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Recent Developments Concerning State Engineer Rulemaking Authority for the South Platte River Basin

RECENT DEVELOPMENTS CONCERNING STATE ENGINEER RULEMAKING AUTHORITY FOR THE SOUTH PLATTE RIVER BASIN

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I. OVERVIEW AND HISTORY

For more than thirty years, there have been approximately 4000 high capacity wells drilled before 1972, operated in the South Platte River Basin under substitute water supply plans (“SWSP”) and authorized annually by the State Engineer. In December, 2001, the Supreme Court decision in *Empire Lodge Homeowner’s Association v. Moyer*¹ made it clear that the State Engineer did not have legal authority to approve SWSPs under the statute, Colorado Revised Statute section 37-80-120, that had historically been relied upon. Therefore, changes from the historic practice were necessary.

During the 2002 session, the General Assembly responded by enacting House Bill 02-1414.² This statute granted the State Engineer specific authority to review and approve SWSPs under four circumstances: (1) all previously approved SWSPs could be re-approved for 2002 only;³ (2) augmentation plans filed with the Water Court could be approved as SWSPs while Court adjudication was

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1. 39 P.2d 1139 (Colo. 2001)

2. H.B. 1414, 63rd Gen. Assem., 2nd Reg. Sess. (Colo. 2002) (codified at COLO. REV. STAT. § 37-92-308 (2002)).

3. *Id.* § 37-92-308(3).

pending;⁴ (3) short duration water uses (not exceeding five years) could be approved as SWSPs without Water Court adjudication;⁵ and (4) a water supply plan necessitated by a public health and safety emergency could be approved as an SWSP without Water Court adjudication for a period not to exceed ninety days.⁶ House Bill 02-1414 acknowledged the pre-existing rulemaking authority of the State Engineer under section 37-92-501 of the Colorado Revised Statutes, but it did not address the question of whether that rulemaking authority was broad enough to include annual approval of out-of-priority depletions without Water Court adjudication.

The key remaining question was whether the operation of the pre-1972 wells had to be adjudicated by the Water Court under augmentation plans, or whether operation of these wells could continue under annual plans approved by the State Engineer, without Water Court adjudication. The owners of many surface water rights believed that Water Court adjudication was required. The State Engineer and Ground Water Appropriators of the South Platte River Basin, Inc. ("GASP") did not, and responded to the *Empire Lodge* decision by proposing amended rules and regulations pursuant to section 37-92-501 of the Colorado Revised Statutes, under which annual State Engineer approval would have continued without Water Court adjudication.⁷

II. THE PROPOSED RULES

During March and April 2002, the State Engineer's Office and the owners of surface water rights in the South Platte Basin held a series of meetings to see if compromise rules could be agreed upon. Surface water users requested more detailed information concerning plans for the operation of these wells to be disclosed through public notice of each plan, broad public participation in the plan review and approval process, and a requirement that all plans must go to Water Court for adjudication within a defined period of time. The State Engineer showed limited willingness to accommodate the concerns of the surface water users, mostly sided with GASP, and refused to require these plans to go to Water Court.

4. *Id.* § 37-92-308(4).

5. *Id.* § 37-92-308(5).

6. *Id.* § 37-92-308(7).

7. The State Engineer had previously promulgated a set of amended rules and regulations for the Arkansas River Basin which provide for such annual approval of replacement plans. *See* Amended Rules and Regulations Governing the Diversion and Use of Tributary Ground Water in the Arkansas River Basin, Colorado (June 1996). Those rules were supported by most of the water users in the Arkansas Basin and the Water Court approved of such rules in a detailed decision entered in Case No. 95CW211, Water Division No. 2. Because of the broad-based support for the Arkansas Basin rules, the question of the State Engineer's authority to approve annual replacement plans was not actually litigated in that case.

On May 31, 2002, the State Engineer filed the proposed rules with the Water Court.⁸ The proposed rules would have created a process for the State Engineer to annually review and approve “replacement plans,” that would have authorized continuing out-of-priority depletions by pre-1972 wells.

III. THE WATER COURT LITIGATION⁹

More than thirty water user individuals and entities opposed the proposed rules. Only a handful supported them. The parties agreed that there were threshold legal issues that could be briefed and decided as questions of law, and that this should be done before any trial was held. Accordingly, several motions were filed challenging the State Engineer’s authority to adopt the proposed rules, and arguing that they could not take effect until after a full trial on the merits had been completed (the State Engineer wanted the rules to become automatically effective December 31, 2002, regardless of the status of Water Court review). These issues were briefed in the fall of 2002.

In separate rulings, the Water Judge held that the rules could not take effect until after review by the Water Court had been completed, and that the rules must be dismissed in their entirety because the State Engineer lacked statutory authority to review and approve annual replacement plans outside the statutory framework of express authorization granted by section 37-92-308 of the Colorado Revised Statutes.

IV. THE SUPREME COURT APPEAL

The final dismissal by the Water Judge was signed on December 30, 2002.¹⁰ The State Engineer filed his appeal the next day, and requested expedited review by the Supreme Court. The court granted the request; the involved parties fully briefed the case in approximately five weeks; and the court held oral argument on February 19, 2003.

There were three issues presented for the Colorado Supreme Court to decide. First, did the State Engineer have authority for the proposed rules under section 37-92-501 of the Colorado Revised Statutes (the water rule power)? Second, did the State Engineer have authority for the proposed rules under section 37-80-104 of the Colorado Revised Statutes (the compact rule power)? Third, could the proposed rules take effect before the Water Court had conducted a full review?¹¹

8. See generally OFFICE OF STATE ENG’R, AMENDED RULES AND REGULATIONS GOVERNING THE DIVERSION AND USE OF TRIBUTARY GROUND WATER IN THE SOUTH PLATTE RIVER BASIN, COLORADO: ORDER OF THE STATE ENGINEER (2002).

9. When filed with the Water Court as required by Colorado Revised Statute section 37-92-501, the proposed rules were assigned Case No. 2002CW108. Copies of pleadings filed and orders of the Court in that case can be obtained from the Water Court for Water Division No. 1 in Greeley. *Bijou Irrigation Co. v. Simpson*, No. 02CW108, slip op. (Colo. Dist. Ct. Water Div. 1, Dec. 23, 2002).

10. *Simpson v. Bijou Irrigation Co.*, 69 P.3d 50, 57 (Colo. 2003).

11. *Id.* at 55.

The parties expected a rapid decision, however, the court did not issue its decision until April 30, 2003. The Supreme Court reversed the Water Judge's ruling on one issue (number 2, above),¹² but affirmed the ruling on the other two (numbers 1 & 3, above).¹³ In so doing, the decision effectively nullified the proposed rules and regulations.

The court devoted the majority of the decision to analysis of the scope of State Engineer authority under the water rule power. After detailed analysis of existing statutes and legislative history, the court concluded that the replacement plans contemplated by the proposed rules were the functional equivalent of augmentation plans, that the State Engineer did not have legal authority to review and approve such plans except for the authority expressly granted to him by the General Assembly in section 37-92-308 of the Colorado Revised Statutes (and a couple of other statutes not relevant here), and that review and approval of augmentation plans is within the exclusive jurisdiction of the Water Court.¹⁴ After reaching these conclusions, the court held that the State Engineer does have authority to enact rules and regulations to enforce the South Platte River Compact under the compact rule power, but that such rules must also fall within the scope of the water rule power.¹⁵ This holding leaves the door open for a different set of rules in the future, if needed to enforce the South Platte Compact, but effectively nullified this set of proposed rules. Last, although the court found the issue to be moot for the purposes of this case, it held for future rulemaking cases that proposed rules cannot take effect until after Water Court review has been completed.¹⁶

Interestingly, the actual impact of this decision in the South Platte River Basin may not be great, because of the provisions of new legislation adopted as Senate Bill 03-73, discussed below. Similarly, there is virtually no impact in the Arkansas River Basin because of the existing rules and the express statutory authorization for them also contained in Senate Bill 03-73. The decision will govern the State's five other river basins, and will mean that the State Engineer cannot adopt rules and regulations using annual replacement plans in those basins, absent express statutory authorization in the future.

V. THE LEGISLATIVE COMPROMISE

In January, 2003, the legislative session opened shortly after the Water Judge had dismissed the proposed rules. Senator Dave Owen and Representative Diane Hoppe, whose districts encompass a good portion of the South Platte River Basin where these pre-1972 wells are located, were interested in a legislative solution to the well regulation

12. *Id.* (holding that the South Platte River Compact is not self-executing and administrable pursuant to its own terms.)

13. *Id.* at 55-56.

14. *Id.* at 63-67.

15. *Bijou Irrigation Co.*, 69 P.3d at 71.

16. *Id.* at 73.

problem. They co-sponsored Senate Bill 03-73.¹⁷ As introduced, the bill would have granted express authority to the State Engineer to approve replacement plans under the water rule power in section 37-92-501 of the Colorado Revised Statutes. Many surface water users viewed this bill as an attempt to continue the status quo, and thus were adamantly opposed from the beginning.

In response to this opposition, legislators undertook efforts to develop a compromise. Attorney General Ken Salazar, Representative Hoppe, and Senator Owen appointed a special committee of water users to see if a compromise could be reached. That committee met in Greeley during the second half of January, and developed a replacement draft for Senate Bill 73. They patterned the basic structure of the bill after the SWSP process already contained in section 37-92-308 of the Colorado Revised Statutes. It also would have required all plans involving pre-1972 wells to be filed in Water Court by the end of 2005. Because this committee was only allowed two weeks to work on the bill, it did not solve all problems, but gained support from fifteen out of the eighteen committee members. The committee took the revised bill to the legislators, and it passed the Senate Agriculture Committee on February 13, by a 4-3 vote. The Senate Appropriations Committee also approved the bill, but then the bill stalled on the Senate floor.

A sub-committee of the Colorado Water Congress undertook another negotiating effort. The sub-committee worked with the same basic structure that had passed the Senate committees, but it added numerous additional amendments. After nine meetings between February 17 and April 9, a compromise was reached. In the second half of April, Senate Bill 73 sped through the Senate, the House, and Governor Owens signed it into law on April 30.

Senate Bill 03-73 provides authority for the State Engineer to approve substitute water supply plans for these pre-existing wells for 2003-2005, under the interim standards and procedures set forth in it. Long and detailed negotiations took place between the interested parties to strike the balance in this compromise. The two sides focused on providing some operational flexibility for these wells during the next three years, while providing enough process and defined standards for the SWSPs to ensure that senior surface water rights are protected; requiring that the State Engineer approval process is transparent and fair to all; and ensuring that the actual operation of these SWSPs is visible to other water users through public accounting and reporting.

The key features of the compromise include the following:

a. Existing well rules in the Arkansas Basin (Water Division 2) are ratified so that the State Engineer will continue to have the authority he needs in that basin to deal with well regulation and Compact

17. S.B. 73, 64th Gen. Assem. 1st Reg. Sess. (Colo. 2003) (signed by Governor Owens on April 30, 2003) (to be codified at COLO. REV. STAT. § 37-92-308(3)).

issues.¹⁸

b. In the South Platte Basin (Water Division 1), the State Engineer will have limited authority to approve SWSPs using the procedures and standards in the Bill. Wells not in augmentation plans have only until the end of 2005 to file those plans. If Water Court plans are not filed, the wells are shut down.¹⁹

c. Specifies a detailed set of information to be provided with the SWSP request.²⁰

d. Provides notice to the public and a thirty-day opportunity to file written comments for each SWSP.²¹

e. Specifies a public hearing process to be held for contested SWSPs.²²

f. Sets forth interim standards for the State Engineer to apply in evaluating SWSPs, that are more protective of surface water rights than the standards used in the past. They include higher consumptive use factors (fifty percent for flood irrigation on metered wells) (Blaney-Criddle method using crops, acres, and crop consumptive use for unmetered wells).²³

g. Specifies methodology to calculate stream depletions.²⁴

h. Requires replacement of all out-of-priority depletions after October 31, 2002, and up to eighteen months after date of the SWSP request, to make sure that out-of-priority, winter depletions are addressed.²⁵

i. Provides a mechanism to allow depletions from last winter to be remedied by agreement with injured parties, if noticed and approved as part of an SWSP.²⁶

j. Requires the State Engineer to curtail diversions from wells, if out-of-priority depletions are not replaced in accordance with the SWSP.²⁷

k. Allows existing surface water rights to be used for replacement water even if they are not changed by Water Court decree, under terms and conditions that prevent expanded use and injury to other water rights.²⁸

l. Requires replacement water to be provided at the time and location necessary to satisfy senior diverters.²⁹

18. *Id.* §§ 37-92-308(1)(c)(I) & (II).

19. *Id.* § 37-92-308(3)(a) (No other basins are affected by the Bill).

20. *Id.* § 37-92-308(3)(b)(I).

21. *Id.* §§ 37-92-308(3)(b)(II)&(III).

22. S.B. 73, 64th Gen. Assem. 1st Reg. Sess., § 1 (to be codified at COLO. REV. STAT. § 37-92-308(3)(b)(IV)).

23. *Id.* § 37-92-308(3)(c)(I).

24. *Id.* § 37-92-308(3)(c)(II).

25. *Id.* § 37-92-308(3)(c)(III).

26. *Id.*

27. S.B. 73, 64th Gen. Assem. 1st Reg. Sess., § 1 (to be codified at COLO. REV. STAT. § 37-92-308(3)(c)(III)).

28. *Id.* § 37-92-308(3)(c)(IV).

29. *Id.* § 37-92-308(3)(c)(V).

m. Defines augmentation wells³⁰ and specifies criteria for the use of augmentation wells in SWSPs.³¹

n. Provides a process for SWSP amendments, including an abbreviated notice and comment process to add flexibility for short-term responses to changing conditions during the irrigation season.³²

o. Requires monthly accounting for SWSPs and an annual year-end report of actual plan operations, all to be made available to the parties that filed written comments concerning the plan.³³

p. Requires the State Engineer to provide a detailed statement of the basis and rationale for any decision approving or denying an SWSP, including the consideration given to written comments.³⁴

q. Specifies the appeal process for the Water Judge to review a State Engineer decision about an SWSP and sets filing fees for the Water Court appeal.³⁵

r. Allows applications to be filed before the effective date of the Bill, so long as all process occurs and the Bill is in effect before the approval date.³⁶

s. Provides for a study by the State Engineer to investigate options for compensation to injured users if an SWSP falls short.³⁷

t. Allows augmentation wells to be approved by State Engineer under emergency SWSPs, without notice and comment, so long as those wells are included in a regular SWSP request.³⁸

u. Provides additional flexibility for Water Court augmentation plans to use water leased for short terms.³⁹

VI. CONCLUSION

In 1969, the General Assembly dramatically changed the law governing tributary ground water in Colorado, by requiring that all tributary wells be integrated into the prior appropriation system. Exactly how to accomplish that goal has received a great deal of debate and has caused turmoil for water users. For the past twenty five years, ground water users in the South Platte Basin had some temporary stability by operating under annual substitute water supply plans, but surface water users were never satisfied that the temporary plans were adequate to protect their senior water rights.

30. *Id.* §§ 37-90-103 (21)(a) & 37-92-103 (14)(a).

31. *Id.* § 37-92-308(3)(c)(VII).

32. S.B. 73, 64th Gen. Assem. 1st Reg. Sess., § 1 (to be codified at COLO. REV. STAT. § 37-92-308 (3)(c)(VIII)).

33. *Id.* § 37-92-308(3)(c)(IX).

34. *Id.* § 37-92-308 (3)(e).

35. *Id.*

36. *Id.* § 37-92-308 (3)(f).

37. S.B. 73, 64th Gen. Assem. 1st Reg. Sess., § 1 (to be codified at COLO. REV. STAT. § 37-92-308 (3)(g)).

38. *Id.* § 37-92-308(7).

39. *Id.* § 37-92-305 (8).

In the past year, we have written another chapter in the debate about how to get this job done. We now know that it will not be done through State Engineer rulemaking. Within the next few years, augmentation plans adjudicated by the Division 1 Water Court should finish the job of fully integrating these wells into the priority system while protecting senior surface water rights.