

THE LAST GASP: THE CONFLICT OVER MANAGEMENT OF REPLACEMENT WATER IN THE SOUTH PLATTE RIVER BASIN

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INTRODUCTION

Colorado's eastern plains receive approximately ten inches of moisture per year and even less in drought years.¹ Over the course of the last century however, farmers transformed the northeastern plains into fertile agricultural zones providing vegetables for Front Range² cities and hay, alfalfa, and corn for Colorado's cattle industry.³ Despite a growing urban population, eighty-five percent of water withdrawn from Colorado's waterways is still used for irrigation.⁴ To get water where it is needed, irrigators construct surface diversions that transport water to places where it will be used.⁵

In addition to the hundreds of surface diversions still in use today, technological improvements during the 1930s and drought in the 1950s compelled farmers in Colorado's river basins, including the South Platte, to sink hundreds of wells tapping into the aquifers moving beneath the rivers.⁶

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1. Justice Greg Hobbs, A Primer on Colorado Water Law, at http://www.cml.org/pdf_files/cowaterlaw.pdf (last modified June 26, 2003); JAMES N. CORBRIDGE JR. & TERESA A. RICE, VRANESH'S COLORADO WATER LAW 3 (rev. ed.1999).

2. The "Front Range" refers to the transition zone east of the Continental Divide that runs north to south, between Castle Rock, Colorado (approximately twenty-seven miles south of Denver), to the Wyoming border; see <http://www.geocities.com/CapitolHill/Lobby/3162/Colorado/colloquialisms.htm> (last visited Feb. 15, 2004).

3. CORBRIDGE & RICE, *supra* note 1, at 6.

4. Hobbs, *supra* note 1.

5. CORBRIDGE & RICE, *supra* note 1, at 7.

6. Lawrence J. MacDonnell, *Colorado's Law of "Underground Water": A Look at the South Platte Basin and Beyond*, 59 UNIV. COLO. L. REV. 579, 604 (1986) [hereinafter MacDonnell, *Colorado's Law of "Underground Water"*]. By the early 1960s, "[s]enior [s]urface users notice[d] diminishing surface water flows that

Increased numbers of water users and three consecutive years of severe drought recently triggered sharp conflicts over the legal and practical means of effectively managing water in this arid region. This comment presents the current conflict over water management in Colorado's South Platte River Basin,⁷ the events that led to the conflict, and solutions proposed by the judiciary and the legislature.

Unlike surface diversions, tributary groundwater wells were not regulated from the beginning, even though they took water from the river just as if diverting it by a surface ditch. Initially, surface appropriators alleged that such unregulated pumping resulted in shortages in surface supplies and injury to existing water rights. Furthermore, no system existed requiring well users to replace or augment the water they diverted. All of this has resulted in what is referred to as the "well problem."⁸

In order to solve the well problem, dramatic legislation in 1969⁹ called for the complete integration of surface and groundwater uses in all of Colorado's river basins—otherwise known as "conjunctive use."¹⁰ Proponents of conjunctive use

[were] not related to nature. [The Bureau of Reclamation] confirms that wells [were] causing the impact." South Platte Well Regulation Timeline (on file with the University of Colorado Law Review).

7. The South Platte River, one of the waterways still used to divert water for irrigation, drains over 19,000 square miles of Colorado's Front Range. It forms in the Pike National Forest in northern Park County, Colorado, and flows southeast to Elevenmile Canyon Reservoir at Florissant Fossil Beds National Monument. From Elevenmile, the South Platte turns to flow northeast through Cheesman Reservoir, into and through Denver and Greeley, and finally east by northeast to its confluence with the North Platte River in Nebraska. It is a major Colorado waterway that is fed by numerous rivers and creeks including Clear Creek, Boulder Creek, Bear Creek, Big Thompson and Little Thompson Rivers, North and South Saint Vrain Creeks, and others. *See generally* Colorado State University, Colorado Water Knowledge, at http://waterknowledge.colostate.edu/s_platte.htm (last visited Mar. 22, 2004).

8. *See, e.g.*, Robert Wellborn, The Water Right Determination and Administration Act of 1969: Its Background, Development, Enactment, Implementation and Teaching, Presentation Before the Colorado Bar Association (Oct. 8, 2003) (on file with the author).

9. Water Rights Determination and Administration Act of 1969, ch. 373, § 1 (codified as amended at COLO. REV. STAT. §§ 37-92-101 to -602 (2003)).

10. Recognizing the interconnection of groundwater and surface water, Colorado integrates the management of tributary groundwater with surface sources under prior appropriation law. DAVID H. GETCHES, *WATER LAW IN A NUTSHELL* 276 (3d ed. 1997) [hereinafter GETCHES, *NUTSHELL*]; *See also* CORBRIDGE & RICE *supra* note 1. It is important to recognize this view of conjunctive use is unique to Colorado. Other states like Arizona and California

believed it would prevent injury to existing surface users because the legislation required all the tributary groundwater wells to be brought within the prior appropriation system¹¹ so they could be regulated in relation to existing senior surface rights.¹² In order to accomplish this daunting task,¹³ the legislation created two mechanisms: augmentation plans¹⁴ and

view conjunctive use differently. William Blomquist, Tanya Heikkila, and Edella Schlager, *Institutions and Conjunctive Water Management Among Three Western States*, 41 NAT. RESOURCES J. 653 (2001).

11. The basic premise of the prior appropriation system is as follows: a person obtains a senior usufructuary right to the water if he diverts water from a stream and puts it to beneficial use before someone else. COLO. CONST. art. XVI § 5 (1876). The modern doctrine consists of three parts: (1) first in time first in right, (2) the right to divert, and (3) putting the water to beneficial use. GETCHES, NUTSHELL *supra* note 10, at 8. See *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443 (1882); *Irwin v. Phillips*, 5 Cal. 140 (1855). Thus, the second person to put water to beneficial use has rights senior to all subsequent users except the first water user, and so on. GETCHES, NUTSHELL, *supra* note 10, at 74-75. The doctrine of prior appropriation creates vested rights in private individuals to use water, and protects the rights of people who first appropriated waters because of the great effort and expense involved in constructing elaborate mechanisms to remove the water from the natural streams and convey it to where it was most needed. COLO. REV. STAT. § 37-92-103(4) (2002). Furthermore, in times of drought, appropriators clearly understand when and where they will or will not receive water based on the order in which their rights to the water are established. CORBRIDGE & RICE *supra* note 1, at 146.

12. Harrison C. Dunning, *The "Physical Solution" in Western Water Law*, 57 U. COLO. L. REV. 445, 467 (1986).

13. The task is considered to be particularly daunting as many other western states have failed to even recognize the interconnection between surface and groundwater supplies, much less attempt to integrate the two uses. See Hal Simpson, *What is Working for Water Administration Officials and What is Not: Retrospective of the Water Rights Determinations and Administration Act of 1969*, Presentation Before Colorado Bar Association, (Oct. 8, 2003) (transcript on file with the University of Colorado Law Review).

14. Augmentation plans are detailed, court-approved plans that allow a water user to divert water "out of priority" (which occurs when an appropriator does not technically have the right or "priority," to take the amount of his appropriation from the flow of the natural stream in preference to another appropriator, but is legally allowed to divert water anyway because he has a court-approved augmentation plan or a state engineer-approved SSP), as long as adequate replacement water is put into the affected stream system in order to increase the supply of water available for beneficial use . . . by the development of new or alternate means or points of diversion, by a pooling of water resources, by water exchange projects, by providing substitute supplies of water, by the development of new sources of water, or by any other appropriate means.

COLO. REV. STAT. § 37-92-103(9) (2003). This provision is designed to optimize the "beneficial use" of existing water supplies of the state. § 37-92-103(9). For more information pertaining to augmentation plans, see §§ 37-83-105, 37-92-501.5, -305, -302.

substitute supply plans (SSPs).¹⁵ These plans would integrate surface diversions and tributary groundwater well depletions, thereby achieving “maximum” or “optimum utilization”¹⁶ of Colorado’s water resources in accordance with the objectives of the 1969 Act.¹⁷

Generally, an augmentation plan is a court-approved plan that allows junior water users to divert water out of priority so long as adequate replacement is made to the affected stream system, thereby preventing injury to existing water rights.¹⁸ Receiving a decree for an augmentation plan satisfies the due process concerns of other existing water users and brings replacement plans into the priority system.¹⁹ SSPs were intended to work in tandem with augmentation plans. They encourage junior appropriators to get decrees for their replacement plans, because SSPs allow these new water users to divert water out of priority right away while they wait for court approval of their augmentation plans.²⁰ While the water

15. The SEO has interpreted COLO. REV. STAT. § 37-80-120 (2003) to grant it the authority to approve SSPs allowing junior water users to temporarily store or divert surface waters originally intended for downstream senior users out of turn. See § 37-80-120. However, these junior users can only do this if they provide a substitute supply of water to the downstream senior user in exchange for the water the junior used out-of-priority. See § 37-80-120. A court can “compel a senior right holder to accept a substituted source of water . . . in order to benefit the junior and to achieve better overall utilization of the resource.” Dunning, *supra* note 12, at 448. See generally Justice Gregory J. Hobbs, Jr., *Colorado’s Adjudication and Administration Act: Settling In*, 3 U. DENV. WATER L. REV. 1, 10 (1999).

16. See §§ 37-92-101 to -602. To avoid confusion about the meaning of the word “maximum,” the word “optimum,” (also used in the *Fellhauer* opinion), will be used to more clearly convey the objective of the *Fellhauer* court and the Act of 1969 best use, not necessarily squeezing every drop to the maximum amount. See *Fellhauer v. People*, 447 P.2d 986, 994 (Colo.1968).

17. It is important to note that not all groundwater is created equal. In Colorado there are three basic legal definitions of groundwater. For the purposes of this comment however, the only groundwater referred to throughout is “tributary groundwater.” Tributary groundwater is water that is hydraulically connected to a surface stream or an alluvial aquifer, such that it can influence the rate or direction of movement of the stream or aquifer. § 37-92-103(11).

18. R. WASKOM & M. NEIBAUER, GLOSSARY OF WATER TERMINOLOGY (Colo. State Univ. Coop. Extension, Crop Series No. 4.717) (2002), at <http://www.ext.colostate.edu/Pubs/crops/04717.html> (last visited Feb. 11, 2004).

19. Dunning, *supra* note 12, at 445.

20. This allows new water users to become a part of the prior appropriation system without being penalized by not being able to divert because of a lengthy adjudication process. So serious were state lawmakers about making it as easy as possible for appropriators to get decreed augmentation plans that water courts were empowered to “compel a senior right holder to accept a substituted source of

court approves augmentation plans, SSPs are administered²¹ by the State Engineer's office (SEO).²²

Pursuant to the statutory mandate to optimize utilization of the state's water resources, the SEO used its authority to liberally grant SSPs, effectively turning a stopgap measure into a means of indefinitely evading the adjudicatory process mandated by the statute.²³ Moreover, the SEO expressly encouraged many well users operating under SSPs to form well user organizations.²⁴ Members of such well user organizations were, thereby, reliant on the broad scope of the SEO's apparent authority by which they completely avoided the adjudication process.

Many appropriators with decreed augmentation plans and senior surface rights were troubled by the SEO's willingness to approve SSPs year after year without requiring these newer appropriators, particularly members of well user organizations, to go to water court for a decreed augmentation plan. Existing appropriators alleged that the SEO transformed SSPs from a temporary measure into a permanent extra-judicial activity, causing injury to existing rights and undermining the prior appropriation system.²⁵

Until recently, three factors permitted surface and tributary groundwater appropriators along the lower South Platte River to tacitly coexist. First, Colorado enjoyed above-

water . . . in order to benefit the junior and to achieve better overall utilization of the resource." Dunning, *supra* note 12, at 448. Therefore, an SSP is a "temporary augmentation plan" and serves as a stopgap measure while the proposed permanent augmentation plan wends its way through water court. A "replacement plan" is the functional equivalent of a "substitute supply plan," and refers to the source of water that a junior or undecreed well user makes available to a senior appropriator to offset any injury caused to the senior by the junior's or undecreed well user's out-of-priority groundwater depletions. See COLO. REV. STAT. § 37-92-308 (2003).

21. Water rights administration requires the SEO to take decrees of courts and apply the terms and conditions of those decrees to manage the water rights in question within the priority system.

22. § 37-80-120. The SEO has authority to grant permission to junior appropriators to store and divert water out of priority if the stored water may readily be made available to downstream senior appropriators when needed and can also grant permission for junior users to have substituted supplies of water available for the senior appropriators.

23. See *e.g.*, *Empire Lodge Homeowner's Ass'n v. Moyer*, 39 P.3d 1139 (Colo. 2001); *infra* Part III.A.

24. See *infra* Part II.

25. See, *e.g.*, Timothy R. Buchanan, *Doing the Right Thing*, BRUSH NEWS-TRIBUNE, Jan. 22, 2003, <http://www.brushnewstribune.com>.

average precipitation for more than thirty years.²⁶ Second, Denver and the surrounding municipalities, responsible for introducing thousands of acre-feet of water from the western slope via transbasin diversions, were not using these diversions to extinction.²⁷ Finally, many appropriators with decreed surface rights also diverted water via tributary groundwater wells.²⁸ Presumably, they did not want to look too closely at the potential injury caused by well depletions, because any concerted effort to strictly enforce the prior appropriation system to protect existing surface rights would more than likely reduce their ability to use tributary groundwater. These circumstances created a substantial surplus of water within the system, which constituted "a gift" to downstream water users along the lower South Platte and fostered reluctant accommodations between decreed and undeclared appropriators.²⁹

After three years of severe drought between 2000 and 2002 eliminated any surplus water supplies, existing appropriators, in particular those with decreed augmentation plans, could no longer accommodate those operating under SSPs.³⁰ Turning to the state courts and legislature, those with decreed augmentation plans demanded the laws outlined in the 1969 Act governing the management of replacement water be enforced, specifically the statutes pertaining to court-approved augmentation plans.³¹ They also claimed the SEO had exceeded its authority by approving SSPs year after year for the last thirty years, and that the SEO's authority to approve SSPs should be greatly reduced, if not eliminated, in order to put a stop to what many believed to be illegal pumping from

26. See, e.g., News Release, Colorado State University Colorado Climate Center, State Climatologist Warns of Growing Threats for a Dry Winter and a Serious Multi-Year Drought (Feb. 10, 2003), at <http://ccc.atmos.colostate.edu/newsfeb10.php> (last visited Jan. 30, 2004).

27. Developers of foreign water sources are entitled to reuse the additional water they bring to a stream. See COLO. REV. STAT. § 37-82-106(1) (2003).

28. See MacDonnell, *Colorado's Law of "Underground Water"* *supra* note 6, at 614-15.

29. "Between 1941 and 1981, transmountain diversions have added an average of about 259,000 acre-feet of water per year." *Id.* at 604 (citing BLATCHLEY ASSOCS., INC., "TUNNEL VISION": AN ANALYSIS OF RIVER CALL DATA IN THE SOUTH PLATTE RIVER BASIN 11, tbl.4 (July 1984)).

30. See *infra* Part III.B.2.

31. *Id.*

tributary groundwater wells.³²

While the effects of unregulated well pumping and tensions between those with decreed augmentation plans, those operating under SSPs, and the SEO, first appeared in the Arkansas River Basin,³³ this conflict emerged in the South Platte River Basin for four reasons: (1) the South Platte River is over-appropriated;³⁴ (2) irrigators, operating under SSPs, share the South Platte with the state's largest municipalities, many of whom operate under decreed augmentation plans; (3) all water users had suffered the damaging effects of three consecutive years of severe drought;³⁵ and, most importantly for the purposes of this comment, (4) the drought highlighted long-standing differences between those with decreed augmentation plans, those operating under SSPs, and the SEO, over how best to manage replacement water.

Arguably, the SEO was responding to pressure from members of the agricultural community operating under SSPs and trying to fulfill its statutory duty to optimize utilization by granting SSPs allowing pre-1972 wells to keep pumping, and infusing a certain degree of equity into the prior appropriation system. However, the laws governing the use of Colorado's water resources are designed to create certainty among water users in a region where periods of water shortages are inevitable. Granting SSPs in perpetuity, without requiring such water users to obtain a decreed augmentation plan, renders existing priority dates meaningless in times of water scarcity. While the prior appropriation system has many flaws, if the system is to continue and the goal of conjunctive use as

32. *In re Proposed Amended Rules and Regulations Governing the Diversion and Use of Tributary Groundwater in the South Platte River Basin*, No. 02CW108 (Colo. Dist. Ct., Water Div. No. 1, Dec. 23, 2002); see also Buchanan, *supra* note 25.

33. *Fellhauer v. People*, 447 P.2d 986 (1968). In 1940 only 2,000 acre feet of water were being pumped from wells in the Arkansas River Valley, but by 1964, 240,000 acre feet of water were being pumped by unregulated wells. *Id.*

34. A term used to describe a surface water drainage system that is subject to more decreed water rights claims than can be satisfied by the physical supply of water available. WASKOM & NEIBAUER, *supra* note 18.

35. See, e.g., *Drought May Force Farm Families to Shut Down Wells*, U.S. WATER NEWS ONLINE (Aug. 2002), at <http://www.uswaternews.com/archives/arconserv/2dromay8.html> (last visited Jan. 30, 2004); Dan Luecke et al., *What the Current Drought Means for the Future of Water Management in Colorado* 5 (Jan. 2003), http://tu.org/pdf/conservation/wwp/CO_DROUGHT_REPORT.PDF (last visited Mar. 14, 2004).

defined by Colorado statute is to be achieved, the law must be strictly enforced. If a change in the law is considered necessary, the legislature is the body empowered to amend it.

Many obstacles frustrate effective management of replacement water, but it is nevertheless time to enforce the provisions of the 1969 Act and bring all replacement water diverted without a court-approved augmentation plan along the lower South Platte within the prior appropriation system. Otherwise, the fallout from the conflict along the lower South Platte—forcing many small farmers out of business and disrupting rural communities—will be needlessly repeated in Colorado's other river basins.³⁶

This comment presents the current conflict between decreed and undeclared appropriators and between administrators of water rights with diametrically opposed ideas about the management of replacement water in the lower South Platte River Basin. It examines the events that led to the conflict and the solutions proposed by the judiciary and the legislature. There are many issues surrounding this conflict that are beyond the scope of this comment.³⁷ Therefore, the reader is left with some important yet unanswered questions that will need to be resolved before better management of replacement water through conjunctive use can be achieved.

This comment proceeds in three parts. Part I presents the nature of the well problem, early attempts to solve it through statutory provisions compelling conjunctive use, and the difficulties inherent in applying those provisions. With this foundation in place, Part II presents a case study from the lower South Platte River Basin illustrating how, until recently, one well user organization operated under SSPs. Finally, Part III presents the recent conflicts between those operating under

36. Judith Kohler, *Water Fight Brewing in Colorado's San Luis Valley*, STAR TELEGRAM, Jan. 27, 2004, at <http://www.dfw.com/mil/startelegram/news/state/7807353.htm> (last visited Feb. 28, 2004).

37. For example, this comment does not include the effects to surface streams from pumping of "exempt wells." Exempt wells are in a different category from all other water rights and owners of exempt wells are not required to adjudicate their water rights. See COLO. REV. STAT. § 37-92-602(4) (2003). Exempt wells include, but are not limited to, wells that do not pump more than fifteen gallons per minute, are used for household purposes, fire protection, watering of poultry, domestic animals, livestock on farms and ranches, and for the irrigation of not more than one acre of home gardens and lawns. They cannot be used for more than three single-family dwellings. See § 37-92-602(1)(b)-(f).

augmentation plans and SSPs and examines how the decisions of the judiciary and legislature should serve as a warning for appropriators in Colorado's other river basins.³⁸

I. THE WELL PROBLEM, STATUTORY SOLUTIONS AND CHALLENGES IN APPLICATION

During the late 1940s and early 1950s, improved technology and access to affordable electricity made it possible for hundreds of farmers living within Colorado's river basins to drill wells to irrigate their crops.³⁹ Such wells took water from the flow of a river affecting the tributary aquifer, but because these diversions were not regulated as part of the prior appropriation system,⁴⁰ the "well problem" arose. Existing appropriators felt the system was inadequate because it only regulated surface depletions, leaving existing water users vulnerable to the negative effects of the depletions by these high capacity wells. These concerns compelled lawmakers to formulate legislation mandating the complete integration of surface and groundwater uses, and in 1969, Colorado enacted laws designed to solve the problem.⁴¹

A. *The Well Problem*

Tributary aquifers and rivers are linked and wells pumping from tributary aquifers take water from the river as if they are surface diversions, depleting available supplies and potentially causing injury to existing senior surface rights.⁴²

38. Although the SEO's authority to manage replacement water in the South Platte River Basin was significantly diminished, the legislative and judicial decisions did not repeal the existing rules and regulations governing the Arkansas River Basin. COLO. REV. STAT. § 37-92-308 (2003).

39. See Robert F. Wellborn, *Two Colorado Water Crises*, 1 U. DENV. WATER L. REV. 307, 307 (1998). See also South Platte Well Regulation Timeline, *supra* note 6 ("1940's: Rural electrification and well drilling technology improve allowing [for] more well development.").

40. The Colorado legislature did not take steps to regulate tributary groundwater until 1953 with the Underground Water Act. Underground Water Act, 1953 Colo. Sess. Laws 647.

41. Water Rights Determination and Administration Act of 1969, ch. 373, § 1 (codified as amended at COLO. REV. STAT. §§ 37-92-101 to -602 (2003)).

42. See U.S. EPA Final Report: A Comparative Institutional Analysis of Conjunctive Management Practices Among Three Southwestern States, at gov/ncer_abstractDetail/abstract/615/report/F (last visited Jan. 30, 2004); South Platte Well Regulation Timeline *supra* note 6.

Prior to the 1969 Act, unregulated wells pumped freely at the user's discretion and many farmers based their livelihood on this unrestricted well usage.⁴³ On the other side of the well problem were farmers, industries, cities, and towns that diverted surface flows through ditches administered pursuant to the prior appropriation system.

The earliest efforts to address the unregulated wells appeared when coalitions of senior surface water users formed in the Arkansas River Basin to force the SEO to regulate the wells that were diverting water out of priority. Legislation effective in 1966 permitted the SEO to shut down the wells harming senior rights.⁴⁴ However, Mr. Fellhauer, a farmer along the Arkansas River, whose farm depended upon pumping water from his wells, refused to allow his wells to be curtailed. Litigation ensued, and the case went before the Colorado Supreme Court where it was determined that wells should be administered under the prior appropriation system. In *Fellhauer v. People*,⁴⁵ to repeat an oft-quoted passage, the court wrote that

It is implicit in these constitutional provisions that, along with vested rights, there shall be maximum utilization of the water of this state. As administration of water approaches its second century the curtain is opening upon the new drama of maximum utilization and how constitutionally that doctrine can be integrated into the law of vested rights. We have known for a long time that the doctrine was lurking in the backstage shadows as a result of the accepted, though oft violated, principal that the right to water does not give us the right to waste it.⁴⁶

One year after *Fellhauer*, the state legislature furthered the objective of efficient use of the state's water resources by enacting the Colorado Water Rights Determination and Administration Act of 1969,⁴⁷ (1969 Act), which expanded the

43. For instance, Mr. Fellhauer and his thirty-nine wells. In *Fellhauer v. People*, 447 P.2d 986, 991 (Colo. 1968), it was stated that in 1940 2,000 acre feet of water was being pumped from wells in the Arkansas River Valley, but by 1964, 240,000 acre feet of water were being pumped.

44. See Act of May 3, 1965, ch. 318, 1965 Colo. Sess. Laws 1244 (repealed in part and amended in part, now codified at COLO. REV. STAT. § 37-92-501 (2003)).

45. 447 P.2d 986.

46. *Id.* at 994 (emphasis in original).

47. Water Rights Determination and Administration Act of 1969, ch. 373, §

objectives of administration of Colorado's water resources to include the goal of optimum utilization.⁴⁸

B. The Statutory Solution: Conjunctive Use

Lawmakers believed the solution to the well problem was the optimum utilization of the state's water resources through conjunctive use⁴⁹ because surface water⁵⁰ and tributary groundwater would be treated the same way,⁵¹ thereby "increasing" or "acknowledging" all the water in the system.

Conjunctive use "increases" the amount of water within the system because it allows appropriators to use wells instead of and along with surface diversions. Pumping is often a more efficient, less wasteful means of appropriating water. First, if water is pumped through a well, only the amount to be diverted is removed from the aquifer. In contrast, if the water must travel via surface stream flow, one must divert the amount of water needed *plus* enough additional water to carry the needed water downstream to the point of diversion, to allow the needed water to reach the elevation of the diversion works along the stream,⁵² and to make up for water that will be lost while traveling through long, leaky earthen diversion channels.⁵³

Thus, wells "increase" the total amount of water by reducing transit losses inherent in surface diversions. This

1 (codified as amended at COLO. REV. STAT. §§ 37-92-101 to -602 (2003)).

48. See *supra* note 17.

49. COLO. REV. STAT. § 37-92-102(1)(a) (2003).

50. See A. DAN TARLOCK, JAMES N. CORBRIDGE, JR. & DAVID H. GETCHES, *WATER RESOURCES MANAGEMENT: A CASEBOOK IN LAW AND PUBLIC POLICY* 369 (5th ed. 2002).

51. Tributary ground water (for Colorado statutory purposes) is water that is hydraulically connected to a surface stream or an alluvial aquifer such that it can influence the rate or direction of movement in the stream or aquifer. § 37-92-103(11). Another way to determine if the water is tributary is if its withdrawal will deplete the flow of the surface stream within one hundred years of the time of pumping.

52. See *State ex rel. Cary v. Cochran* 292 N.W. 239, 245 (Neb. 1940) (explaining that under the prior appropriation doctrine, it required 700 cfs of water from the North Platte to deliver 162 cfs to the headgate at the Kearney Canal (the ditch where the water was being called to)).

53. Otherwise referred to as *evapotranspiration*. Evapotranspiration (ET) is a process by which water is evaporated from soil surfaces and water is transpired by plants growing on that surface. WASKOM & NEIBAUER, *supra* note 18.

benefits appropriators, especially junior appropriators, when insufficient water is available for diversion from the surface water due to drought or a call placed on the river by a senior appropriator.⁵⁴ Some senior appropriators are not opposed to the use of wells because they use them in conjunction with previously decreed surface rights.⁵⁵ The "increase" also creates a replacement supply for junior appropriators' augmentation plans if the depletions occur outside the irrigation season.⁵⁶

To support new uses, SSPs provided junior appropriators with what was to be temporary approval to divert water out of priority, authorized and administered by the SEO while they waited for their decree.

Moreover, the 1969 Act provided an additional inducement to encourage well owners with undecreed replacement plans to come to water court by stipulating that the priority dates of the wells would *not be* postponed⁵⁷ for well applications filed by

54. CORBRIDGE & RICE, *supra* note 1, at 154. Senior appropriators may satisfy their needs for water to the extent the water is available, by *calling* the river. "Calling the river" occurs when a request is made by an appropriator for water which the person is entitled to under his decree; such a call will force those users with junior decrees to cease or diminish their diversions and pass the requested amount of water to the downstream senior making the call. WASKOM & NEIBAUER, *supra* note 18. If a call is placed on the river by a senior appropriator, junior appropriators must let that water pass to the downstream senior user who put the "call" on the river. CORBRIDGE & RICE, *supra* note 1, at 27.

55. COLO. REV. STAT. § 37-92-301(3). An alternative point of diversion is defined as a place where the water user has permission via a decree from the water court to divert the amount of water approved in the original decree from a different location—for example, from a surface diversion versus a tributary well.

56. § 37-92-305; Wells pumping ground water that is hydrologically connected to a stream may reduce streamflow, although the time between the well pumping and the associated streamflow reduction may be days, weeks, months or years. See David L. Harrison & Gustave Sandstrom, Jr., *The Groundwater-Surface Water Conflict and Recent Colorado Water Legislation*, 43 U. COLO. L. REV. 1, 18 (1971); Douglas L. Grant, *The Complexities of Managing Hydrologically Connected Surface Water and Groundwater Under the Appropriation Doctrine*, 22 LAND & WATER L. REV. 63, 74-80 (1987).

57. Water Right Determination and Administration Act of 1969, ch. 373, sec. 1, § 148-21-22, 1969 Colo. Sess. Laws 1212 (codified at Colo. Rev. Stat. § 148-21-22 (1971)) states that:

With respect to the divisions described in section 148-21-8, priorities awarded in any year for water rights or conditional water rights shall be junior to all priorities awarded in previous years and junior to all priorities awarded in decrees entered prior to the effective date of this article or in decrees entered in proceedings which are pending on such date; except that with respect to water rights which are diverted by means of wells (the priorities for which have not been established or sought in any such decree or proceeding), if the person claiming such a

July 1, 1972.⁵⁸ In other words, well users filing for a decree within three years would not have to assume a priority date based on the date they filed their application, but could use the date their wells first came on-line and the water pumped was first put to beneficial use.⁵⁹ For many well users, this date was at some point during the late 1940s and early 1950s.⁶⁰ Under a "first in time, first in right" system of water administration, the date of appropriation was a much preferred date to 1972, or whenever they actually filed their application.⁶¹

C. *The Difficulties of Application*

Water courts, particularly in Division One covering the South Platte River, braced themselves for the flood of applicants seeking approval for plans of augmentation.⁶² But the flood never came. While some forward-thinking individuals did file applications for approval of augmentation plans during

water right files an application for determination of water right and priority not later than July 1, 1971, . . . and such application is approved and confirmed, such water right, subject to the provisions of section 148-21-21(1), shall be given a priority date as of the date of actual appropriation and shall not be junior to other priorities by reason of the foregoing provision.

(emphasis added)

Therefore, under the postponement doctrine, water rights adjudicated in a previous decree are senior to water rights adjudicated in a subsequent decree on the same stream, regardless of their dates of appropriation (when the water was diverted and put to beneficial use). See *S. Adams County Water & Sanitation Dist. v. Broe Land Co.*, 812 P.2d 1161, 1164 (Colo. 1991).

58. Act of Mar. 2, 1971, sec. 1, ch. 373, 1971 Colo. Sess. Laws 1333 (codified as amended at COLO. REV. STAT. § 148-21-22 (1971), current version at § 37-92-306 (2003)). In an effort to adjudicate as many wells as possible so as to bring them within the prior appropriation system the postponement cut-off date was later extended to July 1, 1972. 1971 Colo. Sess. Laws 1333.

59. See 1971 Colo. Sess. Laws 1333.

60. Email from Raymond Liesman, Referee, Colo. Dist. Ct. Water Div. No. 1 to author (Mar. 16, 2004, 08:32:08 PST) (on file with the University of Colorado Law Review).

61. COLO. REV. STAT. § 37-92-306 (2002).

62. The 1969 Act contained "special procedures" for reviewing augmentation plans, there was to be a moratorium on filing such plans between July 1, 1971 and July 1, 1973. Water courts were concerned about the potential for applicants inundating the courts with applications, so no applications were accepted during that time. See Lawrence J. MacDonnell, *Plans for Augmentation: A Summary, in TRADITION, INNOVATION AND CONFLICT: PERSPECTIVES ON COLORADO WATER LAW* 137, 146-47 (Lawrence J. MacDonnell ed., 1986) [hereinafter MacDonnell, *Plans for Augmentation*].

this period, a large number of well users did not file, opting to join well user organizations instead.

The SEO encouraged well users to form well user organizations in part because of the confidence it had in its authority to promulgate rules and regulations governing, among other things, replacement water in each river basin. However, the Amended Rules and Regulations Governing the Use, Control and Protection of Surface and Ground Water Rights of the South Platte River and its Tributaries (1974 Rules)⁶³ and Senate Bill 74-7 seemingly *limited* the SEO's broad apparent authority. The language in both the 1974 Rules and Senate Bill 74-7 reiterated the temporary nature of SSPs, thereby reinforcing the 1969 Act's mandate that water users adopt SSPs in the short term and file for approval of an augmentation plan with the water court.

1. The 1974 Rules & Senate Bill 74-7

The 1974 Rules, still in effect today, mandate the total curtailment of undecreed tributary groundwater wells along the lower South Platte by 1976 unless the wells are operating under (1) a decreed augmentation plan, (2) a decreed alternate point of diversion or new point of diversion for diversion of surface water, (3) its own priority date without causing injury to senior water users, *or* (4) an SSP approved by the SEO pursuant to Senate Bill 74-7.⁶⁴ Senate Bill 74-7 expressly authorized the SEO to approve SSPs *while* applications for approval of augmentation plans wended their way through

63. Rules and Regulations Governing the Use, Control and Protection of Surface and Ground Water Rights of the South Platte River and Its Tributaries, in I COLORADO WATER LAWS, at IV-10 (George E. Radosovich, ed. 1979), available at http://water.state.co.us/pubs/rule_reg/south.pdf (last visited Mar. 31, 2004).

64. Two years for all interested parties to file for approval of augmentation plans, from the time the Rules and Regulations were adopted by the state engineer in 1974, to total curtailment of the wells in 1976 was stipulated to by the parties involved in a lengthy trial before the Division One Water Court Judge with a decree entered in March of 1974. See *In re Proposed Rules and Regulations Governing the Use, Control and Protection of Surface and Ground Water Rights Located in the South Platte River and Its Tributaries*, Nos. W-7209, W-7232, W-7249, W-7290, W-7295, W-7296, W-7298 (Colo. Dist. Ct., Water Div. No. 1, Mar. 15, 1974), in I COLORADO WATER LAWS, at IV-2 (George E. Radosovich, ed. 1979), available at http://water.state.co.us/pubs/rule_reg/south.pdf (last visited Mar. 31, 2004). Provision (4) has historically been disregarded as Senate Bill 74-7 was repealed three years after the Rules and Regulations were approved and the state engineer continued to grant SSPs year after year until 2002.

water court.⁶⁵

Therefore, if an application was pending before the water court, water users could take advantage of the flexibility provided by the 1974 Rules and Senate Bill 74-7 and continue to divert out of priority under an SSP while awaiting a decree from the water court. Well users therefore avoided total curtailment if they filed applications for augmentation plans.

In 1977, however, Senate Bill 74-7 was repealed in part because decreed appropriators claimed it did not contain the necessary procedural mechanisms to guard against injury to their existing water rights and that the SEO had exceeded its authority under the bill.⁶⁶ In response to these complaints, the General Assembly repealed the provision arguably granting the SEO authority to approve SSPs under Senate Bill 74-7.⁶⁷ Arguably, senior water users probably thought their efforts to repeal Senate Bill 74-7 returned the power to make material injury determinations to the exclusive jurisdiction of the water courts and that the SEO understood it had exceeded its statutory authority under Senate Bill 74-7.

Ironically, State Engineer Kuiper testified in favor of repealing Senate Bill 74-7, seemingly siding with decreed appropriators, but he claimed the repeal of the Senate Bill 74-7 would *not* eliminate the SEO's authority to approve SSPs because that authority still existed under Colo. Rev. Stat. § 37-80-120. Section 120 states in part, "[w]henever substitute water is supplied to a senior . . . the supplier or his assignee may take an equivalent amount for beneficial use from the water of the state"⁶⁸ The SEO construed this to mean that

65. Water and Irrigation Act, sec. 1, ch. 111, 1974 Colo. Sess. Laws 440 (codified at COLO. REV. STAT. § 37-92-307 (1974), and subsequently repealed in 1977 with the enactment of Senate Bill 77-04). The general assembly had previously approved SSPs under Senate Bill 69-105 in 1969 which allegedly gave the SEO authority to approve SSPs.

66. *See Kelly Ranch v. S.E. Colo. Water Conserv. Dist.*, 550 P.2d 297 (Colo. 1976).

67. *See Hearing on S.B. 74-4 Before the Senate Comm. on Agric., Natural Resources & Energy*, 51st Gen. Assem., 1st Reg. Sess. (Colo. 1977) (State Archives Legislation Tape MIT-77-3A); *see also* COLO. REV. STAT. § 37-80-120 (2003).

68. § 37-80-120(4). Kuiper testified further that he did not possess sufficient staff or money to hold the kind of hearings required by Senate Bill 74-7. Query then, if by choosing to repeal Senate Bill 74-7, the general assembly struggled with logistical concerns relating to the lack of resources in the SEO to conduct formal hearings and provide notice to interested parties rather than reducing the scope of the authority of the state engineer to approve SSPs. *See Hearing on S.B. 74-4, supra* note 68.

it already had the power to grant SSPs under § 120, effectively interpreting the statute to allow the SEO to make determinations of the adequacy of the replacement water despite statutory language granting that power exclusively to the water court.⁶⁹

Arguably, senior water users probably thought their successful efforts to repeal Senate Bill 74-7 returned the power to make material injury determinations to the exclusive jurisdiction of the water courts and that the SEO understood it had exceeded its statutory authority under the bill in encouraging the formation of well user organizations and approving their SSPs year after year with no proof that approval for an augmentation plan was pending before the water court. However, it appears that the opposite was true.

So convinced were the SEO and well users of the SEO's authority to approve SSPs at its discretion under § 120, that those who had joined well user organizations did not file for approval of augmentation plans with the water court.⁷⁰ When faced with the choice of expending scarce financial resources to adjudicate the wells in water court, or avoiding the water court entirely, many well users chose the latter.

The following section presents a case study illustrating how, until recently, a well user organization operated under just such an unadjudicated, large-scale SSP.

II. MOVING TOWARD CONJUNCTIVE USE?: A CASE STUDY OF A SUBSTITUTE SUPPLY PLAN

As the following case study illustrates, conjunctive use can look very different as set forth in the language of the statute and as applied in the field. Faced with the choice between the rule of law and equity, the SEO chose equity. As set forth above, the SEO, assuming its apparent authority under § 120 in conjunction with the substantial surplus of water supplies that existed in the lower South Platte, liberally granted SSPs year after year and expressly encouraged those operating under SSPs to form well user organizations.⁷¹ Groundwater Appropriators of the South Platte (GASP) was a classic

69. See §§ 37-92-203(1), -301(3).

70. Simpson, *supra* note 13.

71. See discussion *supra* Part I.

example of one of the large well user organizations formed within the South Platte River Basin. It comprised hundreds of small farmers operating under SSPs approved annually by the SEO for over thirty years, during which time most of GASP's members made no attempts to obtain decreed augmentation plans.

Many water users along the South Platte are small-scale farmers, rural towns, and school districts, which simply cannot afford the time or money required to adjudicate augmentation plans.⁷² In theory, well user organizations like GASP⁷³ were to function in a materially similar manner to those with decreed augmentation plans, but without court approval. Well users found organizations like GASP very appealing because they offered a fast and affordable way to acquire replacement water. By 1972, 4,000 wells scattered from Fairplay⁷⁴ to Julesburg,⁷⁵ with the majority located in the South Platte River Basin below Greeley,⁷⁶ had come under GASP's umbrella.⁷⁷ For many, GASP was the only way to get water because the costs involved—in formulating an augmentation plan, retaining engineers and attorneys, seeking water court approval, and implementing that augmentation plan, if it was in fact

72. Telephone Interview with Jack Odor, Manager of GASP (Feb. 7, 2003); Telephone Interview with Dave Nettles, Water Engineer Division One (Aug. 12, 2003).

73. GASP is not the only well user organization that depends on water from substitute supply plans. Central Colorado Water Conservancy District ("CCWCD") also uses SSPs. However, a Division One Water Court Ruling on December 23, 2002 caused CCWCD to abandon its year-to-year reliance on water supplied to its members from SSPs. *In re Proposed Amended Rules and Regulations Governing the Diversions and Use of Tributary Ground Water in the South Platte River Basin*, No. 02CW108 (Colo. Dist. Ct., Water Div. No. 1, Dec. 23, 2002) (order granting motion for summary judgment). CCWCD filed for approval of plans for augmentation on Friday December 27, 2002 in order to obtain permission to continue using its SSPs for up to five years while it awaits a judicial decree on its plans for augmentation. See CCWCD's 2002 Executive Director's Report, at <http://www.ccwcd.org/html/report2002.asp> (last visited Feb. 27, 2004); Simpson *supra* note 13.

74. Fairplay is approximately one hundred miles southwest of Denver.

75. Julesburg is near the Colorado-Nebraska state line.

76. Telephone interview with Jack Odor, *supra* note 72.

77. Irrigation is considered to be a preferred beneficial use. For example, "Weld county ranks fifth in the country for money generated from agriculture." Julio Ochoa, *Agriculture Soaks Up 85-90 Percent of Water in State*, GREELEY TRIB., Jan. 6, 2003, <http://www.greeleytrib.com/apps/pbcs.dll/artikkel?SearchID=7316028877656&Avis=GR&Dato=20021230&Kategori=DROUGHT&Lopenr=212300101&Ref=AR> (last visited Feb. 13, 2004).

approved by the court—frequently exceeded the value of the water.⁷⁸

GASP was a non-profit organization designed to augment out-of-priority depletions in the South Platte River Basin.⁷⁹ GASP found replacement water for its wells and supplied water for agricultural,⁸⁰ municipal,⁸¹ and industrial uses.⁸²

GASP operated through a mechanism often referred to as “call management.”⁸³ Call management operated in the following manner: the SEO would anticipate, based on the historic uses and time of year, which senior appropriators were most likely to put a “call”⁸⁴ on the river. The SEO would then turn to GASP and request that GASP provide replacement water in the amount of the call placed on the river by that senior appropriator. This would result in removing the call from the river, thereby enabling junior appropriators, like GASP’s members, to continue using their out-of-priority wells.

Under this regime, no specific quantity of replacement water was ever documented and it allowed GASP’s members to avoid individually accounting for the depletions their wells

78. Telephone Interview with Jack Odor, *supra* note 72; Telephone Interview with Dave Nettles, *supra* note 72.

79. MacDonnell, *Plans for Augmentation*, *supra* note 62, at 137, 155; Simpson, *supra* note 13.

80. *Id.* Agricultural use amounted to 361,803.57 AF pumped from 2,101 wells. *Id.*

81. *Id.* Ninety-five member wells pumped 10,606.26 AF of water for municipal use. *Id.*

82. *Id.* Commercial use comprised eighty wells and 1,368.16 AF was pumped. Furthermore, in 2002, GASP pumped a gross total amount of 373,803.57 AF of water and replaced all of the water pumped, back to the stream. *Id.*

83. Call management was expressly authorized in *In re Proposed Rules and Regulations Governing the Use, Control and Protection of Surface and Groundwater Rights Located in the South Platte River Basin*, Nos. W-7209, W-7232, W-7249, W-7289, W-7290, W-7295, W-7296, W-7298 (Colo. Dist. Ct. Water Div. No. 1, Mar. 15, 1974), in *I COLORADO WATER LAWS*, at IV-8 (George E. Radosevich, ed. 1979), available at http://water.state.co.us/pubs/rule_reg/south.pdf (last visited Mar. 31, 2004).

84. Senior appropriators may satisfy their needs for water to the extent the water is available, by *calling* the river. “Calling the river” occurs when a request is made by an appropriator for water which the person is entitled to under his decree; such a call will force those users with junior decrees to cease or diminish their diversions and pass the requested amount of water to the downstream senior making the call. WASKOM & NEIBAUER, *supra* note 18. If a call is placed on the river by a senior appropriator, junior appropriators must let that water pass to the downstream senior user who put the “call” on the river. CORBRIDGE & RICE, *supra* note 1, at 27.

caused to the river.⁸⁵ This method of supplying replacement water via call management worked well enough for the last three decades because, as previously stated, the South Platte had surplus water in the system due to above-average precipitation and transbasin diversions.⁸⁶

The replacement water supplied to downstream users by GASP each year came in different forms and from a variety of sources. While GASP owned some permanent water supplies, the vast majority of its replacement water was leased on an annual basis in the winter⁸⁷ to use as replacement supplies in exchange for the water its members' wells pumped during the summer irrigation season.⁸⁸ GASP received a small proportion of the necessary replacement water from reservoirs,⁸⁹ but wells⁹⁰ supplied most of GASP's replacement water.⁹¹

GASP's replacement wells were strategically located directly across from ditch headgates belonging to those senior appropriators most likely to put calls on the river during periods of low flow. By sinking its wells directly across from these headgates, GASP could supply substantial amounts of water directly to the senior appropriator's ditch, thereby keeping the call off the river and allowing its members to continue pumping. Despite the somewhat questionable nature of GASP's tactics, senior appropriators did not complain because both senior and junior appropriators were satisfied.

85. MacDonnell, *Colorado's Law of "Underground Water"*, *supra* note 6, at 604.

86. *See supra* notes 26 & 29.

87. When the demand and price per acre-foot of the water were both low because no crops are grown in Colorado during the winter months, no irrigation water is needed.

88. Telephone Interview with Jack Odor, *supra* note 72.

89. *Id.*

90. Recharge programs offer a practical alternative to storing water in reservoirs that have to be built or enlarged, dredged to remove silt from stream run-off, and that suffer from inefficiencies from evaporation and transpiration. These artificial recharge/recovery systems (ASRs) are currently being tested by researchers at Colorado State University for their ability to restore ground water levels depleted by well pumping, nutrient reduction in groundwater runoff, deferral of water treatment facilities expansion and timely supply of water to irrigators to prevent injury to other water users. *See* D.S. Dunford et. al., *Effects of Managed Groundwater Recharge on the Hydrology and Water Quality of the South Platte River Basin*, Colorado AES Project 2002–2003, at <http://www.colostate.edu/Depts/AES/projs/732.htm>. (last visited Jan. 7, 2003).

91. Telephone Interview with Jack Odor, *supra* note 72.

GASP describes these wells as "retiming wells,"⁹² where the water from the retiming wells is supposed to "beat" the depletions caused by the other wells in the race to impact the river in some way. Theoretically, retiming wells act as a replacement plan, preventing any noticeable depletion to the stream that would harm downstream users.⁹³ GASP eventually began accounting for the water pumped out of priority by requiring each member to provide GASP with the following information: crop type and number of acres planted; the type of irrigation system used such as flood, sprinkler or drip; the distance of a particular well from the river; and the amount of time it takes for depletions to appear in the stream caused by well-pumping, known as the "SDF."⁹⁴

According to GASP's Manager, every well was run through a modeling program called "SDF View" that calculated the depletion "affection" to the river for that individual well.⁹⁵ Once GASP made the necessary SDF calculations on behalf of its members, GASP informed the SEO. GASP then began the task of finding sufficient amounts of replacement water for the upcoming irrigation season based on those amounts.⁹⁶

While this comment does not seek to question GASP's accounting methods or the accuracy of its reports to the SEO, GASP claims it has replaced the water its wells diverted out of priority during the last three decades.⁹⁷ However, as the effects of the recent drought materialized, existing water users, particularly those with decreed augmentation plans, looked more closely at GASP's replacements under its SSPs. Many alleged that GASP's SSPs were causing significant injury to

92. A retiming well is "any well that diverts water for recharge or to augment or replace water to a stream, ditch, canal, or reservoir." S. 03-073, 64th Colo. Gen. Assem., 1st Reg. Sess. (Colo. 2003) (unenacted) (on file with the University of Colorado Law Review).

93. *Id.*

94. Depletion delay times are reported monthly. Telephone Interview with Jack Odor, *supra* note 72. GASP members are able to calculate depletion delay times with the help of a map created by the USGS that show delay times in numbers of days based on the well's proximity to the river. See USGS Stream Depletion Map (1977), at <http://mcmweb.er.usgs.gov/platte/sdfmaps1a.html> (last visited Feb. 13, 2004).

95. See Stream Depletion Factor Model SDF View 1999, at <http://www.ids.colostate.edu/projects/sdfview> (last visited Jan. 30, 2004). Modeling of this type is arguably not completely accurate as water pumped from each well experiences different conditions on its trip from the river.

96. *Id.*

97. *Id.*

those existing surface rights because GASP was not replacing the water pumped out of priority.⁹⁸

Furthermore, many with decreed augmentation plans were troubled by inequities stemming from the fact that GASP's members had been operating under SSPs for the last thirty years.⁹⁹ The 1969 Act clearly intended SSPs to be a temporary measure until new appropriators obtained a decreed augmentation plan in order to achieve conjunctive use.

The concerns expressed by decreed appropriators were put before the court in *Empire Lodge Homeowners Association v. Moyer*,¹⁰⁰ and ushered in the beginning of the end for GASP when the Colorado Supreme Court determined that the SEO had exceeded its authority to approve SSPs along the lower South Platte.¹⁰¹

III. CONFLICTS BETWEEN AUGMENTATION PLANS AND SSPs

Based on the way SSPs were applied during the last three decades, it is debatable whether the provisions permitting augmentation plans to be used conjunctively with SSPs have ever been successful. This part comprises two sections covering the evolution of the most recent conflict between augmentation plans and SSPs. Section A examines *Empire Lodge Homeowner's Association v. Moyer*¹⁰² and the ripple effects of the decision, compelling lawmakers and judges to once again attempt to heal the rift between those with decreed augmentation plans and those operating under SSPs. Section B presents the most recent disputes between decreed and undecreed appropriators that played out before the courts and legislature.

A. *Empire Lodge Homeowner's Association v. Moyer*

Empire was a battle between neighbors over a small

98. See *In re Proposed Amended Rules and Regulations Governing the Diversion and Use of Tributary Groundwater in the South Platte River Basin*, No. 02CW108 (Colo. Dist. Ct., Water Div. No. 1, Dec. 23, 2002) (order granting summary judgment) (on file with the author).

99. See *id.*

100. 39 P.3d 1139 (Colo. 2001).

101. *Id.*

102. *Id.*

tributary of the Arkansas River, hundreds of miles away from the South Platte River Basin. However, the decision by the Division Two Water Court judge, later affirmed by the Colorado Supreme Court, aggravated the controversy along the South Platte River by expressly stating that the SEO blatantly exceeded its statutory authority in approving Empire's SSPs for twelve consecutive years with no proof Empire had filed an application for an augmentation plan with the water court.

In *Empire*, the Homeowner's Association made out-of-priority diversions under an SSP from Empire Gulch Creek to fill two ponds, known as Beaver Lakes, used for fishing and recreation by residents of the Beaver Lakes subdivision. Anne and Russell Moyer operate a large ranch downstream from Empire Lodge. When Empire diverted water to fill its ponds, no water returned to Empire Gulch.

In September 1996, the Moyers alleged injury to their water rights because Empire was (1) illegally storing water, (2) unilaterally implementing a change in the use of its water rights without court approval of a decreed augmentation plan, and (3) not entitled to divert any water for these inappropriate and illegal purposes.¹⁰³ The Moyers had decreed water rights for irrigation with a priority date of 1871.¹⁰⁴

Amazingly enough, Empire did not have an adjudicated augmentation plan, did not present any evidence of its intent to even file for an augmentation plan, and did not have a decree from the water court approving its change of use of water rights.¹⁰⁵ In fact, Empire did not even have a decree that recognized that Empire had *any* vested water rights.¹⁰⁶ Thus, the Moyers claimed Empire had no priority date authorizing it to fill the two ponds.¹⁰⁷

At trial, the SEO testified that in 1986 it notified Empire that in order to be allowed to continue to divert water out of priority, it needed to file for and receive a decreed augmentation plan from the water court.¹⁰⁸ *Twelve years later*, Empire still had not filed for an augmentation plan with the water court, but it continued to appropriate water out of

103. *Id.* at 1146.

104. *Id.* at 1157.

105. *Id.* at 1144, 1156.

106. 39 P.3d. at 1156-57.

107. *Id.* at 1158.

108. *Id.* at 1159.

priority with annual approval from the SEO under an SSP.¹⁰⁹

The water court's March 2000 decree dismissed Empire's claims against the Moyers,¹¹⁰ issuing an injunction against Empire's out-of-priority diversions.¹¹¹ The court observed that the SEO's authority cannot substitute for or inappropriately intrude upon the authority of the water courts to adjudicate water rights.¹¹² It was a decisive victory for the Moyers.

Furthermore, the court determined because the SEO interfered with the water court's ability to protect senior user's vested water rights, the water court was justified in taking steps to return control of the state's water resources to the courts by way of strictly interpreting the doctrine of prior appropriation and narrowly interpreting the power of the SEO.¹¹³ The water court found that the SEO had far exceeded its authority by repeatedly approving Empire's SSP without evidence that Empire had filed for an augmentation plan.¹¹⁴ Thus, the water court found the SSP illegal.

On appeal, the Colorado Supreme Court affirmed the water court's ruling and held in pertinent part that (1) Empire's out-of-priority diversions required a decreed augmentation plan that authorized such diversion; (2) the water court did not abuse its discretion in enjoining Empire's out-of-priority diversions pending approval of a permanent replacement plan from the water court; and (3) Colorado Revised Statute § 37-80-120 did not grant the SEO authority to approve SSPs.¹¹⁵

The opinion of the court caused a chain reaction calling attention to the SEO's activities in going beyond its statutory authority and infringing upon the duties exclusive to the water court: adjudicating water rights through material injury determinations. The spotlight remained on the SEO, but the drama shifted from the Moyers and Empire, two private parties in the Arkansas River Basin, to the decreed and undecreed appropriators along the entire reach of the lower South Platte River.

109. *Id.* at 1157.

110. *Id.*

111. *See id.*

112. 39 P.3d. at 1156.

113. *See id.*

114. *Id.* at 1153–55.

115. *Id.* at 1146.

B. Legislative and Judicial Reactions

The legislature and the judiciary responded to the conflict over the management of replacement water highlighted in *Empire* with the enactment of House Bill 1414 in 2002,¹¹⁶ the Colorado Supreme Court's decision in *Simpson v. Bijou Irrigation Company*,¹¹⁷ and the enactment of Senate Bill 03-73 in 2003.¹¹⁸

1. House Bill 02-1414

After the ruling in *Empire*, the SEO turned to the Colorado legislature for assistance in preserving its authority to approve SSPs.¹¹⁹ House Bill 02-1414, now codified as Colorado Revised Statute § 37-92-308 (§ 308), introduced special procedures for SSPs that allowed the SEO to approve out-of-priority diversions subject to very limited conditions.¹²⁰ In practice, it gave those operating under SSPs one year to file for approval of an augmentation plan. Although the legislature recognized the statutory rulemaking authority of the SEO under Colorado Revised Statute 37-92-501, it left open the question of the scope of the SEO's authority under the rulemaking power to approve SSPs year after year with no augmentation plan pending before the water court.¹²¹ GASP held out hope that its operation might be allowed to continue under such power.

116. H.R. 02-1414, 63d Gen. Assem., 2d Reg. Sess. (Colo. 2002) (codified at COLO. REV. STAT. § 37-92-308 (2003)).

117. 69 P.3d 50 (Colo. 2003).

118. S. 03-073, 64th Gen. Assem., 1st Reg. Sess. (Colo. 2003).

119. H.R. 02-1414.

120. H.R. 02-1414. The statute stipulated that the SEO could approve an SSP under four specific circumstances. First, for those operating under SSPs granted by the authority of § 37-80-120, H.R. 02-1414 permitted the SEO to approve SSPs, but they were not to operate beyond December 2002. § 37-80-120(c)(3). Second, H.R. 02-1414 allowed the continuation of an SSP if an application for approval of an augmentation plan had been filed with the water court and a decree was pending. § 37-80-120(c)(4)(a). Third, SSPs could be approved if the temporary use would not exceed five years in duration. § 37-80-120(5)(b). Finally, SSPs could be granted if there was an emergency situation that did not exceed 90 days. § 37-80-120(7). See generally H.R. 02-1414, 63d Gen. Assem., 2d Reg. Sess. (Colo. 2002), available at http://www.leg.state.co.us/2002a/inetcbill.nsf/fsbillcont/6C267724C6B6451787256B7500004942?Open&file=1414_enr.pdf (last visited Mar. 14, 2004).

121. See COLO. REV. STAT. § 37-92-308 (2003).

2. The SEO's Proposed Rules and the Judicial Response

Due to the fact that the legislature had not expressly limited the SEO's rulemaking power, in an attempt to salvage some of its authority that had expanded over the years, the SEO presented proposed rules and regulations for the water court's approval. These proposed rules and regulations for the South Platte River Basin were designed in part to manage water under replacement plans and continue the SEO's authority to approve SSPs indefinitely.

Unfortunately for the SEO and GASP, Colorado was in the midst of one of the worst droughts on record. Appropriators with 1870 priority dates were not receiving water while well users with no priority date were receiving water. Existing water users were able to make a compelling case that the SEO's proposed amended rules related to replacement plans exceeded its authority. The response from the Division One Water Court, later affirmed by the Colorado Supreme Court, determined the SEO had exceeded its statutory authority and rejected the proposed rules. Without the SEO's protection, GASP's days were numbered. Possibly suffering from blind optimism, denial, or insufficient funds, even after the Division One Water Court rejected the SEO's proposed amended rules, GASP has not filed for approval of an augmentation plan with the water court.

In 2002, the SEO set forth proposed rules and regulations (amending the 1974 Rules), for approval by the Division One Water Court.¹²² The Proposed Rules, in part pertained to replacement water within the South Platte River Basin. These rules were immediately challenged in court by decreed appropriators and found to be void in their entirety. GASP and the SEO maintained that the holding in *Empire* and the repeal of § 308(1)(c) did not eliminate the authority of the SEO to approve SSPs.¹²³

122. *In re Proposed Amended Rules and Regulations*, No. 02CW108 (Colo. Dist. Ct., Water Div. No. 1, Dec. 23, 2002) (order granting motion for summary judgment) (on file with the author).

123. The SEO based his authority in part, on the rules and regulations promulgated and adopted by the SEO under COLO. REV. STAT. § 37-92-501 (2003), which permits the SEO to create rules and regulations for each watershed to assist him in effective water management within each watershed. See § 37-92-

In pertinent part, the proposed rules authorized the SEO to continue to approve SSPs for pre-1972 wells (all of GASP's member wells), in the South Platte River Basin. Furthermore, the proposed amended rules and regulations did not require well users to file for or receive approval for an augmentation plan in order for the SEO to approve an SSP.

Unfortunately for the SEO and GASP, Colorado was in the midst of one of the worst droughts on record. Appropriators with 1870 priority dates were not receiving water while well users with no priority dates were. Existing water users were therefore able to make a compelling case that the SEO's proposed amended rules related to replacement plans exceeded its apparent authority.

Upon review of the Proposed Rules, the Division One Water Court determined, and the Colorado Supreme Court subsequently affirmed, that the SEO could only approve SSPs in accordance with House Bill 02-1414.¹²⁴ The supreme court concluded that replacement plans were the same as SSPs and were the functional equivalent of augmentation plans.¹²⁵ The court further held that review and approval of augmentation plans were, and should remain, within the exclusive jurisdiction of the water court.¹²⁶

Furthermore, the supreme court dismissed the SEO's argument that provisions of § 308 exempted the SEO's rules and regulations from the other provisions of § 308 limiting the SEO's power to approve SSPs.¹²⁷ The supreme court looked instead to legislative intent¹²⁸ and concluded that the

501; *In re Proposed Amended Rules and Regulations*, No. 02CW108 (Colo. Dist. Ct., Water Div. No. 1, Dec. 23, 2002) (order granting motion for summary judgment) (on file with the author).

124. *Simpson*, 69 P.3d 50.

125. *Id.* at 63-67.

126. *Id.*

127. COLO. REV. STAT. § 37-92-308(3), (4), (5), (6), & (7) (2003); both the water court and the Colorado Supreme Court rejected the SEO's assertions that approval of SSPs fell under the purview of his curtailment authority set forth in § 37-92-501(1) (the SEO's rulemaking power) and (2)(a) (the water rule power). The water court relied on the Colorado Supreme Court's decision in *Empire* to determine the SEO's authority regarding SSPs. See *Simpson*, 69 P.3d 50; *Empire Lodge Homeowner's Ass'n v. Moyer*, 39 P.3d 1139 (Colo. 2001). In *Empire* the court recognized that the SEO has administrative authority under § 37-92-501 to regulate wells. *Simpson*, 69 P.3d at 58. Both courts correctly pointed out, however, that nothing in the language of § 37-92-501 allows the SEO to make a determination of material injury regarding the approval of SSPs. *Id.* at 65.

128. *Simpson*, P.3d at 59.

legislature did not intend for the SEO's river basin rulemaking power to permit the continuance of the SEO's "self-proclaimed authority to unilaterally approve" SSPs for out-of-priority well depletions caused by the wells.¹²⁹ The supreme court affirmed the water court's determination that the SEO's authority to approve SSPs was restricted to the four narrowly defined situations set forth in the provisions of § 308.¹³⁰

In sum, both courts rejected the SEO's claimed authority.¹³¹ The SEO failed to preserve its existing authority to continue to grant SSPs on a year-to-year basis, and failed to establish another legal basis for expanding this authority by claiming that, pursuant to § 308, the SEO could promulgate

129. *Id.* at 55.

130. COLO. REV. STAT. § 37-92-308(3)(b) (2003) states:

Beginning January 1, 2003, the state engineer may approve the operation of a well described in paragraph (a) of this subsection (3) under a substitute water supply plan if the following conditions are met: (I) The well is tributary to the South Platte river, has been included in a substitute water supply plan previously approved by the state engineer or is an augmentation well, and is included in a new written request for approval of a substitute water supply plan filed with the state engineer after January 1 of each calendar year from 2003 to 2005. The written request shall be signed by a person with legal authority to represent all of the owners of the wells subject to the request and shall contain acknowledgments that the operation of all wells in the substitute water supply plan pursuant to this subsection (3) shall cease no later than December 31, 2005, and that the wells shall be included in an application for approval of a plan for augmentation filed in the district court for water division 1 no later than December 31, 2005, in order to continue subsequent pumping, unless the wells can be operated under their own priorities without augmentation. The request shall also identify for each well, including any augmentation wells: the 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 calculate stream depletions and the assumptions, input data, and output data used by the applicant in such model.

131. *Simpson*, 69 P.3d at 71-72.

and implement rules and regulations for the South Platte River Basin.

Without the SEO's protection provided by its rulemaking authority, GASP's days were numbered. Possibly suffering from blind faith in the state legislature, denial, or insufficient funds, even after the Division One Water Court and the Colorado Supreme Court rejected the SEO's proposed amended rules, GASP did not file for approval of an augmentation plan with the water court.

After the courts' rulings, the SEO and GASP looked to the state legislature for help in battling to overturn the limitations on the SEO's authority. Unfortunately for GASP, legislators sided with the judiciary and enacted legislation significantly reducing the SEO's authority to grant SSPs in the South Platte River Basin.¹³² The next subsection examines the legislative response.

3. Legislative Response

In a one-two punch, on the same day the Colorado Supreme Court decided *Simpson*, upholding the water court's limitation of the SEO's authority to approve SSPs, the governor signed Senate Bill 03-73. This law severely limits the SEO's authority to administer replacement water in the South Platte River Basin.¹³³

a. Provisions of Senate Bill 03-73

As enacted, Senate Bill 03-73 is described by its creators as a compromise bill between surface and tributary groundwater well users which amends § 308.¹³⁴ The bill is a compromise because it is likely that none of the parties involved were

132. It is important to note that H.R. 03-1001, 64th Gen. Assem., Reg. Sess. (Colo. 2003), preserves the SEO's authority to approve SSPs year after year in the other river basins in the state. Thus, the South Platte River Basin is the only place where the SEO's authority to approve SSPs indefinitely will be totally eliminated after December 2005. See S. 03-073, 64th Gen. Assem., 1st Reg. Sess. (Colo. 2003).

133. S. 03-073, 64th Colo. Gen. Assem., 1st Reg. Sess. (Colo. 2003) (codified at COLO. REV. STAT. § 37-92-308(3) (2003)).

134. The bill ratified the existing Rules and Regulations for the Arkansas River Valley adopted without opposition in 1996. Therefore, this bill is specific to well and surface users along the South Platte River. See § 37-92-308(1)(c)(I), (II).

wholly pleased with the outcome, but it affirms the Colorado Supreme Court's opinion in *Simpson* by clearly articulating that the SEO does not have the authority to approve SSPs year after year, and provides well users operating under SSPs until December 2005 to wean themselves from their SSPs and file for approval for augmentation plans with the water court. This is somewhat more accommodating than the one year time limit stipulated in House Bill 02-1414.¹³⁵

Specifically, Senate Bill 73, like its predecessors, doggedly pursues the objective of conjunctive use by: (1) deleting the language in § 308(1)(c) that the SEO argued preserved its authority to grant SSPs indefinitely;¹³⁶ (2) stating that after December 2005, the SEO shall not have the authority to grant approval for SSPs unless they are operated pursuant to a decreed or pending augmentation plan;¹³⁷ and (3) by providing a grace period until December 2005 for well users by allowing pre-1972 wells to continue pumping out of priority pursuant to SEO-approved SSPs.¹³⁸ Total curtailment of the wells obviously would have been the equivalent to a death warrant for GASP's members and all those operating under SSPs, resulting in severe economic losses to entire communities.¹³⁹

However, the statute mandates that after December 2005, the wells will be totally curtailed unless the well users can supply proof that they are awaiting adjudication of an

135. See *supra* Part III.B.1.

136. Senate Bill 03-73 stated:

Prior to January 1, 2002, the general assembly gave the state engineer administrative authority to regulate wells upon promulgation of rules for a river basin or aquifer, subject to the review of the water court judge as provided in section 37-92-501(3); and *nothing in this section shall be construed to modify such authority . . .*

(emphasis added) As noted in the text, this language was deleted.

137. Senate Bill 03-73 stated:

On and after January 1, 2003, the state engineer shall not have any authority in Water Division 1 to approve plans for, or to otherwise allow, the operation of wells, including augmentation wells, that cause out-of-priority depletions unless the wells are operated in accordance with plans for augmentation approved by the water judge or as allowed in this section.

138. S. 03-073.

139. James Pritchett & Stephen Weiler, *Estimated Economic Impact of Well Depletions by the Groundwater Appropriators of the South Platte (GASP)*, Colorado State University Agriculture and Resource Policy Report (Colo. State Univ. Coop. Extension) (Jan. 2003), at <http://dare.agsci.colostate.edu/csuaagecon/extension/docs/impactanalysis/apr03-01.pdf> (last visited Mar. 14, 2004).

application for an augmentation plan.¹⁴⁰ The bill also mandates that there will be no subsequent extensions to this deadline.¹⁴¹

If this language appears familiar, that is because it is virtually identical to the language in the 1974 Rules requiring all those operating under SSPs to file for approval of augmentation plans with the water court by 1976 or be totally curtailed.¹⁴² This same language appeared again in House Bill 02-1414, with a December 31, 2002 deadline.¹⁴³ In the face of two virtually identical failed attempts to enforce the curtailment provisions, it remains to be seen if the third time is a charm and the wells will actually be shut down on January 1, 2006.

b. Application of Senate Bill 03-73

Although well users were relieved their wells were not going to be immediately curtailed,¹⁴⁴ the new requirements for receiving approval for an SSP under Senate Bill 03-73 are stringent for the applicant and onerous for the SEO. Many, including GASP, could not meet the heightened criteria and were not granted SSPs for the 2003 irrigation season.¹⁴⁵

For instance, the SEO is required to conduct a detailed hearing and comment process far more elaborate than that

140. Arguably, agencies will be more effective if given only a limited time to accomplish certain goals. Colorado was one of the first states to enact sunset legislation as a means of making administrative agencies like the SEO, politically accountable on a regular basis. See generally Anthony R. Licata, *Zero-Based Sunset Reviews*, 14 HARV. J. ON LEGIS. 505, 510-16 (1977).

141. COLO. REV. STAT. § 37-92-308(IX)(d). Remember under H.R. 02-1414, the deadline for total curtailment of pre-1972 wells was December 31, 2002. The date came and went and GASP's members continued to pump out of priority with no augmentation plan pending before the water court.

142. Rules and Regulations Governing the Use, Control and Protection of Surface and Ground Water Rights of the South Platte River and Its Tributaries (1974), at http://water.state.co.us/pubs/rule_reg/south.pdf (last visited Jan. 30, 2003).

143. H.R. 02-1414, 64th Gen. Assem., Spec. Sess. (Colo. 2002).

144. See, e.g., John J. Sanko, *Panel OKs Well Proposal: Water Plan Would Avoid Shutdown, Add Restrictions*, ROCKY MTN. NEWS, Feb. 14, 2003, at 6A.

145. Decision of the SEO Concerning Request for Approval of a Substitute Water Supply Plan pursuant to COLO. REV. STAT. § 37-92-308(3) for the Groundwater Appropriators of the South Platte River Basin, Aug. 22, 2003, available at <http://www.gaspaugmentation.org> (last visited Nov. 14, 2003).

outlined in Senate Bill 74-7 or House Bill 02-1414.¹⁴⁶ Opposing parties are permitted to present their case, cross-examine applicants,¹⁴⁷ and include either a claim of injury or terms and conditions for the SSP to prevent injury, plus any other information opposers wish the SEO to take into consideration in reviewing the application. If the applicant wants to renew his application for another year, he must repeat the process outlined above.¹⁴⁸ In addition, in order to satisfy due process concerns, the SEO is required to serve all parties with a copy of its decision on an SSP.¹⁴⁹ This copy must include a detailed statement explaining the decision.¹⁵⁰

Finally, continued approval of the SSP relies upon a monthly accounting of, among other things, the amount and location of calculated depletions from all wells.¹⁵¹ Theoretically, if monthly depletions exceed amounts originally approved in the SSP, the SEO is required under Senate Bill 03-73 to revoke approval of the SSP.¹⁵²

It remains to be seen if these additional procedural requirements will be followed. The legislature did not allocate additional monies or personnel to apply and enforce the provisions of the bill. The SEO is understaffed, and it is unlikely the SEO will have time to review each account once a month. Even if it did, the SEO might not be eager to take action because of its tendency to accommodate undecreed well users. GASP's SSP for 2003 was not renewed because it could not acquire enough replacement water.¹⁵³ Under the

146. See discussion *supra* Part III. The new approval process requires a request to identify all of the following: (1) each well, including augmentation wells; (2) the permit number and location; (3) the projected use and volume of pumping; (4) the projected number of acres and crops to be irrigated; (5) the anticipated stream depletions that impact the stream after October 2002 and for eighteen months after the date of the request, specifying the time, location, and amount; (6) a detailed description on how those depletions were calculated; (7) a list of the identity, priority, location and amount of all replacement water sources to be used to replace stream depletions, and (8) the model which the applicant used to calculate stream depletions. S. 03-073(b)(1), 64th Gen. Assem., 1st Reg. Sess. (Colo. 2003) (codified at COLO. REV. STAT. § 37-92-308(3)(b)(I) (2003)).

147. COLO. REV. STAT. § 37-92-308(3)(b)(I), (II) (2003).

148. § 37-92-308(d).

149. § 37-92-308(e).

150. § 37-92-308(e).

151. § 37-92-308(c)(IX).

152. § 37-92-308(b)(3).

153. See Decision of the SEO Concerning Request for Approval of a Substitute Water Supply Plan pursuant to COLO. REV. STAT. § 37-92-308(3) for

heightened scrutiny of Senate Bill 03-73, the SEO determined that GASP failed to provide adequate proof of sufficient replacement supplies. Moreover, concerns over possible compact implications at the Colorado-Nebraska state-line probably compelled the SEO to strictly enforce the provisions when reviewing GASP's SSP.

The legislation outlined above expressly eliminates the SEO's authority to approve SSPs for well users on the South Platte after December 2005, thereby inducing them to go to water court for approval for augmentation plans. Even this grace period might be insufficient to mitigate losses suffered by GASP's former members, as many of their wells remained in GASP and they obtained SSPs for the 2003 season for the sole purpose of replacing their post-pumping well depletions dating as far back as the 1970s, which left no water to irrigate their crops during the 2003 season.¹⁵⁴

In an attempt to mitigate the limitations of Senate Bill 03-73 imposed on well users operating under SSPs, the legislature modified what constitutes a source of replacement water for augmentation plans under Colorado Revised Statutes § 37-92-305. Section 305 states:

A plan for augmentation may provide procedures to allow additional or alternative sources of replacement water, including water *leased on a yearly* or less frequent basis, to be used in the plan after the initial decree is entered if the use of said additional or alternative sources is part of a [SSP] approved pursuant to § 37-92-308 or if such sources are decreed for such use.¹⁵⁵

the Groundwater Appropriators of the South Platte River Basin, Aug. 22, 2003, available at <http://www.gaspaugmentation.org> (last visited Mar. 15, 2004).

154. Telephone Interview with former member of GASP who preferred to remain anonymous (Mar. 4, 2004) (on file with the author).

155. § 37-92-305(8). Due in part to the fact that Senate Bill 03-73 is applicable only to well users within the South Platte River Basin and sunsets after December 31, 2005, House Bill 03-1001 picks up where Senate Bill 03-73 leaves off. House Bill 03-1001 provides the SEO with statewide authority to approve SSPs where a water user applies for an augmentation plan or a change of water right. House Bill 03-1001 allows the SEO to approve SSPs on a yearly basis for up to five years. The SEO can even extend approval of the SSP beyond the five-year limit if the applicant can provide legitimate reasons for the delay in obtaining a water court decree. Additionally, water users can use existing surface rights as replacement water for an SSP even if they are not decreed for replacement if the state engineer prevents expanded use of the surface supplies.

This language adds flexibility to a key component of augmentation plans—permanent supplies of replacement water. The amendment infuses a degree of adaptability into existing augmentation plan provisions to tempt well users operating under SSPs to file for decrees with the water court.

Most of the well users who once operated their wells under GASP's umbrella have left GASP and either joined another well user organization who did file for approval of a collective augmentation plan or filed for individual approval of augmentation plans with the Division One Water Court in order to keep operating under SSPs pursuant to the requirements of Senate Bill 03-73. Currently however, there are at least 800 wells that were formerly GASP member wells that have not yet filed applications for approval of augmentation plans with the water court. Many apparently remained with GASP pending approval of GASP's SSP for 2003 under the new provisions of Senate Bill 03-73, which as previously stated was denied by the SEO.

This left several hundred GASP members with no water for the 2003 irrigation season. Because they are no longer under the umbrella of GASP's SSP, these small farmers will have to file individually for approval for augmentation plans, pool their resources in some organization like GASP to file for approval for a collective augmentation plan, or stop pumping altogether, causing many to lose their farms. Furthermore, as previously stated, even if those farmers do go it alone, file for approval of an individual augmentation plan and receive approval for an SSP in the interim, it is uncertain if the water diverted under the SSP will be used to irrigate their crops or to replace thirty years of post-pumping depletions.

As a result of the denial of GASP's SSP for 2003, the organization's previous form is largely defunct and is currently operating in a severely limited capacity, serving as an accounting resource calculating depletions for individual wells for a nominal fee.¹⁵⁶ It is troubling to hear of GASP members' repeated attempts to obtain information from GASP's

Similar to Senate Bill 03-73, the SEO is engaged in making material injury determinations, but these decisions cannot be appealed on an expedited basis to the water court. Furthermore, once the SEO finds no injury, he is not required under the statute to conduct a formal hearing.

156. Telephone Interview with Dave Nettles, Water Engineer, Water Division One, (Sept. 15, 2003).

representatives and be told all was well when the opposite was true.¹⁵⁷ However, while much of the responsibility for their situation rests with GASP's Manager, Board of Directors and the SEO, GASP's members cannot put forth a convincing case that they are innocent victims. GASP members can unequivocally be described as a sophisticated, highly knowledgeable group, capable of understanding the laws governing their wells and the problems inherent in call management via SSPs during times of scarcity. Furthermore, they are empowered to choose to act, or not, in accordance with the statutory provisions requiring decreed augmentation plans.

CONCLUSION

By 1969, the effects of unregulated pumping from thousands of tributary groundwater wells in the South Platte River resulted in legislation mandating conjunctive use of surface and groundwater. The severe drought of 2000 through 2003, and possibly beyond,¹⁵⁸ destroyed the uneasy peace between augmentation plans and SSPs that had lasted for over thirty years. Decreed appropriators claimed injury to their existing rights due to insufficient replacement supplies from well users operating under SEO-approved SSPs. While the SEO is certainly qualified to administer water rights pursuant to statutory authority, there are no provisions, nor have there ever been any provisions, granting it the power to authorize SSPs indefinitely for out-of-priority users. The immediate response from the judicial and legislative branches in the lower South Platte River example indicates that they perceived a legitimate threat to the prior appropriation system. State lawmakers quickly and expressly reaffirmed the Colorado Doctrine, which is a fairly pure system of prior appropriation. But at what cost?

It is troubling to consider that, because the SEO was allowing other appropriators to sidestep the adjudication process for replacement plans, for over thirty years the rights of existing appropriators were not being protected in accordance with the law. It is equally troubling that

157. Telephone Interview with member of GASP, *supra* note 158.

158. National Weather Service Hydrologic Outlook, at <http://www.crh.noaa.gov/cgi-bin-den/showProduct.pl?title=Hydrologic+Outlook&product=esfden&backto=9> (last visited Mar. 14, 2004).

potentially hundreds of farmers will be forced to sell their farms and water rights to the highest bidder.

Serving as Colorado's agent, the SEO clearly advised well users to disregard the augmentation plan mandate based on the SEO's understanding it had the power to protect them. Perhaps the state of Colorado shares in some of the responsibility for current circumstances. Or perhaps the well users are out of luck because mischaracterization of the law is no excuse and lawmakers merely reaffirmed long-standing state water laws. Did the SEO and the well users think that because two other similar bills had passed with similar provisions but no enforcement, business as usual would enable the SEO and GASP to ignore the situation because surely things would return to "normal" as soon as it snowed? Perhaps it is prudent to place a significant portion of any liability incurred by the farmers on the well user organizations themselves, especially GASP, because other well user organizations filed for decreed augmentation plans while GASP did not, effectively leaving well users diverting from over 800 wells high and dry. In addition, one has to ask what kind of fiduciary duties, if any, rest with GASP's Manager and Board of Directors to advise its members of the dire straights it found itself in during the drought.

More troubling questions remain. Another irrigation season draws near and as of March 2004, water supplies in the lower South Platte are sixty-eight percent of normal. Will there be sufficient water supplies in the lower South Platte to ease the burdens of the last three years or will the problems caused by the drought continue? Will the SEO enforce the provisions set forth in Senate Bill 03-73 and curtail well users who have not filed for approval of augmentation plans by December 31, 2005?¹⁵⁹ Will there be a return to the status quo allowing SSPs to be approved after 2005, thereby failing to enforce Senate Bill 03-73 and putting off, yet again, the ultimate goal of conjunctive use? Will there be liability for the post-pumping depletions caused long after the curtailment of wells that do not have augmentation plans? Who will be responsible to existing water users for these depletions? What

159. It is notable that the Water Engineer for Division One had at least tagged the 800 wells and arguably, the neighbors who have filed for court-approved augmentation plans will be vigilant, thereby preventing any illegal pumping from those wells.

implications are there, if any, for the compact requirements over water Colorado is required to deliver to Nebraska?

The resolution is likely to be bittersweet. The original goal of conjunctive use, set forth in the 1969 Act, might finally be realized. The prior appropriative rights of water users might be honored. However, if this happens, it may indeed be the last gasp for many small farmers in northeastern Colorado.

It is nevertheless time to enforce the provisions of the 1969 Act, to put to the test the statutory language which articulates the ways to achieve the goal of conjunctive use, and to bring all the replacement plans operating without a court-approved augmentation plan along the lower South Platte within the prior appropriation system. Otherwise, as water supplies in Colorado's remaining river basins become appropriated, the fallout from the conflict along the lower South Platte will be repeated, forcing small farmers out of business and disrupting rural communities in other Colorado river basins.