary determination that one or more of those remaining river basins are fully appropriated. Once a basin is preliminarily determined to be fully appropriated, Section 46-714(2) of the statutes requires that stays be imposed (a) on the construction of any new water well in the area covered by the determination if such construction has not commenced prior to the determination, whether or not a construction permit for such water well was previously obtained from the department or a natural resources district, and (b) on the use of an existing water well or an existing surface water appropriation in the affected area to increase the number of acres historically irrigated. It is very important to note that none of the options discussed at the meeting would affect the ability of an owner of a non irrigation well that was constructed prior to the determination to continue to use that well or the ability of an owner of an irrigation well to continue to use that well if it was used for irrigation before the determination.

The specific concern expressed in the August 17, 2005, meeting was that some irrigation wells drilled before the report is released will not have been used for irrigation before that report becomes public and therefore could not be used if the basin is determined to be fully appropriated unless the NRD provided an exception to the stays in Section 46-714(2). The main option for exception discussed at the meeting is spelled out in Section 46-714(3)(k) of the statutes. It gives the NRD in a fully appropriated basin the authority to allow post-stay expansion of irrigated acreage if that expansion is through the use of irrigation wells that have been constructed within nine months prior to the date of the stay but were not used for irrigation prior to the effective date of the stay. Also discussed was the suggestion that if this exception were exercised by an NRD, the NRD may want to require that all such wells be used by a certain date, for example July 1, 2006, in order to be considered a certified use by the NRD. It is important to note that whether this option is exercised is a decision that must be made as part of an official action by the NRD board. This is not a decision the Department has the authority to make.

As emphasized at the meeting, choosing the option to except new but unused wells from stays does not eliminate the need to comply with Section 46-715(3)(c). That section requires that when the integrated management plan for a fully appropriated area is developed by DNR and the NRD involved, that plan must protect certain existing water uses from depletions caused by uses begun after a stay takes effect. If an NRD chooses the Section 46-714(3)(k) exception discussed above, there are at least four ways for the plan to address the issue of protecting existing ground water and surface water users: (1) any offset required because of the new use could be supplied by the NRD; (2) any required offset could be supplied by the individual owning the well; (3) any required offset could be supplied by the state in those circumstances where the state is otherwise obligated or chooses to provide the offset; or (4) if the NRD and DNR determine as a result of the planning process, that the well does not result in a water supply/water use imbalance, no offset will be required.

It ~~was emphasized at the August 17, 2005, meeting that it~~ is not presently possible to know whether adding new irrigated acreage in a given basin will cause a water supply/water use imbalance or adversely impact streamflow~~another water user~~. As a result we cannot say one way or another whether controls in an integrated management plan~~Therefore it is also not presently possible to know whether offsets~~ will be required because of new streamflow depletions caused by any new consumptive uses of water.

~~In order to help reduce the risk of creating an imbalance and/or adverse impacts by allowing the use of new wells, the Department indicated that it would be willing to consider the impact of new but unused wells that the NRD chose to except as part of the analysis required to determine whether or not a basin is fully appropriated. By including these wells in the analysis, or so-called baseline for the determination, a basin would be more likely to be designated as fully appropriated than if these new uses were not included in the analysis. Any resulting earlier designation could help to reduce the need to offset the additional consumptive use of water that would result from allowing these new wells to be used. It was agreed that the analysis of these new wells would assume that the acres to be irrigated would be those listed in the well registration data base. Although not discussed at the meeting, Senator Langemeier suggested that it would make sense that if the Department was to be able to have time to include the new well in the analysis, the well should be drilled and registered with the Department by October 1, 2005. Choosing this date would provide the Department with ample time to include the impacts of these new wells in the analysis and still meet the January 1, 2006, report deadline. Please note, however, this October 1, 2005, date does not change the law that would allow any irrigation well that was used before the preliminary determination of fully appropriated to continue to be used. The date simply determines which unused wells would be considered by the Department in the analysis for determining whether a basin is fully appropriated should an NRD wish to adopt this option.~~

~~Whether the "nine months before" exception specified in Section 46-714(3)(k) and discussed at the August 17, 2005, meeting is used will be up to each NRD with land area in a basin preliminarily determined to be fully appropriated. It is certainly not mandatory that an NRD utilize that option, that it use October 1 as a cutoff date as part of that option, or that it allow any other optional exception to the stay on new ground water irrigation. The NRD also does not have to determine before the end of the year whether, if it later chooses to allow ground water users to increase irrigated acres after a stay goes into effect, those users will have any responsibility for any required offset. The discussion of the option was intended only to provide an example of the flexibility that the NRD's have under the law. As the August 20, 2005, letter indicated, an NRD in an area that is preliminarily determined to be fully appropriated also has the ability to not allow expansion of irrigation, even if that expansion would result from use of wells drilled shortly before the stay takes effect.~~

~~The letter also mentions how the NRD might want to deal with subirrigated acres. The issue of whether a landowner that has subirrigated acres could put a new well on those acres has been raised by a number of landowners. Whether to approve a variance that would allow a new well on these acres would also be a decision that must be made by the NRDs. If such a decision is anticipated and if the NRD wants acres that are presently irrigated only through subirrigation to be considered as part of the Department's analysis for determining fully appropriated, the NRD~~

~~will need to let the Department know the location and extent of those acres by the first of October.~~

Again I apologize for any confusion caused by the August 20, 2005, letter. Hopefully this letter will clarify the DNR's position on this issue.~~your understanding of what was discussed at the August 17, 2005, meeting.~~ If you have further questions or concerns, please feel free to call me at 402-471-2366.

Sincerely,

Ann Bleed
Acting Director

Xc: (NRDs, Senators at the meeting, and others who are known to have received a copy of the August 20 letter)