Water Law Review

Volume 1 | Issue 2 Article 10

6-1-1998

Two Colorado Water Crises

Robert F. Welborn

Two Colorado Water Crises

COMMENTARY

TWO COLORADO WATER CRISES

ROBERT F. WELBORN[‡]

INTRODUCTION

It should go without saying that water is one of our most precious natural resources. What can not be said too many times is that, like all resources, it is the victim of legislative procrastination, political machination, greed, and ignorance. The Colorado water crises addressed in this commentary stem from the Legislature's treatment of underground water in Colorado. The essay begins by discussing those events in the 1950s and 1960s that led up to the Water Right Determination and Administration Act of 1969 ("1969 Act").[1] The increase in the number of wells taking water from the alluvium of the surface stream dramatically affected stream flow and surface water rights, putting wells and surface interests on a collision course. The 1969 Act was a response to this conflict. The essay then moves to address an issue of pressing urgency — the drainage of Colorado's aquifers, particularly the Denver Basin Aquifers. While the 1969 Act may have been a belated legislative response to a situation that had been brewing for several decades, it was a response nonetheless, and an effective one at that, addressing the issues head–on with an eye towards the future, and provisions that shored up the past. In remarkable juxtaposition, Colorado's legislative treatment of nontributary ground water leaves much to be desired, the recognition of which is little comfort in the face of the increasingly rapid depletion of the state's aquifers.

---

‡ Robert F. Welborn is Of Counsel to the Denver firm of Welborn, Sullivan Meck & Tooley, P.C. Mr. Welborn graduated from Dartmouth College in 1940, received his law degree from the University of Denver in 1946, and is admitted to practice before the Supreme Court of the United States. In 1969, Mr. Welborn was a significant participant in the drafting and passage of Colorado's Water Right Determination and Administration Act.

* * *

1. Water Right Determination and Administration Act of 1969, ch. 373, 1969 Colo. Sess. Laws 1200 (codified as amended at COLO. REV. STAT. §§ 37-92-101 to -602 (1997).

THE WATER RIGHT DETERMINATION AND ADMINISTRATION ACT OF 1969

In the years following World War II, major changes in irrigation were taking place. This was particularly true in the agriculturally rich Arkansas River and Platte River Valleys. Farmers were finding that significant volumes of water could be obtained by drilling wells directly on their farms — wells that tapped underground sources tributary[2] to streams. Some who drilled had senior water rights allowing for the direct diversion from the stream. Others had no such rights. Regardless, farmers found it profitable to use this underground water source for their irrigation needs. To be sure, there was the cost of drilling the wells, installing the pumps, and then actually running the pumps. At the same time, here was a reliable source of water not dependent on the vagaries of weather or river flow, nor was it subject to the regulation of ditch rights in Colorado's priority system.

During the 1950s and 1960s, the number of wells tapping water tributary to streams rapidly increased, particularly in eastern Colorado. It was not too long before it was discovered that these wells significantly affected stream systems. However, water officials, the State Engineer and the Division Engineers did not feel there was clear statutory authority for the regulation of the wells within Colorado's priority system. As for the courts, they differed in their consideration of the matter. Finally, in 1965, the Legislature enacted legislation that specifically required the regulation of tributary wells in the priority system.[3] The statute gave the State Engineer authority to issue orders to accomplish such regulation and the ability to obtain court assistance to enforce such orders.[4] Despite this, implementation was not without its problems, as evidenced by the case of *Fellhauer*.[5]

It was in the Arkansas Valley that one of the wells selected to be shut down was owned by a Mr. Fellhauer, an individual who refused to

---

2. In this paper, *tributary water* is considered to be water that is either in or flowing into natural streams as well as water underground which is so related to a natural stream that the use of it or other affect on it ultimately affects a natural stream. *Nontributary water* is water in underground aquifers or other structures of containment which are so geologically and hydrologically separate from tributary water that there is no significant effect on the amount, flow or quality of tributary water if water is removed from such aquifers or other structures and there is no significant natural recharge from tributary sources in the event of a depletion in such aquifers or other structures. These definitions are intended to express generally the basic considerations in determining tributary and nontributary water. For the precise statutory definitions of tributary and nontributary, see Colorado Revised Statutes section 37-90-103(10.5).

3. Act of May 3, 1965, ch. 318, 1965 Colo. Sess. Laws 1244 (originally codified at COLO. REV. STAT. § 148-11-22 (1963), repealed by Water Right Determination and Administration Act of 1969, ch. 373, 1969 Colo. Sess. Laws 1200).

4. Of course, for a variety of reasons (the distance to the stream, the time of pumping, well depth, etc.) wells differ in their effect on stream systems. Regulation was therefore not as simple as the regulation of surface diversions.

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

comply with the order of the Division Engineer (acting under the authority of the State Engineer and pursuant to the 1965 legislation). Action was instituted against Mr. Fellhauer by the Attorney General, action that was supported by the owners of various surface water rights on the Arkansas River. Although the district court supported the order of the Division Engineer, upon appeal, the Colorado Supreme Court added a few words of caution, saying there should be a plan, rules and regulations for the administration of the entire system, that it was not satisfactory to simply shut down wells on a selected basis.[6]

Fellhauer was decided by the supreme court in 1968. While it was winding its way through the courts, the Colorado Legislature, by specific statute ("1967 Act"), authorized a study of the situation from the engineering, scientific, and legal standpoints, and called for the drafting of new legislation.[7] Funds were appropriated, and, under the direction of the Department of Natural Resources, work began. The Legislature had allotted a time period of two years (until it met in 1969) for the study and for the development of legislative language. The writer of this essay, working with a group of lawyers, was engaged to prepare and present to the Legislature the general legislation that would deal with water rights determination and administration and that would bring wells into the priority system. The 1967 Act also provided that, pending the study and completion of the legislation, the status quo should be maintained. No new well permits were to be issued and the regulation of wells was postponed.

The integration of wells into the priority system was essential if existing water rights were to be protected. But it was also essential to integrate them in such a way that well owners, dependant on this source of water for their livelihoods, would be protected to the maximum extent legally and practically possible. It was truly a crisis situation with both interests, surface and well, on a collision course — a collision course because those responsible for water law and administration, particularly the Legislature, had not taken action a decade or two earlier that would have allowed for the accommodation of tributary well water usage within the priority system. Had it done so, it would have been before economies were built on well usage and at a time when coordination could have been accomplished with much less injury, stress and strain. The crisis had been allowed to develop because no one had confronted the problem; everyone had put off dealing with the problem and allowed it to get worse and worse. Coloradans today could well take heed and deal with the second crisis discussed in this essay, the problem with respect to the treatment of nontributary underground water. But they are not doing so, as will be noted later.

In order to carry out the intent and purpose of the two year study authorized by the 1967 Act, the Legislature planned effective action in

6. *Fellhauer*, 447 P.2d at 986. The Division Engineer had in fact issued orders to only a small number of the hundreds of wells in the Valley.

7. Act of April 19, 1967, ch. 175, 1967 Colo. Sess. Laws 249.

the 1969 session to develop legislation that would be comprehensive, effective and fair. To this end, and to show the tremendous importance that the Legislature placed on the matter, the entire membership of the State Senate was constituted as a water committee with hearings to commence at the very start of the 1969 legislative session. The objective was to consider the language prepared by the study group and to take action on it. The legislation proposed was in the form of Senate Bill 81.[8] So critical was the matter, and so numerous were those interested in the outcome, that hearings on the bill were held several times a week over the course of several months. It is doubtful that any bill in years before or after was more thoroughly considered. The stakes were high, the interests conflicting, and the need impressive. The well being of farms and ranches was at stake, as was the integrity and viability of the priority system and the adjudicative and administrative process. Much could be written on what took place in the first months of 1969 in considering the proposed bill and in converting it into what became the Water Right Determination and Administration Act of 1969.[9] Accounts of these procedures could be very instructive to those individuals today who are responsible for water management and who are dealing (or not dealing) with the current crisis developing in the treatment of nontributary ground water.

It would be remiss not to mention the importance of the support that came from various sources outside the Legislature. Lloyd Sommerville, President of the Colorado Farm Bureau, was representative of these people and very much responsible in his own quiet way for the development, final passage, and implementation of the 1969 Act. His constituents were people in the center of the crisis, on both sides of the crisis, and dependent upon surface water rights, well water rights, or both. There was no question that some accommodations would have to be made and that wisdom would have to prevail over the emotions and desires for personal benefit.

Although there were significant changes, Senate Bill 81 finally passed (basically intact), requiring adjudication and administration of tributary wells in the priority system. Possibly the most significant impact of the 1969 Act was a change in the procedure for the adjudication of water rights from one in which there were periodic general adjudication proceedings in the various water districts (proceedings which could last for years as the court permitted statements of claims to be filed), to one of individual adjudication which could be accomplished on each claim that was made. This change made sense in terms of the general regulation of Colorado water, but it was most important for facilitating the well adjudication.

It is not the province of this essay to delineate all of the concepts of the 1969 Act, some of which went beyond addressing the issues of the

8. S. 81, 47th Leg., 1st Reg. Sess., 1969 Colo. Sess. Laws 1200.

9. Water Right Determination and Administration Act of 1969, ch. 373 1969 Colo. Sess. Laws 1200 (codified as amended at COLO. REV. STAT. §§ 37-92-101 to -602 (1997)).

immediate crisis to provisions affecting general water issues within the State. However, in addition to the adjudication procedures, one of the most important provisions for easing the economic impact of regulation of the wells in the priority system was that of augmentation, a concept which is in general use today. The augmentation concept led to the development of major programs that would permit the well diversions to continue. For example, in Water Division 1, inhabitants of the Platte River Valley came together and created an organization called the Groundwater Appropriators of the South Platte ("GASP"). GASP acquired senior water rights, the uses of which could be converted to make-up stream depletions caused by the pumping from wells which had junior priorities and which would otherwise be shut down. The conversion simply amounted to a discontinuance of the use of the senior water rights to the extent necessary to make up for the well depletions, and such that there would be no damage to the stream system. The State Engineer and the Division Engineer cooperated in this program, and the farmers and ranchers, by joining GASP, could continue to obtain water from wells on which the operations of their farms or ranches depended.

A few more changes that resulted from the 1969 Act might be mentioned as well. Prior to the Act, the state was divided in to more than sixty water districts for water right administration and adjudication. The Act eliminated the water districts and established seven water divisions, each division comprising a water drainage area, such as the Platte River and the Arkansas River (Water Divisions 1 and 2, respectively). All files from the water districts and courts in the districts were consolidated in the office of the water division clerk in which the districts were located. The position of Water Judge was established for each water division, and all proceedings regarding water matters (as defined by the Act) in a particular division were to be before the Water Judge of that division. The 1969 Act also provided that initial proceedings are to be handled by a water referee (unless immediately taken over by the Water Judge). All changes in water rights, such as a change in the point of diversion, can be adjudicated, not just those specifically mentioned under the previous law. The Act then specified particular factors that must be considered in connection with changes. It also provided for the tabulation of water rights and the tabulation of abandonments of water rights.

The first years of the Act's implementation were critical and difficult ones. Society had failed for too long to deal with the obvious collision course on which tributary wells and surface diversions were traveling. There were angry and frustrated people on both sides. The State Engineer at the time, Clarence Kuiper, deserves much credit for his courage and good sense in his handling of the situation. Although he faced hostile crowds at meetings, he proceeded relentlessly with the integration of the tributary wells into the priority system. The tributary wells were adjudicated and took their proper place in the system, taking advantage of provisions under the new law that lessened or even precluded undue hardship from the regulation.

AQUIFER DEPLETION

The water crisis discussed in the preceding pages, the deficiencies that led up to it, and its ultimate handling could be instructive with regard to the current developing crisis in the area of nontributary water. But society seldom learns from the past, and seldom seems to acknowledge present problems. The developing crisis in the utilization of nontributary ground water is due to the fact that nontributary groundwater, for all intents and purposes, is a nonrenewable resource. With increased growth, it is being depleted at an increasingly rapid rate, and sufficient plans are not in place for the time when it will no longer be available in easily obtainable amounts. Of course, what society should be doing is conserving this natural resource, using it only when reasonable water levels and water pressures can be maintained, and devising means of recharge adequate in both quality and quantity.

Some public awareness of the problem was in evidence in 1978 when applications under the 1969 Act were filed throughout the state to acquire rights to use nontributary ground water pursuant to the constitutional doctrine of appropriative rights. So numerous and so extensive were these applications, and so important were the issues they raised that the Colorado Supreme Court consolidated the proceedings before one special water judge.[10] Among the most basic points argued before the Water Judge and the Colorado Supreme Court were these: 1) Is water that is not tributary to a stream, that is, water in nontributary aquifers, subject to appropriation under Article XVI, Sections 5 and 6 of the Colorado Constitution?, 2) Are rights to that water subject to adjudication under the statutory procedures and principles that apply to water in or tributary to a stream?, and 3) Is nontributary ground water owned by the overlying land owner?

In 1983, the Colorado Supreme Court, on appeal from the decision of the Water Judge, held as follows: 1) Nontributary ground water cannot be appropriated under Sections 5 and 6 of Article XVI of the Colorado Constitution or under the laws applicable to water in or tributary to the natural streams, 2) Rights to nontributary ground water cannot be adjudicated under the 1969 Act, and 3) Nontributary water is not the property of the overlying land owner but in effect, is public property to be dealt with as such by the Colorado Legislature. The court also noted:

> Tributary waters are not subject to eventual depletion because they are annually replenished, and the vested rights of senior appropriators can be fully protected by seasonal regulation of diversion by junior appropriators. Nontributary ground water supplies, however, may dwindle because water can be withdrawn from the aquifers in excess of the recharge rate, causing a 'mining condition'.[11]

10. Colorado v. Southwestern Colo. Water Conservation Dist., 671 P.2d 1294 (Colo. 1983).

11. *Id.* at 1313.

In the first legislative opportunity after the supreme court decision, land developers and other special interest groups prevailed upon the Legislature to pass a law that reversed certain portions of the decision — a law providing that rights to nontributary ground water could be adjudicated under the 1969 Act and that all decrees previously entered would be validated even though obtained through procedures the court had held could not be followed.[12]

In 1985, the Legislature passed what became known as Senate Bill 5.[13] The bill was basically promoted by land developer interests, a bill that, instead of providing a reasonable and effective way of treating nontributary ground water so as to satisfy the public interest, and therefore the interest of future generations, provided for the depletion of nontributary ground water within a period of 100 years. But then the Legislature did not indicate when the time period would begin to toll. The legislation also provided that nontributary ground water would be allocated on the basis of the ownership of the overlying land. The Legislature completely disregarded the supreme court's direction that this water was essentially public property and that the State should provide a system for the efficient utilization of this vital resource. Of course, it did so in a system that desires, permits and encourages Legislatures to make such public policy decisions, but that doesn't change the fact that the legislation was shortsighted and biased.

To further promote and facilitate the usage of nontributary ground water and its withdrawal without regard to conservation or to the interests of landowners who might in the future wish to use the water, the Legislature provided that lowering the water level or the water pressure in the aquifer would not be deemed to cause injury. Yet these two factors would of course cause injury to others by making recovery of the water more costly and more problematical. In effect, the Legislature turned truth on its head and declared that which was clearly an injury would now *not* be an injury. But this provision was essential if land developers were going to have the ability to use this water without restriction. They wanted free, unfettered use in the development of the land without regard to what future owners of that land might face as the nontributary ground water source became depleted. Moreover, assuming that allocation was proper to begin with, this provision did not treat all landowners equally. Those who took water first had the advantage. Any delay in use was penalized because of the increase in recovery cost resulting from the lowering of the water level and pressure. This created the inducement to use "now" while the taking was relatively easy.

The fundamental concept in our water law, that one cannot use one's water right in a manner that injures others, is violated by such

12. Act of Oct. 11, 1983, ch. 285, 1983 Colo. Sess. Laws 2079 (codified at COLO. REV. STAT. § 37-92-203(1) (1997)). However, the Legislature did not purport to reverse the holding of the supreme court decision that nontributary ground water is not subject to the constitutional doctrine of appropriation.

13. S. 5, 1st Reg. Sess., 1985, Colo. Sess. Laws 1160.

legislative fiat. That concept was even written into the very law on wells which Senate Bill 5 amended. If the Legislature wanted to permit injury, as it so obviously did, then, in fairness to those injured and to the public, it should have so specifically stated, and not resorted to this subterfuge. This allocation of nontributary ground water on the basis of landownership is in effect applying a riparian concept to nontributary ground water, allocating it to the adjacent (upward) land.[14]

The legal, ethical and environmental propriety of the 1985 legislation and the practices it has encouraged should be questioned, particularly the allocation of the water, the depletion of this resource within 100 years, and the patent misstatement that lowering the water level and pressure does not cause injury. Assuming that the allocation of water on the basis of the ownership of the overlying land is proper, is it then legal constitutionally or statutorily for the water to be sold for use separate and apart from the land? That is carrying the digression from the 1983 Colorado Supreme Court decision one step further, and puts this water in commercial transactions for private profit.

The nontributary ground water crisis continues. The aquifers continue to be pumped, and continue to be depleted. The "no injury" provision of the 1985 Act sees to that. And as noted previously, the Act contemplates full depletion in 100 years. Some jurisdictions have tried to extend the hundred year period to a longer time, such as 300 years, but such suggestions still work within a depletion concept. What happens when the economic end of this water becomes a reality, an event that could very well be within the lifetime of persons living today? What happens to the persons relying upon it? As the water levels and water pressures are lowered and costs of recovery increase, economic viability will become more and more questionable. What is the alternative? One would think that conservation would be first on the list. But conservation should have been provided for in the original legislation.

CONCLUSION

The choices made by Colorado's Legislature reflect a state of mind that prevails throughout society. That state of mind is of limited purview, reflects a remarkable indifference to the future, and emphasizes present day greed. But crisis lurks in the background. The general public may not be aware of what goes on beneath their feet (and perhaps it is unfair to think it should be), but the land developers know, as do the political powers. They know the reservoirs of coal, oil, gas and nontributary water are finite. But they put conservation out of mind in the euphoria of economic growth, resource development,

14. Under the doctrine of riparian law, the owner of the land on the stream has the right to use a reasonable amount of water on that land. Reasonable use of nontributary ground water might be a usage on the land to which it is allocated that is consistent with the conservation of that resource.

more and more malls, more and more houses, more and more stadia, more and more automobiles.

For centuries, society has promoted the belief that the development of natural resources is one of the great goods of civilization. The mining of coal and other minerals, the taking of oil and gas, and the depletion of our underground water aquifers all are considered to be virtues in the business world. As the water levels decrease, the silent crisis continues. It is the state of mind today that technology will solve all, but can technology replenish our aquifers? Why cannot we look to Nature's wisdom in controlling natural resources, rather than the specious wisdom of present day promoters of development who are so shortsightedly unconcerned with the future, and are certainly not losing sleep over aquifer depletion. Instead of economic growth as the panacea and the assurance of prosperity, why can we not, as a society, adopt patterns of consumption based on sustainability and have "quality of life in a quality environment" as our goal? Through our legislative and judicial systems, through activists and protectors of public interest, we must review these questions of water allocation and use. What is happening to nontributary ground water under Senate Bill 5 is contrary to the protection of the environment, to the conservation of natural resources, to the wisdom of the supreme court, to the considered and wise progression of our water law, and contrary to the public interest — the interest of our children and grandchildren.

The exploitation of deep aquifer water is but a part of human exploitation of all Nature's substances and processes. The despoliation of our natural resources — soil, water, minerals, vegetation — resources that were created over millions of years, is absolute immorality and absolute folly. If the life and beauty of this planet, upon which the quality of human existence depends, are to be preserved, we must plan and implement a compassionate and rational stewardship of the planet. We must have respect for and pursue conservation of Nature, its substances, its processes, and its living things.