

Ann Diers

From: Jim Cook [jcook@dnr.ne.gov]
Sent: Monday, March 27, 2006 12:58 PM
To: Roy Lyles
Cc: Ann Bleed; Ann Diers; Susan France >; Tina Kurtz >
Subject: Requested memo on significance of May 1, 2006 date and registration of previously unregistered wells.

Roy, attached is the memo I promised you last week. Let me know if you have any questions.

Jim Cook

3/27/2006

DNR 008147

March 27, 2006

TO: Roy Lyles

FROM: Jim Cook

SUBJECT: Need to certify acres by May 1, 2006 and ability of NRD to prevent registration of wells

Roy, you asked me to provide you with information about (1) any prescribed schedule for the NRD to complete its irrigated acres certification process and (2) the extent to which an NRD could prevent DNR from registering a well that was drilled before new well construction was prevented in your NRD but was not properly registered following that construction. I will address those separately below.

Deadlines for Certification

You indicated that one or more directors are concerned that, because of the Platte River New Depletion Plan, irrigated acreage certification must be completed by the NRD by May 1, 2006. That date was once a deadline found in the new depletion plan, but, for the reasons noted below, it is no longer a critical date.

As you know there have been many delays associated with the proposed Platte River Recovery Implementation Program (PRRIP). For at least two years, we assumed that the PRRIP would be implemented on January 1, 2006. As a result earlier versions of the new depletion plan used May 1, 2006 as the deadline for establishing irrigation use baselines from which future increases in use could be measured. Even the current "long form" of the new depletion plan (which is titled the "Nebraska Implementation Plan for Platte River Recovery Implementation Program and is to be used only for in-state purposes) still has that date in it.

The September, 2005 version of the new depletion plan is the one that was approved by the Governance Committee. The approved plan does not reference the May 1 date so there should be no concern about failing to abide by it. Even though the May 1 date is still in the "long form" version (obviously I need to revise that again), there are two reasons why the certification process no longer needs to be completed by then. First, the PRRIP was not implemented on January 1 and will not be implemented until at least October 1 of this year. Second, even if the PRRIP starts in October, the LB962 stays (which apply to all of the area subject to the post-2005 portions of the new depletion plan) will effectively prevent any significant new or increased uses. Those stays won't be lifted until the integrated management plans (IMPs) have been prepared, adopted and implemented.

If the PRRIP is eventually implemented, the vehicle for implementing the post-2005 portions of the new depletion plan will be the IMPs. Those IMPs will need to have the necessary provisions to either prevent or require offset for any new adverse depletions caused by any new uses allowed from that point forward. For purposes of the PRRIP,

that is when the baselines will need to be established, not just for irrigation but also for other new uses.

That does not mean we should do nothing in the near future. There are reasons other than the PRRIP for completing the certification process as soon as it can be done properly. First, certification would be very helpful to the extent that the LB962 stays need to be enforced. Second, certification will almost certainly be a key component of your NRD's IMP. I commend the board for wanting to move forward now with that certification.

Registration of Pre-July, 2004 Wells

If I understand the second question correctly, some directors are asking if the NRD can prevent DNR from registering a well because it was drilled but not properly registered either before the NRD prevented well construction or before the LB962 stays took effect. The answer is no. Subsection (8) of section 46-602 states in part: "Whenever a water well becomes an illegal water well as defined in section 46-706, the owner of the water well **shall either correct the deficiency that causes the well to be an illegal water well** or shall cause the proper decommissioning of the water well in accordance with rules and regulations. . . ." If the only reason a well is "illegal" is because it is not properly registered, that deficiency can be corrected by completing the registration and DNR will not deny someone the right to do that.

While your NRD cannot require that DNR deny well registration for the reason discussed above, you certainly can issue cease and desist orders against the use of illegal wells (including those that are not properly registered) and you can deny acreage certification, allocation, or other rights to use any well that is operated in violation of a cease and desist order. You will need to seek your own NRD counsel's advice as to whether you could deny certification to a well that was not properly registered when constructed but has since been properly registered.

The relationship between registration and illegality of wells is something that DNR and the NRDs have been struggling with for some time. I would expect discussions in that regard to continue until a decision is made about whether and how registration should be affected when wells are illegal for reasons other than non-registration. What is important to keep in mind is that registration will not make "legal" any well that is "illegal" for any reason other than lack of registration. Similarly, any refusal by DNR to register a well that is "illegal" for any other reason would not make that well more "illegal." The NRD has the authority to deal with wells that are illegal for any one or more statutory reasons, regardless of whether they are registered at DNR.