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WRITTEN INSTRUCTION 2015-03

Instruction Concerning the Administration of Diversions of Water during a “Futile Call Determination”

Pursuant to section 37-92-501(1), C.R.S., the State Engineer hereby issues this Written Instruction concerning the administration of diversions of water during a “Futile Call Determination. The State Engineer and Division Engineers shall allow diversions of water during a “Futile Call Determination,” subject to the explanation below.

1.0 INTRODUCTION

The State Engineer may issue written instructions and orders to the Division Engineers regarding the administration of water rights. The State Engineer may also promulgate rules to establish administration practices, but such rules are not required for administration.

This Written Instruction directs the Division Engineers concerning the administration of water rights in order to ensure consistent and equitable administration that is also consistent with Colorado water law and applicable court decrees.

2.0 PURPOSE

This Written Instruction shall direct the Division Engineers in administering diversions during a “Futile Call Determination.”

3.0 AUTHORITY

This Written Instruction is issued pursuant to section 37-92-501, C.R.S. This Written Instruction ensures that water users in Colorado may divert waters of the state to beneficial use while ensuring that such practices are consistent with the law and occur without causing injury to vested water rights.

4.0 PROCEDURES

Section 37-92-502(2)(a), C.R.S. states that “(e)ach division engineer shall order the total or partial discontinuance of any diversion in his division...to the extent that the water being diverted is required by persons entitled to use water under water rights having senior priorities, but no such discontinuance shall be ordered unless the diversion is causing or will cause material injury to such water rights having senior priorities.” This underlined portion of the statute

directs the Division Engineer to not curtail a diversion if the Division Engineer has determined that the diversion does not cause injury to senior water rights. This subsection of the statute further states that “(i)n the event that a discontinuance has been ordered pursuant to the provisions of this paragraph (a), and nevertheless such discontinuance does not cause water to become available to such senior priorities at the time and place of their need, then such discontinuance order shall be rescinded.” This second underlined portion of the statute continues by directing the Division Engineer to rescind a curtailment order, in the event that curtailing a water right does not make water available to senior water rights. The two underlined portions of the statute referenced here give the Division Engineers the authority to make a “Futile Call Determination.” The Division of Water Resources relies on these statutory provisions to allow diversions by a water user in certain situations when that water user would not otherwise be allowed to divert because there is a call by a senior water right.

For the purposes of this Written Instruction, when considering the legal nature of a diversion during a Futile Call Determination the Division Engineers shall consider whether the diversion is an in-priority diversion, a lawful out-of-priority diversion, or an out-of-priority diversion that deprives a senior calling right of water and, therefore, requires replacement or remedy to be lawful. A diversion under a Futile Call Determination is a *lawful out-of-priority diversion*. The distinction between the two types of out-of-priority diversions is important because a diversion of water during a Futile Call Determination is an out-of-priority diversion since it takes place when there is a senior water right placing a call. However, this particular type of diversion is not the same as an out-of-priority diversion that deprives the senior calling right, or any senior right, of water and requires replacement or remedy to be lawful. The term *lawful out-of-priority diversion* is used in this Written Instruction when referring to a diversion under a Futile Call Determination to emphasize that distinction.

The objective of this Written Instruction is to direct the Division Engineers’ actions when making a Futile Call Determination. To document the bases for the direction, this Written Instruction includes an explanation of the Division of Water Resources’ application of the governing factors of 37-92-502(2)(a) when Division Engineers make decisions to curtail or not curtail a diversion. This Written Instruction has statewide applicability, however, the Division of Water Resources recognizes the statutory provision that “(e)ach diversion shall be evaluated and administered on the basis of the circumstances relating to it and in accordance with provisions of this article and the court decrees adjudicating and confirming water rights.” Therefore, while state statute makes it clear that a Futile Call Determination must be an amount, location, and time-specific determination, the objective of this Written Instruction is to provide uniform direction to each Division Engineer.

1. The Division Engineers shall be responsible for making the Futile Call Determination.¹ The Division Engineers may delegate the responsibility for the Futile Call Determination to other division staff, but remains responsible for each determination. In all cases where a water user is diverting water as allowed during a Futile Call Determination, the water user has the responsibility to cease diverting immediately when the Futile Call Determination no longer exists.

¹ If a court of competent jurisdiction has found a diversion to be non-injurious because of a “futile call,” such diversion shall be administered pursuant to the court’s findings, not the Division Engineer.

2. The Division Engineer shall allow water to be diverted during a Futile Call Determination without a decreed water right as long as the water user diverting the water has confirmed with the Division of Water Resources that the Division Engineer has made a Futile Call Determination for that diversion and the water is placed to a beneficial use.
3. Each Division Engineer shall allow a water user with a decreed water right to divert during a Futile Call Determination with the following limitations:
 - a. If the diversion is for uses decreed for the water right, whether for direct-flow or storage purposes, the amount of the diversion will be credited to any volumetric limits for that decreed water right and must take place consistent with the terms and conditions of that water right. This requirement ensures that the diversion during the Futile Call Determination does not alter the historical exercise of the water right, potentially resulting in injury. Further, this requirement ensures that any provisions associated with the decreed diversion that protect other water users are retained. Should direct flow diversions during a Futile Call Determination reach any volumetric limitations imposed by the water court for a time period, subsequent diversions during a Futile Call Determination, for that time period, need not comply with the provisions that may have been decreed for the diverting structure.
 - b. If the diversion is for uses not decreed by the water right and the diversion is for direct flow uses, the diversion need not comply with terms and conditions of the decreed water right.
 - c. If the diversion is for uses not decreed by the water right and the diversion is for storage, the diversion need not comply with terms and conditions of the decreed water right. Because diversions to storage during a Futile Call Determination could cause injury by extending the period the reservoir may divert to a different time of year, accounting must show that the decreed water rights for the water user have been filled in an amount equal to the amount diverted during the Futile Call Determination (“paper filled”), in order of seniors first. Specifically, diversions into reservoirs with existing water rights during a Futile Call Determination must be made in accordance with accounting² approved by the Division Engineers prior to the diversion into storage. See the Division of Water Resources’ Reservoir Administration Guidelines on the DWR website.
(http://water.state.co.us/DWRIPub/Documents/Res_Admin_Guidelines_Oct2011.pdf)

Basis for this direction: For the purposes of this direction, a diversion during a Futile Call Determination is similar to a diversion during Free River. The Water Court has determined that a diversion during Free River “creates the potential for water users to “bank” their more senior water rights, including historic consumptive use credits for diversion during times when the junior rights were called out, thereby altering the historic exercise of the senior rights resulting in injury.”³ Diversions during a Futile Call Determination for structures with water rights that have volumetric limits, including diversions into reservoirs with existing

² Accounts reflect separate and distinguishable ownership, types, uses or “colors” of water in a reservoir. The sum of all accounts equals the amount of water in storage on a daily basis. Refer to the *Reservoir Accounting Guideline, Division One - South Platte River*, dated February 25, 2013 and *General Administration Guidelines for Reservoirs*, dated October 2011

³ Case No. 04CW236, Division 5.

water rights, have the potential to allow the owner of the water right to divert some or all of the decreed amount of the water right. If the diversion is not applied to the accounting for the water right, the diversion has the potential to extend the priority water right later into the season, impacting the historical exercise of the water right to the detriment of other water users. Therefore, the owner of the water right must reconcile the diversion during the Futile Call Determination with the accounting for the decreed water right to ensure the diversion does not cause injury by altering the historical exercise of the water right.

4. For a diversion that has no delayed impacts to the stream, and that has an augmentation plan that has been decreed, Division Engineers shall allow a diversion during a Futile Call Determination unless the augmentation plan decree contains terms and conditions expressly precluding such diversions. Such a diversion will be allowed independent of the augmentation plan's replacement requirements or volumetric limits, unless operation in this manner would extend the duration of the Futile Call Determination or injure a senior water right.

Basis for this direction: The State Engineer recognizes that, while decrees may include some variation of language that requires replacement whenever there is a "downstream senior call" on the river, or when "the diversions are out of priority," that language is considered and construed in the context of the augmentation plan decree and the intent of the statutory scheme regarding augmentation plans.

The purpose of an augmentation plan is to address out-of-priority diversions that would otherwise be curtailed because they deprive the senior calling right or other senior priorities of water and require replacement water to prevent injury. A *lawful out-of-priority diversion* allowed during a Futile Call Determination by the Division Engineers will not be curtailed because the diversion does not deprive the senior calling right or other senior priorities of water and does not require replacement water to prevent injury. Therefore, phrases like "when there is a senior call" or "when the diversions are out of priority" in the context of an augmentation plan are intended to address out-of-priority diversions that would result in injury to the calling right if not replaced in time, location and amount, and not *lawful out-of-priority diversions*.

5. For a diversion that has a delayed impact to the stream and operates pursuant to a decreed augmentation plan or another administrative approval to replace the lagged depletion to the stream or to maintain return flows, the Division Engineers shall not require that the lagged depletion from that ground water diversion be replaced during a Futile Call Determination unless the augmentation plan decree or administrative approval contains terms and conditions expressly requiring replacement during a Futile Call Determination or unless operation in this manner would extend the duration of the Futile Call Determination or injure a senior water right.

Basis for this direction: As required by law (*Simpson v. Bijou*), ground water administration requires that such a diversion structure (a well) can operate only according to a court-decreed augmentation plan or substitute water supply plan approved by the State Engineer. However, for a well that has previously made

ground water withdrawals according to the terms and conditions of the augmentation plan or SWSP, the question of the necessity of replacing depletions to the stream during a Futile Call Determination is a question of injury to be determined by the Division Engineers.

To allow the depletion to go unreplaced, the State Engineer and Division Engineers do not rely on the specific language of section 37-92-502(2)(a). The considerations in 37-92-502(2)(a) apply to current diversions from the stream and not lagged depletions from previous diversions, since prior diversions cannot be curtailed. Instead, the Division Engineers' authority to not require replacement is based on section 37-92-501(1), which gives general guidance to the State Engineer to not require the replacement of ground water diversions' withdrawals for the benefit of surface right priorities, even though such surface right priorities be senior in priority date, when, assuming the absence of ground water withdrawal by junior priorities, water would not have been available for diversion by the surface right under the priority system. In addition, section 37-92-502(4) provides that "(e)ach plan for augmentation shall be administered to accomplish the maximum economic use of and benefit from the water which may be available or developed for such administration if persons owning, or entitled to use water under, water rights or conditional water rights will not be injuriously affected thereby." These two statutes guide the State Engineer and Division Engineers to allow lagged depletions from ground water diversions to not be replaced when the Division Engineers make a Futile Call Determination based on existing stream and anticipated climatic conditions. This is based on the Division Engineers' determination that no injury will occur as a result of depletions not being replaced and such an allowance will allow the maximum economic use of and benefit from the diverter's available replacement water.

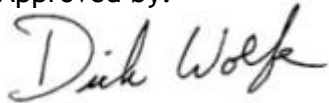
6. The Division Engineers shall consider the surface water and, to the extent necessary to prevent injury, any connected ground water when making a Futile Call Determination⁴. Therefore, before making a determination that a junior appropriator need not be curtailed under a Futile Call Determination, the Division Engineers must ensure that the diversion by that junior appropriator does not reduce the sub-surface flow of an alluvial system such that downstream senior water rights will be deprived of surface flow to which they are entitled, even if that deprivation is not immediate.
7. If a Futile Call Determination is applied to a specific stream reach that contains multiple water rights, the Division Engineers shall administer all water rights within that reach according to their priorities. If a diversion is allowed for a structure with no decreed water right during a Futile Call Determination, that diversion will be administered as being junior to all other decreed water rights in the reach.
8. When the Division Engineers allow a diversion under a Futile Call Determination, the diversion shall be recorded in the diversion records as "authorized" with any appropriate

⁴ As cited earlier, 37-92-502(2)(a), C.R.S, states "the materiality of injury depends on all factors which will determine in each case the amount of water such discontinuance will make available ... at the time and place of their need. Such factors include the current and prospective volumes of water in and tributary to the stream from which the diversion is being made; distance and type of stream bed between the diversion points; the various velocities of this water, both surface and underground." (Underline emphasis added.)

accompanying comment. The State and Division Engineers shall consider a diversion during a Futile Call Determination to be a legal diversion in future legal proceedings.

9. The State and Division Engineers shall not object to a claim in a water court application to make a conditional water right absolute solely due to the fact that the claim is based on diversions made during a Futile Call Determination if the water available for appropriation was diverted and placed to a beneficial use as necessary to perfect the right, without material injury to senior water rights.
10. The State and Division Engineers shall not object to a water court application for a new absolute water right solely due to the fact that the claim is based on diversions made during a Futile Call Determination since water available for appropriation was diverted and placed to a beneficial use.
11. The State and Division Engineers shall not object to including diversions made during a Futile Call Determination in an HCU analysis for a change of water right if the water available for appropriation was diverted and placed to a beneficial use. Such diversions constitute actual historical use under the water right priority as it relates to junior appropriators.
12. For public information purposes only, diversions authorized by Futile Call Determinations will be posted as an Authorized Diversion in the HBDMC Administrative Calls manager.

Approved by:



Dick Wolfe
Dick Wolfe, Director/State Engineer

Date: November 4, 2015