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Legal History of Ground Water Regulation

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Decision Support System is using MODFLOW along with additional geohydrological data to improve regional knowledge of groundwater impacts on surface water.

Matt Freemann

LEGAL HISTORY OF GROUND WATER REGULATION

Veronica A. Sperling, Esq. of Buchanan and Sperling, P.C. gave a presentation on the Legal History of Ground Water Regulation in Colorado. Although her presentation covered all ground water regulation, Veronica primarily focused on the type of wells that generated most of the legal history- high capacity irrigation wells that pump tributary ground water.

Most high capacity irrigation wells were drilled between 1930 and 1970, when there were few ground water regulations. The irrigation wells pumped large quantities of tributary ground water that would have otherwise ended up in a stream, thus affecting the amount of surface water available to surface water right holders. Conflict between surface water users and groundwater users began as early as the 1950's. Ground water regulation's most pressing legal issue was how to belatedly integrate ground water users with the surface water prior appropriation system.

The first instances of a legislative attempt to reconcile ground water and surface water uses were the 1953 Act and the 1957 Act. The 1953 Act required well drillers to obtain a license, give notice before drilling, and submit well logs after drilling. The 1957 Act repealed the 1953 Act and required the State Engineer to issue permits to drill water wells. The 1957 Act expressly stated that the well permit did not confer a water right, and the legislature obligated the State Engineer to issue all permits, provided all the fees were paid.

Ground water regulation's next evolution came in 1965 with House Bill 1066 and the Colorado Ground Water Management Act. HB 1066 defined the State Engineer's duty to administer tributary ground water within the surface water prior appropriation system. The Ground Water Management Act allowed the State Engineer to deny a ground water well permit for the first time.

The 1965 Act was challenged in *Fellhaur v. People*. The State Engineer tried to curtail ground water use in the Lower Arkansas Valley. The Colorado Supreme Court ruled that the State Engineer violated the Colorado Constitution's due process and equal protection clauses. Furthermore, any ground water curtailment must be supported by reasonable written rules and regulations, reasonably lessen a material injury to a senior surface water rights, and allow wells to operate as long as senior water users were protected. The court also opined the need for "maximum utilization" of Colorado's water resources. Maximum utilization is now integrated into statute and called "optimum utilization." Optimum utilization does not advocate using every available drop of water, as maximum utilization did.

In 1967, partially in response to *Fellhaur v. People*, Colorado passed Senate Bill 407. SB407, among other things, called for ground water studies. The 407 studies concluded that pumping ground water had infringed senior surface water rights. These results, coupled with increasingly depleted surface

flows, compelled the state to administratively integrate ground and surface water uses in the 1969 Act. The 1969 Act encouraged ground water users to adjudicate their water rights through water courts and integrated ground water wells into the surface water priority system by using augmentation plans.

Colorado's Water Division One, the South Platte River basin, stayed closest to the 1969 Act by using augmentation plans to regulate ground water. The State Engineer promulgated rules governing ground water use for the South Platte in 1974, which resulted in the State Engineer approving Central GMS and GASP annual operating plans as temporary substitute supply plans even though the State Engineer's approval was not authorized by statute. The State Engineer's power to approve the temporary substitute supply plans was successfully challenged first in 2002 by *Empire Lodge Homeowners' Association v. Moyer* and in 2003 by *Simpson v. Bijou.*

The same day the *Simpson* decision was handed down, the Colorado Governor signed Senate Bill 03-73 into law. SB 03-73 named December 31, 2005 as the date to curtail pumping in all ground water wells in District One unless the well had a water court approved augmentation plan, a pending application for an augmentation plan, or a well could operate under its own priority without need for an augmentation plan. Division One has approximately three thousand wells with approved augmentation plans with hundreds more augmentation plans pending approval.

In 1973 the State Engineer also promulgated rules for Water Division Two, the Arkansas River basin, which allowed the State Engineer to curtail ground water pumping up to four days per week to prevent injury to senior surface water rights. In 1974 the State Engineer tried to promulgate rules that would further curtail ground water wells, but the Supreme Court in *Kuiper v. Atchison, Topeka & Santa Fe Railway Co.* that there was insufficient operating experience under the 1973 rules to justify decreased ground water pumping.

In 1985 Kansas claimed that Colorado violated the 1949 Arkansas River Compact because ground water wells drilled after the Compact were depleting the usable flows at the state line. Kansas sued Colorado. In 1994 the United States Supreme Court held that ground water pumping in Colorado had violated the Compact. In 1996 new well pumping rules were promulgated, replacing the 1973 rules. The 1996 rules imposed an augmentation requirement for all wells in the Arkansas River basin.

Veronica stated that ground water regulation in Water Division Three, the Rio Grande River basin, lagged behind Water Divisions One and Two. In 1966 Texas and New Mexico sued Colorado for violations of the 1938 Rio Grande River Compact. Colorado agreed to meet the conditions of the 1938 Compact and the State Engineer began to substantially curtail surface water uses. In 1975 the State Engineer proposed new rules that would limit ground water pumping over a five year period unless a well had a court approved augmentation plan. The rules were protested and after a lengthy appeal process the District Three water users adopted the "60/40 Agreement" in 1985. The 60/40 Agreement provided protection only for 1985 use levels and only for then-existing wells. In 1998 Colorado addressed post-1985 ground water uses by passing HB 98-1011, which contained criteria to guide the State Engineer in promulgating new ground water use rules. The new rules went into

effect in 2006. Additionally, Colorado passed Senate Bill 04-222, which prohibited the State Engineer from curtailing ground water withdrawals in Division Three wells that are part of a ground water management sub-district. The Colorado Supreme Court characterized SB 04-222 as an alternative to court approved augmentation plans. So far the water court has only approved one sub-district, Special Improvement District One, although five other sub-districts are planned for Water Division Three. Currently, approximately three thousand wells located outside Sub-district One are depleting stream flows in Division Three. The depletions are not being replaced and the State Engineer is not curtailing the wells.

Gabriel Kester

THIRD ANNUAL CARVER COLLOQUIUM

Denver, Colorado November 12, 2013

THE COLORADO RIVER COMPACT: EFFECTIVE OR OBSOLETE?

Lawyers, students, scientists, and the general public gathered to watch the 3rd annual Carvel Colloquium, an Oxford-style debate about the future of the Colorado River Compact ("Compact"). The event followed two years of stellar debates on timely topics– namely the push to build transmission lines for renewable energy sources and the question of who has primacy when it comes to regulating hydraulic fracturing of oil and gas wells. Professor Jan Laitos, holder of the John A. Carver Jr. Chair, hosted the debate and served as a moderator. Speaker-debaters included CEO and Manager of Denver Water, Jim Lochhead, and Assistant Provost of IE Research and Curriculum Initiatives for the University of Denver Sturm College of Law, Tom I. Romero.

Mr. Lochhead is recognized as one of the nation's foremost water rights and natural resources attorneys. He is the former executive director of the Colorado Department of Natural Resources and past shareholder at Brownstein Hyatt Farber Schreck, where he worked on issues relating to water rights, interstate water matters, the Endangered Species Act, public lands and natural resources, zoning, land use, and real estate development. Professor Romero teaches and researches in the areas of the legal history of the American West, land use, water law, urban development, and local government, and has published extensively on these topics in prestigious law reviews.

Introducing the issue to the crowd, Professor Laitos discussed the value of Colorado River water in the past, today, and moving into the future. The river is an incredibly important source for water needs in Colorado and beyond. As the lifeblood of the West, especially the Southwest, the Colorado River serves seven states and two countries. Past intelligent management of the river allowed for economic growth in the arid west.

The Compact, signed in 1922 at the Bishops Lodge in Santa Fe, brought all seven Colorado River Basin states into agreement as to the allotment of Colorado River water. It has served as the foundation for the "law of the river" ever since, but has many noted shortcomings. It famously overestimated the amount of water available from the Colorado River and failed to anticipate