



StreamLines

Quarterly Newsletter of the Office of the State Engineer

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The State Engineer is moving forward to amend the 1974 South Platte River Basin rules to establish procedures to approve operation of replacement plans under Section 37-92-501, C.R.S.

South Platte River Basin Ground Water Rules to be Amended

Hal Simpson, State Engineer

In 1974, after a lengthy trial before Judge Carpenter, the State Engineer promulgated rules applicable to the diversion and use of tributary ground water in the South Platte River basin. This was done to allow the State Engineer to administer high capacity non-exempt wells within the priority system as required by the 1969 Water Rights Determination and Administration Act. The 1974 rules required affected wells to curtail pumping or operate pursuant to a plan for augmentation approved by the State Engineer under a statute (CRS 37-92-307) allowing temporary approval of a plan for augmentation.

In 1977, Section 37-92-307, C.R.S., was repealed. Since 1977, the rules have been annually implemented through the reliance on an interpretation of Section 37-80-120, which deals with substitute water supply plans. In the December 2001 opinion of the Colorado Supreme Court in Empire Lodge Homeowners Association v. Moyers, the court concluded that the State Engineer could not approve substitute water supply plans that involve replacing out-of-priority depletions through Section 37-80-120.

Therefore, the State Engineer is moving forward to amend the 1974 South Platte River Basin rules to establish procedures to approve operation of replacement plans under Section 37-92-501. This is the same process used in 1996 to promulgate amended rules for the Arkansas River Basin concerning the use of tributary ground water.

A draft of the proposed rules has been given to various water user organizations and posted on the Division of Water Resources website (<http://www.water.state.co.us>). Public meetings were held in February in Evans, Fort Morgan, and Sterling to explain the rules and receive comments on the rules. A drafting committee of attorneys and engineers representing various organizations will work through March to revise the proposed rules so that the major portion of the rules are acceptable to all. It is expected that certain parts of the rules will not be acceptable to some parties and will be litigated before the Water Judge. The rules will be filed by April 1 with the Water Court for publication in the resume.

Empire Lodge Homeowners Decision

Steve O. Sims, Assistant Attorney General, Attorney General's Office

On December 17, 2001, the Supreme Court decided the Empire Lodge Homeowners v Moyers case. Though the case only dealt with the question of who has the right to sue another water user, the Supreme Court analysis cast doubt on the State Engineer's longstanding substitute supply plan approval practices. The case arose in Division 2 on Empire Creek, a tributary of the Arkansas River, just south of Leadville. Empire Lodge Homeowners maintained two small off-channel trout ponds in the middle of a residential subdivision made up primarily of vacation homes. Access to the subdivision was through the Moyers ranch. The Empire Lodge Homeowners ponds were filled and kept fresh with diversions from the Nelson Woods #2 ditch, an irrigation ditch no longer used for irrigation purposes. Water typically flowed through the ponds and spilled back into Empire Creek. The Nelson Woods #2 ditch was not decreed for piscatorial or recreation purposes. The senior calling right on Empire Creek is the Empire Creek ditch, owned by the Moyers. This ditch diverted downstream of the point where the ponds spilled back into Empire Creek.

In the mid-1980's, the Division Engineer notified the Empire Lodge Homeowners that their pond freshening diversions were out of priority and would be curtailed when there were calls from the Arkansas mainstem. To avoid curtailment, Empire Lodge Homeowners leased Twin Lake shares and sought to exchange the Twin Lakes releases to the trout ponds. The Division Engineer approved the exchange with the condition that the exchange could not operate when the Moyers were calling, because the substituted supply only benefited the mainstem and did not put water in above the Moyers' water right. After two years operating as an exchange, the Empire Home-

owners practices were evaluated as a substitute supply plan instead of an exchange, largely due to the increasing complexity of the plan of operations and the request by Empire Homeowners for the Division Engineer to incorporate a Empire Creek futile call finding (the futile call was never recognized) into the annual operations plan.

Empire Lodge Homeowners and the Moyers got into a dispute regarding access issues. The dispute escalated and the Moyers began putting a call on Empire Creek to prevent the freshening exchange. Moyers called for their water in order to irrigate some acreage not within the terms of its original decree. Empire Lodge Homeowners eventually sued Moyers' attempting to enjoin the enlarged use of the Empire Ditch. Empire Lodge Homeowners argued that the enlarged use injured them by preventing them from freshening their lakes pursuant to the approved substitute supply plan.

The Water Judge for Division 2 took a great interest in substitute supply plans in general. Although the State Engineer was not a party in the case, the judge ordered the State Engineer to appear and give extensive testimony about his statewide substitute supply plan approval practice. Nearly two years after the testimony of the State Engineer, the Water Judge held that the repeated approval of the Empire substitute supply plan made that plan illegal. The Water Judge also enjoined all diversions (even during free river conditions) into the trout ponds until Empire Lodge Homeowners had an adjudicated augmentation plan.

The Supreme Court upheld the Water Judge's ruling, but on different grounds. The Supreme Court held that Empire Lodge Homeowners did not have the right to sue the Moyers in the first place because Empire

Lodge Homeowners did not own an adjudicated water right.

In the process of explaining why the substitute supply plan did not qualify as an adjudicated water right, the Supreme Court ruled that the State Engineer only had the authority to approve out of priority diversions in situations specifically authorized by the General Assembly (such as gravel pits and the water bank rules). The Court rejected the State Engineer's interpretation of Section 37-80-120, C.R.S., as authority to allow out of priority diversions except as set forth in Section 37-80-120(1) concerning out of priority upstream storage.

The Court stated that the State Engineer had the enforcement discretion to allow some out-of-priority diversions, but the water user could not rely on that discretion as the basis for bringing suit against another water user. The Court also recognized that the State Engineer has the authority to regulate wells pursuant to rules and regulations approved by the Water Judge, and implied that substitute supply plans allowed by such rules were permissible.

On many occasions in the opinion, the Court indicated that the General Assembly may want to clarify the authority of the State Engineer to grant substitute supply plans. The State Engineer is working with the Colorado Water Congress to draft legislation for the 2002 session that would clarify the areas where the State Engineer may allow out of priority depletions without the approval of the Water Judge.

In conclusion, the Empire Lodge Homeowners decision has caused the change in a 30-year-old practice of the State Engineer's Office. The legislation resulting from this decision will add much-needed clarity in how the State Engineer uses this important tool for the maximization of the use of the state water resources.

Update on Kansas v. Colorado

Hal D. Simpson, State Engineer

The lengthy litigation in Kansas v. Colorado concerning compliance with the Arkansas River Compact is moving towards its fourth and, hopefully, final phase. Special Master Arthur Littleworth will hold hearings in June and July to address the remaining issues related to this litigation which began in 1985.

The U.S. Supreme Court's decision of June 11, 2001, determined that prejudgment interest should be computed from 1985 when Kansas filed its complaint, and not 1969 as recommended by the Special Master, or 1950 as requested by Kansas. The Special Master had recommended a judgment against Colorado of about \$42 million based on the 1969 date. The U.S. Supreme Court remanded the case to the Special Master to determine the final judgment using the 1985 date. Colorado's experts believe that the final judgment should be about \$22 million. It is interesting to note that Kansas at one time claimed over \$322 million in damages based on alleged

benefits to Colorado from overuse of Arkansas River water.

The Special Master must also determine compact compliance and monetary damages, if any, for the period after 1996, which was the last year for which depletions to usable stateline flows were computed in the prior trial segment. In addition, Colorado's present and future compliance with the Arkansas River Compact based on the administrative rules promulgated in 1994 and 1996 will be determined. This issue will involve experts from both states providing testimony based on results from complex hydrologic computer models on the compact compliance question. The trial in the summer of 2002 is expected to last about eight weeks and will be very intense with much at stake for Colorado water users. Kansas does not believe that the existing rules are sufficient to protect Kansas' entitlement under the compact and wants thousands of acre-feet of additional water provided each year at the state line. Colorado believes that the current rules are adequate.

Special Points of Interest

- Kansas filed its original complaint on December 16, 1985
- The liability phase of the trial commenced on September 17, 1990
- The Special Master's August 2000 report made recommendations concerning the determination of economic damages

The two states attempted to settle the litigation in November and December of 2001 by agreeing to use former Montana Attorney General Joe Mazurek to mediate the settlement effort. Unfortunately, the states could not reach agreement on the remaining issues and the mediation was halted. The states did agree to revisit the potential for settlement after final expert reports are filed on April 11, 2002.

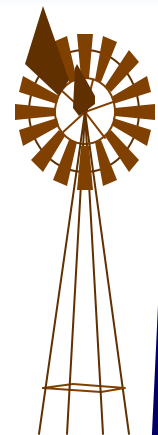


Water Well Testing Class

Chuck Roberts, Geologist, Geotechnical Services Branch

The Colorado Division of Water Resources is planning a *workshop/class* on water well testing. The class is intended for well drillers, pump installers and other persons interested in performing water well measurement tests pursuant to the Well Measurement Rules of the State Engineer for the Arkansas River Basin, Designated Ground Water Basins, and for well measurement programs in other areas of the state. The class is scheduled to be held in Pueblo from April 17th through April 19th, 2002. The cost of the class is \$250 for three days of classroom instruction and field exercises.

The class is designed to give an overview of groundwater hydrology, well hydraulics, water measurement methods, methods of collecting and analyzing data for determining power coefficients, well efficiency, system head considerations, reporting requirements, totalizing flow meter verification and more. Attendees will be allowed to take a test at the end of the class to obtain Division of Water Resources approval as a water well tester.



Baca Ranch Sold!

Mike Sullivan, Assistant Division Engineer, Division 3

At the end of January 2002, the Nature Conservancy announced that it had signed an agreement to purchase the 100,000-acre Baca Ranch for \$31.28 million.

The Baca Ranch, one of the original Spanish land grants in the southwest, has had a controversial history in the San Luis Valley for the past few decades. In the late 1980's, American Water Development, Inc. (AWDI) filed a water court case to export several hundred thousand acre-feet of water out of the Valley for sale to municipalities. The water users in the valley, fearing that the export would injure their water rights, successfully fought that change in water court. In the 1990's, the ranch changed hands and another water development company, Stockman's Water Company, moved in, again to develop the water for export

from the basin. In 1998, Stockman's managed to get two initiatives onto the state ballot trying to further their development scheme. However, those initiatives were defeated. The water users spent in excess of \$1 million to fight those ballot initiatives.

In late 2000, with the help of Senators Wayne Allard and Benighthorse Campbell, and Representative Scott McGinnis, the U.S. Congress authorized the purchase of the Baca Ranch to create the Great Sand Dunes National Park and Preserve.

The Nature Conservancy, a neighbor to both the Sand Dunes and the Baca Ranch, began negotiations to purchase the ranch at that time. Negotiations were proceeding slowly by the end of 2001. In January, information was uncovered that the majority partner in the

consortium that owned the Baca Ranch was an investment group funded by the Yale Endowment. Senator Allard met with the president of Yale and persuaded him to help complete the sale to the Nature Conservancy. In addition, Yale agreed to donate its profits from the sale back to the Nature Conservancy. That donation is expected to be around \$4 million. By the end of January, a deal had been signed for purchase of Baca Ranch. Closing is expected to occur sometime between May 2002 and April 2003. The State of Colorado is helping with the purchase through a loan from Great Outdoors Colorado (GOCO) and financial assistance from the Colorado State Land Board.

The Nature Conservancy is to turn around and sell the ranch to the Federal government for inclusion in the Great Sand Dunes National Park and Preserve by 2005.

Yampa River Basin Management Plan

Robert Plaska, Division Engineer, Division 6

Perhaps the most significant event in Division 6 in 2001 was the completion of the Yampa River Basin Management Plan. The plan has been in the development stage since August of 1999. The Plan was the first step in the issuance of a Programmatic Biological Opinion covering the entire Yampa basin in both Colorado and Wyoming.

The Plan outlines steps that will be taken to protect and recover the four endangered fish species currently listed in the Upper Colorado River Basin, while also providing protection for existing and future depletions. Under the management plan, future growth in the basin within Colorado would be allowed to deplete an additional 30,000 acre-feet of water. There is also a provision to request an addi-

tional 20,000 acre-feet of depletion, subject to approval of the U. S. Fish and Wildlife Service (USFWS).

The management plan focused on two major areas for protecting the endangered fish; flow augmentation and reducing impacts from non-native fish. The Colorado Water Conservation Board modeled depletions in the basin for both present and future needs using the Colorado River Decision Support System. Using the results of this modeling, twelve alternatives were developed to provide water to augment natural river flows in low flow months. The USFWS will evaluate the management plan and select what they feel is the best flow augmentation alternative. The Division of Wildlife has implemented an

Aquatic Wildlife Management Plan for the Yampa River, which forms the basis in the management plan for dealing with the non-native fish issues.

The management plan was submitted to the USFWS toward the end of 2001. The USFWS will evaluate the plan and use it as the basis for preparing a programmatic biological opinion for the Yampa River Basin, which should be completed this year. The issuance of a Programmatic Biological Opinion for the Yampa Basin is critical to insuring that the endangered species covered by the opinion are protected and recovered, and at the same time protects current and future depletions in the basin.

Human Resources

New Employees

Cynthia Barker joined the Denver office as a Budget Analyst on November 1, 2001. Cynthia came to the state from Prudential Securities where she worked as a Financial Advisor, following completion of an MBA in Finance from the University of Colorado, Boulder. She also worked for over 20 years as a Software Engineering Manager and Production Manager in banking, health insurance, and magazine subscription fulfillment.

Rona Troutman started as the new Program Assistant for the Division 4 office in Montrose on December 3, 2001. Rona grew up in the Hayden area, and brings with her extensive office management experience. While working at the Montrose School District, Rona developed training programs for fellow employees in Microsoft Word, Excel and PowerPoint. Rona brings excellent computer expertise, plus a pleasant and enthusiastic personality to the Division.

Scott Edgar was hired on December 21, 2001 as the lead commissioner in Water District 5. Scott already had previous experience in this position when he volunteered to take over the commissioner position when the position came open due to retirement. He also was the Deputy Water Commissioner in Water District 5 the previous summer. Scott has a B.A. in Environmental Earth Science from the University of Northern Colorado.

Boyd Sheets was hired on December 21, 2001 as the Deputy Water Commissioner in Water District 6. He worked the previous summer in this position as a temporary employee. Boyd also has 20 plus years of previous work experience as a Ditch Superintendent for several ditch companies.

Myron "Lee" Cunning started working for Division 1 on January 2, 2002 as a full-time hydrographer. His duties include providing engineering support to the hydrographic program for Division 1. Lee worked over five years for Sear-Brown in Fort Collins as a Senior Engineer II Project Manager and is a graduate of Colorado State University.

Alison Needham joined the Division of Water Resources on February 4, 2002 to fill the Litigation Coordinator position. Alison brings an impressive combination of academic and work experience in the regulatory government service area as the legal assistant for the Division of Racing and Liquor Enforcement. Alison will be responsible for the daily legal coordination and activities between this office and the Attorney General's Office and water bar.

Rhona Jackson started with the Division as a temporary receptionist in December, 2001, and became a permanent Administrative Assistant on February 25, 2002. Her previous experience includes human resources, with an emphasis on recruiting, for an IT consulting firm in Anchorage, Alaska.

Retirements

Norm Hill retired on December 31, 2001 due to physical disability. Norm worked for the Division as a well drilling inspector since 1988 in both the Alamosa and Denver offices. In this position he reviewed all construction and abandonment reports for wells and conducted field investigations of drilling activities and water well completion compliance. His experience in the well drilling field made him a valuable resource both for the staff and the public.

Don Brazelton will retire on March 14, 2002. Don began working for the Division of Water Resources on August 1, 1972 in the Greeley Office. In August of 1982, Don became the lead Water Commissioner in Water District 4. In this capacity, he was responsible for administration of a major portion of the Colorado Big Thompson Project in addition to water administration duties associated with both municipal and agricultural water rights. Don was considered a leader by both water users and personnel in Division 1 because of his knowledge, dedication, attitude and communication abilities.



In Memory of David Allen Nelson

Dave Nelson started working for the Division of Water Resources in 1985 taking over a water district and the well commissioner work from Ivan Danielson. Dave quickly learned the system and exercised initiative in helping with the decentralization proposals for well permitting. Dave had many accomplishments. He received the Water Commissioner of the Year award in 1991 and 1995 in Division 7. He was always prompt and thorough about completing work. He was firm in enforcement having taken on several illegal uses of water in subdivisions north of Durango in 2001. In 1999, he wrote an interactive water rights play for the Children's water festival which was used in the last two years with much success. It was demonstrated for the Teachers Natural Resource Workshop in Durango in 2001.

Dave was well respected and admired by the water user community and by the office staff. He provided a great resource for the local water attorneys, well applicants and their representatives. Dave attended Colorado State University where he earned a degree in agronomy. He moved to Durango in 1985, and began his work with the Colorado Division of Water Resources. He was a longtime and active member of Christ the King Lutheran Church where he sang in the choir, was a Sunday School teacher and a member of the church council. He enjoyed bowling, umpiring and playing softball. Dave died on January 30, 2002, in an automobile accident near Delta, Colorado. He was 47. He will be greatly missed by his family, his church, and his coworkers.



CALENDAR OF EVENTS

- March 21** Rio Grande Compact Meeting, Santa Fe, New Mexico; for more information, contact Jerri Baker at 719-589-6683
- March 21-22** Colorado Water Conservation Board Meeting, Aurora, Colorado; for more information, contact Catherine Gonzales at 303-866-3441
- April 2** Colorado Board of Examiners of Water Well Construction and Pump Installation Contractors Meeting, Denver, Colorado; for more information, contact Gina Antonio at 303-866-3581
- May 17** Colorado Ground Water Commission Meeting, Denver, Colorado; for more information, contact Marta Ahrens at 303-866-3581

Office of the State Engineer

*Colorado Division of Water Resources
Department of Natural Resources
1313 Sherman Street, Room 818
Denver, CO 80203*

Bill Owens, Governor
Greg Walcher, Executive Director, DNR
Hal D. Simpson, State Engineer
Marta Ahrens, Editor

*Phone: 303-866-3581
FAX: 303-866-3589
Records Section: 303-866-3447
Ground Water Information Desk: 303-866-3587*

We're on the web:
<http://www.water.state.co.us>

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