Ann Diers

From: Peter and Ann Bleed [pbleed@neb.rr.com]
Sent: Saturday, September 03, 2005 10:09 AM
To: Ann Diers; Jim Cook; Tina Kurtz
Cc: Ann Bleed DNR
Subject: Rewrite of letter explaining meeting of Aug 17 and letter Aug 20

I revised the letter as drafted by Ann D and Jim C. See what you think. Ann

September 7, 2005

Dear_____,

At an August 30 meeting, NRD managers sought clarification of an August 20 letter that was sent to 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 to address concerns over the uncertainty of how irrigation wells drilled but not used before January 1, 2006 would be treated by an NRD if a basin were to be designated as fully appropriated. The letter 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 providing greater certainty for well owners. The letter was not intended to be broadly disseminated and in fact the letter itself recommends that before the NRD advertises what, if anything, the board proposes to do, they should provide a copy of the plan to the Department to make sure the proposal fits with the Department's interpretation of the law. My primary reason for signing 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 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 meeting.

The primary subject of the August 17th 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 on 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 or acres historically irrigated. It is very important to note that none of the options discussed at the meeting would affect the ability of a well owner to use a well that was constructed prior to the

determination or in the case of an irrigation well, a well that was used for irrigation before the determination.

The specific concern expressed in the August 17 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 major option for exception discussed at the meeting is already 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, such as 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) option, there are at least four ways for the plan to address that "protect" issue: (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; 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 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 another water user. Therefore it is also not presently possible to know whether offsets will be required because of new 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. The resulting earlier designation would 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 would have to be drilled and legally registered 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 report deadline. Please note,

however, this October 1 date does not change the law that would allow any irrigation well that was used before the designation of ~~being~~ 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" option specified in Section 46-714(3)(k) and discussed at the August 17th 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 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 allow a new well on these acres would also be a decision that must be made by the NRDs. If such a decision were made and if the NRD wanted these acres to be considered as part of the Department's analysis for determining fully appropriated, the NRD would have to make sure that the Department knew that these acres were to be considered.

Again I apologize for any confusion caused by the August 20th letter. Hopefully this letter will clarify your understanding of what was discussed at the August 17th 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)