

Ann Diers

From: Jim Cook [jcook@dnr.state.ne.us]
Sent: Tuesday, August 02, 2005 1:57 PM
To: David Kracman
Cc: Jim Cannia; Tina Kurtz >; Ann Diers >
Subject: Use of drilling dates as basis for differential regulation

David,

On the way home last night I figured out what was missing from my previous note to you about use of drilling dates as the basis for differential regulation. To my recollection, there isn't a statute that specifically says that drilling dates can't be used for that purpose. However, there are statutes that produce the same result in different ways. One of those is section 46-702. The second paragraph of that section adopts the reasonable use/correlative rights rule as the general rule for groundwater. Under that common law rule originally established by the courts, all groundwater users have the same rights to the supply regardless of drilling dates. As that paragraph also states, exceptions to the common law rule can be made by the Legislature. Right now those exceptions are found in Chapter 46, Articles 6 and 7, the latter being the Ground Water Management and Protection Act.

Last week I noted the specific exceptions in 46-739(6)(b) and (6)(c). What I failed to direct you to were the statutes that provide for regulatory uniformity. Those are sections 46-739(4) and 46-740. Both of those make it clear that uniform controls are to be established for all groundwater uses except to the extent that varying conditions justify otherwise. The only statutes that allow drilling date to be considered a "varying condition" are the two I cited last week. Every thing else being equal, wells not subject to at least one of those statutes cannot be treated differently just because they have different drilling dates. However, there are a number of other "varying conditions" listed in 46-739(4), (5), and (6)(a) that can be used to justify differential treatment. One of those is "varying ground water use", which is a bit ambiguous by itself. However, when put in the context found in the last sentence in 46-739(4), it authorizes differential treatment based on section 46-613, the groundwater preferences statute. Also note the general reference in section 46-749 to that preferences statute.

Let me know if you have other questions in this regard.

Jim Cook

8/5/2005

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