Colorado Stream Lines

QUARTERLY NEWSLETTER OF THE OFFICE OF THE STATE ENGINEER
COLORADO DIVISION OF WATER RESOURCES

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Governor Romer Signs Arkansas River Protection Act

As most of our readers are aware, in May 1995, the U.S. Supreme Court ruled in Kansas v. Colorado, that ground water well pumping that had occurred along the Arkansas in Colorado since the Arkansas River Compact was signed in 1948 had resulted in damage to the state of Kansas' water entitlements under the compact. In response, the Colorado legislature passed and the Governor signed into law, Senate Bill 124, which gives the Water Conservation Board authority to make $3.7 million in loans to the Lower Arkansas Water Management Authority to purchase water for augmentation. It also allows the Colorado Water Conservation Board to cost-share channel improvement and flood mitigation studies and projects with federal, local and other state agencies.

Further provisions of the bill require power companies to transmit data on power use to the State Engineer electronically; gives the State Engineer authority to levy and collect fines for violation of ground water well regulations; and provides 9.5 full-time positions for the Division of water Resources and 3 full-time positions for the Department of Law to bring Colorado into compliance with the compact.

The Division of Water Resources has promulgated rules that restrict large-capacity ground water pumping in the valley unless the well user is part of an approved water replacement plan. Trial in that matter begins April 8.

Meanwhile, trial is ongoing in Pasadena, California, concerning the damages portion of the Kansas v. Colorado lawsuit. Colorado and Kansas recently stipulated to an amount of depletion for pre-1985 pumping as being approximately 329,000 acre-feet. The ongoing trial is now focusing on the amount of depletions for 1986 to the present. After this portion of the trial is complete, the remedy phase will focus on how the State of Kansas is to be repaid.

Monitoring Well Application Fee Increase

Effective February 1, 1996, filing fees for each monitoring and observation well application, that are required by statute (currently $60 each) will be collected upon receipt of each application(s). Previous charges allowed the $60 fee to cover group applications on a quarter/quarter basis, no matter how many applications were submitted in a group.

The reasons for the change include a change in the statutes which specified that monitoring and observation wells were to be considered exempt wells. That statute specifies a filing fee of $60 for each exempt well permit application. Further, the cost of processing these applications to permits is the same as other exempt well applications and it takes just as much time and room to maintain these permit records in the data base and central files.

Governor Romer and Secretary Babbitt Outline Partnership Under Endangered Species Act

Interior Secretary Bruce Babbitt and Colorado Governor Roy Romer announced a cooperative agreement between the State and the Department of Interior with the broad goal of preventing listings under the Endangered Species Act through coordinated conservation efforts. The unprecedented agreement will provide a greater role for the State in SEA conservation programs including listing, conservation and recovery of endangered species.

"This is an important example of what can be done to make the SEA work with greater flexibility and align State and Federal conservation priorities," said Secretary Babbitt. "This is a 'working agreement' that provides a road map to avoid train wrecks, prevent listings, and achieve wildlife conservation goals with reduced economic impacts."

"Endangered species issues have become very contentious and polarized. In the debate, we have lost sight of the importance of protecting species and yet do so in a way that does not seriously infringe on property rights and economic growth," said Governor Romer. "This agreement represents a new way of addressing this issue in a more proactive, collaborative and effective way. It shows how we here in Colorado, together with the Department of Interior, can make the SEA work for us to preserve our wildlife and our economy."

The Colorado declining species agreement outlines a framework to encourage the voluntary participation on a multi-species basis to protect species and wildlife habitat, and avoid the need to list species as threatened or endangered. This agreement seeks to involve public and private interests such as landowners, anglers, hunters, public land recreation interests, Native American tribal governments, local governments, and others in wildlife conservation initiatives. The agreement creates a framework so that participants can change conservation approaches consistent with the goals of good scientific practices, cost-effectiveness and predictability.

For species that are declining, but not yet threatened or endangered, this agreement envisions the development of "conservation agreements" between state and federal agencies to prevent listings. Where listings become necessary, this agreement envisions employing a new feature under the Endangered Species Act, called "Recovery Agreements," that would use elements of the conservation agreements to streamline formal requirements of the SEA and accelerate conservation and resource development objectives. Under recovery agreements, state and federal agencies are to identify priority actions likely to accelerate recovery of species, provide a clear basis for alternatives that achieve conservation and development goals, and guide the development of Habitat Conservation Plans (HCPs).

"This is another step in our hands-on efforts to make the Endangered Species Act more user-friendly," said Secretary Babbitt. "Our aim is to prevent the listing of species. However, if species must be listed, we'll have a plan in place that from the start incorporates significant state, local government and public participation. This agreement will take the sting out of the listing process."

Babbitt said the agreement was 100 percent consistent with the direction proposed by the Western Governors' Association to provide a larger, more effective role for the States under the Endangered Species Act.

Some species-specific areas where state and federal agencies will be working together include: efforts to stem the decline of many native fish species such as the Arkansas darter, Rio Grande sucker, Colorado river cutthroat and other South Platte River species; sustaining short grass prairie species such as the swift fox, burrowing owl and ferruginous hawk; conserving other species like the preble's meadow jumping mouse, sage grouse, and the boreal toad, and delisting of the Colorado greenback cutthroat trout.

Under the agreement, the U.S. Fish and Wildlife Service and the State Department of Natural Resources and its divisions will identify conservation strategies that optimize conservation initiatives on public lands which have the effect of increased flexibility for private landowners.

When is Water Like a Car?

(An excerpt from a speech given by Steven Witte, Division Engineer, Water Division 2)

"David Robbins (a prominent Colorado Water Attorney) used the term usufructuary yesterday. I went home and looked that up. Webster defines usufructuary as the right to utilize and enjoy the profits and advantages of something belonging to another, so long as the property is not damaged or altered. In simpler terms, I think that the rules pertaining to a water right are similar to those that applied to the use of the family car when you were a kid. What happened if you failed to bring the car home at the appointed time when Dad needed it? Your use was curtailed, right? That's priority -- Dad had priority. What would have happened if you totaled the car through recklessness? Your use undoubtedly would have been curtailed. Why? Waste of a commonly or jointly held resource. Suppose you told the folks that you were going to take the car six blocks to the Malt Shop, you left with a full tank of gas, and returned with it empty. Might there have been some inquiry into your expanded use? Might there have been some future restriction on your use of the resource? Well, Colorado courts have long held that these same kinds of limitations apply regarding waste and expanded use an are implied in every water right."

Congress Allocates $10 Million to Start Construction of Animas-La Plata Project

Under H.R. 1905, the Congressional Appropriations Bill signed into law on November 13, 1995 after debate in conference, $10 million has been allocated to start the long-debated Animas-La Plata project.

The purpose of the project is to satisfy the water requirements under the "Colorado Ute Indian Water Rights Settlement Act" of 1988. The project, when complete, would supply irrigation and M&I water to both Indian and non-Indian users in southwest Colorado and northwest New Mexico. The Act requires the project's completion by the year 2000, though that goal may not be attainable.

Two of the most important provisions of the appropriations bill are:

- Although the President had requested only $5 million in funds for the project, with $4.75 million earmarked for environmental compliance work and only $250,000 for construction, project supporters succeeded in adding an additional $5 million for construction.

- Project supporters also included language in the bill requiring the Secretary of the Interior to "proceed without delay" with construction of those project facilities included in the 1991 Biological Opinion that are considered to have no adverse environmental impact, including the Durango pumping plant, pipeline, and the Ridges Basin Reservoir.

The supplemental EIS on the entire Animas La Plata Project is expected to be completed by next Spring.

In further developments regarding Animas-La Plata, the Sierra Club announced that a coalition of taxpayers and environmentalist has filed suit in federal district court in Denver, charging that the Bureau is deliberately violating its duty to involve the public in consideration of repayments contracts for the project.

"He who expects the letter of the law in relation to irrigation to be executed with the precision of clockwork, and that infallible results will be obtained, has a small conception of the tangled web of difficulties in the way, and a meager knowledge of the uncertainties of the element to be manipulated." J. P. Maxwell, State Engineer, 1890

In an effort to keep the public and our readers informed, the State Engineer has been publishing any new policies in this newsletter. In continuance of that effort, the following policy is published in full.

POLICY MEMORANDUM 95-7

Subdivision Water Supply Plan Review

Effective immediately, the following shall replace any existing guidelines and policies relating to consideration of cumulative effect of individual wells, and in particular the March 1, 1988 memorandum regarding county land diversion of 35 acres or more into three parcels.

Due to the August 7, 1995 decision to only comment on "subdivision" referrals from the county planning offices, I have reconsidered the previous policies and guidelines that were developed based on the counties granting exemptions to the definition of a subdivision for many land divisions. This change does not affect county division of land by exemption where cumulative effect of wells on such lots is not considered.

The passage of Senate Bill 35 in 1972, which required this office to consider the cumulative effect of new on lot subdivision wells on existing water rights, was intended to require new subdivisions to remedy any injury they may cause to existing water rights. It was later amended to require this office not to rely on the presumptions of no injury for exempt wells in these instances and to consider the provision of Section 37-92-602(3)(b)(III), C.R.S., regarding cumulative effect in evaluating well permit applications in subdivisions. To implement these requirements, I (the State Engineer) am adopting the following evaluation standards for subdivision water supply plan review:

1. Proposals to subdivide parcels of 35 acres or more into two or more tracts, served by individual on lot wells, shall consider the cumulative effect of all such wells unless specifically allowed by other policy. This means we will not "exchange" a well permitted as the only well on 35 acres or more under the provision of Section 37-92-602(3)(b)(II)(A), C.R.S., for three household use only wells.

2. Proposals to subdivide pre June 1, 1972 parcels into two or more tracts, served by individual on lot wells, shall consider the cumulative effect of all such wells unless specifically allowed by other policy. This means that in the case of division of one parcel into two or more lots, we will consider the cumulative effect of all wells if either; 1) no well exists on the original parcel, or 2) an existing well was permitted under the provision of Section 37-92-602(3)(b)(II)(A), C.R.S., and conditioned as the only well on the original parcel.

In order to provide for the issuance of consistent opinions to the counties and actions on well permit applications, the following examples of when to consider cumulative effect are provided:

(cont. next page)

EXISTING SITUATION	SUBDIVISION PROPOSAL	EVALUATION CRITERIA
35 + ACRES NO EXISTING WELLS	2 OR MORE LOTS INDIVIDUAL ON LOT WELLS	CUMULATIVE EFFECT
35 + ACRES PERMITTED WELL PER 602(3)(b)(II) AS ONLY WELL ON 35 +	2 OR MORE LOTS INDIVIDUAL ON LOT WELLS	CUMULATIVE EFFECT
35 + ACRES * PRE 5/8/82 PERMITTED EXEMPT WELL OR QUALITY UNDER 602(5) THAT SERVES ONE SINGLE-FAMILY DWELLING	2 LOTS W/IND WELLS (ONE ADD. HUO WELL) 3 LOTS W/IND WELLS (TWO ADD. HUO WELLS)	NO CUMULATIVE EFFECT CUMULATIVE EFFECT
35 + ACRES * POST 5/8/72 WELL PERMITTED PER 602(3)(B)(I) AND SERVES ONE SINGLE-FAMILY DWELLING	2 LOTS W/IND WELLS 3 LOTS W/IND WELLS	NO CUMULATIVE EFFECT CUMULATIVE EFFECT
35 + ACRES WITH EXEMPT WELL REGARDLESS OF HOW PERMITTED	NOT MORE THAN 3 LOTS SERVED BY COMMON EXEMPT WELL PERMITTED UNDER 602(3)(B)(II)(A) AS ONLY WELL ON THE 35 + ACRE PARCEL TO BE DIVIDED INTO 3 LOTS	NO CUMULATIVE EFFECT

* In these cases, the subject 35 + acre parcel must not have been involved in a previous division of land after June 1, 1972, that created one or more parcels of less than 35 acres that are served by a well or wells approved pursuant to Section 37-92-602(3)(b)(II)(A) C.R.S.

EXISTING SITUATION	SUBDIVISION PROPOSAL	EVALUATION CRITERIA
<35 ACRES NO EXISTING WELLS	2 OR MORE LOTS INDIVIDUAL ON LOT WELLS	CUMULATIVE EFFECT
<35 ACRES PERMITTED WELL PER 602(3)(B)(II) AS ONLY WELL ON THAT TRACT	2 OR MORE LOTS INDIVIDUAL ON LOT WELLS	CUMULATIVE EFFECT
<35 ACRES ** PRE 5/8/72 PERMITTED EXEMPT WELL OR QUALITY UNDER 602(5) THAT SERVES ONE SINGLE-FAMILY DWELLING	2 LOTS W/IND WELLS (ONE ADD. HUO WELL) 3 LOTS W/IND WELLS (TWO ADD. HUO WELLS)	NO CUMULATIVE EFFECT CUMULATIVE EFFECT
<35 ACRES ** POST 5/8/72 WELL PERMITTED PER 602(3)(B)(I) AND SERVES ONE SINGLE-FAMILY DWELLING	2 LOTS INDIVIDUAL ON LOT WELLS 3 LOTS INDIVIDUAL ON LOT WELLS	NO CUMULATIVE EFFECT CUMULATIVE EFFECT

** In these cases, the subject lass than 35 acre parcel must not have been involved in a previous division of land after June 1, 1972.

As other examples of application of these concepts become apparent this list will be supplemented.

Development of Ground Water Regulations in Colorado
By Glen Graham, Physical Scientist Researcher III

Colorado's water law and system of regulation of the waters of the state evolved around the need to preserve and administer the distribution of seasonal surface water flows for year around use. Primary to an understanding of how ground water in Colorado is regulated must be the realization that Colorado recognizes two administrative categories of ground water, designated ground water and undesignated ground water. Both of these administrative categories can be further subdivided into tributary, nontributary, and not nontributary ground water types. In addition, undesignated ground water may be located within the drainage system of an overappropriated stream system, or may be located within the drainage of a stream system which has water available for appropriation. The determination as to whether or not there is water available for appropriation within a stream system is made by the Division Engineer responsible for administering the waters of that stream system. In spite of case law as early as 1893[1] that affirmed the presumption that all ground water was tributary to a stream, the limited reliance on ground water in the early 1900s allowed essentially unregulated development of this resource until 1957. On the other hand, there is also case law from 1907 that rebuts the presumption of the tributary nature of ground water.[2]

A portion of the 1957 Water Rights and Irrigation act known as the "Colorado Ground Water Law"[3] was the first statutory attempt to integrate ground water use into the prior appropriation system of administration of surface water. This act gave all ground water users 3 years to register existing uses of ground water by filing of a statement of use. The act also established a fee for this registration, thus creating the term "fee well" still used in administration of Colorado's ground water. This act regulated only the registration, construction and use of "large capacity" wells, e.g. irrigation, municipal, industrial, and commercial wells. Wells with discharge pipes less than 2 inches in diameter used for stock watering and domestic purposes and artesian (flowing?) wells with discharge pipes with diameters of 3 inches or less were exempted from regulation. The concept of "exempt wells" or "exempt uses" of ground water, was a result of the 1957 . Act. Further, the act established the Ground Water Commission and authorized the designation of "tentatively Critical Ground Water Districts", later to be known as "Designated Ground Water Basins." Designated ground water basins are areas established by the Ground Water Commission in which ground water withdrawals have constituted the principal water source for at least 15 years, and where there are few, if any, continuously flowing streams. Designated ground water is ground water which would not be available to, or required for the fulfillment of, decreed surface water rights. Local management districts were established to review applications to develop ground water within designated ground water basins.

The 1965 "Colorado Ground Water Management Act"[4] acknowledged the weaknesses in the 1957 Act by repealing and reenacting it. More power was vested in the Ground Water Commission, while local management districts were preserved. Construction of wells outside designated ground water basins required a permit issued by the State Engineer's Office, if the State Engineer could find that there would be no injury to existing water rights (read surface water rights) by diversions from the proposed well. The law did not define injury, but did state that lowering of historic water levels would not necessarily constitute injury. The 1965 Act was amended in 1967 to require that a finding of non-injury be supported by hydrological and geological facts[5].

The 1969 "Water Right Determination and Administration Act"[6] attempted to further integrate surface and ground water use by requiring the protection of vested rights and the maximum utilization of ground water. This act also required that no new wells be constructed outside the boundaries of a designated ground water basin, or the supply of water from existing wells be increased without approval of an application for a permit to do so by the State Engineer. It further required the State Engineer to promulgate rules in each basin integrating the

administration of tributary ground water rights and surface water rights.

The provisions of the 1965 Act were again amended in 1971 to require a finding by the State Engineer's Office that unappropriated water was available before granting of a permit.[7]

A 1972 act which addressed county planning commissions and land use regulations, commonly known as Senate Bill 35[8], created the definition of "subdivided land" or "subdivision" and exempted certain parcels of land from the definition of a subdivision or subdivided land. This law also required the State Engineer to consider the cumulative effect on existing water rights of all existing and proposed individual wells in a subdivision. Wells to be located on parcels exempt from the definition of subdivided land and used for purposes considered to be exempt from administration in the priority system are presumed to cause no injury to existing water rights. Some specific kinds of parcels exempted from the definition of "subdivided land" are parcels in single ownership containing 35 or more acres or parcels in multiple ownership such that the area of the parcel divided by the number of ownership interests in that parcel results in 35 or more acres per ownership interest, parcels exempted from the definition of "subdivided land" by act or resolution of a board of county commissioners, and parcels which are created by court action, provided that the action has been reviewed by the local board of county commissioners.

In conjunction with the 1972 Colorado land use legislation, water related legislation enacted that same year began to address the administration of ground water used for exempt purposes by requiring that persons seeking domestic, stock watering, or individual residential wells obtain a permit from the state engineer allowing construction of new or replacement wells. This legislation also created the definition of in-house use only as a separate category of ground water use and allowed the State Engineer to deny applications for permits to construct exempt type wells.[9]

In 1973, a section was added which created a statutory 100-year aquifer life and a right to divert groundwater based on ownership of the land surface or consent of the land surface owner. The 100-year aquifer life criteria applied to ground water not found in the alluvium of natural streams or in aquifers in hydraulic connection with any natural stream[10]. Conceptually, this ground water was different from designated ground water or tributary ground water.

A 1985 amendment, known as Senate Bill 5[11], to the 1969 Water Right and Administration Act further refined the distinction between tributary and nontributary ground water by codifying a technical definition of nontributary ground water. Nontributary ground water is "..that ground water, ..at an annual rate greater than one-tenth of one percent of the annual rate of withdrawal". This amendment also mandated the promulgation of the statewide Nontributary Ground Water Rules and the Denver Basin Rules and Regulations. Not nontributary ground water is contained only within the Denver Basin aquifers. There have been no substantive amendments or additions to Colorado ground water law since the enactment of Senate Bill 5 in 1985.

References:

1. Vranesh, G., 1987. Colorado Water Law, Vranesh Publications, Boulder, CO v. 1, pp. 232-240.

2. Ibid.

3. See section 147-19-1, et seq., C.R.S. (1957) (now codified as section 37-90-101, et seq.)

4. See section 148-18-1, et seq., C.R.S. (1965) (now codified at section 37-90-101, et seq.)

5. See section 148-18-36, C.R.S. (1967) (now codified at section 37-90-137(2)).

6. See section 148-21-1 through 148-22-10, C.R.S. (1969) (now codified at section 37-92-101, et seq.)

7. See section 148-18-36, C.R.S. (1971) (now codified at section 37-90-137(2)).

8. See section 106-2-4 through 106-2-37(3), C.R.S. (1972) (now codified at sections 30-28-101, et seq., C.R.S.).

9. See sections 148-21-45(3) & (4), C.R.S. (1972) (now codified at section 37-92-602(1) through (6), C.R.S. (1990 & 1995 Supp.).

10. See section 148-21-3(4), C.R.S. (1969) (now codified at section 37-91-103(11), C.R.S. (1990).

11. See sections 37-90-102 & 103, C.R.S. (1990 & 1994 Supp.)

CALENDAR OF EVENTS

May 13-14, 1996	Colorado Water Conservation Board (CWCB) Meeting will be held in Sterling. Contact Susan Maul CWCB, at (303)866-3441, for information.
May 17	Colorado Ground Water Commission, Room 318, 1313 Sherman Street, Denver, CO. Contact Marta Ahrens, Division of Water Resources (DWR), at (303) 866-3581.
June 4	Board of Examiners of Water Well Construction and Pump Installation Contractors, Room 615, 1313 Sherman Street, Denver, CO. Contact Marta Ahrens DWR, at (303) 866-3581.
August 16	Colorado Ground Water Commission, location has not been determined. Contact Marta Ahrens DWR, at (303) 866-3581.
August 22-23	Colorado Water Congress (CWC), Summer Convention, location has not been determined. Contact Dick MacRavey CWC, at (303) 837-0812.
September 26 - 27	Colorado Water Congress (CWC), Annual Water Law Seminar, Holiday Inn, Northglenn, CO. Contact Dick MacRavey CWC, at (303) 837-0812.

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