

# DNR MEMO

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February 24, 2006

TO: Ann Bleed  
FROM: Ann Diers and Pam Andersen  
SUBJECT: Options for Tribasin

As you know, the Department issued its "FAB" Report last December and simultaneously issued notice that it had made a preliminary determination that portions of the Tri-Basin NRD, the Little Blue NRD and the Upper Big Blue NRD are hydrologically connected to the Platte River Basin and, therefore, fully appropriated. The hydrologically connected area (also referred to in the Groundwater Management and Protection Act ("GWMPA") as the "effected geographic area") was determined by using the Jenkins Stream Depletion Factor method ("SDF line"). Subsequent to the issuance of the FAB Report and DNR's preliminary determination, a run of the COHYST model revealed that in the Tri-Basin NRD some of the geographic area described by the SDF line was not within the COHYST 10/50 line and that some land not within the SDF line was within the COHYST 10/50 line (sometimes referred to as "the twelve sections").

The differences in the two calculations of hydrologically connected areas has raised questions about the best way for the department to proceed with making a final determination of the appropriation status. Can DNR use information it did not have when it issued its FAB Report to alter its preliminary determination or to make a final determination that is different from the preliminary determination? Does the idea that DNR conduct an evaluation annually mean we cannot consider information received after the Report is issued, that instead we have to save it for next year's evaluation? If so why require a public hearing to gather comments and addition information about the preliminary determination? How can stays be placed on the twelve sections if they weren't included in the preliminary determination? If we don't include the twelve sections will they be riddled with wells in a year?

#### Relevant statutes

Section 46-713 states that "For each river basin, subbasin, or reach evaluated, the Report shall describe ..., (ii) the geographic area within which the department preliminarily considers surface water and ground water to be hydrologically connected and the criteria used for that determination."

Section 46-714(1) states in pertinent part that "Whenever the department makes a preliminary determination that a basin has become fully appropriated, the department shall place an immediate stay [on new uses and permits in the basin]. The department shall also notify the

public of the preliminary determination that the basin is fully appropriated and “of the affected geographic area.”

Section 46-714(2) states in pertinent part “If the department preliminarily determines a basin to be fully appropriated and has identified the existence of hydrologically connected surface water and ground water in such basin, stays shall also be imposed on (a) construction of new wells 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. Stays begin 10 days after first publication.

Section 46-714(4) states in pertinent part “any stay imposed shall remain in effect for the affected basin until the department has made a preliminary determination. Within the time period between the dates of the preliminary and final determinations, the department and the affected NRD shall consult with [a variety of named entities and “other water users and stakeholders”] The department shall also hold one or more public hearings not more than ninety days after the first publication of the notice. Any interested person may appear at such hearing and present written or oral testimony and evidence concerning [1] the appropriation status of the basin, [2] the department’s preliminary conclusions about the extent of the area within which the surface water and ground water supplies for the basin are determined to be hydrologically connected, and [3] whether the stays on new uses should be terminated.

Section 46-715(5) states in pertinent part “Within 30 days after the final hearing, the department shall notify the appropriate NRD of the department’s final determination with respect to the appropriation status of the basin. If the final determination is that the basin is fully appropriated, the department, **at the same time**, shall (a) decide whether to continue or to terminate the stays on surface water uses and (b) designate the geographic area within which the department considers surface water and ground water to be hydrologically connected in the basin and describe the methods and criteria used in making that determination. The department shall provide notice of its decision to continue or terminate the stays in the same manner as the notice required by subsection (1) of this section.

Section 46-714(6) states in pertinent part “If the department’s final determination is that the basin is not fully appropriated, the department shall provide notice of such determination as provided in subsection (1) of this section, the stays imposed shall terminate immediately, and no further action shall be required.”

#### Issues

The 2005 FAB Report states that the Department determined that using a combination of the Jenkins Stream Depletion Factor analysis, Cooperative Hydrology Study (COHYST) models and numeric ground water models derived from the COHYST model would be the best scientific method readily available to the Department to locate the 10% in 50 year line. So all types of available methodology are covered by the Report and that’s not an issue.

The issues come in with respect to the following:

1. The Report must be prepared using the best scientific data and information readily available (46-713(1)(d));
2. The Report speaks as of its completion date, which was “by January 1” (hence, prior to the availability of the COHYST line);

3. Section 46-713(1) requires that the Report describe the geographic area within which the Department preliminarily considers surface water and ground water to be hydrologically connected;
4. While the GWMPA allows for input (from interested persons) at the hearing concerning the appropriation status of the river basin, the department's preliminary conclusions about the extent of the area of hydrologically connected surface and ground water, and whether the stays on new uses should be terminated, it is not clear what the process should be if there is input indicating the extent of the area of hydrologically connected surface and ground water should be expanded based on better science (46-714(4)). In the usual APA rule making process, the expansion of the hydrologically connected area would be a substantial change and require the Department to issue a new proposed regulation. This isn't a usual APA rule making process but the constitutional notions of due process still apply. Is it fair to the interested persons within the twelve sections to go forward with a final determination that includes the twelve sections when it wasn't included in the original proposal/preliminary determination?
5. Stays are imposed for fully appropriated areas only as a result of a preliminary determination (46-714(1) and (2)), and while the post-hearing provisions of that section, subsections (5) and (6), direct that the department shall decide whether to continue or terminate the stays, those sections do not appear to contemplate that the department may determine that it is necessary to expand the area of the stays. Furthermore, the NRDs continue the stays on the area included in the preliminary determination by deciding to not hold a hearing. If the NRD doesn't call a hearing, it has made the decision to continue the stays. If there isn't a stay to continue, what happens?

Given the above, these are the options for the Department to consider:

- A. The COHYST information may be put into the record at the hearing, and will be the basis for a Department decision that it will reevaluate that basin in the next Report.

This option is supported by the following:

1. It leaves intact the Report, rather than posing the issue of how information gathered after the Report's completion can be added. (Specifically, Figure UP-1 would need to be replaced).
2. It is contemplated by Section 46-713(2), which provides a mechanism for reevaluation of a basin if new scientific data or other relevant information "has become available since the last evaluation" of the basin.

ISSUES: It will make it necessary to evaluate the basin again next year, even though the extent of the additional area that should be covered is already known at this point. This approach could lead to a "rush on drilling" in the area that it is known will be designated in the next Report.

Is it really a reevaluation of the basin? The law requires DNR to evaluate all land not already included in an ongoing IMP process. This portion of the Tri-Basin NRD is not included in any IMP process. If we reevaluate the Platte Basin where it may extend into the Tri-Basin NRD will we also need to reevaluate the Platte Basin where it may extend into the Upper Loup and other NRDs not working on an IMP.

Can we accept the information provided by the COHYST model to decrease the hydrologically connected area but not increase it? Does that make scientific sense? It makes some administrative law sense since adding land creates the due process concerns discussed above.

- B. The COHYST information may be put into the record at the hearing, and will be the basis for a Department decision to issue a new preliminary determination that the area of hydrologically connected surface and ground water will be defined by the COHYST information. (The Department also would be required to issue an Order within thirty days of the hearing concerning its preliminary determination. That Order could be a final Order as to the fact of fully appropriated, and would designate the area of hydrologically connected surface and ground water based on the Jenkins analysis). *Note from Pam: This could go two ways: (1) none of the COHYST line is accepted and therefore the second preliminary determination is all COHYST and cancels part of the SDF line or (2) only the portion of the COHYST line decreasing the SDF line is accepted and, therefore, the second preliminary determination is just about the twelve sections.*

This option is supported by the following:

1. Although 46-714 does not directly address the situation in which there would be information introduced at the hearing indicating that an expanded area should be designated, that is clearly one of the possible outcomes in any hearing of this type.
2. This addresses concerns with lack of Notice if the Department were to simply expand the area in its final order following the hearing.
3. Procedurally, a further preliminary determination would be issued by the Department, and any stays would be imposed pursuant to Section 46-714 (1) and (2) pursuant to that preliminary determination. This is approach has a “clean” appeal in comparison to any attempt to impose new stays after the hearing.

ISSUES: Another hearing on the preliminary determination must be held within 90 days, so this does add to the expense, and draws the process out (only as to the additional area reflected in COHYST). It is not entirely clear that there is authority for the Department to have more than one preliminary determination. Arguably, we are broadening the “evaluation process” referred to in 46-713 (1)(b) to include information that was provided after the date of the Report.

- C. The COHYST information may be put into the record at the hearing, and will be the basis for a Department decision to issue a final determination that the area of hydrologically connected surface and ground water is the area defined by the COHYST information.

This option is supported by the following:

1. Although 46-714 does not directly address the situation in which there would be information introduced at the hearing indicating that an expanded area should be designated, that is clearly one of the possible outcomes in any hearing of this type.
2. This would be the cheapest alternative, and would not delay the final result.

ISSUES: The Department will have to issue stays in the additional area (and the statute does not appear to contemplate this). The issues of when the additional stays should take effect are not addressed by the statutes.

D. Same as Option C except in the Notice giving the date and time of the hearing, we give notice that additional information has been received. We give a brief explanation about the COHYST results and where they can find more information and we state that we will take comments on the COHYST lines as well. At the hearing we present the COHYST lines and then hold the record open for an additional 30 days to take more comments.

We can then issue a final determination that includes the twelve sections and will have provided some due process to the public. The final determination will state clearly where the stays are (everything within the COHYST lines) and aren't (the portion of the SDF line outside the COHYST line) and give a date when they are effective for the twelve sections. The NRD will then be able to decide whether to take no action or to hold a hearing and lift the stays.

*14 27 days*