

Ann Diers

From: Ann Diers [adiers@dnr.state.ne.us]
Sent: Thursday, September 01, 2005 3:43 PM
To: Ann Bleed (ableed@dnr.state.ne.us)
Cc: Tina Kurtz (tkurtz@dnr.state.ne.us); Jim Cook (jcook@dnr.state.ne.us)
Subject: Explanatory Letter

Ann:
Tina and Jim have both reviewed this and are fine with it. You will note that there are a few additional items from the Senator's letter that we should probably clarify as well. Once you are okay with it, we will need to send it over to Dave Cookson.

Ann

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other issues referenced in the letter that may need clarification:

- 1. the issue re “baseline”**
- 2. acres accounted for by the Department based on registration data (# 4 in letter)**
- 3. subsurface irrigation (#5) (Ann, I don't know what to do about this—do you know if it was discussed at the meeting?)**

August 31, 2005

Dear Governor Heineman,

At an August 30 meeting, NRD managers sought clarification of an August 20 letter that was sent to you and was co-signed by Senator Langemeier and me. Several of the NRD managers had received copies of the letter because they had attended an August __ meeting that I also attended. The purpose of this correspondence is to provide the clarification requested at the August 30 meeting.

The subject of the August __ meeting, from a broad aspect, was the Department's upcoming first annual report required by Section 46-713(1)(a). 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. The specific concern expressed in the August __ meeting was that some irrigation wells drilled before the report is released will not have been used for irrigation before that report becomes public. The problem presented is that, with release of the report, an almost immediate statutory stay on the expansion of irrigated acres will go into effect in any basin preliminarily determined to be fully appropriated. The question brought forward at the August __ meeting was where would such a stay leave the owners of those irrigation wells that, prior to the date of that stay, have been constructed but have yet not been used for irrigation?

During the August __ meeting, various options were discussed. One option 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.. It is important to note, as was done at the August __ meeting, that choosing that option 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 ___ 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. Therefore it is also not presently possible to know whether offsets will be required because of new depletions caused by such new uses of water.

Much has been asked about the significance of the October 1 date in the August ___ letter. When DNR prepares its annual report, it will have to estimate how much water usage already exists in the basin. As is noted in the August 20 letter, I agreed at the meeting that, for the purposes of that first report, the Department would consider acres attributed to wells constructed and registered by October 1, 2005 as part of the usage baseline when that estimate is made. [My understanding from Ann Bleed was that the October 1 date showed up in the letter. I did not get the impression it was discussed at the meeting. May need more clarification from Ann on this.]

Whether the "nine months before" option specified in Section 46-714(3)(k) and discussed at the August ___ 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.

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)