

## What Is the Meaning of LB962's Fully Appropriated Basin Designation?

NOTE: The following is NOT intended to change or replace current law, but is intended as an explanation of the current law.

### **What is an overappropriated basin?**

The statutory formulation of the definition of an overappropriated basin is a very precise, three part definition that operated at a single point in time: July 16, 2004.<sup>1</sup> In an overappropriated basin where existing uses exceed the supply, surface water flows can be expected to decline and ground water table elevations can be expected to drop until either there is no water to use or the cost of using the water is too great to result in beneficial use. As water supplies decrease in an overappropriated basin conflicts between users are likely to increase.

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<sup>1</sup> A river basin, subbasin, or reach shall be deemed overappropriated if, on July 16, 2004, the river basin, subbasin, or reach is subject to an interstate cooperative agreement among three or more states and if, prior to such date, the department has declared a moratorium on the issuance of new surface water appropriations in such river basin, subbasin, or reach and has requested each natural resources district with jurisdiction in the affected area in such river basin, subbasin, or reach either (i) to close or to continue in effect a previously adopted closure of all or part of such river basin, subbasin, or reach to the issuance of additional water well permits in accordance with subdivision (1)(k) of section 46-656.25 as such section existed prior to July 16, 2004, or (ii) to temporarily suspend or to continue in effect a temporary suspension, previously adopted pursuant to section 46-656.28 as such section existed prior to July 16, 2004, on the drilling of new water wells in all or part of such river basin, subbasin, or reach. Neb. Rev. Stat. § 46-713(4)(a)

When drafting LB 962, the intent of the Water Policy Task Force was to ensure that economic viability, social and environmental health, safety and welfare of the state be achieved and maintained by balancing water uses with water supplies. In those basins that are already overappropriated, the Task Force sought to provide for a managed reduction of uses to a level where the remaining uses can be maintained.

### **What is a fully appropriated basin?**

The statutory formulation of the definition of a fully appropriated basin is also very precise.<sup>2</sup> As a general concept, a basin is fully appropriated when existing uses of both surface water and hydrologically connected ground water supplies are equal to but do not exceed the available <sup>6</sup>water supplies over the long term. If a basin is fully appropriated, any new use will in time take water away from an existing use. To prevent a fully appropriated basin from having the problems encountered in overappropriated basins, the state must be proactive in identifying and managing a basin's water supplies before the existing uses in a basin exceed the long term supply. ✓

### **How does the rule operate to prevent more basins from becoming overappropriated?**

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<sup>2</sup> A river basin, subbasin, or reach shall be deemed fully appropriated if the department determines that then-current uses of hydrologically connected surface water and ground water in the river basin, subbasin, or reach cause or will in the reasonably foreseeable future cause (a) the surface water supply to be insufficient to sustain over the long term the beneficial or useful purposes for which existing natural flow or storage appropriations were granted and the beneficial or useful purposes for which, at the time of approval, any existing instream appropriation was granted, (b) the streamflow to be insufficient to sustain over the long term the beneficial uses from wells constructed in aquifers dependent on recharge from the river or stream involved, or (c) reduction in the flow of a river or stream sufficient to cause noncompliance

In determining whether a basin is fully appropriated the Department will first look at whether there is sufficient unappropriated surface water to justify an economic investment in a new water right. The evaluation will focus on surface water rights because surface water appropriators are the first to feel the impacts of water use in excess of the available supply. In essence the surface water analysis acts like the canary in the mine; it is designed to detect the first signs that a basin already is or is soon to be fully appropriated.

If a basin is determined to be fully appropriated, an integrated management plan will be developed and implemented. In order to protect existing users from the adverse effects of new uses begun between the time a basin is preliminarily determined to be fully appropriated and the time an integrated management plan can be implemented, the law requires that temporary stays be put in place at the time of a preliminary determination.

In essence these stays provide for a temporary time out. <sup>a final determination of fully appropriated is made by the Department.</sup> They are to remain in effect only until an integrated management plan for the basin can be adopted, at which time they can be continued as part of the integrated management plan or be terminated pursuant to statute. Once an integrated management plan is implemented, new uses could be allowed without requiring an offset or the retirement of an existing use if, with increased information, it is determined that there are supplies of water that can be developed without adversely affecting an existing user.

It should be noted, however, that the law also provides for variances from the stays under

The statute for contemplates that stays will remain in effect until

establishes other circumstances in which the stays may be terminated.

~~stays to the Department or the DNR~~  
by Nebraska with an interstate compact or decree, other formal state contract or agreement, or applicable state or federal laws. Neb. Rev. Stat. § 46-713(3).

The rule also defines the extent of the area for which ground water uses must be included in the integrated management plan (i.e., the geographic area within which the Department preliminarily considers surface water and ground water to be hydrologically connected). The area needs to be large enough to prevent new ground water uses from eroding supplies for existing users within a reasonable planning horizon. If the area is too small, there will be no authority under an integrated management plan to prevent a proliferation of new uses outside the management area that will erode the water supplies for existing users within the managed area. [This problem could be addressed by the NRD through a separate integrated management plan or ground water management area plan. ~~sketch~~ *sketch* *Remove?* ✓]

**What needs to be included in an integrated management plan for a fully appropriated basin?**

Prior to implementing an integrated management plan, existing uses must be certified and water use tracking systems need to be developed.

Included in the integrated management plan should be a comprehensive water monitoring system that would allow for the identification of any water supplies that could provide water for a new use without adversely affecting an existing user. If such water supplies are available, new uses could be allowed.

If additional water supplies cannot be identified, the plan must require that new uses of water will be offset. One method of providing an offset could be by the retirement of

existing uses. This retirement could be by the entity wanting to make a new use of water or it could be the responsibility of the NRD and DNR as part of the integrated management plan itself. In either case, at the end of the day, the plan must protect existing users from new uses that would adversely affect their existing use.

To enable offsets, the transfer of water from one type of use and/or user to another could be included in the plan. Such transfers could provide for a change in use of water to accommodate future economic development. Any transfer must meet the condition (among others) that the transfer does not harm existing users. NRDs could develop ground water bulletin boards or other methods to facilitate transfers as may be appropriate. Similar methods may be investigated by DNR to assist surface water users. Other practices that reduce the consumptive use of water also could be used to provide offsets.

### **What does not need to be in a fully appropriated plan?**

As long as an area is not overappropriated or in an area subject to the restrictions of a <sup>le</sup> interstate Compact, the NRD is not required to make existing users reduce their use of water.

However, such management options as allocations, metering, and reduction of acres remain among the tools that NRDs may use in an integrated management plan to reduce existing use so that new uses can be achieved.

**How can NRDs deal with areas where the area considered hydrologically connected crosses NRD boundaries?**

Understanding that hydrologically connected geographic boundaries ~~do~~ not always coincide with the NRD's administrative boundaries and anticipating the need to administer across district boundaries, the Legislature stated in Section 46-703(4) "The Legislature recognizes that ground water use or surface water use in one natural resources district may have adverse effects on water supplies in another district or in an adjoining state. The Legislature intends and expects that each natural resources district within which water use is causing external impacts will accept responsibility for ground water management in accordance with the Nebraska Ground Water Management and Protection Act in the same manner and to the same extent as if the impacts were contained within that district." Section 46-739(8) states, "Whenever a management area designated under section 46-712 or 46-725 or sections 46-713 to 46-719 encompasses portions of two or more districts, the responsibilities and authorities delegated in this section and sections 46-740 and 46-741 shall be exercised jointly and uniformly by agreement of the respective boards of all districts so affected. Whenever management areas designated by two or more districts adjoin each other, the districts are encouraged to exercise the responsibilities and authorities jointly and uniformly by agreement of the respective boards." Section 46-726(1) also refers to the expectation that there be joint and uniform exercise of the responsibilities and authorities.

Obviously, to carry out the responsibility, where hydrologic boundaries cross NRD boundaries, the affected NRDs and DNR must work together to implement a mutually acceptable integrated management plan. There are numerous options that could be adopted to fulfill this responsibility. If there are varying climatic, hydrologic, geologic or soil conditions within the management area and the uniform application of one or more controls would fail to carry out the intent of the Ground Water Management and Protection Act in a reasonably effective and equitable manner, an integrated management plan can have different provisions for portions of the management area (i.e. subareas) (Section 46-739(4)). Thus, whatever controls are adopted for the area of overlap may not need to be extended to the area in the NRD beyond the overlap. If one NRD already has either an integrated management plan or a ground water management plan in an area in which integrated management planning is necessary, it is possible that the controls that are in the existing plan could suffice to satisfy the responsibilities one NRD has to an adjacent NRD. These controls can be carried forward into the integrated management plan during the planning process. If no controls are in place at the time of the final determination, or the existing controls are not mutually acceptable to the affected NRDs and DNR, then during the integrated management planning process, new controls will have to be developed. Depending on the potential for harm to existing water users in the adjacent NRD, the integrated management plan could include controls ranging from adoption of minimally intrusive controls (e.g. a monitoring program) to more stringent controls (e.g. allocations). One of the NRDs' and DNR's responsibilities in this integrated management planning process would be to ensure that the plan will protect existing water uses in the affected NRDs.

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