

1-1-2003

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Rebekah S. King, Legislative Report, Colorado Water Congress Workshop on Senate Bill 73, 6 U. Denv. Water L. Rev. 557 (2003).

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Colorado Water Congress Workshop on Senate Bill 73

LEGISLATION UPDATE

THE COLORADO WATER CONGRESS WORKSHOP ON SENATE BILL 73

Denver, Colorado May 22, 2003

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Colorado is currently experiencing one of the worst droughts in its recorded history. While the drought has affected all of Colorado, the South Platte River basin has been the focus of a recent Colorado Supreme Court case as well as various legislative efforts. Among the legislation proposed this year was Senate Bill 73, which concerns the State Engineer's authority to approve the use of water in the South Platte River basin. Because of the far-reaching effects of Senate Bill 73, the Colorado Water Congress, which took an active roll in the development and ultimate composition of the bill, held a workshop to clarify and discuss the bill as it was passed.

INTRODUCTORY COMMENTS

Attorney General Ken Salazar opened the discussion with an overview of what Senate Bill 73 is meant to accomplish. He initially noted that the bill was intended to address the situation on the South Platte should the state lose the case that was currently on appeal with the Colorado Supreme Court regarding the State Engineer's authority to approve replacement plans on the South Platte. To that end, the bill provides a legal framework for the future. However, the Attorney General did note that Senate Bill 73, as enacted, is a compromise among several parties, and as such, many are unhappy with the result, and no one is completely satisfied.

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SESSION ONE—BRIEFING ON SENATE BILL 03-073 AND THE SUPREME COURT DECISION

A. Background and History

Mr. Dennis Montgomery of Hill & Robbins PC provided a summary of the events that led up to the need for and ultimate adoption of Senate Bill 73. Mr. Montgomery began with the organization known as GASP, which stands for Groundwater Appropriators of the South Platte. GASP represents about 1200 people who own and operate approximately 3000 wells. Senate Bill 73 will directly impact all GASP members. Moreover, some GASP members will simply be unable to operate due to increased costs associated with Senate Bill 73, which carries with it new engineering and legal expenses.

Turning to a more general history of Colorado water law, Mr. Montgomery provided a short history of the similar events that occurred in the Arkansas River basin in the 1960s. In the spring of 1964, many wells were in the process of being drilled for the Farmers Highline Canal in the Arkansas River floodplain. Soon after, the legislature passed House Bill 1066, which met a number of objectives. First, House Bill 1066 authorized the State Engineer to regulate wells in the basin and adopt rules and regulations to facilitate this; the State Engineer had never before been granted this type of authority. In addition to this authority, House Bill 1066 also gave the State Engineer the power to enjoin those diverting in violation of the law. And finally, the bill created a rebuttable presumption that any then existing wells were not causing material injury as defined by statute. This allowed existing wells to continue operating.

House Bill 1066 led to the Colorado Supreme Court decision of *Fellhauer v. People*.¹ In *Fellhauer*, the court held the Division Engineer's actions unconstitutional and stated that any actions must meet three criteria: (1) the adoption of rules and regulations; (2) minimization of material injury; and (3) the imposition of conditions on existing wells in order to allow for their continuing use. Pursuant to this decision, the State Engineer adopted rules and regulations in the Arkansas River basin that have been in effect since 1973.

Mr. Montgomery then related the experience in the Arkansas River basin to that currently in existence in the South Platte River basin. The main difference is that in the South Platte, the wells are operating under Substitute Supply Plans ("SSP"), which, until recently, the State Engineer approved on an annual basis without any public notice or comment procedures. However, in December of 2001, the Colorado Supreme Court held that the State Engineer did not have the authority

1. *Fellhauer v. People*, 447 P.2d 986 (Colo. 1968).

to approve wells pursuant to SSPs in the South Platte River basin, and should promulgate rules like those in the Arkansas River basin.²

Having provided a brief history of the events leading up to the current situation in the South Platte River basin, Mr. Montgomery turned the program over to the next speaker.

B. Rules and Regulations Litigation

Ms. Veronica Sperling provided a summary of the recent litigation in the Colorado Supreme Court regarding the authority of the State Engineer in the South Platte River basin.³ It used to be that calls on the South Platte were only in reference to the mainstem, and calls did not affect tributaries. About ten years ago this changed. Eventually, water users on the tributaries began to get called out, and at the same time GASP gained a more prominent position in the politics of the South Platte. At that time, the State Engineer was approving SSPs for GASP's wells on an annual basis.

There are two statutes under which the State Engineer found the authority to approve these SSPs. The first power is referred to as the Water Rule Power.⁴ Pursuant to this power, the State Engineer can promulgate rules and regulations to assist in administering water rights. The second statute by which the State Engineer claimed authority to approve SSPs is known as the Compact Rule Power.⁵ Under the Compact Rule Power, the State Engineer is authorized to enter into interstate compacts in order to ensure the delivery of an adequate amount of water at the state line.⁶

The current procedure for the State Engineer to promulgate new rules and regulations follows several steps. First, the State Engineer drafts new rules, at this time, there is no obligation to confer with water users or anyone else. The State Engineer then files those proposed rules with the Water Judge in the appropriate water division. At this time, the proposed rules are published in the monthly water

2. *Empire Lodge Homeowners' Ass'n v. Moyer*, 39 P.3d 1139 (Colo. 2001).

3. It should be noted that this past winter and spring saw two independent yet related efforts concerning regulation of the South Platte basin. The State Engineer published proposed Rules and Regulations for the basin, which provided that office with the authority to approve replacement plans on the South Platte wells. This effort ultimately went to the Colorado Supreme Court. Alongside this effort was the creation and adoption of Senate Bill 73, which was essentially a compromise among all parties to the litigation, and, in effect, nullified the court's decision.

4. COLO. REV. STAT. § 37-92-501 (2002).

5. *Id.* § 37-80-104.

6. Colorado is a party to nine interstate compacts: The Colorado River Compact, COLO. REV. STAT. §§ 37-61-101 to -104; The Upper Colorado River Compact, COLO. REV. STAT. §§ 37-61-101 to -106; The La Plata River Compact, COLO. REV. STAT. §§ 37-63-101 to -102; The Animas-La Plata Project Compact, COLO. REV. STAT. § 37-64-101; The South Platte River Compact, COLO. REV. STAT. § 37-65-101; The Rio Grande River Compact, COLO. REV. STAT. §§ 37-66-101 to -102; The Republican River Compact, COLO. REV. STAT. §§ 37-67-101 to -102; The Amended Costilla Creek Compact, COLO. REV. STAT. §§ 37-68-101 to -102; and The Arkansas River Compact, COLO. REV. STAT. §§ 37-69-101 to -106.

court resumes and anyone has the opportunity to file a Statement of Opposition to protest the proposed rules. If there is opposition that cannot be resolved through a stipulation or other out of court process, the parties will go to the Water Court with their dispute. After the Water Court's ruling, either party may appeal to the Colorado Supreme Court.

This is essentially what has happened on the South Platte over the past year. In May, 2002, the State Engineer filed proposed amendments to the original South Platte Rules, which were promulgated in 1974. The State Engineer held some meetings with interested parties and water users, although unsuccessful in reaching compromises or consensuses. The proposed amendments that the State Engineer did file were to establish standards and procedures for approval of replacement plans. The State Engineer did this in response to the Colorado Supreme Court's ruling that the State Engineer could not approve SSPs in *Empire Lodge*. Those opposing the proposed amendments argued that a replacement plan was essentially the same as an SSP, and that the State Engineer was attempting to do what *Empire Lodge* disallowed under a different name. Opposers argued that the end result was the same. The State Engineer could approve an out of priority diversion by a well user, a process that should require approval by the Water Court. In addition, the proposed amendments were to go into effect on December 31, 2002, regardless of whether the Water Court had ruled on any opposition. Opposers also objected to this clause in the proposed amendments.

Initially, the Water Court ruled that the proposed amendments could not go into effect before the Water Court issued a ruling. Regarding the State Engineer's authority to approve replacement plans, the Water Court held that the State Engineer could not have such authority except where provided by statute in limited situations.

The State appealed the ruling to the Colorado Supreme Court. Interestingly, the Court issued its opinion on the same day that Senate Bill 73 was signed into law.⁷ The court's decision was divided into three parts. First, the Court addressed the State Engineer's authority under section 501, the Water Rule Power. The court held that the State Engineer does not have authority to approve out of priority diversions requiring augmentation except pursuant to already enacted legislation.⁸ Next the court addressed the State Engineer's authority under section 104, the Compact Rule Power. The court reversed part of the Water Court's ruling, holding that the South Platte River Compact is not in need of clarification; the State Engineer could adopt rules and regulations to ensure compliance with the Compact, but had no more authority than that granted under section 501, the Water Rule Power. Finally, holding that the regulations could not go into effect before a Water Court Ruling, the Colorado Supreme Court

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

8. These limited exceptions include, COLO. REV. STAT. §§ 37-80-120(5), 37-90-137(11)(b), 37-92-308(3), (4), (5), & (7).

stated that water users need an opportunity to participate in such decisions, and the venue for this is the Water Court.

Ms. Sperling concluded by noting that two petitions for rehearing have been filed in this case, and then turned the presentation over to the next topic.

C. Evolution of Senate Bill 73

Mr. Michael Shimmin presented an overview of all of the events and proceedings leading up to the eventual form of and adoption of Senate Bill 73. Mr. Shimmin broke his presentation down into two parts, (1) how the bill reached its enacted form; and (2) what the plain language of the bill means.⁹

D. Approval Process for Substitute Water Supply Plans

Mr. Steven Sims addressed the mechanics of applying for and obtaining approval of a substitute water supply plan. Now that the new rules are in place, a water user in the South Platte River basin has essentially two courses of action to choose between. A water user can follow either the procedures provided in last year's House Bill 1414, or opt to follow the newly enacted Senate Bill 73 guidelines. Both of these options include the same basic five steps: (1) application for an Substitute Water Supply Plan ("SWSP"); (2) data supporting the SWSP; (3) public input; (4) a final decision; and (5) the possibility of an appeal.

The first step, the application process, is very different depending on which option a well user uses. Under House Bill 1414, the application process is very simple, just apply and ensure that the application matches with a plan for augmentation applied for in the Water Court. However, under Senate Bill 73, the application process is much more detailed. Applications must include:

[T]he permit number and location; the projected use and volume of pumping; for all wells using the modified Blaney-Criddle method to determine consumptive use, the projected number of acres and crops to be irrigated; the anticipated stream depletions that affect the river after October 31, 2002, until eighteen months after the date of the request in time, location, and amount, including a detailed description of how such depletions were calculated, and shall list the identity, priority, location, and amount of all replacement water sources to be used to replace stream depletions, including both accretions and depletions attributable to any augmentation wells. Upon the request of any party who has subscribed to the substitute water supply plan notification list for water division 1, the applicant for a substitute water supply plan shall also provide the model used to

9. For a complete overview, see Mike Shimmin, *Recent Developments Concerning State Engineer Rulemaking Authority for the South Platte River Basin*, 6 U. DENV. L. REV. 549 (2003).

calculate stream depletions and the assumptions, input data, and output data used by the applicant in such model.¹⁰

Under House Bill 1414, the supporting data necessary is not set out in detail, however, the State Engineer does review the supporting data and requires detailed information. In addition, the State Engineer issued Policy 2002-2, which provides guidelines to applicants as to necessary supporting data.¹¹ Policy 2002-2 also allows for comment on any proposed plans. Senate Bill 73 sets forth a more detailed list of what is required as supporting data. Some of these requirements are listed in section 308(3)(b)(I), above. The bottom line is that both application schemes require detailed supporting data. If the data provided is not sufficient, the State Engineer will return the application to the applicant with a list of what further data is required.

Both schemes provide for public involvement, however Senate Bill 73's public involvement process is more comprehensive. Senate Bill 73 recognizes that most people who provide comments have specialized knowledge of their particular area of the South Platte River basin and provides for a public hearing. The notification process is modeled after that in House Bill 1414, but sending notice out to all who subscribe to the notification list. However, Senate Bill 73 takes the notification one step further and also provides for a hearing, where parties can examine and cross-examine witnesses in front of the State Engineer. This allows for asking questions of applicants directly when not satisfied with the information provided in an application.

In both instances, the final decision is made by the State Engineer, but House Bill 1414 does not provide provisions for obtaining a copy of a final decision; Senate Bill 73 establishes procedures for this. The State Engineer must send a copy of the final decision addressing all individual concerns raised by anyone who protested or appeared at the hearing to question the applicant, to all involved parties. In addition, the final decision must contain terms and conditions to address depletion calculations, credit for replacement water, and operating instructions.

Finally, Senate Bill 73 has altered the appeals process. Under House Bill 1414, an SWSP was joined with a plan for augmentation. Under Senate Bill 73, an appeal can be separate and in an expedited manner. The appeal can proceed as fast as the appellant wishes it to, which ensures decisions are made in an appropriate time frame, considering the irrigation and farming season in Colorado.

10. COLO. REV. STAT. § 37-92-308(3)(b)(I) (2003).

11. See Office of the State Eng'r, Policy 2002-2, Implementation of HB 02-1414 (Section 37-92-308, C.R.S. (2002)) Regarding Substitute Water Supply Plans (July 2, 2002).

SESSION TWO--ENGINEERING ASPECTS ON SENATE BILL 03-073

Mr. Jon Altenhofen of the Northern Colorado Water Conservancy District addressed the engineering aspects pertinent to Senate Bill 73. Mr. Altenhofen stressed that recharge is the key element. Engineers deal with causes and effects; the cause being what a user is doing at the well, the effect being what happens to the river or stream. The goal of the State Engineer is to administer the river so that replacement supplies are greater than depletions, and in order to reach this goal, a policy of openness and transparency is absolutely necessary.

The main question that the State Engineer looks at is how much ground water that is pumped from a well is actually consumed; an augmentation plan is designed to replace that amount. Since all wells on the South Platte are junior wells, in order for the river to be effectively managed, a certain percentage of water that is consumed must be put back into the river.

For those irrigation wells where diversions are actually measured using water meters or verified power conversion measurements, the presumed amount of consumptive use from wells used for flood irrigation shall not be less than *fifty percent* of diversions, and the presumed amount of consumptive use from wells used for sprinkler irrigation shall not be less than *seventy-five percent* of diversions. For those irrigation wells where diversions are not actually measured, the state engineer shall determine the amount of stream depletions using actual data for the crops grown, acres irrigated, surface water deliveries, and the modified Blaney-Criddle method.¹²

Once consumptive use is determined, the next critical piece of information is the lag depletive effect on the river. Mr. Altenhofen noted that the stream flow depletion factor method arose out of the 1969 Act. Since then maps have been developed and standards have been established. Senate Bill 73 adopts the use of these maps and standards.

The next engineering issue is accounting for replacement supplies. Mr. Altenhofen identified two methods to accomplish this: (1) ditch bypasses of senior rights; and (2) augmentation wells. Ditch bypasses leave a senior surface right in the water, but do have a depletive effect on the aquifer. Augmentation wells tap directly into an aquifer to augment wells pumping out of priority. Although these tend to be winter depletions, they still must be accounted for. Both of these methods are contained in Senate Bill 73.

Mr. Altenhofen concluded that the ultimate key to a successful SWSP is to get to the bottom line of what kind of augmentations are necessary to ensure that an out-of-priority well does not injure senior users. In order to ensure this goal is met, Mr. Altenhofen stressed again, that absolute openness and transparency is necessary.

12. COLO. REV. STAT. § 37-92-308(3)(c)(I) (2003) (emphasis added).

SESSION THREE – SECTION 309 OF THE WATER QUALITY CONTROL ACT

Mr. Tom Pitts of Water Consult, Engineering and Planning Consultants addressed issues regarding Section 309 of the Water Quality Control Act. Mr. Pitts provided comments on the examination of the need to revise Colorado's aquatic life classification system to address Section 309. Initially, Mr. Pitts noted that those in the regulatory community would be reluctant to accept changes in the proposed classification and standards system without first understanding the impacts of those changes on discharge permits and other regulatory functions, such as total maximum daily loads. In order to understand these implications, case studies on selected stream segments displaying the existing classifications system and associated standards, the rationale for the existing system, and the proposed classifications and associated standards will need to be conducted. In addition, Mr. Pitts noted that the concept of "effluent dominated" and "effluent depended" should be expanded to include "return flow dominated" and "return flow dependent."

Mr. Pitts then reviewed the specific sections under consideration, and concluded by noting that at this time, it would not be productive to spend a lot of time commenting on those sections. More fundamental information is needed first, such as:

- What is the role and purpose of sub-classifications?
- Are qualifiers still needed, and if so, what are the roles of qualifiers?
- How are qualifiers distinct from sub-classifications?
- What appropriate definitions should be applied with respect to ephemeral, intermittent, return flow dominated, and return flow dependent streams or stream segments?

SESSION FOUR–LUNCH SPEAKER

The State Engineer, Mr. Hal Simpson, provided a summary of where Colorado is right now regarding the drought and the levels of selected reservoirs. Mr. Simpson noted that some reservoirs are nearly full, others, however, such as Lake Dillon, still have a long way to go. Mr. Simpson then addressed House Bill 1001, stating that the main purpose of the bill is to modify § 308(4). The bill shortens the time period for approving plans and states that a plan can operate on a temporary basis.

SESSION FIVE–CURRENT RESEARCH AND DEVELOPMENTS IN THE SOUTH PLATTE

Dr. Robert Ward, director of the Colorado Resources Research Institute moderated the discussion. First, Dr. Luis Garcia, Director of the Integrated Decision Support Group and Associate Director of the

Colorado Agricultural Experiment Station at Colorado State University, addressed work on the South Platte MAP ("SPMAP"). SPMAP is a program involved in entering data and other information into a comprehensive geographic information systems ("GIS") database. Once complete, this program will allow engineers to better determine the effects of wells in the South Platte River basin.

Second, Dr. Garey Fox, of the Department of Civil Engineering at Colorado State University, provided a discussion of the water quality impacts of recharge projects. Dr. Fox's work also used GIS and other computer modeling tools such as MODFLOW to facilitate his research. Continuing work in this area will allow engineers to address not only quantity impacts, but also quality impacts to the operation of wells in the South Platte River basin.

SESSION SIX—SOUTH PLATTE DECISION SUPPORT SYSTEM (SPDSS)

Mr. Ray Alvarado, a Senior Water Resource Specialist with the Colorado Water Conservation Board addressed the South Platte Decision Support System ("DSS"). Mr. Alvarado first identified the four main components to a DSS: (1) data; (2) tools to interpret the data; (3) documentation; and (4) user involvement. Mr. Alvarado explained that DSS is a set of tools and models to better determine consumptive use, as well as causes and effects of wells in the South Platte River basin. Ultimately, DSS will help to maximize use and minimize depletions.

SESSION SEVEN – ENDANGERED SPECIES ISSUES ON THE SOUTH PLATTE

Mr. Alan Berryman, head of the Engineering Service Branch of the Northern Colorado Water Conservancy District and Mr. Don Ament, Commissioner, State Department of Agriculture, spoke about issues regarding endangered species in the South Platte River basin. Mr. Berryman and Mr. Ament briefly noted that the Endangered Species Act is here to stay and that it is a factor that water resource planners must consistently account for. The speakers recounted recent examples in neighboring states where endangered species needs required a certain amount of water in a stream, and this took precedence over any other rights. In addition, if neighboring states need more water for endangered species needs, this could affect the compacts to which Colorado is a party.