12-1966

0114 Implementation of 1965 Water Legislation

Colorado Legislative Council

0114 Implementation of 1965 Water Legislation

Report to the Colorado General Assembly

IMPLEMENTATION OF 1965 WATER LEGISLATION

COLORADO LEGISLATIVE COUNCIL

LEGISLATIVE COUNCIL

OF THE

COLORADO GENERAL ASSEMBLY

Senators	Representatives
Floyd Oliver, Chairman	C. P. (Doc) Lamb, Vice Chairman
Fay DeBerard	Forrest Burns
Vincent Massari	Allen Dines, Speaker
L. T. Skiffington	Richard Gebhardt
Ruth Stockton	Harrie Hart
Robert L. Knous, Lt. Governor	Mark Hogan
	John R. P. Wheeler

* * * * * * * *

The Legislative Council, which is composed of five Senators, six Representatives, and the presiding officers of the two houses, serves as a continuing research agency for the legislature through the maintenance of a trained staff. Between sessions, research activities are concentrated on the study of relatively broad problems formally proposed by legislators, and the publication and distribution of factual reports to aid in their solution.

During the sessions, the emphasis is on supplying legislators, on individual request, with personal memoranda, providing them with information needed to handle their own legislative problems. Reports and memoranda both give pertinent data in the form of facts, figures, arguments, and alternatives.

IMPLEMENTATION
OF 1965
WATER LEGISLATION

Legislative Council

Report To The

Colorado General Assembly

Research Publication No. 114
December 1966

COLORADO GENERAL ASSEMBLY

LEGISLATIVE COUNCIL

ROOM 341, STATE CAPITOL
DENVER, COLORADO 80203
222-9911 - EXTENSION 2285

November 29, 1966

To Members of the Forty-sixth Colorado General Assembly:

As provided under the directives of House Joint Resolution No. 1024, 1965 session, the Legislative Council submits the accompanying report and recommendations relating to the implementation of water laws enacted in the 1965 session.

The report and recommendations of the committee appointed to continue the water study begun in 1964 were accepted by the Council at its meeting on November 28, 1966, for transmission to the members of the Forty-sixth General Assembly.

Respectfully submitted,

Senator Floyd Oliver
Chairman

FO/mp

COLORADO GENERAL ASSEMBLY

LEGISLATIVE COUNCIL

ROOM 341, STATE CAPITOL
DENVER, COLORADO 80203
222-9911 - EXTENSION 2285

November 17, 1966

Senator Floyd Oliver, Chairman
Colorado Legislative Council
Room 341, State Capitol
Denver, Colorado

Dear Mr. Chairman:

Your committee appointed to continue the water study begun in 1964 has completed its activities for 1965-66 and submits the accompanying report and recommendations.

As may be noted from the committee's report, the members devoted their primary attention to problems and procedures connected with the implementation of House Bill No. 1066 and Senate Bill No. 367 that were enacted in the 1965 session. In this respect, the committee is proposing one bill designed to clarify some of the provisions and administrative procedures under S.B. 367. Additionally, the members generally agreed on a list of principles with respect to underground water that is tributary to surface flow but were unable to agree on statutory language to accompany these principles.

Consequently, additional legislative action will undoubtedly be necessary in the future based on the effects and experience developed over the next few years.

Respectfully submitted,

Representative Forrest Burns,
Chairman
Committee on Water

FB/mp

FOREWORD

House Joint Resolution No. 1024, 1965 regular session, included the directive that the Legislative Council was to continue the water study begun in 1964. The members appointed to this committee included:

Rep. Forrest Burns, Chairman
Senator William Bledsoe
Senator Donald Kelley
Senator Harry M. Locke
Senator Carl J. Magnuson
Senator Floyd Oliver
Senator Wilson Rockwell
Senator Lowell Sonnenberg
Senator James P. Thomas*
Rep. T. John Baer, Jr.
Rep. Lowell B. Compton
Rep. Charles Conklin
Rep. T. Everett Cook
Rep. George Fentress
Rep. Robert Schafer
Rep. Theodore Schubert

*Appointed to replace Senator Wilkie Ham, deceased.

In view of the substantial changes in the state's water laws that were adopted in the 1965 session, the members decided to place major emphasis on reviewing the implementation of these laws by the State Engineer and the Colorado Ground Water Commission. This decision led to the holding of various area meetings with water users as well as with water officials to determine where legislative changes are needed in order to develop the optimum beneficial use of water in Colorado.

Phillip E. Jones, senior research analyst for the Legislative Council, had the primary responsibility for the staff work on this study. Miss Clair T. Sippel, secretary of the Legislative Reference Office, provided the bill drafting services for the committee.

November 29, 1966

Lyle C. Kyle
Director

TABLE OF CONTENTS

WATER COMMITTEE FINDINGS AND RECOMMENDATIONS

The importance of water to Colorado's prosperity continues to grow each year, and, as this importance continues to grow, so do the number of problems connected with regulating the beneficial uses of the limited amount of water that is available to the people of Colorado. In an effort to pinpoint the various problems encountered by Colorado water users, the Legislative Council was directed by the General Assembly to appoint a committee in 1964 "to make a comprehensive study of the surface and underground water supplies of the state." This 23-member committee held several meetings in the various river basins of the state to review problems and to develop recommended changes for consideration in the 1965 session.[1]

In the 1965 session, major changes were adopted with respect to underground water, including its relationship with surface flow, when Senate Bill No. 367 and House Bill No. 1066 were enacted into law. The members of the General Assembly recognized that the passage of these two bills would have serious ramifications in areas where there is heavy use of underground water for irrigation purposes, and consequently directed the Legislative Council to continue the water study begun in 1964.

Members of the committee agreed at their first meeting that the primary function of the committee should be to closely follow the progress and problems under the legislation adopted in the 1965 session. The members also agreed that a secondary goal of the committee would be to review developments with respect to other water problems and suggested solutions thereto.

Summary of Major Water Legislation Adopted in 1965 Session

Four bills relating to water rights and irrigation were adopted in the 1965 session, two of which -- House Bill No. 1066 and Senate Bill No. 367 -- greatly affected the users of water for irrigation purposes in this state. These two bills were adopted only after rather prolonged and, at times, bitter debates in the two houses, with charges and countercharges being made as to their ultimate effects. A brief analysis of the provisions of these two

1. The committee's recommendations and general background information relating to water supplies and problems developed by the committee in the course of its study are contained in Water Problems in Colorado, Colorado Legislative Council, Research Publication No. 93, November 1964.

bills may therefore be helpful in gaining insight with respect to the committee's activities during 1965 and 1966.

House Bill No. 1066. Under the provisions of Article 11, Chapter 148, Colorado Revised Statutes 1963, the State Engineer is provided with the "general supervising control over the public waters of the state." To assist in carrying out this responsibility, the state has been divided into seven irrigation divisions and each irrigation division contains several water districts within its boundaries. A division engineer heads each of the irrigation divisions and is responsible to the State Engineer for the administration of water laws within his division.

Water commissioners are appointed for the water districts to serve as the officials coming directly into day-to-day contact with irrigation water users. As provided in Article 15 of Chapter 148, C.R.S. 1963, it is the duty of water commissioners to divide the water of natural streams among the several irrigation ditches in the order of the priority of appropriation of each of these ditches. That is, the ditch with the oldest priority right is entitled to receive its appropriated share of water before any other ditch that is junior to it in date of appropriation, and so on down the line. A water commissioner has the authority to shut down withdrawals of water by any ditch that is junior in date of appropriation in order to supply water to senior ditches.

Article 15 also declares that it is the duty of a water commissioner to keep "the stream clear of unnecessary dams or other obstructions." An early state supreme court decision[2] held this provision to mean that it is the duty of a water commissioner to keep a natural stream clear of dams and other obstructions wrongfully maintained to the injury of senior appropriators. However, in the absence of specific statutory language, some doubt existed as to whether the words "other obstructions" included wells if, in fact, their use interfered with the rights of senior appropriators.

With the enactment of House Bill No. 1066 (Chapter 318, Session Laws of 1965), provisions were added to the statutes to clarify the duties and responsibilities of the State Engineer and his agents with respect to wells drawing water from underground formations that are tributary to water flowing visibly on the surface. This new act provides that the State Engineer must administer the surface waters of the state, including any tributary underground waters, in accordance with the right of priority of appropriation, and the State Engineer or his agents are charged with the duty to enjoin the diversion of surface waters or underground water tributary thereto

2. Ortiz v. Hansen (1905), 35 C. 100, 83 P. 964.

when necessary to prevent such diversion from materially injuring the vested rights of senior appropriators.

In short, H. B. 1066 places all water users in the state on an equal footing when they are drawing upon the same supply of water, whether flowing on the surface or in an underground formation that is part of the surface flow, and this equal footing is based on priority date of appropriation. The net effect of this legislation is to define by statute that tributary waters, whether found on the surface or underground, are part of the surface stream and are therefore subject to Colorado's doctrine of prior appropriation.

Senate Bill No. 367. Colorado courts have long held that underground water tributary to a natural stream must be considered as part of the stream supply and must be used in accordance with the doctrine of prior appropriation.[3] At the same time, however, prior to the 1965 session neither the courts nor the statutes clearly defined rights to underground waters that could be declared nontributary in a legal sense. In this latter connection, there are areas in the state where underground water is found in considerable volume that does not contribute to adjudicated surface rights such as the Republican River drainage in the High Plains area and the closed basin area in the San Luis Valley.

Senate Bill No. 367 (Chapter 319, Session Laws of 1965) was enacted to provide a system to determine the rights of respective well owners to the waters of a common underground source of supply that was not considered part of the surface waters. As the declaration of policy in this bill states:

"It is hereby declared that the traditional policy of the state of Colorado, requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to the designated ground waters of this state, as said waters are hereinafter defined. While the doctrine of prior appropriation is recognized, such doctrine should be modified to permit the full economic development of designated ground water resources. Prior appropriations of ground water should be protected and reasonable ground water pumping levels maintained, but not to include the maintenance of historical water levels. All designated ground waters in this state are therefore declared to be subject to appropriation in the manner herein defined."

3. E.g., Safranek v. Town of Limon (1951), 123 C.330, 228 P. 2d 975.

"Designated ground water" is defined in the act as (1) ground water which in its natural course would not be available to and required for the fulfillment of decreed surface rights (such as in the High Plains area or in the closed basin area of the San Luis Valley), or (2) ground water in the areas not adjacent to a continuously flowing natural stream wherein ground water withdrawals have constituted the principal water usage for at least 15 years preceding January 1, 1965.

S. B. 367 assigned the major responsibility for the administration of its provisions to the Colorado Ground Water Commission as reconstituted by this act. Under this law, the commission has the authority to establish designated ground water basins, after holding a public hearing and meeting other requirements set out in the act, and in these areas the commission is responsible for the issuance of permits for the use of underground water and the establishment of a priority date for each well. Wells in existence at the time of the adoption of this act (May 17, 1965) are issued a priority date in accordance with the records on file with the State Engineer.

Permits issued for wells after May 17, 1965, are to be made in accordance with the doctrine of prior appropriation. However, if the commission finds that the issuance of such a permit would unreasonably impair any existing use or would result in the unreasonable lowering of the water table, it may deny the requested permit to drill a well. This provision is in keeping with the rather broad powers given the commission to conserve the designated underground water resources in the state and to protect the vested rights of other appropriators. The State Engineer serves as the enforcing officer for the commission and is also responsible for ruling on well permit applications in areas of the state outside designated ground water basins established by the commission.

Local ground water management districts may be formed within designated ground water basins by vote of the local citizens. If a district is formed, the district itself has broad general powers of management over the underground water resources within the designated area. The district, however, does not have the authority to issue or deny ground water permits, but any recommendation of a local district on this point would carry considerable weight with the ground water commission.

Members of the boards of directors of local ground water management districts are elected by vote of the taxpaying electors within the district. The district is financed by an ad valorem tax of not to exceed one-half mill and by an assessment against well owners of not to exceed five cents per gallon of the rated pump capacity of each well. Boards of directors of these management districts are authorized to regulate the use, control, and conservation of their ground water by:

(1) Providing for the spacing of wells and regulating pumping so as to minimize as far as practicable the lowering of the water table or the reduction of artesian pressure;

(2) Acquiring lands for the erection of dams and other projects necessary to recharge the underground water reservoir;

(3) Developing comprehensive plans for the most efficient use of their underground water supply and for the control and prevention of the wasting of such water supply and by encouraging their adoption and execution;

(4) Requiring the closing or capping of any open or uncovered well that is not being used; and

(5) Prohibiting the use of underground water outside the boundaries of the district where such use materially affects the rights acquired by permit by any owner or operator of land within the district.

Summary of Committee Meetings[4]

In carrying out their assignment, the members of the committee held seven meetings during the biennium -- on June 14, September 13, and November 8, 1965, and on May 9, July 18, September 27, and November 17, 1966. Most of these meetings were devoted to developing information on the progress being made and problems being encountered in the administration of House Bill No. 1066 and Senate Bill No. 367, both from the viewpoint of state officials and water users alike.

As the committee began its study, in June of 1965, problems reported in connection with the administration of House Bill No. 1066 were held to a minimum because of the substantial amounts of rainfall that were experienced. Various problems were reported, however, with respect to Senate Bill No. 367 as well as some gloomy forecasts as to what could be expected under the provisions of House Bill No. 1066 if 1966 were a dry year.

4. A limited number of copies of the minutes of the meetings of the Committee on Water are available in the office of the Legislative Council, Room 341, State Capitol, Denver.

On the basis of the information gathered and the testimony presented at the committee's three meetings in 1965, the problems encountered in the early stages of implementing the 1965 water legislation may be summarized as follows: One of the first problems resulted from rumors being started, especially in the lower part of the Arkansas River Basin, that no permits for wells would be issued by the State Engineer or the ground water commission and that it would be two or three years before any permits would be issued. These rumors were not true, of course, but they were aided by the fact that the issuance of well permits was delayed because of the new requirement that the State Engineer has to consider the effect of a new well on any existing wells before approving an application for a new well permit.

In this connection, another contributing factor was the lack of sufficient staff in the State Engineer's Office to meet the duties added by the 1965 legislation since the General Assembly did not appropriate increased funds to accompany the increased duties. Thus, the State Engineer's Office was not able to conduct field checks to determine the effects of new wells on existing wells, and a general rule was consequently followed that no new well would be approved that was closer than one-half mile to an existing well. The fear was expressed to the committee that this general rule, if rigidly applied, would be harmful to certain areas in the state where smaller and more numerous wells are needed to obtain proper irrigation.

In addition to the delay in issuing permits for new wells, the committee discovered that, for a period of time, the State Engineer's Office was not issuing permits for replacement wells due to the absence of specific statutory authority in Senate Bill No. 367. This problem was resolved later in 1965 when the committee adopted a resolution to the State Engineer stating that it was the legislative intent that permits for replacement wells would be granted as a matter of routine, and the State Engineer's Office began approving permits for replacement wells.

So far as water users are concerned, several reported to the committee that, because of the uncertainty regarding water well rights under the 1965 legislation, lending agencies were reluctant to grant loans until more information about their effects became known. Similarly, well users also expressed concern about the fact the State Engineer had not made public any rules and regulations that would be followed in regulating the pumping of wells under the provisions of House Bill No. 1066. But the most major problem for well owners appeared to be that the 1965 water legislation contained no recognition of the underground water facilities in existence at the time the laws were passed. As a result, the investments made in these facilities by thousands of citizens were felt by many well owners to be in serious jeopardy, with the very real possibility that their economic well-being and, ultimately, the economic well-being of the state, would suffer severe damage.

In retrospect, the committee notes that 1965 was a relatively quiet year with respect to the water legislation adopted in the 1965 session; 1966 was a different matter entirely, however, since the snowpack in the mountains ranged from 20 to 40 per cent below normal and rainfall during the growing season was not sufficient to make up this deficiency. Consequently, the provisions of House Bill No. 1066 were placed into effect in May of 1966 for the first time since the bill had been adopted.

At the committee's first meeting in 1966, which was held on May 9th in La Junta, the members reviewed the progress being made on a study of the Arkansas River Basin by the United States Geological Survey; the progress being made by the Colorado Ground Water Commission in implementing Senate Bill No. 367; and the progress being made by the State Engineer's Office in administering the provisions of House Bill No. 1066. In addition, area water users submitted comments and suggestions with respect to these two laws and their administration.

In regard to the U.S.G.S. study of water resources in the Arkansas Valley, the committee was informed that the hydrological data developed should provide insight with respect to the most beneficial uses of water along a 150-mile stretch of the Arkansas River, or from Pueblo to the state line. Also, an electric analog model of the valley had been constructed that can serve as a useful tool to evaluate the problems along the Arkansas River and to provide a fairly definitive analysis of the effects of any proposals to manage the water in the valley.

At present, there are some 1,500 large capacity irrigation wells in the Arkansas Valley. Most of these wells have been drilled since World War II, with the number of such wells having doubled within the past ten years. By way of comparison, ground water withdrawals in the valley totaled 90,000 acre feet in 1954 and some 230,000 acre feet in 1964. This latter figure, incidentally, was about equal to surface water use in 1964. The major factors determining the effect of a well on stream flow, in addition to the amount of water being pumped, are the transmissibility of the soil and the distance of the well from the river. In general terms, using 1964 as an example when pumping in the valley totaled 230,000 acre feet, it was estimated that stream flow in the Arkansas River would have been increased by a minimum of 50,000 acre feet if there had been no pumping and the net gain to the river could have been as much as 100,000 acre feet.

Water users appearing at the meeting urged that a change be made in the one-half mile spacing requirement between wells since in some cases, for example, a person would not be able to drill a well on his own land when it was surrounded by existing wells. Also, a uniform, statewide requirement such as this is rather difficult because ground water conditions vary from county to county and even from section to section within a county.

Other suggestions presented to the committee included: (1) Wells in being at the time of the passage of House Bill No. 1066 should be exempted from its provisions as this law should apply to future wells only; (2) the control of underground water usage should be left to local districts; (3) the provision in the law should be eliminated that places the burden upon the underground water user to show that his well is not damaging other users, with the hope that the General Assembly would declare that the presumption is that a well in existence on the date of passage of the law is not damaging; (4) multiple diversion points should be allowed to permit ditch companies to pump up t[redacted]gulated amount of water per acre but not in excess of their river decrees; (5) water should be so used that its return flow would return to the aquifer where it originated, with this provision applying to new users only; (6) consideration should be given to the requirement that surface users maintain elevation of their points of diversion as they historically were, rather than permit them to build up and then require surface users to raise the water up to fill their ditches; (7) consideration should be given to permit any person who eliminates phreatophytes to use the water salvaged thereby and also to rechannelization of our rivers; (8) the law on water conservancy districts should provide for board members to be elected; and (9) agricultural users of water should have major representation on the various water boards and commissions of the state.

The closing part of the meeting in La Junta was devoted to a question and answer period regarding the administration of House Bill No. 1066, as follows:

> Question: What does the division engineer mean when he uses the term implementation of the 1965 water legislation?
>
> Answer: Mr. John Patterson, division engineer for the Arkansas River, said that, first of all, this is no easy problem, which is part of the reason he had been interested in setting up an advisory committee composed of ditch and well users. The law as written, if literally interpreted, could be very rough, but, he continued, even if every well were shut down, this would s[redacted]ot satisfy all of the surface users.
>
> Question: What are the plans for implementing the 1965 legislation along the Arkansas River?
>
> Answer: Mr. Patterson said that this was the purpose of the advisory committee that had been appointed -- to try to get local participation for the formulation of recommendations for his office to consider in implementing this 1965 water legislation. He added that various proposals have been offered, and he hoped they would [redacted]

able to come up with something at the advisory committee's meeting this evening.

Question: Will the date a well was drilled have any bearing on whether it is shut down or not?

Answer: Mr. Patterson indicated that he thought the age of a well would receive some consideration. He pointed out that H. B. 1066 merely reaffirmed the state's appropriation of water doctrine, but it left the State Engineer with a great deal of latitude in the administration of this law. Mr. Patterson reported that the distance of a well from the stream is not the determining criteria; this criteria is the time it takes a well to affect stream flow in the river.

Question: If no agreement is reached at the meeting this evening, what will be done on May 15th?

Answer: Mr. Patterson stated that, unless there is a flood, it will be a matter to implement the bill to preserve existing adjudicated rights consistent with the economy of the valley. He doubted that the regulation would be as severe as many people think it will be.

Question: How can the law and its administration penalize one man and not all well owners?

Answer: Mr. Patterson agreed that this posed a difficult problem, but he said that, rather than shutting down every well, the State Engineer's Office was well within its rights to set up a management system to best utilize the waters within a river basin.

Question: If one well can be shut down by the State Engineer, what is to keep our neighboring states from coming in and shutting all of the wells down?

Answer: Mr. Patterson stated that the relationship between Colorado and its neighboring states is governed by interstate compacts with respect to water, and so long as Colorado meets its commitments under these compacts, these states may not enter into the control of water within Colorado.

Question: What was the reason the General Assembly passed H. B. 1066 in the first place?

Answer: Representative Cook said that the primary purpose of H. B. 1066 was to protect the rights of prior users according to the provisions of the state's constitution. This purpose was tempered by allowing the State

Engineer to adopt rules and regulations in the administration of this act, adding that there was no question but what senior rights have been and are being hurt through the use of wells. Representative Cook pointed out that the members of the General Assembly have to look to the future when considering proposed legislation, which in this case included the future growth of the state and the best use of water. He concluded his remarks by saying that this law will benefit the upper part as well as the lower part of the valley and again noted that the law provides a flexible means of regulation.

The committee's meeting in Fort Morgan was held on July 18th, near the end of the irrigation season for many farmers and a time when several weeks of experience had been obtained under the workings of House Bill No. 1066. In brief, the program of the State Engineer's Office to administer the South Platte River under this law included the following guidelines:

1. Every ditch must use surface water to the extent it is available to supply its water rights.

2. When surface flows are not sufficient to supply decreed rights, the amount available should be augmented by pumping from the underflow, either directly to land or into the ditch.

3. It will be necessary that ditch officials designate the wells that are to be used, and the amount pumped will be charged against the decreed amount.

4. In times of shortage, no ditch may receive more than its decreed amount from all sources.

5. On demand of a senior ditch which cannot obtain its full decreed amount from all sources, the water commissioner will curtail uses by junior appropriators upstream, including pumping from the underflow, until the senior right is supplied.

6. Ground water users may negotiate for reservoir water as a replacement by means of exchange which would enable them to make use of ground water and the facilities for obtaining the same.

As reported to the committee by the State Engineer, this program to administer the South Platte River under the provisions of House Bill No. 1066 was put into effect and proved to be workable, at least for a while, but the program broke down within a few weeks after having been put into operation when a shortage developed during the last part of May in the Sterling area and the senior decree in that area shut down junior ditches upstream having some 220 cubic second feet in surface rights.

In terms of enforcement actions, the State Engineer reported that injunctions were being sought against three well owners in the Arkansas Valley for violating the directive of the division engineer to cease pumping, and a similar suit was filed against the city of Fort Morgan in the South Platte River Basin. At the same time, however, the Weldon Valley Irrigation Company had brought suit in Greeley against the State Engineer's Office demanding that wells be regulated to protect the company's 1881 surface priority date.

Several water users attending the Fort Morgan meeting reported their feelings about the 1965 water legislation. One person suggested that the problem of administering surface and underground water is a problem of distribution and the efficient utilization of the total supply, and legislation is needed that will recognize that, in this area of the state, wells are fully as important to the over-all economy as surface water.

Another water user commented that the individual farmer has tried to solve the problem of insufficient rainfall by modern tool -- in this case using wells to draw on water supplies stored in underground formations. He said that wells were first installed to augment surface supplies of water, but the fact today is that surface supplies are used to augment underground water supplies.

It was suggested that Senate Bill No. 3, 1966 session, contained the answers to some of the problems along the South Platte River, but not all of them. Other suggestions included:

1. Ample compensation should be provided referees involved in water adjudications.

2. Any law relating to the waters of this state should declare that the doctrine of appropriation as it relates to priority owners shall include waters produced by the stockholders or landowners of a district and used on lands supplied by such priority owners. No more wells should be drilled on the South Platte River until such time as sufficient and proper legislation has been enacted to regulate the use and disposition of water derived from such wells.

3. Wells not under ditches should either take their decreed date or an attempt should be made to administer such wells under Senate Bill No. 367, which might give the well owners more protection than securing priorities.

4. An amendment to the change of a point of diversion statute should be enacted allowing pumps to be supplemental points of diversion. The priority owners would be required to bring such change for supplemental points of diversion and control of the use of the pumps covered by such decree.

5. After such change or decree, then all water produced from the wells affected thereby should be charged against the direct decree of the priority owner.

6. One of the most dangerous and difficult problems in the administration of water is what is known as a futile call on the river where the calling appropriator can never get any or very little of the water called from a junior appropriator upstream. Certain case law has been announced that should be enacted into statutory law:

   (a) One is not entitled to command the whole or a substantial flow of the stream merely to facilitate his taking the fraction of the whole flow to which he is entitled.

   (b) Junior appropriators should not be required to shut off their water when they are so situated that shutting them down would not result in improving the water supply of the senior appropriator.

The members of the committee met in Denver on September 27, 1966, to review the various recommended changes that had been submitted at their meetings held previously in 1965 and 1966. During the course of this meeting, the State Engineer was asked how he felt House Bill No. 1066 had worked out over-all. As shown in the committee's minutes: "Mr. Owens said that he did not believe H. B. 1066 had worked out too well. If it is rigidly administered, it will paralyze the economy of several counties. Yet, Mr. Owens continued, if it is administered haphazardly or loosely to merely limit pumping close to streams, nothing much would be done for the surface users and, at the same time, individual well owners would be seriously injured. The only workable solution is to use a combination of surface rights and wells.

"Mr. Owens explained that, when surface rights were first granted, the users had sufficient water for the type of crops grown at that time, such as wheat, which took one or two irrigations early in May, and the water left could be used for more valuable crops. Sugar beets began to be grown, along with corn, which meant an extension of the irrigation season through August. Farmers today cannot make a living unless they grow higher-value crops requiring more water.

"Mr. Owens said that the members were going to have to amalgamate present uses -- wells and ditches -- and this should be done in a relatively simple, clear-cut bill. This will have to be worked out on a very local basis so that surface water may be used where there are no wells but require the use of wells if groundwater is available. He felt that the legislature and the State

Engineer's Office were caught in the middle of the changing agricultural economy and conditions in this state, and the problem will not be solved until the various water users can learn to live together. He hoped that he would see the day when a well user and a ditch user will come in and sit down together to work out their problems on the Eastern Slope in the same manner as has been done on the Western Slope."

Comments were also requested by the committee with respect to the Fellhauer Case upholding the shutting down of a well by the State Engineer under the provisions of House Bill No. 1066.[5] Mr. James D. Geissinger, assistant attorney general, reported that in this district court action three days were devoted to the taking of evidence and, after denying the defendant's motion to dismiss, the court ruled that H. B. 1066 was constitutional and granted a temporary injunction against the pumping of Mr. Fellhauer's well. The case was brought to the state supreme court on the basis of the lower court's refusal to stay the temporary injunction. As of September 27th, the day of the committee's meeting, the attorneys on both sides were trying to work out stipulations so that all questions concerning this law could be covered, including its constitutionality as well as the criminal penalties in section three of the bill. Mr. Geissinger said that the State Engineer's Office hopes to have a trial for a permanent injunction and then bring the matter before the state supreme court so that the General Assembly will know what particulars it wants to amend in the 1967 session.

Committee Recommendations

As mentioned previously, committee members placed major emphasis during 1965 and 1966 on reviewing (1) the administration of House Bill No. 1066 and Senate Bill No. 367, 1965 session, and (2) legislative changes for consideration in the 1967 regular session. With respect to the first aspect of the committee's study, the members believe that the administrative programs instituted under the provisions of the 1965 water legislation were about as effective as could reasonably be expected under the circumstances. However, the committee hopes that existing staff vacancies in the office of the State Engineer will be filled shortly and that greater attention can therefore be devoted to implementing these laws.

In connection with the provisions of Senate Bill No. 367, Appendix B contains a summary of the activities of the Colorado

5. See Appendix A for the text of the decision of Judge William E. Rhodes, Pueblo District Court, in this case.

Ground Water Commission for the 18-month period following the passage of this act. Appendix C lists the meetings held by the commission during this period, and Appendix D is a tabulation, by counties, of the fee well permits issued and denied from May 17, 1965, through October 31, 1966. The final item accompanying this report, Appendix E, is a map showing the status as of November, 1966, of the formation and designation of ground water basins in Colorado under the provisions of Senate Bill No. 367.

So far as changes for legislative consideration in the 1967 session are concerned, based on meetings conducted by the committee in 1965 and 1966, it appears that a great deal of misunderstanding continues to exist among users of underground water in this state with respect to Colorado's basic water laws as established by the constitution. This misunderstanding makes a substantial problem even more difficult. For example, at one of the committee's meetings one water user made the statement that "there was no law in this state against wells at the time they were put in." This statement is not completely true, but it represents a common misconception resulting from years of uncertainty and doubt in Colorado in regard to the use of underground water.

The use of water in Colorado is governed fundamentally by the provisions of the state's constitution that was adopted in 1876, or some 90 years ago. In effect, Sections 5 and 6 of Article XVI of Colorado's Constitution dedicate the waters in the state to the people subject to the doctrine of prior appropriation. Under this doctrine, the first person to be awarded a right or decree is superior to all subsequent rights or decrees for the same beneficial use of water, or "first in time, first in right," and when there is an insufficient supply of water, users are denied the right to divert water for themselves in the reverse order of their decreed dates.

Historically, the drilling of wells to pump water from underground supplies for use in irrigation did not become a widespread practice in Colorado until after World War II. At that time the statutes of the state did not contain any laws specifically relating to the use of underground water and, except for court cases brought under the constitutional provisions, there was no statutory direction as to the rights of well owners. Many well owners believed then, just as many well owners believe today, that any water underlying their lands belonged to them and this water was theirs to use as they saw fit. However, under the provisions of the state's constitution, the state supreme court ruled on several different occasions that if this underground water was tributary to water flowing on the surface, its use came under the constitutional doctrine of prior appropriation and could be used only when senior water rights had been satisfied. House Bill No. 1066, therefore, did not change the existing law, but only supplied statutory direction to a situation that had long been controlled by constitutional law as interpreted by the state courts.

In other words, the court's position constituted the law for Colorado when many of the irrigation wells in the state were drilled within the past 20 years and, prior to 1965 at least, while there was no specific law against the drilling of many of these wells, where they were drilled into underground formations that were part of a flowing stream, their use could legally be made only within the order of the priority decrees on the tributary surface flow. The first law requiring the registration of wells was enacted by the General Assembly in 1957. It is highly significant to note that the law as enacted stated in part: "A permit shall not have the effect of granting or conferring a ground water right upon the user nor shall anything in this article be so construed." (Section 148-18-7, C.R.S. 1963).

However, in the absence of any other specific statutory language prior to 1965, individual farmers in Colorado invested thousands of dollars in developing underground water as a source of supply for their crops. It is no wonder, then, that, in addition to being viewed as a change in the state's basic water law, which it was not, the adoption of House Bill No. 1066 in particular in the 1965 session was considered as a threat to their personal livelihood and a taking of their property without due process of law. Under these conditions, it is not surprising that many persons view the General Assembly's action in 1965 with deepfelt bitterness and resentment, when the main thing wrong with this legislation is that it was enacted some 20 or 30 years later than it should have been.

The members of this committee have struggled with this problem for several months, keeping in mind the moral as well as the legal aspects of the situation, and we have reached the conclusion that, in order to best utilize the water resources of the state without materially affecting the economy of some areas of the state, and numerous individuals as well, the state should provide for the optimum beneficial use of water for irrigation purposes by expanding the basic provisions in House Bill No. 1066 to provide the State Engineer with more specific statutory guidelines to apply equally to surface decree holders and well owners. These guidelines should be based on the following principles:

1. Where water is considered as one source, whether flowing on the surface or located in underground formations tributary to the surface flow, its use should be governed by the doctrine of prior appropriation as provided in the state's constitution, tempered with management programs established by the State Engineer to obtain the optimum beneficial use of the available water.

2. In determining the amount of available water, the State Engineer should include water stored in underground water formations as well as water flowing on the surface.

3. Programs to manage the available water should be designed not only to obtain the optimum beneficial use of that water which is available, but also to develop conservation programs of ground water recharge in those areas where the water underground is tributary to surface flow.

4. Multiple points of diversion should be required, where possible, in order to achieve the maximum benefits under the management programs developed by the State Engineer.

5. Practical as well as legal effects should be considered in the management of our water resources so that, for example, clearly futile calls for water by senior appropriators downstream would be sustantially reduced, if not eliminated entirely.

However, while general agreement was reached on these principles, the committee members were unable to agree on any specific statutory language to propose for consideration in the 1967 session. Instead, the members voted to recommend that, during the 1967-68 biennium, the Legislative Council should be directed to appoint a committee to explore the various ramifications of enacting these principles into law and to develop specific statutory language thereon.

Specifically, in terms of legislative action in the 1967 session, the committee recommends that the accompanying bill be favorably considered. This measure, if adopted, would clarify various provisions contained in Senate Bill No. 367 as well as adding other provisions to aid in the administration of this law. In brief, this bill would:

1. define "replacement or substitute" wells and would require the issuance of drilling permits for such wells;

2. clarify those wells generally exempted from the provisions of this act as being "wells used for ordinary household purposes, fire protection, the watering of poultry, domestic animals, and livestock on farms and ranches, and the irrigation of home gardens and lawns, not exceeding fifty gallons per minute";

3. add the requirement that new wells must be located at least 600 feet from an existing well and more than 300 feet from the nearest property line unless, after a hearing, the State Engineer finds that circumstances in a particular instance warrant the drilling of a well in closer proximity to an existing well;

4. provide for the late registration of wells drilled prior to July 1, 1967, that have not been registered with the State Engineer's Office, with the deadline for such late registration being December 31, 1969; and

5. allow for the changing of boundaries of a ground water management district without the necessity of meeting all of the procedural requirements for the initial formation or dissolution of a district as a whole, similar to the provisions contained in the state's water conservancy district law.

These recommendations by the committee should not be considered as representing final solutions or answers. They are not. Instead, these recommendations are designed to build on the statutory foundation established by the General Assembly in 1965 and are part of a step-by-step process to restore order to a situation that was almost totally uncontrolled and out-of-hand a few short years ago. In fact, in view of the substantial problems that were allowed to develop over the years, additional legislative action will undoubtedly be necessary in the future based on the effects and experience developed over the next few years.

A BILL FOR AN ACT

AMENDING ARTICLE 18 OF CHAPTER 148, COLORADO REVISED STATUTES 1963 (1965 SUPP.), KNOWN AS THE "COLORADO GROUND WATER MANAGEMENT ACT".

Be It Enacted by the General Assembly of the State of Colorado:

SECTION 1. 148-18-2, Colorado Revised Statutes 1963 (1965 Supp.), is amended BY THE ADDITION OF NEW SUBSECTIONS (18) AND (19) to read:

148-18-2. Definitions. (18) "Replacement or substitute well" as used in this article means a new well replacing an existing well, and which shall be limited to the yield of the original well and shall take the date of priority of the original well, which shall be abandoned upon completion of the new well.

(19) "Board" or "board of directors" as used in this article means the board of directors of a ground water management district as organized under section 148-18-23 of this article.

SECTION 2. 148-18-4, Colorado Revised Statutes 1963 (1965 Supp.), is REPEALED AND RE-ENACTED, WITH AMENDMENTS, to read:

148-18-4. Exemptions. Wells used for ordinary household purposes, fire protection, the watering of poultry, domestic animals, and livestock on farms and ranches, and the irrigation of home gardens and lawns, not exceeding fifty gallons per minute, shall be exempt from the provisions of this article, unless otherwise specifically stated.

SECTION 3. 148-18-6, Colorado Revised Statutes 1963 (1965 Supp.), is amended BY THE ADDITION OF A NEW SUBSECTION (6) to

read:

148-18-6. Application for use of ground water - publication of notice - conditional permit - hearing on objections. (6) Applications for construction of replacement or substitute wells shall not be denied by the state engineer or the ground water commission.

SECTION 4. 148-18-36 (2), Colorado Revised Statutes 1963 (1965 Supp.), is amended to read:

148-18-36. Permits to construct wells outside designated areas - fees - permit not ground water right - evidence. (2) Upon receipt of an application for a new, increased, or additional supply of ground water from an area outside the boundaries of a designated ground water basin, accompanied by a filing fee of twenty-five dollars, the state engineer shall make a determination as to whether or not the exercise of the requested permit will materially injure the vested water rights of others. If the state engineer shall find that the vested water rights of others will not be materially injured, he shall issue a "permit to construct a well", but not otherwise; EXCEPT THAT NO PERMIT SHALL BE ISSUED UNLESS THE LOCATION OF THE PROPOSED WELL WILL BE (a) AT A DISTANCE OF MORE THAN SIX HUNDRED FEET FROM AN EXISTING WELL, AND (b) AT A DISTANCE OF MORE THAN THREE HUNDRED FEET FROM THE NEAREST PROPERTY LINE; BUT IF THE STATE ENGINEER, AFTER A HEARING, FINDS THAT CIRCUMSTANCES IN A PARTICULAR INSTANCE SO WARRANT, HE MAY ISSUE A PERMIT WITHOUT REGARD TO THE ABOVE LIMITATIONS. The permit shall set forth such conditions for drilling, casing, and equipping wells and other diversion facilities as are reasonably necessary to prevent waste, pol-

lution, or material injury to existing rights. The state engineer shall endorse upon the application the date of its receipt, file, and preserve such application and make a record of such receipt and the issuance of the permit in his office so indexed as to be useful in determining the extent of the uses made from various ground water sources.

SECTION 5. Article 18 of chapter 148, Colorado Revised Statutes 1963 (1965 Supp.), is amended BY THE ADDITION OF THE FOLLOWING NEW SECTIONS to read:

148-18-39. Existing beneficial uses not recorded - fee. (1) Existing uses of ground water put to beneficial use prior to May 1, 1957, not of record in the office of the state engineer on the effective date of this act, may be recorded upon written application and payment of a filing fee of twenty-five dollars, and shall retain date of initiation when first put to beneficial use.

(2) Those uses initiated after May 1, 1957, not of record in the office of the state engineer on the effective date of this act, may be recorded upon written application and payment of a filing fee of twenty-five dollars, and shall have a date of initiation as of the date of acceptance of the application by the office of the state engineer, but no such recording shall be accepted after December 31, 1969. No well shall be eligible for recording under this subsection (2) which shall have been drilled subsequent to July 1, 1967.

148-18-40. Inclusion of lands. (1) (a) The boundaries of any district organized under the provisions of this article may be changed in the manner prescribed in this section, but the

bears the requisite number of signatures and otherwise meets the stated requirements, it shall accept the petition and shall fix a time and place, not less than thirty days nor more than fifty days after the date of such acceptance for a hearing thereon. The secretary of the board shall publish a notice of such hearing by one publication in a newspaper of general circulation in every county in which any portion of the district and the proposed territory for exclusion are located. Such notice shall state the nature of the petition, the description of the territories proposed for exclusion, and that any person owning any interest in real property within such territories or within the district encompassing such territories, may appear at the hearing and show cause in writing why the petition should not be granted.

(2) The board, at the time and place fixed, or at such times to which the hearing may be continued, shall proceed to hear the petition and all objections thereto presented in writing. The failure of any person to object in writing shall be deemed to be an assent on his part to the exclusion of the lands as prayed for in the petition. Upon completion of the hearing, the board may order changes in the boundaries of the lands proposed for exclusion from the district by the inclusion or exclusion of land therefrom upon finding that such change in boundaries would be hydrologically, geologically, and geographically sound. The board, in its discretion, and on conditions to be determined by the board and accepted by the petitioners, may grant the petition, deny it, or grant it as to part of the proposed exclusion of territory and deny it as to the remaining portion. Before any territory shall be excluded from a district, the board shall sub-

mit the question of the exclusion of proposed territory as so determined, to the taxpaying electors within the territory to be excluded, in an election to be held for the purpose.

(3) The board shall appoint three taxpaying electors of the district, including two from the area sought to be excluded, as judges of the election. The secretary of the board shall have published a notice of the time and place of said election to be held in the territory proposed for exclusion in the district, by one publication in a newspaper of general circulation in the territory proposed for exclusion from the district. Such election shall not be held less than twenty days after said publication of notice.

(4) Such elections shall be held and conducted as nearly as may be in the same manner for creating districts as set forth in section 148-18-23. At the election, the taxpaying electors in the territory proposed for exclusion from the district shall vote for or against such exclusion. The judges of the election shall certify the returns of the election to the board. If a majority of the votes cast at such election are for the exclusion of the proposed territory, the board shall make an order to that effect and file the same with the secretary of the board.

(5) Any action of the board with respect to the exclusion of territory from an existing district may be reviewed by the district court in error proceedings filed within ten days after the board's decision has been announced.

(6) If the district within which lands are excluded has incurred any prior bonded indebtedness, outstanding at the time of such exclusion, such excluded lands shall continue to be liable

for the proportionate share of any such bonded indebtedness which they were under obligation to pay at the time of exclusion.

SECTION 6. Effective date. This act shall take effect July 1, 1967.

SECTION 7. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

APPENDIX A

MEMORANDUM NO. 6

September 2, 1966

TO: Committee on Water

FROM: Legislative Council Staff

SUBJECT: Text of Pueblo District Court Decision in Fellhauer Case

The accompanying pages contain the text of the decision of Judge William E. Rhodes, Pueblo District Court, in the Fellhauer Case upholding the shutting down of a well by the State Engineer under the provisions of House Bill No. 1066, 1965 session. The State Supreme Court has since denied a stay of Judge Rhodes' order.

(C O P Y)

IN THE DISTRICT COURT

IN AND FOR THE COUNTY OF PUEBLO

STATE OF COLORADO

Civil Action No. 53065

PEOPLE OF THE STATE OF COLORADO, Plaintiff, vs. ROGER FELLHAUER, Defendant, THE AMITY MUTUAL IRRIGATION COMPANY, CF&I STEEL CORPORATION, THE CANON CITY HYDRAULIC AND IRRIGATING DITCH COMPANY, and THE BESSEMER IRRIGATION DITCH COMPANY, Intervenors.	ORDER FOR TEMPORARY RESTRAINING ORDER

This matter coming on for temporary restraining order, having been heard by the Court on August 8, 9, and 10, 1966, and it appearing to the Court that the defendant is in violation of C.R.S. 148-11-22 as set forth in Findings of Fact and Conclusions of Law,

IT IS THEREFORE ORDERED that effective August 27, 1966 the defendant, his agents, servants and employees be and are hereby restrained from pumping any waters from the defendant's well located in Irrigation Division 2, Water District 14, in the Northeast Quarter of the Southwest Quarter (NE¼SW¼) of Section Three (3), Township Twenty-two (22), South, Range Sixty (60), West of the 6th Principal Meridan until further order of Court, or until the state

engineer shall find that water is available to the defendant without injury to other appropriators pursuant to C.R.S. 148-11-22.

IT IS FURTHER ORDERED that the Clerk of the Court issue a temporary restraining order in compliance herewith.

BY THE COURT

Wm. E. Rhodes, Judge

* * * * * * * * * * *

O R D E R

C.R.S. 148-11-22 does not violate the United States Constitution or that of the State of Colorado. This portion of the statute must be read in conjunction with all of Chapter 148 and Sections 5 and 6 of Article 16 of the Colorado Constitution. The duties of the state engineer and his duly appointed officials are clearly set forth in C.R.S. 148-11-3, 148-12-5, and 148-15-3. The so-called delegation of powers under 148-11-22 then are merely an extension of existing Colorado law, legislative, case law, and adjudicated rights. One operating a well on a sub-surface channel of a continuously flowing stream is subject to the rights of senior appropriators, and the state engineer has similar duties as to senior and junior surface appropriators and as to underground appropriators. The direction of the legislature here is for the state engineer to "execute and administer the laws of the state including the underground waters tributary thereto in accordance with the rights of priority of appropriation..."

It is not necessary, under many Colorado cases, for the state engineer to provide adequate standards for determination whether

ground waters are tributary to surface streams. This is a well-known Colorado presumption, Safranek v. Town of Limon, 123 Colo. 330, 228 P.2d 975.

Such matters as "whether ground waters are tributary to surface streams, whether ground waters are located in the subsurface channel of a continuously flowing stream, whether diversions of ground waters materially injure the vested rights of other appropriators, and whether sources of well supply, if not diverted, will be put to beneficial use by senior appropriators within the State of Colorado" are matters of fact which must be determined by the Court, and are not constitutional questions to be determined by the state engineer.

The defendant next questioned the aforesaid section of the statute on the basis that the legislature cannot delegate its legislative powers to administrative officials, quoting Sapero v. State Board, 90 Colo. 568, 572; 11 P.2d 555 (1932); Prouty v. Heron, 127 Colo. 168, 178; 225 P.2d 755 (1963); Hazlet v. Gaunt, 126 Colo. 385, 395; 250 P.2d 188 (1952); Schechter v. United States, 295 U.S. 495, 520, 79 L. Ed. 1570, 1580 (1935); Field v. Clark, 143 U.S. 649; 36 L. Ed. 294 (1892).

The Court finds these cases distinguishable. In Sapero (Supra) the Board of Medical Examiners actually developed their own law to revoke a physician's license. In Prouty (Supra) State Board of Examiners for Engineers and Land Surveyors specifically broke down a classification of qualified engineers to specific branches of engineers, thus limited certain engineers of a propriety right. Comparing this with the instant statute the state engineer is merely told to enforce the laws of the State of Colorado according to his

duties as a state engineer, and under the laws as expressed by this and other sections of the Colorado statutes. The engineer does not assume a delegation of legislative powers but merely does what he would do under his normal duties and under laws as provided by the State of Colorado.

Defendant then states:

"Delegation by the legislature of the power to make rules and regulations, in the absence of adequate standards and procedural safeguards, violates the due process requirements of the Colorado and United States Constitutions."

Prouty v. Heron, supra

People v. Stanley, 90 Colo. 315, 318; 9 P.2d 288 (1932)

Colorado Anti-Discrimination Commission v. Case, 151 Colo. 235, 250; 380 P.2d 34

Olinger v. People, 140 Colo. 397, 400; 344 P.2d 689 (1959)

School District No. 39 of Washington Co. v. Decker, 159 Nebr. 693; 68 N.W. 2d 354.

Again, these cases are distinguishable from the situation at bar. In the Colorado Anti-Discrimination case, Supra, the commission was empowered to order "...such other actions as in the judgment of the commission will effectuate the purpose of this article." In Stanley, an inspector of cantelopes, was to "...certify such products as far as practical." The Court feels that the standards of the state engineer in the instant cases are set forth by established law, and the standards as set forth in People v. Hinderlider, 98 Colo. 505, 57 P.2d 894, concerning constitutionality, govern. Here the Supreme Court, citing other cases, not listed hereunder, stated as follows:

"(1) Where a statute is susceptible of an interpreta-

tion which conforms to the Constitution and another which violates it, the former will be adopted."

"(2) Where the language used is plain, its meaning clear, and no absurdity is involved, Constitution, Statute, or contract must be declared and enforced as written. There is nothing to interpret."

"(3) Sections 5 and 6 of article 16, Colorado Constitution, are self-executing."

"(5) In Colorado the doctrine of appropriation of water antedates the Constitution."

"(6) Water rights are property rights."

"(8) Junior appropriators may not infringe the rights of seniors."

"(9) Long usage can neither repeal constitutional provisions nor justify their infraction."

"(10) In cases of doubt long usage and practical construction by governmental departments should control."

The defendant next cites Memorial Trusts v. Berry, 144 Colo. 448, 356 P. 2d 884, for several issues of law involving a statute containing criminal terms. The legal question at bar was the necessity to give notice as to what conduct in itself is a crime. The Court does not feel that the criminal aspects of C.R.S. 148-11-22 are before the Court in this case as no crime is being alleged in the Complaint. Further, if the criminal aspect of the statute was invalid, the Court feels that the statute would be severable as later discussed.

The statute before us, namely 148-11-22, clearly defines what the state engineer must do, namely enforce the water laws of the State of Colorado. This only denies the defendant from appropriating water to which he is not entitled. The statute is in itself clear and distinguished from Memorial Trusts v. Berry, supra, which

involved a vague administrative ruling concerning investments of prepaid mortuaries.

Defendant next claims unconstitutionality of C.R.S. 148-11-22 on the basis that "It declares that a violation of the section shall be a criminal offense but unlawfully delegates the legislative power to define a crime to the state engineer or his duly authorized representatives."

The People resist this contention on the basis of Rinn v. Bedford, 102 Colo. 175, 84 P.2d 827, in which it is said "No person is entitled to assail the constitutionality of the statute except as he himself is adversely affected." In the instant case the People are not trying to enforce the criminal provision of C.R.S. 148-11-22 but merely to obtain injunctive relief. This Court feels that Rinn v. Bedford, supra, would govern in the instant case that the issue could not be raised.

The defendant argues that the statute in itself is inseparable and that the third paragraph of the criminal provisions controls the entire section of the particular act. They specifically contend that the following language in the second paragraph governs:

> "Such injunctive proceeding shall be in addition thereto, and not in lieu of, any other penalties and remedies provided by law."

The Court feels that even with the words "in addition to" the statute itself would be separable as to injunctive relief for a violation of this nature as compared to criminal prosecution.

In summary the Court feels that, to raise a constitutional issue, the individual must be directly affected, and even if this were not the case the statute would be separable as to injunctive

relief and criminal prosecution. Colorado Anti-Discrimination Commission v. Case, supra. Hence the criminal aspects of C.R.S. 148-11-22 are moot as to the instant case.

Defendant next contends that C.R.S. 148-11-22 is unconstitutional in that it permits the state engineer or his authorized representatives to restrict defendant in his use of public waters of the state without showing that such waters, if not diverted by defendant, would be used by a senior appropriator within the State of Colorado.

The defendant relies on Sections 5 and 6, Article XVI, of the Constitution together with Colorado Springs v. Bender, 148 Colo. 458, 366 P.2d 552. Again the Court finds that the state engineer or his authorized representative is merely delegated to administer the laws existent in the State of Colorado as to appropriations, and as to statutes which must be read in conjunction with the sections of the constitution as quoted. The functions of the state engineer concerning appropriation are no different in this section of the statute than other sections of the statute concerning rights between senior and junior appropriators. For these reasons the Court does not feel that the section of the statute is unconstitutional. See Stockman v. Leddy, 55 Colo. 24, 129 Pac. 220, at pages 27 and 28.

The defendant by oral argument raises the following questions:

1. Are the waters tributary to a surface water stream?

2. Should there be a hearing before the state engineer?

3. What are the standards for finding a surface stream?

4. How will there be a determination of injury to others?

5. Is this arbitrary on the part of the state engineer?

6. How can these waters be put to beneficial use, and how will this be determined?

All of these questions, like that formerly discussed, are within the duties of the state engineer as designated by statute, and if questions arise on any of the aforesaid points, these, of course, must be determined before a court of competent jurisdiction as a matter of fact finding as in other appropriation matters. The constitutionality is thusly not affected.

Next defendant states that "The Complaint fails to allege, and in Paragraph 6 acknowledges inadequate evidence to show, that defendant's well diversion does in fact cause material injury to the vested rights of other appropriators, and is thereby insufficient on its face for injunctive relief under Chapter 381, Session Laws 1965 (C.R.S. 148-11-22), if the same be constitutional."

The Court finds that defendant in this allegation is relying on a play of words as to what "material injury" means. The State and Intervenor relies in argument on Flank Oil Company v. Tennessee Gas Transmission Company, 141 Colo. 554, 349 P.2d 1005, to dispute the allegation of the defendant. In Flank (supra) the Colorado Supreme Court found that the term "less than cost" as applied to the cost of oil production was a term that could be determined by the Court. As in that case it is felt that though the specific meaning of "material injury" as to the degree of injury is difficult to construe, the Court should be able to determine if a material injury has occurred or will occur. It is not felt that the term "material

injury" is of such consequence so as not to grant an injunctive remedy if the Court finds the same necessary.

It is also to be noted that the State moved and was granted the right to modify its initial Complaint, and particularly Paragraph 6 thereof in compliance with wording as in the statute, namely C.R.S. 148-11-22.

The defendant next states that "The Complaint fails to allege that the State Engineer or his authorized representatives have adopted rules and regulations, promulgated in accordance with the Colorado Administrative Code, C.R.S. 1963, 3-16-2, to administer the surface and underground waters of the state in accordance with the rules of priority, as required by Chapter 318, Session Laws 1965 (C.R.S. 148-11-22) and that defendant failed to comply with an order of the state engineer or his duly authorized representative with respect to the distribution of water issued pursuant to said rules and regulations or by authority of statute."

The Court finds this contention without merit in that testimony definitely discloses that the state engineer did not feel any such rules and regulations nor orders concerning the same are necessary at the present time, it being understood that should such rules and regulations and orders be necessary, compliance would have had to have been made under C.R.S. 3-16-1-6, inclusive.

For the aforesaid reason the contention of the defendant is invalid.

Lastly, defendant argues that "The Complaint fails to allege that appropriators who are alleged to be threatened with injury from defendant's ground water diversions have efficient methods of diversion, meeting the standards described in Bender v. Colorado

Springs, 148 Colo. 458 (1961), and that said appropriators are unable to obtain the quantity and quality of their appropriations by use of efficient facilities for diversion of water from the stream and its underground tributaries."

This allegation attempts to raise the issue of vagueness of the statute, and questions as to how the State can show injuries to the senior appropriators.

The Court feels that the statute itself again merely directs the state engineer to apply the applicable laws of the State of Colorado, and in relation thereto includes certain underground water tributary to surface waters, this for the benefit of the public at large. The statute is specifically concerned with the surface channels of continuously flowing surface streams. This law in itself is not of such a vague quality as to render the same unconstitutional. The state engineer must merely distribute surface and ground waters according to the doctrine of prior appropriation as established by judicial decrees and other sections of Chapter 148, C.R.S.

The defendant relies primarily on Colorado Springs v. Bender, supra, a contest between unadjudicated ground water appropriators. Such questions as (1) the reasonable means of effectuating a diversion; (2) whether appropriations are being made for direct and immediate application to a beneficial use; and (3) whether shutting down of juniors would benefit the entire water supply, if applicable, are issues of fact for the trail court to determine. It is not necessary then in the opinion of the Court for the Complaint to allege what would necessarily need to be proven at the time of trial.

The motion to dismiss is denied.

* * * * * * * * * *

FINDINGS OF FACT

The facts in the instant case involve a violation of C.R.S. 148-11-22. Roger Fellhauer has pumped water from a well located about 400 feet from the Arkansas River for a considerable period of time (either since 1935 or 1940). The state engineer, under provisions of C.R.S. 148-11-22, ordered Fellhauer to stop pumping from his well as senior adjudicated rights were being jeopardized. Fellhauer failed to comply with the state engineer's order. The State then brought this proceeding for a preliminary injunction under the statute, joined by the Intervenors, mainly ditch companies.

Evidence presented to the Court by the State and the Intervenors, and subject to cross examination of the Defendant, clearly indicate the following facts:

1) Defendant admits, under adverse examination, ownership of the land, the well, and the continuous usage of the same.

2) Well pumping continually since March, 1966, at the rate of 500 gallons per minute to produce four cuttings of hay per year.

3) Receipt of notification to cease pumping (Intervenor's Exhibit "C") and refusal to comply with the same on the basis (under cross examination) that Defendant"... didn't think law was any good."

4) Other unadjudicated well owners also notified and most complied with orders of state engineer.

5) On cut-off date, adjudicated rights dating to 1885 and before were unable to get allocated water (i.e., Fort Lyons Canal on cut-off date, June 24, 1966, entitled to 706 cubic feet, and only able to receive 200 cubic feet per second).

6) Great amounts of storage of reservoir water had to be used at this time.

7) All waters of the Arkansas River adjudicated, and none were able to receive their appropriated shares.

8) The water itself was of equal value to farmers, no matter where used.

9) Lack of water to any farmer would cause material injury.

10) The Fellhauer well was within the subsurface channel of the Arkansas River.

11) This water is the same as that in the river though the flow towards the exterior of the channel is slower.

12) Defendant's well had formed a "Cone of depression" and this cone would have to refill even from waters of the surface river itself (See Intervenor's Exhibits D, E, F, G, H, and I).

13) Loss from the subsurface channel is a direct loss from the river itself (hydrologically connected).

14) There are many hundreds of users on the Arkansas River. The Fort Lyons Canal alone has 550 stockholders irrigating from 70 to 1000 acres. When there is not sufficient water, all suffer materially.

CONCLUSIONS OF LAW

Defendant relies on four basic premises for his objection to the issuance of a preliminary injunction in the instant case.

(1) "C.R.S. 148-11-2 does not authorize the issuance of a preliminary injunction but implicitly denies it as a statutory remedy."

The Court does not find this contention to be correct. Fellhauer, in his refusal to comply with the orders of the state engineer to cease and desist in pumping from his well, was in clear violation of the legislative authority of the State of Colorado. It must be borne in mind that others did comply with similar orders.

By its very nature C.R.S. 148-11-22 calls for immediate compliance to stop using waters under situations set forth in the statute, either on the theory of tort or misdemeanor. A preliminary injunction then would merely further the initial concept of C.R.S. 148-11-22. In addition thereto in the instant case the public interest factor must be considered. See 7 Moore Federal Practice, Section 65.04 (7).

(2) "A preliminary injunction should not issue in the present case because an 'adequate hearing' cannot be held on the basis of plaintiff's pleadings."

The Court feels again that his contention is not correct and the law clearly indicates "notice" and an "adequate hearing" was held. The hearing on this preliminary motion lasted almost three full days, and defendant had the opportunity to cross examine plaintiff's witnesses, distinguishing Sims v. Green, 161 F.2d 87, and further had the opportunity to present a defense if they so chose. Hence the Court feels that "notice" as provided in C.R.C.P. 65 (a) was complied with.

(3) "A preliminary injunction should not be employed to effect a change in existing water uses before rights of the parties have been finally adjudicated."

When Fellhauer failed to comply with the orders of the state engineer, he committed a wrongful act. The Court must consider this in balancing the equities. Unlike Warner Bros. Pictures, Inc. v. Gittone, 110 F.2d 292,293 (3rd Cir. 1940), the status quo change culminated in this action, while in Warner Bros., supra, the situation had been one of long standing.

Though the State of Colorado has expressed disfavor of the use of the preliminary injunction prior to the adjudication in C.R.S. 148-9-17 (1) (2), the legislative intent completely differs in C.R.S. 148-11-22 as previously discussed.

Defendant contends "a preliminary injunction should not be granted when it would give the plaintiff all the relief it could obtain on a final adjudication." The instant facts do not substantiate this. Water used by the defendant is lost to the plaintiff and intervenor. This lost water will not be regained. The plaintiff and intervenor are entitled to relief innediately.

Though the rights of the defendant cannot be fully protected by bond, the wilfull flaunting of the statute must be considered together with the loss suffered by plaintiff and intervenor, and the equities balanced. The injunctive relief sought is not within the ruling set forth in Woitcheck v. Isenberg, 151 Colo. 544, 548 (1963).

Lastly, "A preliminary injunction should be denied since it would necessitate duplicitous trial of the identical facts which must be tried at the final hearing."

The Court feels that it was mandatory on the plaintiff and intervenor to establish a prima facie case in order to determine whether a preliminary injunction should issue. This was done. Despite the fact that there would be duplicitous evidence on a secondary hearing, this is minor in light of public interest and the great many people affected by C.R.S. 148-11-22.

Items covered in Defendant's Supplemental Memorandum of Law on Issuance of Preliminary Injunction relate to findings of fact which have already been discussed hereunder. The Court finds no

merit in the theories or citations thereunder applicable to the instant case.

The Court finds that the issuance of a preliminary injunction is discretionary with the trial court, and that the instant case a preliminary injunction should issue to enjoin the defendant, Roger Fellhauer, from pumping water from his well as described in the pleadings until further order of this Court or until such time as the state engineer shall find that water is available to the defendant without injury to the other appropriators.

APPENDIX B

November 16, 1966

TO: LEGISLATIVE COUNCIL WATER COMMITTEE

Gentlemen:

I wish to make a brief statement as to the activities and progress of the Colorado Ground Water Commission in the eighteen (18) months since the passage and approval of the Colorado Ground Water Law, originally known as Senate Bill 367, and now a part of the Colorado Revised Statutes of Chapter 148-18. You will remember that this law was advanced to assist the water users in certain areas of the state to commence to control their valuable resource and to put this control in the hands of local interests. Opposition to this was made by other groups who felt that ultimate control should be autocratic and vested in a state official. As a consequence, the ensuing law had to be a compromise, and as such was, from the point of administration, a rather difficult objective.

At this point, I would like to pay tribute to the cooperative help and activities of all branches of the Natural Resources Department, and most particularly, the Water Resources Division. Granted, there have been differences of opinions, but through conferences and cooperation these differences have been settled, generally, to the satisfaction of all concerned. No litigation has been initiated concerning this portion of the water law or the Ground Water Commission.

Because of the compromise features included in the statute, many requirements for the initiation of designated ground water basins and the formation of ground water management districts were included which, perhaps wisely, precluded a precipitous action and has required time consuming, and to a certain extent, expensive procedures. I might say at this point that the commission has studiously tried to follow each and every step laid out for it by the legislature.

The Colorado Water Conservation Board, under its director, Mr. Sparks, started the ball rolling by initiating a study of an area south of Wiggins in the Kiowa-Bijou Creek Valley. This study, in depth, by the Colorado State University formed the basis for the formation and establishment of the Kiowa-Bijou Designated Ground Water Basin. The initial portion of the hearing, as required by statute, was held in Fort Morgan, Colorado on November 4, 1965. The report was attacked by several interests and because of lengthy testimony and the need for examination, the hearing was recessed and reconvened on December 2, 1965. Two volumes of testimony was taken by the court reporter, covering over 700 pages to be digested and considered by the commission. On February 11, 1966, after thorough discussion and consideration,

the Ground Water Commission established the Kiowa-Bijou Designated Ground Water Basin. The statute provides that if a finding of the commission is not appealed within 30 days after the action of the commission, it shall be deemed final and conclusive. (148-18-14 (2)). No appeal upon the finding of the commission was made and it now stands as the pilot area of such designation.

Another area for which the law was designed presented its case at a hearing on April 14-15, 1966, and at a meeting of the commission of May 13, 1966, the High Plains Designated Ground Water Basin was established. The study of this area was financed by the Colorado Water Conservation Board. The consultants were Woodward-Clyde-Sherard & Associates. Only one objector appeared at the hearing and, when assured that the surface water rights would be assiduously protected, offered no further objections.

Because of the pressure of summer work, little activity was taken in the formation of ground water management districts, as this is to be undertaken by local interests. Several hearings by the commission and its designated hearing officer were held on objections to specific wells by other owners who felt that their prior vested rights might be endangered. However, petitions were received by the Ground Water Commission for the formation of the ground water management district in an area north of Wray, Colorado, lying wholly within Yuma County to be known as the Sand Hills Ground Water Management District. A hearing on these petitions was held in Wray, Colorado on September 9, 1966, and a report made to the commission on October 6-7, 1966. At this Ground Water Commission meeting, the report of the hearing officer was approved and an election was ordered to be held on November 22, 1966, to determine if the Sand Hills Ground Water Management District should be organized. If the election is favorable, the commission will issue the official order immediately.

At the commission meeting on October 6-7, 1966, petitions were received from an area around Burlington in Kit Carson County for the formation of the Plains Ground Water Management District. A hearing on these petitions will be held in Burlington on November 21, 1966 before the hearing officer, whose recommendation will be made to the Ground Water Commission at its next meeting, December 9, 1966. The commission has been informally notified that petitions from the Kiowa-Bijou Basin for the formation of a management district there will be presented to the commission on December 9, 1966. A hearing date will be set on these petitions as provided for by the statute.

This constitutes the tangible activities of the commission in these 18 months. However, it should be pointed out that in addition to the above, requests have been received from four other areas for the formation of ground water basins, and other requests for the formation of ground water management districts. These are shown on the accompanying map (Appendix E). Also included as active projects of the commission are the studies of the lower tip of the High Plains Designated Ground Water Basin; the southern

part of the High Plains area consisting of a portion of Baca, Prowers and Las Animas Counties, and the Black Squirrel area east of Colorado Springs. The study of portions of the northern High Plains area has been reviewed and is being revised. The study in the Black Squirrel is being done by two members of the joint staff of the Ground Water Section of the State Engineer's Office and the Ground Water Commission. The southern High Plains area is under contract to R. W. Beck & Associates and will be finished in February, 1967. These three studies have been financed through the cooperative efforts of the Ground Water Commission and the State Engineer, the Ground Water Commission having very little funds with which to make the necessary studied.

The U.S.G.S. has contributed a great deal of data to the studies and are invaluable as a fact finding organization, studying in depth as they do of all phases of the ground water picture. Their studies, however, are of such a nature, time wise, that to activate any area is impracticable if the commission depended solely upon this agency. Other data are available also in the Ground Water Division of the State Engineer's Office; from C. S. U. and its well-measuring program; U. S. Bureau of Reclamation; the Department of Agriculture, and other state and federal agencies for their data. Through the correlation of these data, our staff and those of consulting firms are able to make reasonable estimates of the requirements of the area under studies as are required under the terms of the statute in 148-18-5 which are prerequisite to the designation of the ground water basin.

Other areas have requested studies and requested designation as ground water basins. On some of these, money has not been available to instigate the studies. In other areas, data are not available that may be readily assembled as a basis for the estimation required. For these reasons, these areas are still prospective in nature.

The State Engineer at the end of the last fiscal year was able to accelerate, slightly, the study in the San Luis Valley, which study is actively underway under mutual cooperative effort of the U.S.G.S. and C.W.C.B. This study is estimated to take a minimum of five years. Interests in the San Luis Valley have indicated that this is too long a time to allow them to do much good in a ground water management field. However, it being so complex and such a large area, what shorter period for estimation only is hard to guess.

If monies were available, data could be assembled and studies instituted on the Prospect Valley area and the upper Big Sandy Creek. The Prospect Valley studies are recommended first because of the information available on it. The Big Sandy should be considered next as it is a smaller area, and probably could be studied similarly to the Black Squirrel study. Attention should also be drawn to development in the Crow Creek, Boxelder Creek (south of the Platte River) and the Badger-Beaver Creeks area. These are potential areas that ground water management districts

might be formed. It is further believed that as future ground water development takes place, both on the east and west slopes of the state, additional areas will be found in which local governmental control should be realized.

I do not wish to conclude without further consideration of additional implementation of the ground water studies and publicly acknowledging the great sense of public service and considerable personal expenditure of time and money by the members of the Ground Water Commission. A more dedicated group of men would be hard to find, and their attention to the needs of their position some times far exceeds ordinary call to duty.

George W. Colburn
Ground Water Division
State Engineer's Office

APPENDIX C

COLORADO GROUND WATER COMMISSION

MEETINGS & HEARINGS

November 4, 1965 -	Hearing on Kiowa-Bijou Designated Ground Water Basin at Fort Morgan - REA - 10 A.M.
November 5, 1965 -	Commission Meeting - same place
December 2, 1965 -	Continuation of November 4 Hearing on Kiowa-Bijou Designated Ground Water Basin at Fort Morgan - REA - 10 A.M.
February 4, 1966 -	Area Advisory Committee Meeting with Commission members Wray, Colorado
February 11, 1966 -	Ground Water Commission Meeting - Denver - 10 A.M. Kiowa-Bijou Designated Ground Water Basin was established.
April 14-15, 1966 -	Hearing on High Plains Designated Ground Water Basin at Wray - City Auditorium - 10 A.M.
May 13, 1966 -	Ground Water Commission Meeting - Wray - City Auditorium - 9 A.M. High Plains Designated Ground Water Basin was established.
June 3, 1966 -	Ground Water Commission Meeting - Monte Vista - Movie Manor Motel - 10 A.M.
June 19, 1966 -	Hearing on applications - Wiggins - Community Hall - Applications rejected.
July 8, 1966 -	Ground Water Commission Meeting - Denver
July 25, 1966 -	Hearing on applications - Akron - Norka Hotel - 9 A.M.
August 17, 1966 -	Hearing on applications - Strasburg - American Legion Hall - (Kiowa-Bijou)
September 2, 1966 -	Hearing on applications - Strasburg - same

September 9, 1966 -	Hearing on Sand Hills Management District - Wray - 10 A.M.
September 29, 1966 -	Hearing on applications - Burlington - Basement Court House - 9 A.M. (High Plains)
October 6-7, 1966 -	Ground Water Commission Meeting - Denver - 9 A.M. (All hearings and protests). Sand Hills Management District Approved - Election of Officers 11-22-66

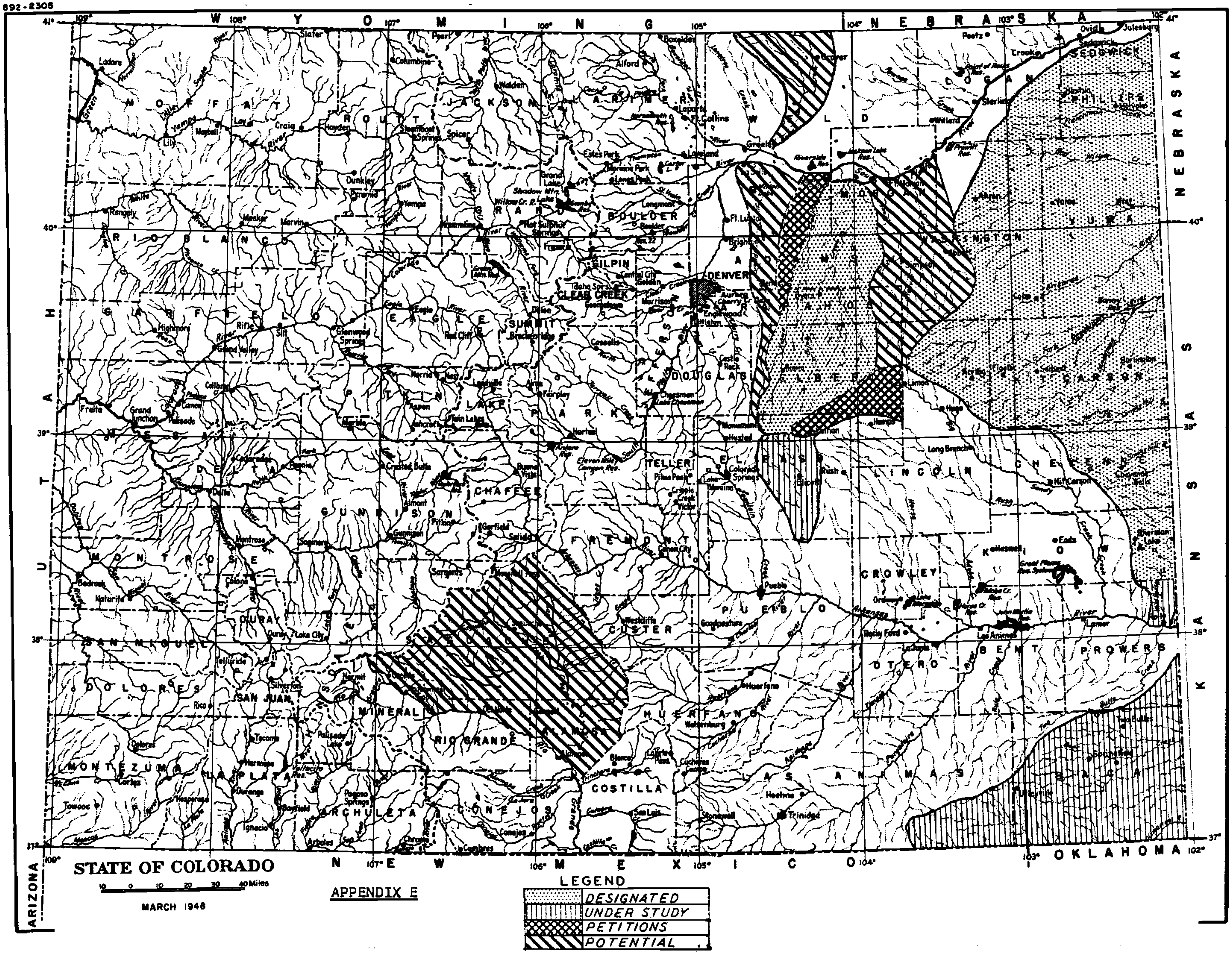
APPENDIX D

FEE WELL PERMITS ISSUED IN COLORADO FROM MAY 17, 1965 THROUGH OCTOBER 31, 1966

	County	Commercial (4)			Industrial (5)			Irrigation (6)			Irr. & Stock (7)			Municipal (8)			TOTALS		
		Issued	Denied	Per Cent Denied	Issued	Denied	Per Cent Denied	Issued	Denied	Per Cent Denied	Issued	Denied	Per Cent Denied	Issued	Denied	Per Cent Denied	Issued	Denied	Per Cent Denied
1.	Adams	14			3			47	16	25	2	1	33.3	11	3	21.4	77	20	20.6
2.	Alamosa	1						51	4	7				1			53	4	7
3.	Arapahoe	4			4			12	3	20				4			24	3	11.1
4.	Archuleta	1															1		
5.	Baca				2			200	11	5	1			2			205	11	5
6.	Bent							12	4	25							12	4	25
7.	Boulder	13			1			1	1	50				8			23	1	4.1
8.	Chaffee	7	1	12.5													7	1	12.5
9.	Cheyenne							9									9		
10.	Clear Creek	2															2		
11.	Conejos	1			1			15	1	6							17	1	5.5
12.	Costilla							7									7		
13.	Crowley							4									4		
14.	Custer							1									1		
15.	Delta				1			1									2		
16.	Denver				1			1									2		
17.	Dolores																		
18.	Douglas	2			3			5	1	16.6							10	1	9.0
19.	Eagle	5												2			7		
20.	Elbert	1						12	1	8							13	1	7.1
21.	El Paso	12			1			30	1	3				15			58	1	1.6
22.	Fremont	1			1			1						1			4		
23.	Garfield	5			2			4						1			12		
24.	Gilpin	1															1		
25.	Grand	8												1			9		
26.	Gunnison	3												1			4		
27.	Hinsdale	3															3		
28.	Huerfano							3									3		
29.	Jackson																		
30.	Jefferson	6			1			1						3			11		
31.	Kiowa							13	1	7							13	1	7.1
32.	Kit Carson	1						128	17	12.7	1			1			131	17	11.4
33.	Lake	2						1						1			4		
34.	La Plata	3															3		
35.	Larimer	14			2			5	4	44.4				1			22	4	15.3
36.	Las Animas							2			1			2			5		
37.	Lincoln							5	1	16.6	1			2			8	1	11.1
38.	Logan	4			4			34	20	37				1	1	50	43	21	32.8
39.	Mesa							1									1		
40.	Mineral																		

	County	Commercial (4)			Industrial (5)			Irrigation (6)			Irr. & Stock (7)			Municipal (8)			TOTALS		
		Issued	Denied	Per Cent Denied	Issued	Denied	Per Cent Denied	Issued	Denied	Per Cent Denied	Issued	Denied	Per Cent Denied	Issued	Denied	Per Cent Denied	Issued	Denied	Per Cent Denied
41.	Moffat				1			5									6		
42.	Montezuma													5			5		
43.	Montrose	2						3						6			11		
44.	Morgan	5			1			38	39	50.6				2			46	39	45.8
45.	Otero	4						4	3	42.8				1			9	3	25
46.	Ouray																		
47.	Park	1															1		
48.	Phillips							18	1	5.2							18	1	5.2
49.	Pitkin	4												2			6		
50.	Prowers				1			56	8	12.5	1			6			64	8	11.1
51.	Pueblo	2			2			13	9	40.9	1			11	4	26.6	29	13	30.9
52.	Rio Blanco	1			1			3									5		
53.	Rio Grande	6						16	6	27.2							22	6	21.4
54.	Routt							1									1		
55.	Saguache	1						38	5	11.6	4			1			44	5	10.2
56.	San Juan																		
57.	San Miguel																		
58.	Sedgwick							5	5	50				1			6	5	45.4
59.	Summit	10						1									11		
60.	Teller	9						1						3			13		
61.	Washington	1			1			15	4	21		1	100	1			18	5	21.7
62.	Weld	7	3	30	10			68	40	37				11	1	8.3	96	44	31.4
63.	Yuma	—	—	—	—	—	—	135	4	2.8	—	—	—	2	—	—	137	4	2.8
	TOTAL	167	4	2.3	44	0		1026	210	16.9	12	2	14.2	110	9	7.5	1359	225	14.2

APPENDIX E



STATE OF COLORADO

MARCH 1948