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Colorado Water Conservation Board
Department of Natural Resources

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DATE: November 20-21, 2019 Board Meeting

AGENDA ITEM: 23. Stockwatering Uses Claimed Under Section 37-92-102(3)(b), C.R.S.

Introduction

CWCB staff and the Division of Water Resources (DWR) have been engaged in discussions, starting in 2014, with the Colorado River Water Conservation District (River District) staff and the Colorado Cattlemen's Association (CCA) about the implementation of section 37-92-102(3)(b), C.R.S. (2019) ("102(3)(b)"). That statute provides that instream flow (ISF) appropriations "shall be subject to the present uses or exchanges of water being made by other water users pursuant to appropriations or practices in existence on the date of such appropriation, whether or not previously confirmed by court order or decree." It is staff's understanding that the River District and CCA initiated these discussions in reaction to the DWR's curtailment of undecreed stockwatering uses subsequent to the irrigation season in Water Division 6 as part of administering a decreed ISF water right. Over the last few years, the River District, CCA, DWR, and CWCB staff have worked together in an attempt to find a mutually acceptable way to implement 102(3)(b) in regard to these and other Division 6 stockwatering uses, but have not succeeded to date. The main point of disagreement centers on whether the law requires water court confirmation of a use claimed under 102(3)(b). The River District and CCA maintain that administrative confirmation by the DWR of such claimed uses is sufficient, and the DWR and CWCB staff maintain that the legislative history of this statutory provision requires water court confirmation. In the face of this apparent impasse, staff has invited the River District, Southwestern Water Conservation District (SWCD), and CCA to address the Board on this topic. This is an informational item with no Board action required.

Background

Early in discussions of this topic, the River District and CCA informed CWCB staff and DWR that the water users they represented did not want to apply to water court to adjudicate their stockwatering uses and obtain recognition of their 102(3)(b) uses in a water court decree. Some water users indicated that they considered their stockwatering uses to be decreed as part of their irrigation water rights. However, the DWR determined that stockwatering uses were not a decreed beneficial use under



those certain decrees, and curtailed the apparent undecreed uses during water rights administration. In an effort to address this issue, CWCB staff worked with the DWR, River District, and CCA on developing a potential administrative procedure that would allow the DWR to review 102(3)(b) stockwatering use claims and to administer stockwatering use against an ISF water right without water court determination of the extent of the claimed undecreed use. However, during internal discussions of the draft procedure, questions arose regarding the authority of either the CWCB or DWR to make a determination regarding the extent of the claimed uses, prompting legal review of the issue. Counsel for CWCB staff and DWR researched the question, including the legislative history of 102(3)(b). Based on that research, counsel concluded that for the DWR to administer an ISF water right as subject to an undecreed use under 102(3)(b), there must be court confirmation of the extent of that use existing at the time of the ISF appropriation. Counsel for the River District and the SWCD have indicated that they disagree with that conclusion.

Discussion

In late October, staff sent the River District, CCA, and the SWCD the attached draft conceptual approach whereby the CWCB would consider filing a water court application to obtain confirmation of 102(3)(b) uses without adjudicating water rights. Staff provided this information solely for discussion purposes, with the caveat that the Board has not fully considered this approach.

Because this issue arose and was brought to staff's attention in the context of ISF water rights administration in Water Division 6, staff's primary goal is to remedy the situation that led to these discussions by implementing this concept in Water Division 6 if the affected water users are willing to participate. Staff anticipates a discussion of this concept at the Board meeting with Board and public input.

Draft concept to address Division 6 stockwatering uses under Section 37-92-102(3)(b)

This concept has been drafted to address concerns expressed by the Colorado Cattlemen's Association and the Colorado River Water Conservation District that some ditch diversions for long-standing stockwatering uses have been recently curtailed during a call for decreed instream flow water rights in Water Division 6. Water users have reported that they considered these uses to be decreed under their irrigation decrees. However, water administrators have determined that stockwatering uses were not a decreed beneficial use under these certain decrees, and have thus curtailed the apparent undecreed uses during river administration. Under section 37-92-102(3)(b), uses that existed as of the date of an instream flow appropriation may be able to operate during an instream flow water right call. Under law, it appears that the 102(3)(b) exception to the prior appropriation system must be confirmed by the water court; therefore, a decree or court order is necessary.

This draft concept has been discussed, but not approved by the CWCB board.

Draft concept: If a stock water user in Water Division 6 is unable or unwilling to file a water court action to obtain the necessary decree or court order to effectuate the 102(3)(b) exception, then that person may ask the CWCB to file the water court action for them to obtain water court confirmation of the use. If several water users on a particular stream wish to obtain court confirmation of stockwatering uses, they may approach the CWCB together to request that the CWCB file in water court to confirm the several uses in one court decree or order for a particular stream. Under this concept, the CWCB would not open its existing decrees, and the water user would not obtain a water right. Rather, the water user would obtain a court confirmation of the specific stockwatering use that would not be curtailed during a call for the subject instream flow water right.



COLORADO RIVER DISTRICT

PROTECTING WESTERN COLORADO WATER SINCE 1937

The Application of Section 37-92-102(3)(b) to Pre-Existing Uses.

Issue: There is no dispute that instream flow rights are subject to pre-existing water uses. The question is whether such uses must first be decreed in order to be protected from curtailment by an instream flow water right.

CRS Section 37-92-102(3)(b) states: “Any such appropriation [for instream flows] shall be subject to the present uses or exchanges of water being made by other water users pursuant to appropriation or practices in existence on the date of such appropriation, whether or not previously confirmed by court order or decree.”

This statute has been in place since 1981. Recently, the State Engineer and CWCB have taken the position that pre-existing water uses must be formally adjudicated or recognized in a water court decree in order to benefit from Section 102(3)(b). The Colorado River District (“River District”) believes the statute clearly states that pre-existing uses do not need to be adjudicated, and that the General Assembly intended to protect pre-existing uses from curtailment by instream flow rights without the need for water court adjudication or confirmation.¹

Concerns: The State’s position is contrary to the plain language of Section 102(3)(b). The River District is concerned about this position because it:

- A. Will force water users into water court in order to adjudicate or obtain judicial confirmation of their pre-existing use. (While some water users may choose to expend resources on attorneys and expert consultants in order to obtain judicial confirmation, other water users simply cannot afford those costs. Nothing in Section 102(3)(b) requires a water user to adjudicate a pre-existing use. In fact, the purpose of the statute was to ensure that water users would not have to incur the significant expense and risk associated with water court.
- B. Will upset the intent of the General Assembly in enacting limitations on the instream flow program when it adopted Senate Bill 414 in 1981.
- C. Will erode support for the instream flow program.

¹ It is important to note that the only water right implicated under 102(3)(b) is the instream flow. An undecreed pre-existing use cannot call out any other water rights. Moreover, due to the fact that the use was in existence prior to the instream flow appropriation there is no impact on the instream flow. By definition, the amount of water diverted by the pre-existing use was being depleted from the stream system when the CWCB quantified the available water supply for the instream flow appropriation.



Historical Background. In 1981, Senate Bill 414 was introduced and titled: *Concerning the Establishment of Principles and Limitations which Govern Appropriations of Water made by the Colorado Water Conservation Board for the Purposes of preserving the Natural Environment to a Reasonable Degree pursuant to section 37-92-102(3)* (“S.B. 414”). As originally introduced, S.B. 414 included the following language:

“Any such [instream flow] appropriation shall be subject to the uses or exchanges of water being made by other water users pursuant to practices in existence on the date of such appropriation, whether or not previously confirmed by court order or decree, and, if not previously confirmed, as may be confirmed by the court in the decree granting such minimum flow or lake level appropriation.”

S.B. 414 Introduced (emphasis added), (attached for reference).

The language of the introduced bill would have required water users to adjudicate or obtain judicial confirmation of pre-existing uses in order to benefit from the protections of Section 102(3)(b). However, the adopted final bill, dropped this requirement, resulting in the language of Section 102(3)(b) as it exists today:

Any such [instream flow] appropriation shall be subject to the present uses or exchanges of water being made by other water users pursuant to appropriation or practices in existence on the date of such appropriation, whether or not previously confirmed by court order or decree.

Session Law S.B. 414 (emphasis added), (attached for reference).

As made apparent by the title of S.B. 414, there were concerns expressed by some in the legislature that the instream flow program had expanded beyond its original scope and should be “limited” in some respects. There were others who did not want to see any limitations. It is apparent in reviewing the legislative history that the language of S.B. 414 was a compromise among those divergent interests. This is made evident by the written statement of then -- Governor Lamm, upon the passage of S.B. 414:

It is my understanding that Senate Bill 414 is a compromise measure which addresses the concerns of water users with regard to potential administrative abuses without, in any way, jeopardizing the State’s ability to acquire and protect instream flows.

I have received extensive legal assurances that Senate Bill 414 does not subordinate minimum stream flow water rights to future changes or exchanges, *but does allow continuation of exchanges or practices in existence at the time such minimum flow appropriations are made.*

I hope Senate Bill 414 will put this issue to rest and neutralize future possible efforts to repeal the minimum stream flow program.



Senate Journal—174th Day—June 29, 1981 (emphasis added), (attached for reference).

Recent Proposals: The River District has worked with the Colorado Cattlemen’s Association, Routt County Cattlemen’s Association, Southwestern Water Conservation District, the State Engineer’s Office, the Attorney General’s Office, staff of the Colorado Water Conservation Board and affected water users to resolve this dispute for several years. Although the parties have worked in good faith, and at times were close to agreement, the dispute has not been resolved and the State’s position has introduced a great deal of uncertainty. Although the issue first arose in the context of pre-existing stockwater uses in the Yampa River basin, it is not limited geographically to Water Division 6, or by type of use.

A. Administrative Process.

The parties worked diligently on an administrative process whereby pre-existing uses would be recognized and recorded in order to facilitate the State Engineer’s administration of instream flow rights consistent with the statutory protection of pre-existing uses.² However, after numerous meetings and substantial drafting effort, the State rejected this concept because of a new legal interpretation that pre-existing uses must be adjudicated in order to benefit from Section 102(3)(b).

B. CWCB Staff Proposal.

The CWCB staff recently put forth a proposal under which the CWCB would seek a water court action in Division 6 to recognize pre-existing stock water rights. We appreciate staff’s effort to explore new options and we are willing to continue to explore other options. However, the current proposal does not fully resolve the dispute because (1) it is too limited in scope -- pre-existing uses are not solely limited to stock watering, nor are they limited to Water Division 6, (2) it still would require water users to subject their pre-existing use to the scrutiny of water court and potential objectors, (3) a one-time filing by the CWCB will not resolve the issue for water users that have not received notice or otherwise are not aware of the CWCB filing, or for any future unadjudicated uses that could be implemented prior to a new junior instream flow, and finally (4) we question whether there is sufficient legal authority for the CWCB to seek a determination of another person’s water right, particularly without the owner’s participation in the water court process. In the event the parties are unable to achieve a satisfactory, statewide administrative resolution of this issue, we propose the following legislative solution.

² The River District believes that the State Engineer has inherent authority to administer instream flow rights as subject to pre-existing uses under his existing statutory authority. (See, C.R.S. §37-92-501, which provides in part that “The state engineer and the division engineers shall administer, distribute, and regulate the waters of the state in accordance with the constitution of the state of Colorado, the provisions of this article and other applicable laws, and written instructions and orders of the state engineer, in conformity with such constitution and laws, and no other official, board, commission, department, or agency, ... has jurisdiction and authority with respect to said administration, distribution, and regulation”).



C. Legislative Solution.

In March of 2019, we proposed to CWCB staff a simple clarifying amendment to 102(3)(b)

Any such appropriation shall be subject to the present uses or exchanges of water being made by other water users pursuant to appropriation or practices in existence on the date of such appropriation, ~~whether or not previously confirmed by court order or decree.~~ AS DETERMINED BY THE STATE ENGINEER OR APPLICABLE DIVISION ENGINEER IN ACCORDANCE WITH C.R.S. 37-92-502(2)(A), REGARDLESS OF WHETHER SUCH USES OR EXCHANGES ARE CONFIRMED BY COURT ORDER OR DECREE. ANY SUCH DETERMINATION BY THE STATE ENGINEER OR APPLICABLE DIVISION ENGINEER SHALL BE REVIEWABLE BY THE WATER COURT ON A DE NOVO BASIS.

It is our understanding that this proposal was rejected by the CWCB. We propose that the CWCB and SEO consider supporting or not opposing this solution as it would provide a clear, concise, and limited clarification of the law that would allow the SEO to administer the statute as originally intended and provide greater certainty for water users across the State.