

## Ann Diers

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**From:** Pam Andersen [pandersen@dnr.state.ne.us]  
**Sent:** Thursday, June 23, 2005 11:19 AM  
**To:** ableed@dnr.state.ne.us  
**Cc:** Mike Thompson; Ann Diers; Tina Kurtz; Roger Patterson; sfrance@dnr.state.ne.us; dvogler@dnr.state.ne.us  
**Subject:** RE: Authority to inspect flow meter without consent

Ann,  
My suggestion is that 61-205 be amended to state explicitly that the Department has the authority to go on private property to ensure compliance with all of the laws, regulations, compacts and interstate contracts, DNR is responsible for enforcing or ensuring compliance with. Since the Supreme Court is concerned that the businesses which are subject to warrantless inspections need to understand that the regulation is "pervasive" and that inspections will be conducted with regularity, I would include provisions requiring annual inspections of dams, headgates, wells, and other diversion devices, powerplants, and any other specific sites or objects we know we inspect presently or should be inspecting. I would include a provision that says if the inspector doesn't get consent the matter will be taken up in civil court and that the license, permit, registration, order of appropriation, etc. can be revoked. I would include a list of the specific sorts of things the inspector will look at such as whether or not the flowmeter is properly installed and working, signs of water having been pumped or diverted or otherwise applied, structural defects in dams, etc. but make it clear that the list is by way of example and not limitation.

If you think that the legislature may resist such broad authority we could just go for an amendment of the Groundwater Management and Protection Act and include only the authority needed to inspect wells and diversion devices necessary to enforce IMP's. It would be easy to include the natural resources districts in that type of amendment and easier to explain the need for unannounced, immediate inspections.

In the meantime, Dave Vogler, pointed out to me that there is a Nebraska law authorizing issuance of inspection warrants to government inspectors. The warrants are issued by a court but require only reasonable cause and not probable cause. The fact that a landowner refused access is enough for reasonable cause. We could get an inspection warrant if an enforcement/inspection problem comes up now.

I don't think the fact that landowners do not own the water they use waives their 4th Amendment rights but it is certainly justification for making water use a pervasively regulated business. I think it also helps that pumps, dams, headgates, etc. are outside in plain site usually and not generally near homes or inside buildings. There is a lesser expectation of privacy. Pam

-----Original Message-----

From: Ann Bleed [mailto:ableed@dnr.state.ne.us]  
Sent: Tuesday, June 07, 2005 3:23 PM  
To: Pam Andersen  
Cc: Mike Thompson; Ann Diers; Tina Kurtz; Roger Patterson  
Subject: Authority to inspect flow meter without consent  
Importance: Low

Pam - Thanks for an excellent memo on this issue. I do have a few thoughts/questions.

Your memo assumes that every water right and well will have a meter. This is not a safe assumption. There are many surface water pumps that don't have a meter and many wells, even in areas that are fully appropriated that do not have and may not be required to have a meter but we still may want to insure that there aren't diverting more than they are permitted to divert or aren't water land they should not. In the case of a surface water pump, we would need to be able to inspect without notifying the diverter ahead of time to catch him or her in the act. Otherwise they would simply turn off the pump or decrease the volume pumped. I think on wells, that don't have permitted flow rate, the need for

surprise argument has less value, but there could still be reason. For example if someone put a stick in the meter so it would not revolve and therefore not register pumping, they could remove the stick if they knew the NRD were going to inspect. If the question is simply whether or not a field has been irrigated, the surprise element is less important. In sum, I am not sure I agree with your argument on the lack for need for surprise.

What would it take to change the statute to provide an adequate substitute for a warrant?

A question, would any of your arguments be different because both surface water and ground water belong to the public and it is the right to use that is permitted?

p.s. would you share this memo with Susan France since she is in charge of water administration. Ann