

SEO FORUM

NOVEMBER 21, 2005

*Hunter Education Building
6060 Broadway
Denver, Colorado*

9:00 A.M. -12:00 P.M.

**Sponsored by
The State Engineer's Office and
Applegate Group**

9:00-9:05	General Overview <i>Dick Stenzel and Dick Wolfe</i>
9:05-9:20	Development and Implementation of New Statutes, Policies, and Guidelines <i>Hal Simpson</i>
9:20-9:50	Review of Proposed Rules and Administration <ul style="list-style-type: none">- Interruptible Water Supply Agreements- South Platte Non-Irrigation Season Administration- SWSP Information Letter <i>Kevin Rein and Jim Hall</i>
9:50-10:10	Break
10:10-10:55	Water Court Application Review - The SEO's Approach on Summary of Consultations, Determinations of Facts, and Statements of Opposition <i>Kevin Rein and Jeff Deatherage</i>
10:55-11:50	Lessons Learned From SWSPs and Augmentation Plans in Division 1 <i>Paul Benington and Jim Hall</i>
11:50-12:00	Questions and Feedback <i>Dick Stenzel</i>

STATE ENGINEER POLICIES:
AGENCY LEGISLATION OR LEGISLATIVE INTERPRETATION?

Prepared by
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- I. State Administrative Procedure Act (“APA”). The APA, §§ 24-4-101, et. seq., governs the procedure for rulemaking and licensing by all agencies with statewide jurisdiction, including the State Engineer/Division of Water Resources.
- A. Rules vs. Policies.
- C.R.S. § 24-4-102(15) defines a “Rule” as “the whole or any part of every agency statement of general applicability and future effect implementing, interpreting, or declaring law or policy or setting forth the procedure or practice requirements of an agency. ‘Rule’ includes ‘regulation’.”
 - “Policy” is not a specifically defined term in the APA, however, C.R.S. § 24-4-103(1), which mandates the following of APA procedures for all agency rulemaking, states (emphasis added): “[e]xcept when notice or hearing is otherwise required by law, this section does not apply to **interpretative rules or general statements of policy, which are not meant to be binding as rules**, or rules of agency organization.”
 - In considering whether an agency’s “statement” is a rule or a policy, the test applied by Colorado courts is whether or not the “statement” in question establishes a binding norm that preordains the agency’s determination in a particular action:
 - “An interpretative rule serves the advisory function of explaining the meaning of a phrase in a statute or other rule and describes the factors an agency will consider in future administrative proceedings, but **does not** bind the agency to a particular result.” Sanchez v. American Standard Insurance, 89 P.3d 471, 474 (Colo. App. 2003)(emphasis added), see also Colorado Motor Carriers Ass’n v. PUC, 761 P.2d 737, 748 (Colo. 1988).
 - “In contrast, an administrative rule based on an agency’s statutory authority to promulgate a substantive standard that carries the **force of law** is a legislative or substantive rule.” Id. (emphasis added); see also Colorado Motor Carriers Ass’n v. PUC, 761 P.2d 737, 748 (Colo. 1988).

- “In contrast to a rule, a general statement of policy does not establish a ‘binding norm,’ nor does it finally determine the issues or rights to which it is addressed.” Meyer v. Colorado Department of Social Services, 758 P.2d 192, 195 (Colo. App. 1988).

B. Validity of and Challenges to Rules and Policies.

- An agency must follow very specific procedures in promulgating rules (see Section C, below). When the APA’s rulemaking requirements are not satisfied, the rule is not enforceable. See Jefferson County School District v. Division of Labor, 791 P.2d 1217, 1219 (Colo. App. 1990); see also C.R.S. § 24-4-103 (“No rule shall be relied upon or cited against any person unless . . . it has been published and . . . it has been made available to the public in accordance with this section [of the APA].”)
- Judicial review of substantive agency rules is governed by the APA, specifically C.R.S. § 24-4-106. In general, an agency rule will be presumed valid by a reviewing court, and a “challenging party has a heavy burden to establish invalidity of the rule by demonstrating that the agency violated constitutional or statutory law, exceeded its authority, or lacked a basis in the record for the rule. The court cannot substitute its judgment for that of the agency.” Colorado Groundwater Com’n v. Eagle Peak Farms, 919 P.2d 212, 217 (Colo. 1996).
- “An interpretative rule will be upheld as long as the agency’s action was not arbitrary, capricious, or an abuse of discretion.” Colorado Motor Carriers Ass’n v. PUC, 761 P.2d 737, 749 (Colo. 1988).
- Procedure for challenging a “policy” on the basis that it is a really a substantive rule is not explicitly provided for by statutes. Likely scenario would involve the appeal of an adverse quasi-judicial determination (i.e. permit or substitute supply plan denial) based on application of a particular policy.
- Colorado statutes specifically provide for appeal to the relevant Water Court in the case of certain actions by the State Engineer (i.e. substitute supply plans, “exempt” well permits), but not in other cases. In the other cases, this may raise an issue as to whether the water court or Denver District Court is the appropriate venue for appeal.

C. Procedure for Rulemaking. C.R.S. § 24-4-103 sets forth the procedure for agency rulemaking. The key provisions are as follows:

- Notice of the proposed rules must be published in the CCR, together with the time and place of a public rulemaking hearing. C.R.S. § 24-4-103(3)(a).

- Agency must hold a public hearing “at which it shall afford interested persons an opportunity to submit written data, views or arguments and to present the same orally . . .” C.R.S. § 24-4-103(4)(a).
- The agency must consider the evidence from the hearing and any finally adopted rules must be based on the record. C.R.S. § 24-4-103(4)(a).
- A statement of basis, authority and purpose must accompany or be incorporated in the rules. C.R.S. § 24-4-103(4)(c).
- The Attorney General must render an opinion on the rules’ constitutionality and legality. C.R.S. § 24-4-103(8)(b).
- Final rules must be filed with and published by the Secretary of State. Final rules must also be filed with the Office of Legislative Legal Services. C.R.S. § 24-4-103(8)(d).

II. State Engineer’s Rulemaking Authority. Colorado Statutes grant the State Engineer both specific and general authority to promulgate rules:

A. Examples of Specific Rulemaking Authority.

- C.R.S. § 37-90-137(9)(a) – may adopt rules regarding permitting of Denver Basin Wells.
- C.R.S. § 37-90-137(9)(b) – shall adopt rules regarding prevention of injury to vested water rights from withdrawal of Denver Basin ground water.
- C.R.S. § 37-87-105 – authority to establish regulations governing the construction of dam structures
- C.R.S. § 37-80.5-104(1)(a) – shall adopt rules for pilot Arkansas River Basin water bank program
- C.R.S. § 37-90.5-106(1) – shall adopt rules regarding the use of geothermal resources

B. General Rulemaking Authority.

- C.R.S. § 37-80-102(1)(k) – State Engineer has the “. . . power and authority to make and enforce such rules and regulations as he may find necessary or desirable to effectuate the performance of his duties. The making of such rules or regulations shall not be a prerequisite to . . . the performance of his duties . . .”

- C.R.S. §37-80-104 – Authority to promulgate rules concerning the deliveries of water to meet Colorado’s compact commitments.
- C.R.S. § 37-92-501 – “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 The state engineer may adopt rules and regulations to assist in, but not as a prerequisite to, the performance of the foregoing duties.”

III. Examples of State Engineer Policies – Substantive or Interpretive?

A. Policy 2004-2: Use of Aquacalc Pro Streamflow Computers.

- Sets forth how Division of Water Resources staff is to record certain measurements, and ensure the accuracy of such measurements.

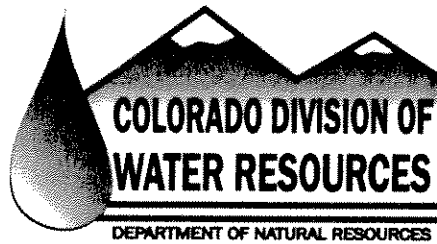
B. Policy 2004-3: Use of Evapotranspiration Credits Within Substitute Water Supply Plans Involving the Exposure of Ground Water in Ponds or Reservoirs not Located Within the Stream Bed.

- “[N]o ET Credit shall be allowed to offset depletions caused by the exposure of ground water in reservoirs and ponds constructed outside the streambed.”
- “Further, no ET Credit shall be allowed to offset evaporative losses occurring as a result of reservoirs and ponds constructed outside the streambed.”

C. Policy 2003-2: Implementation of Section 37-92-308, C.R.S. (2003) Regarding Substitute Water Supply Plans.

D. Others

**Index of
Policies, Guidelines
and
Rules and Regulations
for the
Division of Water Resources**



**State Engineer Forum
November 21, 2005**

**Hal D. Simpson
State Engineer**

POLICY INDEX

- 90-1** Recording and Permitting of Existing Commercial Wells Pursuant to subsection 37-92-602(5), C.R.S. outside of Designated Basins.
(Ground Water)
 - 90-2** Combined Pumping of Tributary and Nontributary Ground Water from the same well in the Denver Basin. (Ground Water)
 - 91-1** Permitting of wells, pursuant to Subsection 37-92-602(3)(b)(II)(A), C.R.S. on tracts of 35 acres or more, where such tracts are divided by right-of-way of necessity.
(Ground Water)
 - 91-1 (BOE)** Use of New Work Report Forms. (BOE)
 - 91-2 (BOE)** Expiration of Verbal Approvals. (BOE)
 - 91-3 (BOE)** Staff Approval of Variance to Three-Day Notice Requirement. (BOE)
 - 91-4 (BOE)** Use of Fly Ash Additive in Cement Grouts. (BOE)
 - 93-1** Amendment or correction of well locations. (Ground Water)
 - 93-2** Feedlot and Dairy Operation Wells. (Ground Water)
 - 93-3** Filing Fees for Changes of Well Ownership and Mailing Address. (Ground Water)
 - 93-4** Use Restrictions for Permits Issued as the Only Well on 35+ Acres.
(Ground Water)
 - 93-5** Expanding the Use of a Pre-1972 Well to Serve One More Dwelling.
(Ground Water)
 - 94-1** Requests for Hearings. (Hearings)
 - 94-2** Policy Concerning Record of Hearings. (Hearings)
 - 94-3** Applications for Permits to Construct Wells into Not Nontributary aquifers Prior to Court Approval of a Plan for Augmentation. (Ground Water)
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- 94-4** Small Capacity Commercial Wells for Confined Animal Feeding Operations Designated Ground Water Basins. (Designated Basins)
 - 94-5** Remediation Project Recovery Wells. (Ground Water)
 - 95-1** Acceptance of 25-Year Lease Augmentation Supplies (Surface Water)
 - 95-2** Acceptance of Statements of Beneficial Use on Non-Exempt Residential Wells (Ground Water)
 - 95-3** Policy of the Colorado Ground Water Commission Pursuant to Rule 8, of the Rules and Regulations for the Management and Control of Designated Ground Water, Concerning the Use of Flow Meters or Power Meters (as an alternate method or device for water measurement) (Ground Water Commission)
 - 95-4** Late Recording of Exempt Wells Pursuant to 37-92-602(5). (Ground Water)
 - 95-7** Subdivision Water Supply Plan Review (Surface Water)
 - 96-1** Signatures on Well Permit Applications and Other Documents (Ground Water)
 - 96-2** Original Well Permit Application Forms (Ground Water)
 - 96-3** Acceptance of Facsimile Forms for Evaluation (Ground Water)
 - 97-1** Standards for Identification of GPS Data to be used by DWR and GPS Units to be purchased for use by DWR (General)
 - 97-2** E-mail and Internet Guidelines (Information Technology)
 - 98-1** Policy for Commuting in State Vehicles
 - 98-2** Resume Review
 - 98-3** Use of Ethanol in Heat Pump Systems (General)
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- 99-1** Location of Conditional Ground Water Rights (Water Wells) in a Proposed Subdivision within a Pending Plan for Augmentation
 - 99-1 (BOE)** Written Examination on the Statutes and Water Well Construction Rules (BOE)
 - 99-2** Administration of Power Interference Contracts (General)

- 00-1** Pending Water Right Applications on Federal Lands
- 00-1 (BOE)** Issuance of Pump Installation Licenses to Reflect Change in National Ground Water Association Examination (BOE)
- 00-2 (BOE)** Re-use of License Numbers (Issuance of Pump Installation or Well Construction License Numbers Previously Issued to a Different Contractor) (BOE)
- 00-3 (BOE)** License Requirements for the Construction of Gallery-Type Wells and Springs Wells (BOE)
- 01-1** Variance from Rule 7.1 of the Geothermal Well Rules for the Construction of Vertical Closed-Loop Ground Source Systems (Type A Geothermal Well; "Heat Pumps") that do not Penetrate a Confining Layer (Ground Water)
(REVOKED 10/12/04)
- 01-2** State Engineer and Ground Water Commission Hearing Record (File) Retention
- 01-3** Substitute Water Supply Plans (Surface Water)
- 01-4** Complaints Policy (Administrative)
- 02-1** Well Permitting Criteria for Use of Existing Wells (Ground Water)
(REVOKED 1/2/03)
- 02-2** Implementation of HB 02-1414 (Section 37-92-308, CRS (2002)) regarding substitute water supply plans (Surface Water) (REVOKED 8/12/03)
- 02-3** Use of computers and Information Technology Systems for the Division of Water Resources (Information Technology)
- 03-1** System Methodology Policy for Retrieving and Updating data from the Division of Water Resources' Information Database (Information Technology)
- 03-2** Implementation of Section 37-92-308, C.R.S. (2003) regarding substitute water supply plans (Ground Water)
- 03-3** Regarding Supplemental Wells, Alternate Points of Diversions for Wells, and Replacement Wells, Including Deepening of Wells in Water Division III (Ground Water)

- 04-1** Use of Magnetic Head Pygmy Meters (Hydrography)
- 04-2** Use of AquaCalc Pro Streamflow Computers (Hydrography)
- 04-3** Use of Evapotranspiration Credit Within Substitute Water Supply Plans Involving
the Exposure of Ground Water in Ponds or Reservoirs Not Located Within the
Streambed (Ground Water)

GUIDELINES

11/2/1989	Revised Guidelines with Regard to <u>Good v. Bell</u> (Good vs. Bell)
2/15/1994	Data QA/QC Guidelines (Quality Control)
2/1996	General Guidelines for Substitute Water Supply Plans for Sand and Gravel Pits Submitted to the State Engineer Pursuant to SB 89-120 & SB 93-260 (Gravel Pits)
96-2A	Guidelines for Permit Issuance – Reviewing Topographic Maps (Ground Water)
10/28/99	Well Permitting Guidelines for Water Division III (Ground Water)
9/21/2000	Guidelines for Submittal of As-Built Locations Pursuant to Rule 6.2.3 of the Water Well Construction Rules (Public Memo) (Ground Water)
9/21/2000	Clarification and guidelines regarding the issuance of permits that do not identify a specific well location pursuant to Rule 6.2.3 of the Water Well Construction Rules dated June 1, 2000 (Ground Water)
03-1	Evaluating Permit Applications for Existing Wells
03-2	Evaluating Permit Reinstatements (<i>revised 9/23/04</i>)
03-3	Evaluating Permit Applications for Existing Wells with Decreed Absolute Water Rights
03-4	Concerning the Retention of Well Permit Applications that are Withdrawn by the Applicant or Returned to the Applicant as Denied or Unacceptable by the Staff of the Division of Water Resources
03-5	Regarding the Use of Wells Within Water Service Areas
04-1	Differentiate between well "repair" and well "replacement"
04-2	Subdivision Review Procedures

Rules and Regulations for DWR

- 2 CCR 402-1 Rules and Regulations for Dam Safety and Dam Construction
- 2 CCR 402-2 Rules and Regulations for Water Well Construction, Pump Installation, and Monitoring and Observation Hole/Well Construction ("Water Well Construction Rules")
- 2 CCR 402-3 Rules of Procedure for All Adjudicatory Hearings before the Colorado Ground Water Commission
- 2 CCR 402-4 Rules for Small Capacity Well Permits in Designated Ground Water Basins
- 2 CCR 402-5 Procedural Regulations
- 2 CCR 402-6 The Rules and Regulations Applying Exclusively to the Withdrawal of Ground Water from the Dawson, Denver, Arapahoe and Laramie-Fox Hills Aquifers in the Denver Basin ("The Denver Basin Rules")
- 2 CCR 402-7 The Rules and Regulations Applying to Applications for Well Permits to Withdraw Ground Water Pursuant to Section 37-90-137(4), C.R.S. ("The Statewide Nontributary Ground Water Rules")
- 2 CCR 402-8 Rules and Regulations for the Implementation of Subsection 25-8-202(7), C.R.S. ("Senate Bill 89-181 Rules")
- 2 CCR 402-9 Fees Set and Collected by the State Engineer for the Water Data Bank Cash Fund, the Division of Water Resources Publication Cash Fund, and the Satellite Monitoring System Cash Fund ("Fee Rules and Regulations")
- 2 CCR 402-10 Rules and Regulations for Permitting the Development and Appropriation of Geothermal Resources through the Use of Wells ("Geothermal Well Rules")
- 2 CCR 402-11 Rules and Regulations for the Permitting and Use of Waters Artificially Recharged Into the Dawson, Denver, Arapahoe, and Laramie-Fox Hills Aquifers ("Denver Basin Artificial Recharge Extraction Rules")
- 2 CCR 402-12 The Rules Governing the Arkansas River Water Bank Pilot Program
- 2 CCR 402-13 Rules Governing the Water Administration Fee Program (Repealed)
- 2 CCR 402-14 Rules and Regulations for Administration of Licensing, Financial Responsibility, Continuing Education and Remedial Action (BOE Rules)
- 2 CCR 410-1 Rules and Regulations for the Management and Control of Designated Ground Water

Amended Rules and Regulations Governing the Diversion and Use of Tributary Ground Water in the Arkansas River Basin, Colorado

Amendments to Rules Governing the Measurement of Tributary
Ground Water Diversions Located in the Arkansas River Basin

Rules and Regulations Governing the Diversion and Use of
Tributary Ground Water in the South Platte River Basin, Colorado

Proposed Rules for the Confined Aquifer of the San Luis Valley

Draft Rio Grande Measurement Rules

Prepared by Dick Wolfe, CDWR, November 15, 2005

STATE OF COLORADO
DIVISION OF WATER RESOURCES
OFFICE OF THE STATE ENGINEER

-DRAFT-

**RULES AND REGULATIONS FOR SUBMITTAL AND EVALUATION
OF INTERRUPTIBLE WATER SUPPLY AGREEMENTS
SUBMITTED PURSUANT TO 37-92-309 C.R.S.**

(IWSA RULES)

2 CCR XXX-XX

**EFFECTIVE DATE:
, 2006**

**1313 SHERMAN STREET, RM. 818
DENVER, COLORADO 80203
TELEPHONE: 303-866-3581
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**RULES AND REGULATIONS FOR SUBMITTAL AND EVALUATION OF
INTERRUPTIBLE WATER SUPPLY AGREEMENTS SUBMITTED PURSUANT TO
37-92-309 C.R.S.**

RULE 1 TITLE

The title of these rules and regulations is "Rules And Regulations for Submittal and Evaluation of Interruptible Water Supply Agreements submitted pursuant to 37-92-309 C.R.S.". The short title for these rules and regulations is "IWSA Rules". They may be referred to herein collectively as the "Rules" and individually as a "Rule". According to 37-92-309 C.R.S., the general assembly has determined that "there are certain circumstances under which administrative approval of the use of Interruptible Water Supply Agreements can maximize the beneficial use of Colorado water resources without the need for an adjudication and without injury to vested water rights or decreed conditional water rights. This section is intended to enable water users to transfer the historical consumptive use of an absolute Water Right for application to another type or place of use on a temporary basis without permanently changing the Water Right."

RULE 2 AUTHORITY

These Rules are promulgated pursuant to the authority granted the State Engineer in Sections 37-80-102(1)(g) and (k) and 37-92-309(5), C.R.S. (2005).

RULE 3 SCOPE AND PURPOSE

- 3.1** 37-92-309(1), C.R.S. states, "(t)he general assembly hereby finds, determines, and declares that there are certain circumstances under which administrative approval of the use of Interruptible Water Supply Agreements can maximize the beneficial use of Colorado water resources without the need for an adjudication and without injury to vested water rights or decreed conditional water rights. This section is intended to enable water users to transfer the historical consumptive use of an absolute water right for application to another type or place of use on a temporary basis without permanently changing the water right."
- 3.2** 37-92-309(3), C.R.S. states, "(t)he state engineer is authorized to approve and administer Interruptible Water Supply Agreements that permit a temporary change in the point of diversion, location of use, and type of use of an absolute water right without the need for an adjudication pursuant to this article..." subject to additional provisions contained in 37-92-309 C.R.S.
- 3.3** The state engineer's authority for approval and administration of Interruptible Water Supply Agreements is in conjunction with the administrative authority given in 37-80-102(1) C.R.S. The Rules promulgated herein are required to enable the State Engineer to carry out the approval and administration of Interruptible Water Supply Agreements pursuant to 37-92-309, C.R.S.

- 3.4 The state engineer does not have the authority under 37-92-309, C.R.S. or these rules to approve out-of-priority depletions caused by diversions from surface or ground water sources and the replacement of those depletions. Such operations require either a court approved plan for augmentation or an approved substitute water supply plan pursuant to 37-92-308, C.R.S.
- 3.5 37-92-309(3) C.R.S. identifies the process by which applications for approval of Interruptible Water Supply Agreements must be submitted, the information that must accompany each application, the evaluation process, and other details related to the approval of the Interruptible Water Supply Agreement. These rules apply to the evaluation and approval of Interruptible Water Supply Agreements and to the assessment of application fees for Interruptible Water Supply Agreements. Their purpose is to set additional standards for submittal of Interruptible Water Supply Agreement applications and their supporting information to make the submittal and evaluation process more uniform and certain.
- 3.6 These rules establish the fee that must be submitted with the application for an Interruptible Water Supply Agreement pursuant to 37-92-309, C.R.S.
- 3.7 These rules do not apply to submittal and evaluation of substitute water supply plans pursuant to 37-92-308, C.R.S.

RULE 4 DEFINITIONS

- 4.1 **Statutory Definitions** - The terms listed below are defined by statute and have the identical meaning as in the referenced statutes:
 - 4.1.1 Section 37-92-309, C.R.S. (2005): Interruptible Water Supply Agreement, loaning water right owner, borrowing water right owner.
- 4.2 **Specific Definitions** - Unless expressly stated otherwise, the following terms shall have the meaning indicated in this Rule:
 - 4.2.1 **Applicant** – the party or the representative of the party that is requesting approval of the Interruptible Water Supply Agreement.
 - 4.2.2 **Application**- The request for approval of the Interruptible Water Supply Agreement; all required documents, information or engineering supporting the request; proof of notice to SWSP list; and the required fee established by these Rules.
 - 4.2.3 **Return Flows** – the portion of the Water Right that is subject of the Interruptible Water Supply Agreement that historically returned to the stream system through surface runoff and deep percolation.
 - 4.2.4 **Replacement Water** – the water that the applicant will use to replace the Return Flows.
 - 4.2.5 **SWSP Notification List** – the list of parties compiled pursuant to 37-92-308(6), C.R.S.

- 4.2.6 Water Right** – The specific water right or water rights that are being loaned and are subject of the temporary change. (Note: a water right, in general, is defined in 37-92-103(12), C.R.S. For the purposes of this document, Water Right, if capitalized, will take the definition given in this Rule.)
- 4.3 Other Definitions** – All other words used herein shall be given their usual customary and accepted meanings. All words of a technical nature specific to the well drilling industry shall be given the meaning that is generally accepted in that industry.
- 4.4 Gender** - Words used in the present tense include other tenses; words used in the masculine gender include the feminine and neuter genders.

RULE 5 GENERAL RULES

- 5.1 Temporary Nature of a Change of a Water Right** – An Interruptible Water Supply Agreement approved according the statutes and the rules promulgated herein shall effect only a temporary change in the historical consumptive use of the Water Right in a manner that will not cause injury to other water rights and decreed conditional water rights, if such conditional rights will be exercised during operation of the Interruptible Water Supply Agreement, and will not impair compliance with any interstate compact.
- 5.2 Knowledge of Rules** – An entity that applies for approval of an Interruptible Water Supply Agreement shall have the responsibility of having the appropriate familiarity with the statutes and Rules pertaining to the Interruptible Water Supply Agreement. These Rules provide minimum standards for the submittal of an Interruptible Water Supply Agreement and they do not preclude the requirement that additional information be submitted for the evaluation of an Interruptible Water Supply Agreement.
- 5.3 Long Term Responsibility** – An Interruptible Water Supply Agreement approved according to the statutes and rules promulgated herein shall be for one ten-year period. The plan shall provide for Replacement Water, accounting, and reporting, even beyond the ten-year period, if necessary, to replace all lagged Return Flows for the period during which Return Flows are shown to occur. The applicant shall be bound to provide such Replacement Water, accounting, and reporting for that duration.
- 5.4 An Individual Interruptible Water Supply Agreement is limited to one Ditch System or Reservoir** – The Interruptible Water Supply Agreement may include multiple shares from a ditch system or reservoir. However, each Interruptible Water Supply Agreement using ditch or reservoir water is limited to water rights decreed to one ditch system or reservoir.
- 5.5 All Water that is Subject of an Individual Interruptible Water Supply Agreement must be Operated as a Unit** – All water that is subject of an Interruptible Water Supply Agreement's Water Right must be either used during any year that the Interruptible Water Supply Agreement is exercised during its

ten-year approval (see 37-92-309(3)(c), C.R.S.). The Water Right may not be "split" such that a part of it is used during one year and the balance used during a subsequent year.

RULE 6 FEES

- 6.1 Fees** – Starting XX, 2006, water users requesting approval of an Interruptible Water Supply Agreement pursuant to 37-92-309, C.R.S., shall pay a fee of two thousand three hundred eighty-nine dollars (\$2,389). On July 1 of each year, the fee shall increase by an amount equal to the Denver Boulder Consumer Price Index. The state engineer will, at a minimum, publish the new fee using the SWSP Notification List. The fees shall be used by the state engineer for the publishing and administrative costs for processing applications and renewals and administering plans. Such fees shall be deposited in the ground water management cash fund.

RULE 7 REVIEW AND APPROVAL

- 7.1** The general guidelines contained in Rule 7 explain the state engineer's interpretation and implementation of 37-92-309, C.R.S. with respect to the state engineer's review and approval of Interruptible Water Supply Agreements.
- 7.1.1** Requests for approval of Interruptible Water Supply Agreements that include a request for approval of out-of-priority diversions and the replacement of depletions caused by those diversions will not be granted. Such operations require either a court approved plan for augmentation or an approved substitute water supply plan pursuant to 37-92-308, C.R.S.
- 7.1.2** Requests for approval of an Interruptible Water Supply Agreements using a water right from wells decreed in Larimer County District Court Civil Action 11217 will not be granted.
- 7.1.3** The application should be submitted as a paper copy and should be sent to the state engineer, 1313 Sherman Street, Denver, CO, 80203. Additional reports, data files, or other documentation may be submitted electronically (for example, on compact disc) or made available from an ftp site.
- 7.1.4** To ensure proper notice, the applicant shall provide copies of the proposed Interruptible Water Supply Agreement to all parties on the SWSP Notification List and shall contact the Division of Water Resources for the current SWSP Notification List at the time of mailing. In addition to providing the Interruptible Water Supply Agreement to all parties on the SWSP Notification List, the applicant must make all reports, data files, and other documentation available to those parties.
- 7.1.5** The Proof of Notice required by section 37-92-309(3)(a), C.R.S. shall be a copy of a certificate of mailing or equivalent by first-class mail from the applicant. The Proof of Notice shall be filed with the Application.

- 7.1.6** The notification required by section 37-92-309(3)(a), C.R.S. shall include a statement that a response to the notice is required to be considered a "party to the application". This response indicating party status must be sent to the state engineer or his designated agent by first-class mail or by electronic mail. The applicant should state in the notice that a response to the state engineer must be received within 30 days of notice and that all responses to the notice must be sent to the State Engineer's Office and the Applicant.
- 7.1.7** Any portion of a water right that is subject of a substitute water supply plan approved pursuant to C.R.S. 37-92-308 may not be included in an Interruptible Water Supply Agreement.
- 7.1.8** The State Engineer's Office does not have the authority or resources to provide consulting engineering services. Thus, a request for approval of an Interruptible Water Supply Agreement must be complete upon submittal to the state engineer. Often, consultation with a professional engineer may be necessary to address the technical and engineering issues involved and to ensure that a complete request is prepared. The following items must be included when submitting a request for approval of an Interruptible Water Supply Agreement.
 - 7.1.8.1** A statement regarding the justification and need.
 - 7.1.8.2** Proof of Notice as required in sections 37-92-309(3)(a), C.R.S.
 - 7.1.8.3** A narrative description summarizing the water resource aspects of the Interruptible Water Supply Agreement including a description of the Water Right, the proposed use of the consumptive use portion of the Water Right to be changed and how it will be diverted and conveyed to the place of use, the source of Replacement Water, and the means by which the Replacement Water will be used to replace Return Flows.
 - 7.1.8.4** A copy of the agreement between the loaning Water Right owner and the borrowing Water Right owner. The agreement should clearly show that both parties have consented to operate the Interruptible Water Supply Agreement consistent with the provisions of 37-92-309, C.R.S. and these Rules.
 - 7.1.8.5** An engineering report for the Interruptible Water Supply Agreement. The report should include, but is not limited to, all pertinent information regarding the Water Right, the analysis and other material (diversion records, aerial photographs to document historical use) used to determine historical consumptive use and Return Flows, location maps, transit losses and the time, location and amount of Return Flows. The engineering report must be prepared consistent with Rule 8 of these Rules.
 - 7.1.8.6** If the Water Right has been used for irrigation, a plan to prevent erosion and blowing soils and a description of compliance with local county noxious weed regulations and other land use provisions.

- 7.1.8.7** A proposed monthly accounting form for the Interruptible Water Supply Agreement that includes all diversions, Return Flow requirements, and Replacement Water deliveries. The accounting must be provided to the water commissioner and division engineer on forms and a reporting schedule that is acceptable to them. The accounting form should contain all information necessary for the administration of the plan. The name, mailing address, and phone number of the contact person who is responsible for operation and accounting of this plan must be provided on the accounting form. The accounting form must be prepared consistent with Rule 9 of these Rules.
- 7.1.8.8** A description of how the water will be measured. All water diverted under the proposed Interruptible Water Supply Agreement shall be adequately measured to the satisfaction of the division engineer or their designee.

RULE 8 ENGINEERING REPORT

- 8.1** The applicant shall submit an engineering report describing the methodology, supporting data, and results of the analysis of the Water Right. If the Water Right is decreed for irrigation, the Applicant shall include consideration for the following in the engineering report:
 - 8.1.1** Analysis of historical consumptive use of an irrigation Water Right shall be based upon the modified Blaney-Criddle method or other methods generally accepted in the engineering community for calculating crop evapotranspiration or determination from previous court decrees for the subject Water Right, if applicable. The historical consumptive use analysis shall be based on a representative study period. Any non-use of the Water Right during a study period shall be included in averaging historical use. All sources of water for irrigation must be considered when determining historical consumptive use. Any occurrence of subirrigation must be documented and considered in the historical use analysis. Documentation of historical irrigation may be based on aerial photographs, sworn affidavits, court decrees, well permit files and water commissioner diversion records.
 - 8.1.2** Estimates of irrigation efficiencies, ditch conveyance efficiency, and subirrigation shall be based on acceptable engineering references and standards and shall be accompanied by supporting documentation.
 - 8.1.3** A portion of land representative of that which would be irrigated by the surface Water Right shall be dried up. The report shall identify a specific location and number of acres that will be dried up. The entire parcel that is subject to dry up shall be identified in the Interruptible Water Supply Agreement.
 - 8.1.4** Maintenance of historical Return Flows from the former irrigated lands will be required if necessary to prevent injury to other water rights. The timing

of Return Flows may be calculated using Glover-based techniques [including, but not limited to parallel drain theory, stream depletion factor (SDF)] or numeric modeling.

RULE 9 ADMINISTRATION, ACCOUNTING, AND REPORTING

- 9.1** The applicant shall submit a detailed accounting sheet providing monthly estimates of the following items including, but not limited to, the projected monthly consumptive use available from the Water Right, the monthly amount diverted, the monthly Return Flow obligation from the Water Right, the monthly amount of Replacement Water available (including consideration of transit losses). The Interruptible Water Supply Agreement shall provide the name, address and telephone number of the contact person who will be responsible for the accounting and operation of this plan.
- 9.2** The accounting sheet shall be updated and submitted monthly to the division engineer and water commissioner. More frequent accounting may be required by the division engineer.
- 9.3** Pursuant to 37-92-309(d), "the applicant shall give notice by March 1 of any year that the option is to be exercised to all parties who filed comments with the state engineer pursuant to this section, unless earlier required in the agreement; except that the option may be exercised at any time during 2003." The applicant shall also provide this notice to the water commissioner and the division engineer.
- 9.4** When providing notice as described in Rule 9.3, the applicant shall provide consolidated accounting showing all remaining Return Flow obligations from previous years' Interruptible Water Supply Agreement operations, Return Flow obligations resulting from the proposed year's operation, and evidence of dedicated Replacement Water to meet all future Return Flow obligations.
- 9.5** When providing notice as described in Rule 9.3, the applicant shall provide maps, aerial photographs, and other records as necessary to identify the specific irrigated area to be dried up. The acreage to be dried up must be consistent with the acreage determined in the engineering report as described in Rule 8.1.3.
- 9.6** Additionally, for an Interruptible Water Supply Agreement that has already been exercised for at least one year, the applicant shall provide consolidated accounting to the water commissioner and division engineer by March 1 of each following year. The accounting shall show all remaining Return Flow obligations from previous years' Interruptible Water Supply Agreement operations and evidence of dedicated Replacement Water to meet all future Return Flow obligations. This accounting shall be submitted until such time as all Return Flow obligations have been satisfied.

RULE 10 VARIANCES

- 10.1 General** - When the strict application of any provision of these Rules presents practical difficulties or unusual hardship, a written request for a variance from the

Rules may be submitted. The applicant must show that the requested variance will comply with the intent of these Rules to effect only a temporary change in the historical consumptive use of the Water Right in a manner that will not cause injury to other water rights and decreed conditional water rights, if such conditional rights will be exercised during operation of the Interruptible Water Supply Agreement, and will not impair compliance with any interstate compact. Variance approval must be obtained prior to operation of the Interruptible Water Supply Agreement.

- 10.2 Written Request Required** – Any request for a variance from a Rule or Rules shall be submitted to the state engineer in writing and shall be signed by the applicant. Such request shall specify the Rule or Rules from which a variance is sought, what the proposed variance is, and the reason for seeking it.
- 10.3 Written Response** - The State Engineer shall respond in writing to a variance request in a reasonable amount of time stating the reasons for the decision and imposing conditions necessary to implement the intent of these Rules, if a variance is approved.

RULE 11 SEVERABILITY

If any portion of these Rules is found to be invalid, the remaining portion of the Rules shall remain in force and unaffected.

RULE 12 REVISIONS

These Rules may be revised in accordance with Section 24-4-103, C.R.S.

RULE 13 STATEMENT OF BASIS AND PURPOSE INCORPORATED BY REFERENCE

The Statement of Basis and Purpose for these Interruptible Water Supply Agreement Rules is incorporated by reference as part of these Rules. *[The Basis and Purpose will be drafted when the Rules have been finalized]*

RULE 14 EFFECTIVE DATE

These Rules shall become effective on , 2006.

Hal D. Simpson, State Engineer

STATE OF COLORADO

WATER DIVISION ONE
OFFICE OF THE STATE ENGINEER
Division of Water Resources
Department of Natural Resources

810 9th Street, Suite 200
Greeley, Colorado 80631
Phone (970) 352-8712
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<http://www.water.state.co.us/>



Bill Owens
Governor

Russell George
Executive Director

Hal D. Simpson, P.E.
State Engineer

James R. Hall
Division Engineer

October 6, 2005

Re: South Platte Non-Irrigation Season Administration

Dear Water User or Interested Party:

The administration of the waters of the South Platte River remains under pressure from the effects of the recent drought, court decisions and increased competition for the limited resource. As a result, the cooperative administrative approaches that have existed for over thirty years are changing. As you are probably aware, prior to 2001, the State Engineer believed he had authority to approve substitute water supply plans to allow wells to operate when they were out-of-priority. However, the Supreme Court ruled in the *Empire Lodge* case that the General Assembly had not granted such authority to the State Engineer.

In response to this 2001 Supreme Court ruling, the State Engineer proposed new Rules in 2002 to allow for operation of Substitute Water Supply Plans (SWSPs) for tributary wells in the South Platte. Many parties challenged these rules, and the Division 1 Water Court ruled that the State Engineer could not approve Substitute Water Supply Plans under the proposed 2002 Rules. The Colorado Supreme Court confirmed the Water Court's decision in April 2003. Meanwhile, legislation enacted in 2002 and 2003 provided a new statute for some users to employ to obtain the State Engineer's approval of temporary SWSPs under certain conditions. Under some circumstances, the temporary SWSPs are intended to allow wells to operate out-of-priority while the users apply for water court approval of an augmentation plan. Many augmentation plans are now winding their way through the court process with interim SWSP's allowing continued operation of some wells. On June 3, 2005, the Water Judge approved the largest of these plans for the Central Colorado Water Conservancy District.

Changes as a result of Supreme Court rulings, legislation, drought and increased competition for water have created significant hardship on a large segment of users and may continue to create hardship on some users. Not surprisingly, recent events have raised several issues

associated with administration in the South Platte, and our office is considering potential changes to its administrative practices. Prior to making any such administrative changes, we are seeking your input. We foresee continuing administration as it presently exists for this winter, but anticipate changes for the storage season of 2006-2007.

Two of the most significant issues include 1) administration of out-of-priority reservoirs on the South Platte, and 2) winter replacement requirements for out-of-priority well depletions. With the cooperation that has existed on the South Platte, the Division has allowed the out-of-priority storage of water in irrigation reservoirs that divert from the South Platte from the Denver Metro area northeast to the state line when it is apparent that senior downstream reservoirs will fill. This administrative scheme has existed for several decades and has allowed for the maximum utilization of our water resources. However, the statute that guides out-of-priority storage specifically states that out-of-priority storage may only be allowed if the "water so stored can promptly be made available to downstream senior storage appropriators in case they are unable to completely store their entire appropriative right due to insufficient water supply." 37-80-120 C.R.S.

We believe some of the reservoirs that have historically had out-of-priority storage probably cannot return water back to the river promptly, as required by the statute. Thus, even though this practice was allowed through the cooperation of users, the Division needs to review whether it can continue the practice of allowing such out-of-priority storage even when the Division is confident that the water will not be needed downstream for a senior storage right. We are seeking public input on this past practice and whether it should continue in the absence of any statutory changes.

In the past, our office has not kept track of calls based on what would have happened if there was no out-of-priority storage, as occurs in other Divisions, because it has not had a need for this type of accounting. In the future, our office is looking at the possibility of keeping track of the call as if there were no out-of-priority storage. Thus, in a simple example, our office would change the call from the senior date of a downstream reservoir to the junior date of the upstream reservoir once the out-of-priority storage by the junior plus the storage by the senior would have filled the senior's reservoir. The Division Engineer is also considering extending this concept to the situation of out-of-priority storage for reservoirs that cannot return water and to well users that are required to make replacements for depletions. Our office desires public input on such practices and whether they may occur without authorization from the Water Court or the General Assembly.

On a related topic, some water users may believe that well owners should replace any time there is a shortage in the amount a reservoir can divert whether we have set a call for the reservoir or not. In accordance with statute, our office only sets calls for water rights if there is a viable need for the water for a decreed purpose. For example, in the case of Julesburg reservoir, we will generally place a "bypass call" to assure the fill of the reservoir. A bypass call allows some juniors to divert upstream while passing a portion of the water downstream.

We have adopted this administrative approach because we believe it is consistent with the statutory provision that requires that the Division Engineer "shall also 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." § 37-92-502(2)(a), C.R.S. (emphasis added). We believe it would be inconsistent with this statutory directive if we caused curtailment in excess of what was required by the senior priority to fill its reservoir. Further, we are concerned that changing this administrative practice would waste water by causing water to flow out of the State resulting in the unnecessary loss of water to all users in Colorado.

Other reservoirs upstream from Julesburg Reservoir whose diversions are from the South Platte have generally filled in recent times except for 2004 and a small amount in 2003. Although these reservoirs have historically filled, we have some concern that they may not fill in the future due to changing circumstances. First, it appears reservoirs will continue to be used more extensively than they have in the past because of some users' inability to use ground water supplies as extensively or at all. This will require more water to refill these reservoirs each non-irrigation season. Some reservoir supplies also will be increasingly used for augmentation purposes in the future, once again requiring more water to refill these reservoirs. More importantly, there will likely be less flow in the future available for storage due to reuse of consumable sources, installation of sprinklers reducing return flows, and the use of direct flow rights earlier in the year because of some users' inability to use ground water supplies as extensively or at all. Some might argue that these effects will be at least partially offset by the several hundred wells that can no longer operate. We expect that we will be able to better predict the global impacts of all these changes upon completion of the South Platte Decision Support System modeling. Because of our concern that South Platte reservoirs will not fill without a call, our office presently foresees the need of placing a senior reservoir call in November in all but the best years.

Concerning winter time replacement of depletions by well user groups, the Division has taken the position in the past that, if the user has resources to make aggregated replacement, then that replacement only need be made if the senior right does not fill or the lack of replacement will impact water rights junior to the senior calling right, but senior to the priority of the wells being augmented. Others with rights junior to the wells have argued that replacement must be made any time that the senior is short water. Under the latter approach, these junior water rights may come into priority more quickly if the senior reservoirs fill more quickly. The Division has resisted this argument in the past. However, upon further review, the Division has decided to reconsider, after public input, whether wells should augment any time there is a shortage, regardless of the fact that this may only benefit water rights with priorities junior to the wells and may cause loss of water to all Colorado users in certain circumstances.

It should be noted that recent augmentation plans approved by the court upon stipulation by the parties already require real time winter replacement unless the court approves agreements between the Augmenting Party and one or more reservoir owners to allow delayed aggregated

replacement, if necessary. We will, of course, follow the direction of the legislature if it provides general guidance and the decrees of the Water Court. Even if wells are required to augment any time there is a shortage, our office contemplates that it will still allow limited aggregation within a particular month during the non-irrigation season for efficiency of replacement purposes.

In conclusion, we foresee possible changes in administration having a significant impact on some users, and thus we are seeking your input before implementing any changes. Please provide us with any comments you have by November 30, 2005. **To allow water users the opportunity to adjust to any administrative changes, we anticipate implementing any changes for the 2006-2007 storage season.**

Sincerely,

A handwritten signature in cursive script that reads "James R. Hall".

James R. Hall, P.E.
Division Engineer

Cc: Hal Simpson, State Engineer
Paul Benington, Assistant Attorney General

STATE OF COLORADO

OFFICE OF THE STATE ENGINEER

Division of Water Resources
Department of Natural Resources

1313 Sherman Street, Room 818
Denver, Colorado 80203
Phone (303) 866-3581
FAX (303) 866-3589
www.water.state.co.us

October 11, 2005



Bill Owens
Governor

Russell George
Executive Director

Hal D. Simpson, P.E.
State Engineer

To: All Parties in Division 1 with Active Substitute Water Supply Plans
From: The State Engineer's Office and the Division Engineer's Office
Subject: Submittal of Substitute Water Supply Plan Requests for 2006

You are receiving this letter because you were granted approval of a substitute water supply plan ("SWSP") during the last 12 months and the State Engineer's Office ("SEO") anticipates that you will submit a request for approval of an SWSP in the upcoming months. The purpose of this letter is to provide you with specific requirements for the submittal of requests for SWSPs to be approved pursuant to C.R.S. 37-92-308.

In the last three years, we have found that only a small number of the SWSP requests that the SEO receives for Division 1 can be reviewed and approved without some level of clarification or modification. The resulting need to correspond with the parties submitting the applications and the time required to resolve issues has caused a significant amount of delay in approving requested SWSPs. Therefore, we request that your next submittal be complete and consistent with the requirements described below. If your submittal meets these requirements, the SEO and the Division Engineer's Office will commit to an expedient review to ensure that the SWSP is approved before the previous SWSP expires and/or any diversions must commence. Please read the following and review the referenced documents.

1. We request that you send one copy of the SWSP request to the SEO. That copy should be a paper copy of the request for approval and should be sent to Hal Simpson, 1313 Sherman Street, Denver, CO, 80203. Additional reports, data files, or other documentation may be submitted electronically (for example, on compact disc) or made available from an ftp site. We also request that you send a duplicate copy of the SWSP request to the Division 1 office in Greeley to allow for simultaneous review of the SWSP request. That copy should be sent to Jim Hall, 810, 9th Street, Suite 200, Greeley, CO 80631. Finally, we request that, when it is available, you send an electronic copy of the addresses of the objectors to the water court application. This will lead to quicker mailing of decisions of the state engineer.
2. We request that you submit the SWSP request for approval at least 90 days before the effective date of the SWSP. Since many SWSPs expire on March 31, 2006, those SWSPs' requests should be submitted by November 30, 2005 if possible.
3. Policy 2003-2, signed by the state engineer on August 12, 2003, addresses the important requirements and restrictions related to the evaluation and approval of SWSPs submitted pursuant to C.R.S. 37-92-308. The policy is attached and can also be found on our website at <http://www.water.state.co.us/pubs/policies/policy2003-2.pdf>. You should follow this policy closely. Doing so will help ensure that your SWSP request is complete and consistent with the statutes.

Note that the policy attachments are organized with headings for the *PROJECT*

DESCRIPTION, DEPLETIONS, REPLACEMENT SOURCES, and OPERATION OF PLAN.
We recommend that you submit the SWSP request with the same topics and in this order to help ensure all of the information is included.

4. Attached are the Accounting, Recharge, and Exchange protocols. We recommend that you review the protocols. The protocols reflect the information that we require. Reviewing them will help you to understand how failure to provide all the required information can lead to delays in the approval of your SWSP. Further, failure to follow the provisions of the protocols could lead to curtailment of the diversions allowed by your SWSP.
5. The following issues have, in our experience, led or will lead to the need for additional review or changes to SWSP requests:
 - a. For an SWSP that will be used to allow the diversion of water from wells, all wells, including alternate points of diversion and supplemental wells must be identified in the SWSP request and, therefore, must also be identified in the water court application. If wells are subject of the SWSP request, but are not identified in the water court application, you must amend the water court application or your SWSP request will be denied.
 - b. If any portion of the SWSP cannot be approved and you modify the request to exclude that part of the SWSP, such a modified request must be submitted in writing to the SEO. (Note that if you modify the SWSP request in any way other than to limit it, you must follow the notice provisions of C.R.S. 37-92-308.)
 - c. All replacement water that is used in the SWSP must be approved/decreed for augmentation use.
 - d. C.R.S. 37-92-308(4)(b) states "(i)f an applicant requests a renewal of a plan that would extend the plan past three years from the initial date of approval, the applicant shall demonstrate to the state engineer that the delay in obtaining a water court decree is justifiable and that not being able to continue operating under a substitute water supply plan until a decree is entered will cause undue hardship to the applicant." If your SWSP falls into this category, then your request must include information to satisfy this provision of the statute.
 - e. If an SWSP request is submitted with limited information based on the statement that the SWSP is identical to the previous year's approved SWSP, the previous year's request will be subject to comprehensive review by the SEO with consideration for how changing conditions may have affected the SWSP's operation. At a minimum, the following information must be provided with the current request:
 - i. A complete description of the SWSP's operation
 - ii. A complete description of all diversion structures in the SWSP
 - iii. A complete description of all replacement sources in the SWSPDetailed engineering that was performed in the previous year's SWSP may be referenced, however, all tables must be updated with current projections for the requested period of approval. All data input files used to estimate current stream depletions or accretions using computer-based methods must be provided. If any parties receiving notification object to the lack of proper notice as required by statute, due to the lacking information, the start of the 30-day notice period may be delayed until all parties have received proper notice.
 - f. The SWSP request must specifically identify any changes to the SWSP request from the previous year. The changes that must be addressed include, but are not limited to, the addition or removal of wells, the addition or removal of replacements sources, and any changes to the engineering assumptions previously used.

6. In addition to reviewing the issues identified in the preceding bullet, you should comprehensively review the terms and conditions of your most recent SWSP approval. In many cases the terms and conditions direct you to take action or provide information that will be necessary to any future approval. The SEO will adhere to those terms and conditions. Therefore, if they are not met, there will be a delay in the evaluation and approval of your SWSP.
7. If the SEO requires additional information or clarification to the SWSP, the evaluating engineer will notify you. You will have 21 days to respond with the requested information or an explanation as to when the information will be forthcoming. If you do not respond within 21 days, the SEO will formally deny the SWSP request, after which time you can request reconsideration. The SEO will allow reconsideration on a case-by-case basis.

Should you have any questions or comments, please contact Kevin Rein or Jeff Deatherage.

Sincerely,



Kevin G. Rein, P.E.
Chief of Water Supply

Attachments:

AUGMENTATION PLAN ACCOUNTING PROTOCOL
RECHARGE PROTOCOL
EXCHANGE GUIDELINE
POLICY 2003-2 AND GUIDELINES

cc: Jim Hall, Division Engineer
Water Commissioners, Division 1
SWSP Notification List

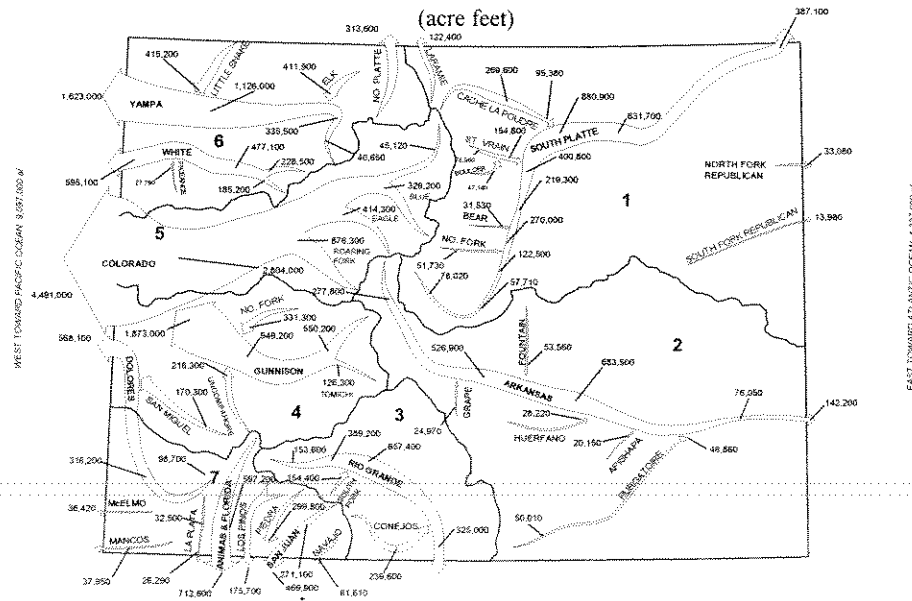
SEO Forum

November 21, 2005



South Platte at the Colorado and Nebraska State Line

COLORADO HISTORIC AVERAGE ANNUAL STREAM FLOWS (acre feet)

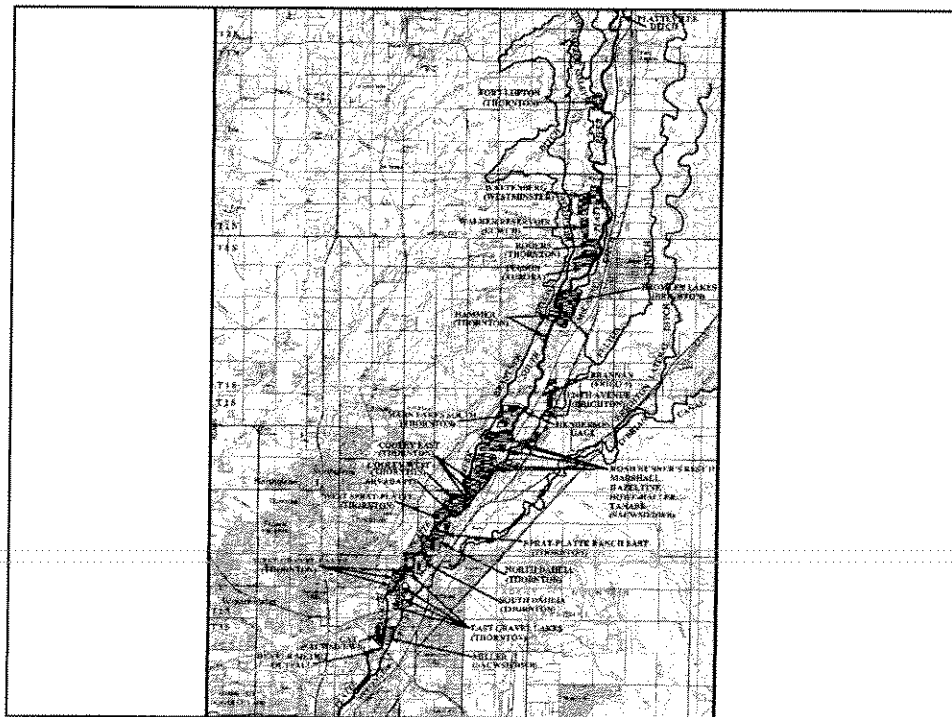


Prepared by the Hydrographic Branch (1995)
Historic averages obtained from USGS Water-Data Report CO-93

OFFICE OF THE STATE ENGINEER
COLORADO DIVISION OF WATER RESOURCES

Changes on the South Platte

- Increased Demand With Growth
- Drought
- Increased Reuse
- Water Court and Supreme Court Decisions Associated with Wells
- Statute Changes





Dillon – Fall 2002

Changes on the South Platte (continued)

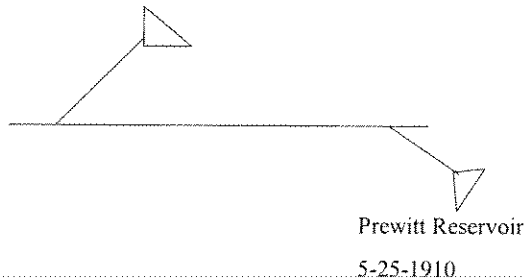
- Endangered Species Issues
- Earlier calls because of well use limits
- Heavier use of reservoirs for irrigation
- Increased installation of sprinklers reducing return flows
- Less cooperation

Questions Seeking Input

- Administration of out-of-priority reservoirs that cannot return water to the river
- Keeping track of the call as if there was no out-of-priority diversions by reservoirs or depletions by wells
- Winter replacement requirements for well user groups

Call Scenario Diagram

Riverside Reservoir, 2nd
Enlargement 10-25-1910





Water Court Application Review

DWR's Approach on Summary of
Consultations, Determinations of Facts,
and Statements of Opposition

SEO Forum
November 21, 2005

Jeff Deatherage, P.E.

Kevin Rein, P.E.



Discussion Topics

- Review Process
- Types of Applications
- DWR Expectations
- Typical Problems
- Questions



Discussion Topics

- Review Process
- Types of Applications
- DWR Expectations
- Typical Problems
- Questions



Discussion Topics – Review Process

- In 2004, DWR reviewed 1,423 water court applications; 468 of them in Division 1
- Of the 468 applications in Division 1, 78 were Denver Basin adjudications and/or Denver Basin augmentation plans
- DWR is required to review each case and provide a Summary of Consultation to the court (37-92-302, C.R.S.)
- DWR is required to file a Determination of Facts for each Denver Basin case (37-92-302, C.R.S.)
- DWR filed a Statement of Opposition in 22 of the 468 cases



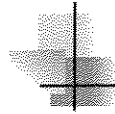
Discussion Topics – Review Process

- Each application in the monthly resume is reviewed individually by DWR staff members
- We conduct a coordinated review between the Denver Office and Division Office
- We draft content for the Summary of Consultation and, if applicable, a Statement of Opposition
- Division staff submits the Summary of Consultation to the court



Discussion Topics – Review Process

- DWR decision to file a Statement of Opposition
 - DWR's objective is to minimize litigation
 - The application is analyzed to determine if there are claims that:
 - Are contrary to the statutes/rules
 - May cause injury
 - Have inherent administrative issues
 - Are not supported with adequate documentation
 - We make a determination as to whether these issues can be worked out through the consultation process
 - If not, we file a statement of opposition



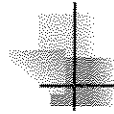
Discussion Topics

- Review Process
- Types of Applications
- DWR Expectations
- Typical Problems
- Questions



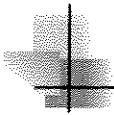
Discussion Topics – Types of Applications

- Augmentation Plans
- Change of Water Rights
- Underground Water Rights – Wells
- Surface Water Rights/Direct Flow/Exchanges
- Storage Water Rights
- Diligence/Make Absolute
- Denver Basin



Discussion Topics

- Review Process
- Types of Applications
- DWR Expectations and
- Typical Problems
- Questions



Discussion Topics – DWR Expectations

- Augmentation Plans
 - DWR reviews the proposed plan for a detailed description of how the plan will operate
 - Assumptions regarding diversions and depletions should be identified and a monthly table demonstrating that all out-of-priority depletions can be replaced should be provided with the application
 - Replacement sources must be identified in detail and must be approved for augmentation use



Discussion Topics – DWR Expectations

- Change of Water Rights
 - The application needs to include documentation (including diversion records) to demonstrate the amount of claimed historical use
 - A change of irrigation rights requires the historically irrigated lands to be dried-up and a map of such lands; if this information is not provided in the application, the requirement must be acknowledged
 - Change of irrigation rights requires the historical diversion and return flow patterns to be maintained



Discussion Topics – Typical Problems

- Augmentation Plans & Changes of Water Rights
 - The application lacks supporting engineering or supporting documentation to detail the basis for claimed water use estimates or historical consumptive use estimates
 - The application claims municipal water rights for an applicant that is not a municipal or quasi-municipal organization



Discussion Topics – DWR Expectations

- Underground Water Rights - Wells
 - The application needs to reference the well permit number
 - The well location, uses, amounts, appropriation date, and source (if applicable) claimed in the application must be consistent with the well permit



Discussion Topics – Typical Problems

- Underground Water Rights – Wells
 - The court application does not identify the well permit number(s)
 - The well permit is not valid. If the well permit is expired, or is otherwise in error (for example, location), the applicant must obtain a valid permit before an absolute water right can be granted



Discussion Topics – DWR Expectations

- Surface Water Rights/Direct Flow/Exchanges
 - For absolute claims, the application needs to identify the dates and amounts when water was diverted in priority and the application needs to identify the use of the diverted water



Discussion Topics – Typical Problems

- Surface Water Right/Direct Flow/Exchange
 - The application references storing water (for longer than 72 hours) without requesting a storage right
 - The application does not specify if the water right claimed is absolute or conditional
 - The claimed appropriation date is not supported
 - The application for an exchange does not identify the exchange from and exchange to points, the amount claimed, and/or the date of appropriation



Discussion Topics – DWR Expectations

- Storage Water Rights
 - For absolute claims, the application needs to identify the dates and amounts when water was stored in priority
 - The application needs to specify the dam height and length, live and dead storage, and if the structure is on or off channel



Discussion Topics – Typical Problems

- Storage Water Right
 - The application does not address whether the storage structure will be excavated and whether ground water will be intercepted
If ground water will be intercepted as a result of the excavation:
 - The application should specifically indicate that the structure will be lined to prevent the exposure and withdrawal of ground water, or
 - The application should acknowledge the need for a well permit, the need to augment evaporation, and the need to account for ground water inflows/outflows (this may involve extensive ground water monitoring/accounting)



Discussion Topics – DWR Expectations

- Diligence/Make Absolute
 - To prove diligence, the application needs to identify the work performed towards completion of the water right and show that the work was done during this diligence period
 - To make absolute, the application needs to provide evidence of that the water right was exercised in the claimed amounts and for the claimed uses



Discussion Topics – DWR Expectations

- Denver Basin
 - Quantification/adjudication of bedrock aquifer ground water
 - The application must contain a complete and accurate description of the subject land area
 - The application must specifically identify the aquifers that are subject of the application
 - The application should acknowledge encumbrances on the water right (existing wells, decrees, pre-213 cylinders)



Discussion Topics – DWR Expectations

- Denver Basin
 - Augmentation Plan
 - The application must specifically identify uses and amounts
 - The application should acknowledge a county's 300-year water supply approach
 - The application must identify replacement sources for pumping and post-pumping periods



Discussion Topics – DWR Expectations

- Denver Basin
 - DWR will issue a Determination of Facts Report (Findings) to document the amount of water available for appropriation from the identified aquifer(s)
 - Findings are presumptive, subject to rebuttal
 - If the applicant has proposed aquifer parameters that differ from those specified by the Denver Basin Rules, the applicant should provide the basis for using such other parameters



Discussion Topics – Typical Problems

- Denver Basin

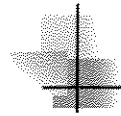
- The application proposes aquifer thickness values that differ from the Denver Basin Rules or site-specific log information, with no basis for using such other parameters
- The application claims not-nontributary water to be nontributary
- The application does not make the necessary reductions due to existing permits, water rights, etc.
- The application does not provide for an exclusion of water to allow for future exempt wells (water per lot assignment or acre-foot per acre basis)



Discussion Topics – Typical Problems

- Denver Basin

- The application claims the right to withdraw the water from “other locations” (Rule 11.A., Statewide Nontributary Ground Water Rules)
- The application claims to waive 600-foot spacing
- The application lacks water use detail for the purpose of the augmentation plan
- Inadequate amounts or sources of water reserved for post-pumping depletions
- Ownership of water



Discussion Topics

- Review Process
- Types of Applications
- DWR Expectations
- Typical Problems
- Questions

SEO Forum November 2005

Typical DWR Comments for Water Court Applications

Augmentation Plans

- Applicant must prove that the proposed augmentation plan will be sufficient to prevent injury to other water rights in time, location and amount.
- Any ruling needs to include a monthly table of diversions, depletions, and replacement water (including transit losses if needed) to demonstrate that the proposed augmentation plan will be sufficient to prevent injury to other water rights in time, place, and amount.
- Applicant needs to provide the engineering assumptions used to determine the annual amount of gross water use, consumptive use, lagged depletions, transit losses, and return flows for applicant's water system.
- Applicant will be required by the Division Engineer to install and maintain measuring devices for the administration of this plan.
- Applicant needs to identify the WDID number assigned by the Division Engineer for each structure included in this plan.
- Applicant needs to provide proposed accounting forms to the Division Engineer and Water Commissioner, which are acceptable to both of them, to allow for the proper administration of this plan, prior to receiving a decree in this case.
- Applicant will be required to provide accounting as required by the Division Engineer. The applicant will also be required to file an annual report with the Division Engineer by November 15th of each year that summarizes diversions, depletions, and replacements made under this plan.
- Applicant needs to include language from CRS §37-92-305(8) in the decree.
- The SEO typically requests that the court retain jurisdiction for some period of time after the augmentation plan becomes operational.

Change of Water Rights

- Applicant needs to provide evidence of the claimed amount of historical use of Applicant's claimed shares of the water rights to be changed with "zeros" for years of no use or no irrigation use and no consumptive use credit for any period the irrigation rights were used for other non-decreed uses.
- The historically irrigated lands must be dried-up and monumented to the satisfaction of the Division Engineer before any historical consumptive use credits are available for use.
- Applicant needs to document that the historical diversion and return flow patterns of the changed water rights will be maintained.

- Applicant must be placed on strict proof that the proposed change of use will not result in an expansion of use so as to prevent injury to other water rights in time, location and amount. Any such change must be limited to the historical season of use and any decree entered should have monthly and annual diversion limits identified for the changed water rights.
- Applicant needs to document ownership of the water rights to be changed.
- Applicant will be required by the Division Engineer to install and maintain measuring devices for the administration of this water right.
- Applicant needs to identify the WDID number assigned by the Division Engineer for each structure included in this case.
- Applicant will be required to provide accounting as required by the Division Engineer.
- The amount of water diverted by this water right from the original point of diversion and all new and/or alternate points of diversion must be limited to diverting only the amount of water legally and physically available at the original diversion structure.

Underground Water Rights - Wells

- Applicant should provide the Court with a copy of the well permit for this well if they have not already done so.
- Applicant must prove the claimed appropriation date.
- Applicant must prove the uses and amounts claimed as absolute.
- The claimed well location, uses, and amounts must be consistent with the Applicant's well permit. Applicant will need a valid well permit for an absolute underground water right.
- Applicant must provide the distance of the well from the section lines.
- Applicant should submit a change of ownership with the Office of the State Engineer to update the SEO's well permit database.

Surface Water Rights/Direct Flow

- Provide the Court with proof of the claimed absolute appropriation date.
- Provide the Court with proof that this water right has been diverted in priority or with the local Water Commissioner's permission at the full claimed absolute amount for all of the claimed beneficial uses.
- Applicant will be required by the Division Engineer to install and maintain measuring devices for the administration of this water right.

- This water right, if granted, will be a junior water right subject to administration. As such, the times at which water may be appropriated will be very limited. Applicant must have permission from the Water Commissioner prior to each diversion of water. Applicant will be required to report the amounts and dates of water diversion under this right to the local Water Commissioner on at least an annual basis.
- Provide the Court with a copy of Applicant's deed for the subject property or provide the Court with proof that Applicant has permission to access the location of the proposed point of diversion as well as identifying the owner of the land on which the structure is located.

Exchanges

- Provide the Court with evidence to support the claimed exchange amount, appropriation date and if the claimed exchange is absolute or conditional.
- Unless wells are located within 100 feet of the stream, this exchange must not be allowed to operate directly to wells, but rather to the uppermost point on the stream where the depletions resulting from pumping the wells impact the stream.
- Water may only be exchanged to the extent that there is a continuous live stream between all of the exchange from and exchange to points.
- Provide evidence to the Court that this plan of exchange can be operated without injury to existing water rights in time, location or amount.
- This exchange may only be operated with the prior approval of the Water Commissioner or Division Engineer and may be subject to transit loss charges if necessary to prevent injury to other water rights.
- Provide the Court with proof that the applicant has permission to use all of the structures referenced in this application.
- Applicant will be required by the Division Engineer to install and maintain measuring devices for the administration of this water right.
- This water right, if granted, will be a junior water right subject to administration. As such, the times at which water may be appropriated may be very limited. Applicant must have permission from the Water Commissioner prior to each exchange of water. Applicant will be required to report the amounts and dates of water diversion under this right to the local Water Commissioner on at least an annual basis.

Storage Water Rights

- Provide the Court with proof of the claimed absolute appropriation dates.

- Provide the Court with proof that the stored water has been diverted in priority or with the Water Commissioner's permission at the claimed absolute amount for all of the claimed beneficial uses.
- Provide the Court with all the information required for the storage rights, including dam height and length, whether the storage structure is on or off channel and the active and dead storage volumes.
- Due to the height of the dam or capacity of the storage structure, this will be a jurisdictional dam¹. Plans and specifications shall be reviewed and approved by the Dam Safety Branch of the Division of Water Resources.
- The dam must comply with all requirements of the State of Colorado's Dam Safety Regulations Resources.
- If groundwater was exposed by the construction of the storage structure, Applicant will need to apply for a well permit with the Office of the State Engineer and obtain a plan of augmentation from the Water Court or a substitute water supply plan from the State Engineer.
- Provide the Court with a map and description of the area to be irrigated by the storage structure.
- Will all the recreation uses be within the storage structure's high water line? If not, specify place of use now to prevent speculation.
- If not already in place, properly maintained measuring devices, acceptable to the Division Engineer or Water Commissioner may be required for the administration of this water right. Applicant may also be required to provide the Division Engineer and Water Commissioner with stage-area-capacity curves or tables for this storage structure. This storage structure must be equipped with outlet works capable of passing all out-of-priority inflows to the nearest natural watercourse. All out-of-priority inflows to this reservoir from any source, including precipitation, must be released without use.
- This water storage right, if granted, will be a junior water right subject to administration. As such, the times at which water may be appropriated will be very limited. Applicant must have permission of the Water Commissioner prior to each diversion of water to storage. Applicant will be required to report the amounts and dates of water diversion under this right to the local Water Commissioner on at least an annual basis.

¹ A "Jurisdictional Dam" is a dam which impounds water above the elevation of the natural surface of the ground creating a reservoir with a capacity of more than 100 acre-feet, or creates a reservoir with a surface area in excess of 20 acres at the high-water line, or exceeds 10 feet in height measured vertically from the elevation of the lowest point of the natural surface of the ground where that point occurs along the longitudinal centerline of the dam up to the flowline crest of the emergency spillway of the dam. For reservoirs created by excavation, the vertical height shall be measured from the invert of the outlet. The State Engineer shall have final authority over determination of the vertical height (2 CCR 402-1, *Rules and Regulations for Dam Safety and Dam Construction*, Rule 4.A.(6)(a)).

Diligence

- Provide the Court with proof that the work claimed for diligence was toward the completion of this water right and occurred in this diligence period.

Make Absolute

- Provide the Court with proof of the claimed absolute appropriation date.
- Provide the Court with proof that this water right has been diverted in priority or with the local Water Commissioner's permission at the claimed absolute amount for all of the claimed beneficial uses.
- Applicant will be required by the Division Engineer to install and maintain measuring devices for the administration of this water right.
- Applicant will be required to provide accounting as required by the Division Engineer.

Denver Basin

- Applicant should be limited to that amount of water found to be available for appropriation in the Determination of Facts Report.
- A determination utilizing aquifer parameters different than those of the Denver Basin Rules should be subject to the Court's retained jurisdiction pursuant to C.R.S. 37-92-305 (11) (1985). In addition, any such determination should be governed by the Denver Basin Rules and the Statewide Nontributary Ground Water Rules as provided in C.R.S. 37-90-137(9)(a).
- Applicant can not use any water from the not-nontributary aquifer until a court approved augmentation plan is in place that will provide for replacement of depletions as required by C.R.S. 37-90-137(9)(c). Replacement of depletions from pumping the aquifer must be made to the affected stream systems to prevent any injurious effect to vested water rights. If not replaced, it appears that the post pumping stream depletions will injure vested water rights in the over appropriated South Platte River drainage. Post pumping depletions should be required for as long as injurious depletions occur. The post pumping augmentation source should be either a renewable surface supply of sufficient amount to cover the maximum anticipated depletions or reservation of a quantity of decreed nontributary water equal to the total amount of water that will be pumped. If previously decreed nontributary water is reserved for augmentation, identification of a specific amount of water from a specific aquifer should be required and the decree should include a provision for a covenant running with the land that would require construction of a well and pumping of the water to replace injurious post-pumping stream depletion.
- For the nontributary ground water in these aquifers, Applicant must limit the consumption to no more than 98% of the water determined to be available in that aquifer, Denver Basin Rule 8, 2 C.C.R. 402-6.

- Any decree entered in this case should contain provisions that allow banking and contain a reference that the State Engineer must issue well permits in accordance with C.R.S. 37-90-137(4) and/or (10) as well as any decree entered in this case.
- Each well should be equipped with a properly installed and maintained totalizing flow meter, and Applicant may be required to submit diversion records to the Division Engineer or his representative on an annual basis or as otherwise requested by the Division Engineer.
- Provide the Court with proof of sole ownership or notice to every person who has any interest in the overlying land of this application within ten (10) days of filing this application as required by C.R.S. 37-92-302(2) and 37-92-305(6).
- Provide the Court with a map of the overlying lands addressed in this application.
- Applicant should not be granted a right for municipal uses without a valid water supply contract with a municipal or quasi-municipal water supply agency.

SEO Forum

November 21, 2005

General Information

- Approximately 9000 High Capacity Wells in South Platte and Tributaries
- Approximately 7000 High Capacity Wells in Substitute Supply Plans or Plans for Augmentation
- Over 90 Substitute Water Supply Plans have been approved in Division 1 in 2005
- Approximately 2000 wells on the enforcement list
- Approximately 500 wells have been tagged or issued certified orders to cease pumping.
- The great majority of parties have complied with our orders to cease pumping.

Lessons Learned in Division 1

- Farmers Respond To Changes
- Focus On Working With Users
- Need For More Formal Recharge And SWSP & Augmentation Plan Accounting Guidelines
- Need To Automate Data Collection
- More Formal Enforcement Action and Notice System
- Staffing Needs

Farmers Respond to Changes

- Increased Use of Surface Water Supplies Especially Early In The Year
- Installation of Pivot Ponds
- Change In Cropping Patterns
- Increased Use Of The South Platte Aquifer For Retiming (Recharge, Augmentation Wells, Recharge Wells)
- More Use of Reusable Effluent and Reservoir Releases for Replacement



Focus on working with users as opposed to enforcement

- Level playing field with single set of rules that is protective of everyone's water rights
- Increased efforts to obtain input on water administration decisions
- Increased effort to make data available
- Need to train users concerning flume and data logger installation.

More Formal Guidelines Developed

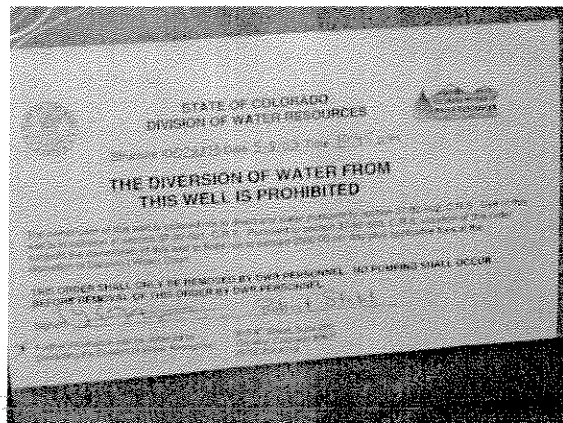
- Accounting Protocol
 - Format for monthly accounting
 - Information Needed
 - Naming Conventions for Accounting
 - Use of WDID for structures
 - Contact Information
 - Summary Information.
- Recharge Protocol
 - Notification Requirements
 - Measurement Requirements
 - Site Requirements
 - Accounting Requirements
- Augmentation Plan Exchange Guideline

Need to Automate Data Collection

- ♦ Working to assure that all depletions and replacements have adequate measurement and accounting.
- ♦ SUTRON developed digital surface flow measurement/recorder directly in response to DWR inquiries. Reduces workload associated with working up charts and increase the speed in which accounting can be accomplished.
- ♦ Radio transmitters may make the possibility of remote data acquisition feasible.

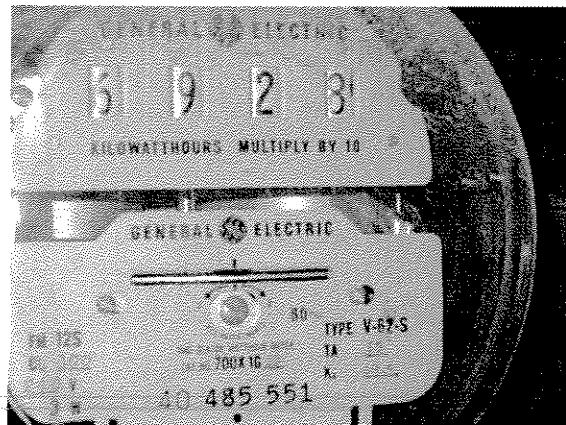
Formal Violation Notice and Enforcement System

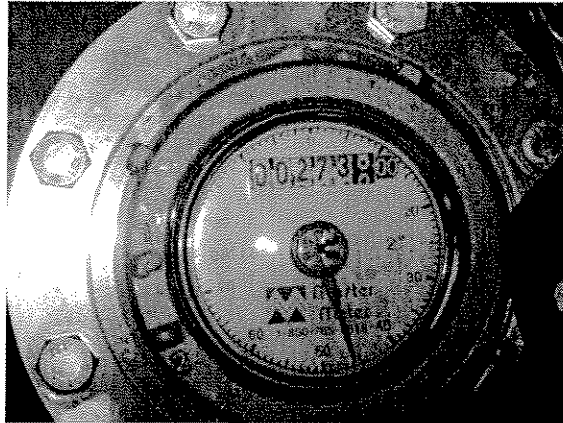
- Use data base of wells and plans to see if a well should be issued an order.
- Field investigate to see if well is being used. If it appears well is used or can be used, “tag” the well ordering use to cease.
- Send a “you have been tagged” letter.
- Obtain power records the following fall.



Formal Violation Notice and Enforcement System (continued)

- If can't determine pumping from power records, then issue order to install meter or require to disconnect power supply or cap discharge tube.
- If appears pumped in violation of an order, send a "violation notification" letter informing them that we will be filing a complaint.
- Unless user shows we have a mistake, file and pursue complaint with water court if we believe user has violated an order.
- During the next spring, send a "you are still tagged" letter to all well owners with a tag.



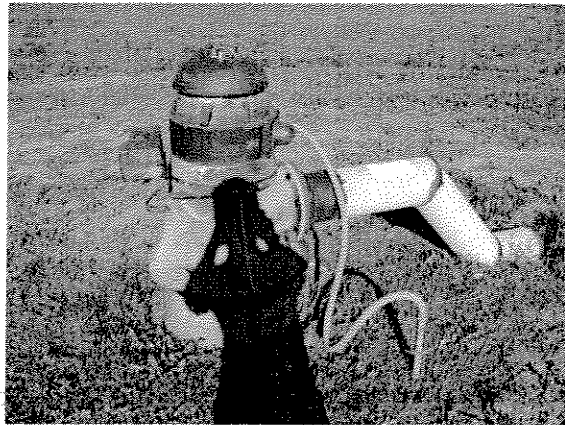


Enforcement Statistics

- Have filed or in process of filing complaints concerning 30 order violations to date including 10 new orders associated with pumping during the summer of 2005.
- Highest penalty paid is \$13,120.
- One case was pursued to the Supreme Court concerning question of notice adequacy.
- Enforcement will be at least a year in arrears for the next several years because of limitations in staffing

Enforcement Statistics

- Still verifying use of remaining 1500 wells (start near the river and moving out, estimate 80% of these wells are in existence, but only 15% are being used)
- At present pace, it will take several years to investigate remaining wells.
- Have also issued a large number of notices and orders concerning measurement devices and accounting.



Staffing

- Two existing Division 1 staff redefined to work solely on the influx of new plan accounting and well enforcement.
- Seek decision item to add 4.5 FTE to work on well issues. With additional staff, enforcement delays will be reduced and better monitoring of recharge and other measurements and accounting will be achieved.

Central Colorado Water Conservancy District Groundwater Management Subdistrict Augmentation Plan

- Filed December 23, 2002 in response to Supreme Court decisions and legislation concerning wells
- 964 Member Wells, Largest Well Augmentation Plan
- Fifty-three parties filed statements of opposition to the application.
- Judge Klein set a twenty-day trial for the application starting on May 16, 2005.
- Prior to the start of the trial, Central was able to settle with all of the parties.

**In settlement, Central and
objectors agreed to the following:**

- a six year projection tool developed for the case to assure there would not be unreplaced out-of-priority post pumping depletions by the wells that could impact other senior water right users.
- to consider Box Elder as a live stream in determining replacement requirements and phase in replacement requirements using this assumption.
- to use an irrigation efficiency of 60% for flood and 80% for sprinkler in determining irrigation well consumptive use

**In settlement, Central and
objectors agreed to the following:**

- to meter all wells by 2008
- to only use CBT as a source if the Northern Colorado Water Conservancy District changes their rules to allow such use.
- to allow the use of water not decreed as an augmentation source in the plan with certain restrictions
- to allow the use of augmentation wells with certain restrictions

Central Colorado Water Conservancy District Augmentation Plan (cont.)

- On June 3, 2005, Judge Roger Klein, the Water Judge for Division 1, approved the plan.
- State and Division Engineer appealed the Water Judges ruling concerning one stipulation. This stipulation did not end up being in the decree and thus does not impact the operation of the decree. This stipulation concerned the approval of a selective subordination.
- Other users appealed language in the decree concerning 305(8), our curtailment authority. This also does not affect the operation of the decree.

Other Major Well Augmentation Resolved to Date

- Harmony Ditch Company, Case No. 02CW363, Signed 6-7-2004
- Lower Logan Well Users, Case No. 03CW208, Signed 1-19-2005
- Sedgwick Well Users, Case No. 03CW209 Signed 11-8-05

Scheduled Augmentation Plan Trials Through 2006

- **Pawnee Well Users, 12/12/2005 5-day trial
scheduled, 04CW46**
- **Logan Well Users 01/17/2006 15-day trial
scheduled, 03CW195**
- **CCWCD / Water Augmentation Subdistrict
05/08/2006 20-DAY TRIAL scheduled,03CW99 and
03CW177-1**
- **Dinsdale Bros 10/02/2006 10-day trial scheduled
03CW194**
- **Jensen Farms 12/11/2006 5-day trial scheduled
02CW263**

DISTRICT COURT, WATER DIVISION NO. 1, COLORADO Court Address: 901 9th Avenue, Greeley, CO 80631-1113 Mailing Address: P.O. Box 2038, Greeley, CO 80632-2038	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
CONCERNING THE APPLICATION FOR WATER RIGHTS OF: THE GROUND WATER MANAGEMENT SUBDISTRICT OF THE CENTRAL COLORADO WATER CONSERVANCY DISTRICT, IN ADAMS, LARIMER, MORGAN, AND WELD COUNTIES.	
<p style="text-align: center;">ORDER</p>	

I. Case History

The Groundwater Management Subdistrict of the Central Colorado Water Conservancy District ("Subdistrict" or "Applicant") filed its Application for Approval of a Plan for Augmentation on December 23, 2002. Subdistrict submitted amendments to its application on September 30, 2003 and July 19, 2004, which this court accepted on October 21, 2004 and July 26, 2004, respectively.

The State and Division Engineers ("Engineers") request that the decree include the following provision: "Pursuant to § 37-92-305(8), C.R.S., the State Engineer shall curtail all out-of-priority diversions, the depletions from which are not so replaced as to prevent injury to vested water rights." Applicant and several opposers seek to modify the Engineers' requested language by adding "in accordance with this decree" to the end of the provision.

Applicant has entered into stipulations with all opposers. This court has approved all but one of those stipulations; the court has not yet entered an order approving the stipulation between Applicant and Opposer Ducommun Business Trust ("DBT"). Applicant entered into a stipulation with DBT on April 20, 2005 ("the DBT stipulation"). The stipulation provides, in pertinent part: "Central agrees that...it will not place a call against or request curtailment of DBT's 1868 priority decreed to the Columbia Ditch, in order to supply Central's...augmentation rights in Case No. 02CW335" under certain conditions. Applicant and DBT filed a Joint Motion to Approve Stipulation on April 22, 2005. The Engineers, the City of Englewood ("Englewood"), and the City and County of Denver ("Denver") filed responses in opposition to the motion.

II. Issues

In accordance with its stipulations, Applicant has tendered a proposed decree to which all parties agree, with the exception of two paragraphs. The parties do not agree on the language contained in paragraph 38 or the incorporation of the DBT stipulation into the decree in paragraph

16.1. Thus this court only needs to determine the appropriate curtailment language for paragraph 38 of the decree and the validity of the stipulation between Applicant and DBT.

The Engineers assert that inclusion of their proposed language in the decree is mandated by statute, and any modification thereof contravenes legislative intent. The Engineers continue by arguing that this provision grants them authority to re-evaluate injury under the augmentation plan, and curtail diversions that comply with the terms of the decree, but that the Engineers believe injure senior appropriators. The parties endorsing modification of the provision argue that the true legislative intent behind § 37-92-305(8) was to limit the State Engineer's post-decree authority by confining the State Engineer's actions within the terms of the decree only.

The Engineers, Englewood, and Denver argue that the DBT stipulation amounts to an unlawful selective subordination.

Oral argument on these two issues was held Monday, May 16, 2005.

III. Analysis

A. Paragraph 38 – Curtailment

C.R.C.P. 57 allows courts to make declaratory judgments. “Any person...whose rights, status, or other legal relations are affected by a statute...may have determined any question of construction or validity arising under the...statute...and obtain a declaration of rights, status, or other legal relations thereunder.” C.R.C.P. 57(b). However, that rule further states that, “[t]he court may refuse to render or enter a declaratory judgment or decree where such judgment or decree if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding”. C.R.C.P. 57(f).

A court may not enter an advisory opinion where no real controversy exists. *Three Bells Ranch Assoc. v. Cache la Poudre Water Users Ass'n*, 758 P.2d 164, 168 (Colo. 1988). No real controversy exists where the controversy between the parties is not current, but may arise at some point in the future. *Id.* This court is without authority to enter an advisory opinion on hypothetical facts. *Tippett v. Johnson*, 742 P.2d 314, 315 (Colo. 1987). During oral argument, the parties provided this court with only hypothetical situations regarding the State Engineer's curtailment authority described in paragraph 38 of the decree. Although both sides of the debate regarding the curtailment language and its implications have made compelling arguments in support of their positions, the court has no facts before it on which to make an informed decision on the issue presented. The court therefore orders that the second sentence of paragraph 38 of the Decree be taken directly from the statute to read, “Pursuant to § 37-92-305(8), C.R.S., the State Engineer shall curtail all out-of-priority diversions, the depletions from which are not so replaced as to prevent injury to vested water rights”. The court will not, at this point, speculate regarding the interpretation of that statute or its impact on the rights of the parties.

B. *Paragraph 16.1 – Ducommun Stipulation*

Contrary to assertions by the Engineers, Denver, and Englewood, there is no explicit legal prohibition on selective subordinations of water rights in Colorado. Subordination of a water right priority is similar to subordination of the priority of a real estate mortgage; a subordination of a water right is an agreement by a senior appropriator to treat his water as having a later priority date than that of a junior appropriator. *Bd. of County Comm'rs of Arapahoe v. Crystal Creek Homeowners' Ass'n*, 14 P.3d 325, 329 n.1 (Colo. 2000). A selective subordination operates to defer a senior appropriator's water right to the right of a particular junior appropriator, but not to others. *Id.* at 340 n.18. In fact, the Supreme Court some time ago decided that a senior appropriator may contract with a junior appropriator regarding their relative priorities. *Perdue v. Fort Lyon Canal Co.*, 184 Colo. 219, 223, 519 P.2d 954, 956 (1974).

Although courts generally disfavor selective subordinations of water rights, a water user may enter a contract creating a selective subordination and a court may enforce the terms of the agreement. *Crystal Creek*, 14 P.3d at 341. Whether the DBT-Subdistrict subordination agreement is permissible in this instance turns on the means by which the parties operate it; how the Engineers administer it; and the cooperation of the ditch companies, the partial rights of which have been subordinated.

The court is not satisfied that it yet has enough information to determine whether the particular subordination created by the stipulation between Applicant and DBT is permissible. The hearing conducted on this issue consisted primarily of oral argument. Although offers of proof were tendered and were largely unopposed, the offers of proof dealt only with the relative priorities and locations of the various water rights on the stretch of the river that could be impacted by the subordination agreement. The parties did not present evidence or propose sufficient terms and conditions on how the subordination agreement would actually be implemented. For example, one side asserts that the Engineers would not recognize a call by the holder of an intermediate water right (junior to Applicant, but senior to DBT) where Applicant has already called out that intermediate right holder in lieu of calling DBT. DBT disagrees and asserts that it could be called out by the intermediate right holder. Neither side cited legal authority to guide the court on call administration, nor did the parties suggest any conditions that may be imposed on the subordination agreement to explain the parties' relative calling rights. Further, neither Applicant nor DBT has presented sufficient information to the court clarifying the practical aspects of how the Engineers will administer the subordination. In addition, without evidence concerning Applicant's agreements with the ditch companies, this court lacks sufficient information on how Applicant will coordinate its subordination with those ditch companies. To determine if this particular subordination agreement is permissible, this court requires additional evidence and proposed terms and conditions establishing how Applicant, DBT, the ditch companies, and the Engineers will implement the subordination agreement.

The court determines that notice to any intermediate water rights holders not parties to this litigation is unnecessary. The court is satisfied that the inclusion of adequate terms and conditions in the subordination agreement will prevent injury to the holders of intermediate water rights.

ORDER

1. Applicant shall include in paragraph 38 of the decree the language quoted above in Section III(A) of this Order and shall omit the qualifying language "in accordance with this decree".
2. The court declines to determine the issue raised by the parties concerning the extent of the Engineers' curtailment authority under the language in paragraph 38 of the decree or § 37-92-305(8), C.R.S.
3. Applicant and DBT shall, within 45 days of the date of this order,
 - a. Set this matter for hearing to present additional evidence; and
 - b. File with the court proposed terms for operation and administration of the subordination agreement.
4. Failure to do either 3.a. or 3.b. will result in the court disapproving the subordination agreement as created by stipulation between Applicant and DBT.
5. This order will not delay the entry of the proposed decree with regard to all provisions other than section 16.1.
6. Applicant shall submit a revised proposed decree to this court that complies with this order. Paragraph 16.1 shall be modified to include only provisional language regarding the DBT stipulation. The fourth sentence of that paragraph shall be replaced by the following: "The use of some of Central's water rights may be subject to the terms and conditions of a Stipulation and No-Call Agreement between Central and Ducommun Business Trust, dated April 20, 2005 as amended, pending additional terms and conditions to be included in that stipulation and pending an order by the District Court for Water Division No. 1 approving that stipulation as modified. Upon the court's approval of the Stipulation and No-Call Agreement, it shall be incorporated herein by reference. In the event that the court does not approve the Stipulation and No-Call Agreement, this reference shall be void."

DATED: May 26, 2005.

BY THE COURT:



Roger A. Klein

Water Judge

Water Division No. 1

This order was filed electronically pursuant to Rule 121, §1-26. The original signed order is in the Court's file.

DISTRICT COURT, WATER DIVISION NO. 1, COLORADO Court Address: 901 9th Avenue, Greeley, CO 80631-1113 Mailing Address: P.O. Box 2038, Greeley, CO 80632-2038	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
CONCERNING THE APPLICATION FOR WATER RIGHTS OF: GROUND WATER SUBDISTRICT OF THE CENTRAL COLORADO WATER CONSERVANCY DISTRICT, IN ADAMS, LARIMER, MORGAND, AND WELD COUNTIES.	
<p style="text-align: center;">ORDER DENYING HARMONY DITCH CO. ET AL. MOTION FOR DETERMINATION OF QUESTION OF LAW REGARDING USE OF WATER RIGHTS THAT HAVE NOT BEEN CHANGED FOR AUGMENTATION PURPOSES AS REPLACEMENT SOURCES IN AN AUGMENTATION PLAN</p>	

This matter comes before the court on a motion by the Harmony Ditch Company, et al. for a determination of question of law regarding use of Water Rights that have not been Changed for Augmentation Purposes as Replacement Sources in an Augmentation Plan, filed January 31, 2005. Having reviewed the responsive pleadings, and being otherwise fully advised, the court makes the following findings and determination with regard to this motion.

I. Case History

The Groundwater Management Subdistrict of the Central Colorado Water Conservancy District ("Subdistrict" or "Applicant") filed its application for approval of a plan for augmentation on December 23, 2002. Subdistrict amended its application on September 30, 2003 and July 19, 2004. This matter is set for a 20 day trial to begin May 16, 2005. Applicant claims numerous sources to be used for augmentation. Some of these water rights are not currently decreed for augmentation purposes ("Unchanged Water Rights") and are not subject to pending applications for changes of use. Subdistrict's amendments declare that it does not seek changes of water rights for the Unchanged Water Rights as part of its application for approval of an augmentation plan.

The North Sterling Irrigation District ("Sterling"), the Harmony Ditch Company ("Harmony"), the City of Boulder ("Boulder"), Centennial Water & Sanitation District ("Centennial"), the City of Thornton ("Thornton"), the Henrylyn Irrigation District ("Henrylyn"), and the Farmers Reservoir & Irrigation Company ("FRICO") (collectively "Objectors") filed a Motion for a Determination of Question of Law pursuant to Rule 56(h) C.R.C.P. asking this court to determine that the Unchanged Water Rights cannot be used as replacement and augmentation sources in Subdistrict's plan for augmentation. Objectors Fort

Morgan Reservoir & Irrigation Company (“Ft. Morgan”), the City of Sterling (“Sterling”), the City of Englewood (“Englewood”) and the Water Users Association of District No. 6 (“Water Users No. 6”) all joined the motion.

In addition to the Applicant, the State and Division Engineers’ Offices (“Engineers”) filed a response to Objector’s motion.

II. Issues

Objectors argue that a water right that is decreed only for irrigation purposes, and not for augmentation, may only be applied to land for irrigation in an amount reasonable for the needs of the crop. Objectors maintain that such water rights may not be used as a source for augmentation until they have been changed by judicial decree for such use.

Applicant states that statute allows it to use water in an augmentation plan that is not decreed for augmentation uses where the water right is part of a substitute supply plan approved by the State Engineer. Applicant asserts, in the alternative, that it is permitted to include the Unchanged Water Rights in its plan for augmentation as part of an interruptible water supply agreement. The Engineers weighed in in support of Applicant’s arguments.

Applicant additionally avows that Objectors’ motion is frivolous. Applicant consequently requests attorneys’ fees and costs pursuant to Rule 11 C.R.C.P.

III. Standard of Review

“Under C.R.C.P. 56(h), a party may move for a determination of a question of law at any time after the last required pleading. If there is no genuine issue of any material fact necessary for the determination of the question of law, the court may enter an order deciding the question. The result is to save time and expense and simplify the trial.” *Jones v. Feiger, Collison & Killmer*, 903 P.2d 27, 33 (Colo. Ct. App. 1994), *rev’d on other grounds*, 926 P.2d 1244 (Colo. 1996).

A Rule 56(h) motion allows the court to “address issues of law which are not dispositive of a claim (thus warranting summary judgment) but which nonetheless will have a significant impact upon the manner in which the litigation proceeds.” *Bd. of County Comm’r. v. United States*, 891 P.2d 952, 963 n.14 (Colo. 1995), citing 5 Robert Hardaway & Sheila Hyatt, *Colorado Civil Rules Annotated* § 56.9 (1985).

To impose Rule 11 sanctions, the court must consider whether the attorney has read the pleading, has reasonably inquired as to the factual and legal assertions therein, and possessed a proper purpose in filing it. *People v. Trupp*, 51 P.3d 985, 991 (Colo. 2002). This is an objective test of reasonableness. *Stepanek v. Delta County*, 940 P.2d 364, 370 (Colo. 1997).

IV. Analysis

A. *Unchanged Water Rights as Replacement Sources*

Water rights decreed for irrigation may only be used on the specific land for which the water was appropriated at the time of entry of the decree. *Enlarged Southside Irrigation Ditch Co. v. John's Flood Ditch Co.*, 120 Colo 423, 428-429, 210 P.2d 982, 984-985 (1949). A water user may permanently use the water on land other than that for which it was originally appropriated or may permanently change the use to which the water will be applied. To achieve a permanent change in the place or type of use, the water user must obtain a court decree. *Santa Fe Trail Ranches Prop. Owners Ass'n v. Simpson*, 990 P.2d 46, 54 (Colo. 1999).

Generally, water to be used as a replacement source in a plan for augmentation has previously been adjudicated in a change of use proceeding to determine the historic consumptive use that may be applied to replacement. *Farmers Reservoir & Irrigation Co. v. Consol. Mut. Water Co.*, 33 P.3d 799, 807 (Colo. 2001). A water user that desires a court adjudication of its water right to change the decreed use must adhere to the statutory application requirements. § 37-92-302(1)(a), C.R.S. Where a water right has been adjudicated for a change in use, there must be parity between the consumptive use of that right before and after the change. *Farmers Reservoir & Irrigation Co. v. City of Golden*, 44 P.3d 241, 246 (Colo. 2002). However, this court has been unable to locate any statutes or case law specifically requiring that an applicant for approval of an augmentation plan include in its proposed plan for augmentation only water rights previously adjudicated for augmentation uses. Nor has this court found any authority supporting the proposition that where an applicant for approval of an augmentation plan does include as replacement sources water rights not previously decreed for augmentation, the applicant must simultaneously file an application for a change of water right.

Augmentation plans must provide replacement water to prevent injury to other water rights. See § 37-92-305(5) & (8), C.R.S. The applicant seeking approval of a plan for augmentation bears the burden of showing that the proposed plan will not result in injury to other water users. *In re Application for Water Rights of the Cities of Aurora & Colo. Springs*, 799 P.2d 33, 37 (Colo. 1990). Movants strenuously argue that, as a matter of law, Applicant may not include the Unchanged Water Rights in its Application for Approval of Plan for Augmentation on the basis that Applicant will be unable to show that no injury will result from the inclusion of such rights in its proposed plan. However, this is a question of fact and it is not properly before this court on Movants' Motion for Determination of Law. Movants attempt to characterize this as a legal issue by citing to the Supreme Court's recent opinion regarding augmentation plans. Contrary to Movants' suggestion, that decision merely upheld the conclusion by the water court that "...any analysis of the augmentation plan must start with the assumption that 100% of the proposed withdrawals that would cause material injury to other water users must be replaced." *In re Application for Water Rights of Park County Sportsmen's Ranch*, 105 P.3d 595, 606 (Colo. 2005). This statement does not establish a legal standard as Movants propose. Instead, the

Supreme Court affirmed the water court's approach to a *factual* determination of injury applied in that particular case.

The court's review of augmentation plans is subject to the standards set forth in § 37-92-305(8), C.R.S. That section provides in pertinent part:

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 substitute water supply plan approved pursuant to section 37-92-308 or if such sources are decreed for such use.

The proponent of an augmentation plan may thus include in its proposed plan as replacement sources water rights not decreed for augmentation where the State Engineer's Office has approved the use of the water in a substitute water supply plan ("SWSP"). This section explicitly allows the use of *either* water decreed for augmentation *or* water included in an SWSP as replacement sources. Review of this statute reveals that Applicant may include the Unchanged Water Rights in its proposed plan for augmentation so long as those rights are subject to an approved SWSP. However, Applicant may only use the Unchanged Water Rights as a replacement source in its plan for augmentation pursuant to an SWSP after the augmentation plan has been approved subject to a decree of this court.

Although approval of permanent plans for augmentation is under the purview of the water court only, the Supreme Court has approved the State Engineer's authority to approve temporary changes in the type of use of a water right as an SWSP without adjudication by the water court. *Simpson v. Bijou Irrigation Co.*, 69 P.3d 50, 55, 58 (Colo. 2003). SWSPs are governed by § 37-92-308, C.R.S. Applying subsections (4) and (5) of that statute, Applicant may properly include the Unchanged Water Rights in its proposed plan for augmentation.

Section 37-92-308(5)(a), C.R.S. provides in pertinent part:

[I]f no application for approval of a plan for augmentation or a change of water right has been filed with a water court and the water use plan or change proposed and the depletions associated with such water use plan or change will be for a limited duration not to exceed five years, the state engineer may approve such plan or change as a substitute water supply plan...

By its own admission, Applicant has not yet filed with this court an application for a change of water right for the Unchanged Water Rights. Although Applicant has filed an application for approval of a plan for augmentation, it has not specifically applied for a change of water right. Subsection (5) should not be interpreted to mean that where an applicant has filed an application for approval of a plan for augmentation, that applicant may not operate a change in water right

pursuant to § 37-92-308(5), C.R.S. or vice versa, as Movants assert. Thus, subsection (5) will govern Applicant's use of the Unchanged Water Rights for augmentation purposes until it does file a change application. So long as Applicant meets the requirements set forth by § 37-92-308(5), C.R.S. and the State Engineer's Office approves, Applicant may use the Unchanged Water Rights subject to the terms of an SWSP as part of its plan for augmentation.

However, SWSPs as contemplated by § 37-92-308(5), C.R.S. only provide temporary relief and are not permanent solutions. These SWSPs may only be approved for one-year periods and may only be renewed for one-year periods not to exceed a total of five years. § 37-92-308(5)(b), C.R.S.

After Applicant has exhausted its ability to use the Unchanged Water Rights as replacement sources in an SWSP approved under § 37-92-308(5), it may nonetheless continue to use the Unchanged Water Rights in its augmentation plan pursuant to a different SWSP if it files applications for changes of use for those rights. Section 37-92-308(4) provides in pertinent part:

If an application for approval of a plan for augmentation or change of water right has been filed with a water court and the court has not issued a decree, the state engineer may approve the temporary operation of such plan or change of water right as a substitute water supply plan...

Applicant asserts in its Response that it will file applications for changes of use at some point in the future. If Applicant files applications for changes of use, it may continue to use the Unchanged Water Rights pursuant to an SWSP during the pendency of the change proceedings. SWSPs approved pursuant to § 37-92-308(4) are still not permanent provisions. § 37-92-308(4)(b), C.R.S.; *Simpson v. Bijou*, 69 P.3d at 65-66. Applicant must, then, succeed in obtaining change decrees for the Unchanged Water Rights in its plan for augmentation or discontinue use of those rights as replacement sources in its plan for augmentation.

Interruptible water supply agreements offer water users another temporary measure of relief. Interruptible water supply agreements "...enable water users to transfer the historical consumptive use of an absolute water right for application to another type or place of use on a temporary basis without permanently changing the water right." § 37-92-309(1), C.R.S. Interruptible water supply agreements are

option agreement[s] between two or more water right owners whereby: (a) the loaning water right owner agrees that, during the term of such agreement, it will stop its use of the loaned water right for a specified length of time if the option is exercised by the borrowing water right owner in accordance with the agreement; and (b) the borrowing water right owner may divert the loaned water right for such owner's purposes, subject to the priority system and subject to temporary approval by the state engineer in accordance with this section.

§ 37-92-309(2), C.R.S. Subsections (1) and (2) of this statute explicitly mandate that interruptible water supply agreements may only be used on a short-term basis. That language is buttressed by § 37-92-309(3)(c), C.R.S., which proscribes the use of interruptible water supply agreements for longer than three years within a ten year period. Further, water rights used as part of an interruptible water supply agreement may not be used as part of an SWSP approved pursuant to § 37-92-308(5). § 37-92-309(3)(c), C.R.S. Interruptible water supply agreements require two separate water users – one that will use the water and one that will curtail the use of that water. Applicant may use as part of an interruptible water supply agreement those Unchanged Water Rights that it does not own as long as the Unchanged Water Rights included in an interruptible water supply agreement are not already subject to an SWSP.

If Applicant succeeds in obtaining this court's approval of its plan for augmentation, this court will retain jurisdiction over the case as required by § 37-92-304(6), C.R.S. That section states in relevant part:

Any decision of a water judge as specified in subsection (5) of this section dealing with a change of water rights or a plan for augmentation shall include the condition that the approval of such change or plan shall be subject to reconsideration by the water judge on the question of injury to the vested rights of others for such period after the entry of such decision as is necessary or desirable to preclude or remedy any such injury. Such condition setting forth the period allowed for reconsideration shall be determined by the water judge after making specific findings and conclusions including, when applicable, the historic use to which the water rights involved were put, if any, and the proposed future use of the water rights involved. The water judge shall specify his determination as to such period in his decision, but the period may be extended upon further decision by the water judge that the nonoccurrence of injury shall not have been conclusively established. Any decision may contain any other provision which the water judge deems proper in determining the rights and interests of the persons involved. All decisions of the water judge, including decisions as to the period of reconsideration and extension thereof, shall become a judgment and decree as specified in this article and be appealable upon entry, notwithstanding conditions subjecting the decisions to reconsideration on the question of injury to the vested rights of others as provided in this subsection (6).

§ 37-92-304(6), C.R.S. So, although Applicant may successfully apply the Unchanged Water Rights as replacement sources in its augmentation plan, the rights of any objectors to the plan will be adequately protected by this court's retained jurisdiction as well as by their rights to appeal. Objectors will have the opportunity to litigate the question of whether their rights will be injured during trial to this court. After the conclusion of trial, Objectors will still have future opportunities to bring the issue of injury before this court under its retained jurisdiction. Section 37-92-304(6) grants this court wide latitude in determining the period of retained jurisdiction and grants this court the ability to extend the initial period of retained jurisdiction where necessary.

This court may, then, retain jurisdiction over Applicant's plan for augmentation, if approved, for the ten year period during which Applicant may operate using SWSPs.

B. Attorneys' fees

As well as sanctions imposed in accordance with C.R.C.P. 11, the court may assess attorneys' fees against a party filing a frivolous motion. C.R.C.P. 121 § 1-15(7). "A claim or defense is frivolous if the proponent can present no rational argument based on the evidence or law in support of that claim or defense." *Western United Realty, Inc. v. Isaacs*, 679 P.2d 1063, 1069 (Colo. 1984). Movants' supported their motion with long-held principals of water law applied to applications for changes of use. Although Movants inappropriately cited judicial opinions and statutes, this court does not find that their motion was frivolous. Movants' motion presented a novel legal question, so this court cannot conclude that there was no rational basis in law for their argument.

ORDER

Based on the foregoing, the court HEREBY DENIES the Motion for Determination of Law Regarding Use of Water Rights that have not been Changed for Augmentation Purposes as Replacement Sources in an Augmentation Plan. The court also DENIES Applicant's request for an award of attorney's fees.

Dated this 12th day of April, 2005.

BY THE COURT:



Roger A. Klein

Water Judge

Water Division No. 1

This order was filed electronically pursuant to Rule 121, §1-26. The original signed order is in the Court's file.

DISTRICT COURT, WATER DIVISION 1, COLORADO 901 Ninth Avenue P. O. Box 2038 Greeley, CO 80632	
CONCERNING THE APPLICATION FOR WATER RIGHTS OF: SEDGWICK COUNTY WELL USERS, INC. IN SEDGWICK COUNTY.	<div style="text-align: center;">▲ COURT USE ONLY ▲</div> Case No.: 03CW209
<div style="text-align: center;">ORDER re: STATE AND DIVISION ENGINEER CURTAILMENT AUTHORITY UNDER § 37-92-305(8), C.R.S. (DECREE ¶ 31)</div>	

This matter came before the court on oral argument by the parties September 12, 2005. The court has reviewed the parties' arguments and, being otherwise fully informed, makes the following determination.

I. Case History

Sedgwick County Well Users, Inc. ("Applicant") filed its application for approval of a plan for augmentation on April 30, 2003. Trial before the court was set for 15 days to commence September 12, 2005. However, prior to trial, Applicant was able to resolve its disputes with all opposers, save for the inclusion of language regarding the state's administration of the plan pursuant to § 37-92-305(8), C.R.S. and the meaning of that language. The disputed provision is emphasized is the portion of the statute reproduced below.

In reviewing a plan for augmentation and in considering terms and conditions that may be necessary to avoid injury,...the water judge shall consider the depletions from an applicant's use or proposed use of water, in quantity and in time, the amount and timing of augmentation water that would be provided by the applicant, and the existence, if any, of injury to any owner of or persons entitled to use water under a vested water right or decreed conditional water right. A plan for augmentation shall be sufficient to permit the continuation of diversions when curtailment would otherwise be required to meet a valid senior call for water, to the extent that the applicant shall provide replacement water necessary to meet the lawful requirements of a senior diverter at the time and location and to the extent the senior would be deprived of his or her lawful entitlement by the applicant's diversion. ...Said terms and conditions shall require replacement of out-of-priority depletions that occur after any groundwater diversions cease. *Decrees approving plans for augmentation shall require that the state engineer curtail all out-of-priority diversions, the depletions from which are not so replaced as to prevent injury to vested water rights.*

§ 37-92-305(8), C.R.S. (emphasis added).

This court previously declined in the Application of the Ground Water Subdistrict of the Central Colorado Water Conservancy District, Case No. 02CW335, to interpret the disputed sentence in § 37-92-305(8), C.R.S., declaring that the parties requested an advisory opinion, which the court was without authority to enter. The court's prior decision was rendered in light of the absence of any real controversy or facts to which the sentence could be applied for purposes of interpretation.

II. Issues

The State and Division Engineers ("Engineers") advocate the following provision for inclusion in the decree approving Applicant's plan: "Pursuant to § 37-92-305(8), C.R.S., the State Engineer shall curtail all out-of-priority diversions, the depletions from which are not so replaced as to prevent injury to vested water rights." The Engineers assert that the disputed sentence in § 37-92-305(8), C.R.S. and its inclusion in decrees approving plans for augmentation grants them the authority curtail diversions made pursuant to a court-decreed augmentation plan where the Engineers determine that the plan does not prevent injury to senior water users.

Opposers City of Boulder ("Boulder"), Centennial Water & Sanitation Dist. ("Centennial"), City of Sterling ("Sterling"), Weaver Ranches ("Weaver"), The Harmony Ditch Co. ("Harmony"), and the Liddle Ditch Co. ("Liddle") (collectively, "Opposers") and Applicant contend that the Engineers' interpretation of the disputed sentence violates Due Process because it operates without notice to interested parties. Opposers did not raise this argument in Case No. 02CW335. The Engineers did not respond to this portion of Opposers' argument.

III. Analysis

A. Notice

Water court proceedings are special statutory proceedings established by the 1969 Act as contemplated by C.R.C.P. 81(a). *Gardner v. State*, 200 Colo. 221, 224, 614 P.2d 357, 358 (1980). The water court obtains jurisdiction over water users not by personal service, but by the resume notice procedure established by § 37-92-302, C.R.S. The water rights resume notice procedure substitutes for personal service and is the only notice provided to potentially interested parties. *Monaghan Farms, Inc. v. City & County of Denver*, 807 P.2d 9, 15 (Colo. 1991). Because the resume constitutes the only notice to parties that may be affected by the water right, it is imperative that the notice is proper. *Id.* Thus, the applicant must strictly comply with the requirements set forth in § 37-92-302, C.R.S. *Closed Basin Landowners Ass'n v. Rio Grande Water Conservation Dist.*, 734 P.2d 627, 634 (Colo. 1987).

Water rights are property rights fully protected by Constitutional guarantees. *Farmers Irrigation Co. v. Game & Fish Comm'n*, 149 Colo. 318, 323, 369 P.2d 557, 559-560 (1962).

Any possible action by the Engineers to require replacement by an applicant outside the bounds of the court-approved plan has the same potential to impact other water users as any other proposed use of water for which a user must file an application pursuant to § 37-92-302(1)(a), C.R.S. *Cf. Danielson v. Jones*, 698 P.2d 240, 245 (Colo. 1985). However, the Engineers have not proposed, nor does their reading of the statute contemplate, any notice to other water users of the Engineers' determination.

B. Engineers' Authority

The State and Division Engineers have exclusive authority to administer, distribute and regulate the waters of the state. § 37-92-501(1), C.R.S. However, the Engineers' administration is subject to the terms and priorities contained in decrees of the water courts. *See Boulder & Left Hand Ditch Co., v. Hoover*, 48 Colo. 343, 347-348, 110 P. 75, 77 (1910) (while state water officials have some discretion, their primary duty is to enforce the terms of decrees without question).

C.R.C.P. 57 allows courts to make declaratory judgments. "Any person...whose rights, status, or other legal relations are affected by a statute...may have determined any question of construction or validity arising under the...statute...and obtain a declaration of rights, status, or other legal relations thereunder." C.R.C.P. 57(b). However, that rule further states that, "[t]he court may refuse to render or enter a declaratory judgment or decree where such judgment or decree if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding". C.R.C.P. 57(f).

A court may not enter an advisory opinion where no real controversy exists. *Three Bells Ranch Assoc. v. Cache la Poudre Water Users Ass'n*, 758 P.2d 164, 168 (Colo. 1988). No real controversy exists where the controversy between the parties is not current, but may arise at some point in the future. *Id.* This court is without authority to enter an advisory opinion on hypothetical facts. *Tippett v. Johnson*, 742 P.2d 314, 315 (Colo. 1987). During oral argument, the parties provided this court with only hypothetical situations regarding the State Engineer's curtailment authority described in paragraph 38 of the decree. Although both sides of the debate regarding the curtailment language and its implications have made compelling arguments in support of their positions, especially the due process argument with regard to notice, the court has no facts before it on which to make an informed decision on the issue presented. The court therefore orders that paragraph 31 of the Decree be taken directly from the statute to read,

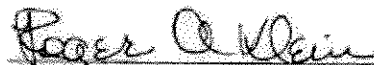
Applicant's augmentation plan is sufficient to permit the continuation of diversions when curtailment would otherwise be required to meet a valid senior call for water, to the extent that the applicant shall provide replacement water necessary to meet the lawful requirements of a senior diverter at the time and location and to the extent the senior would be deprived of his or her lawful entitlement by the applicant's diversion. Pursuant to § 37-92-305(8), C.R.S., the State Engineer shall curtail all out-of-priority diversions, the depletions from which are not so replaced as to prevent injury to vested water rights.

The court will not, at this point, speculate regarding the interpretation of that statute or its impact on the rights of the parties.

IT IS SO ORDERED.

DATED this 8th day of November, 2005.

BY THE COURT:



Roger A. Klein

Water Judge

Water Division No. 1

This order was filed electronically pursuant to Rule 121, §1-26. The original signed order is in the Court's file.

DISTRICT COURT, WATER DIVISION NO. 1, COLORADO Court Address: 901 9th Avenue, Greeley, CO 80631-1113 Mailing Address: P.O. Box 2038, Greeley, CO 80632-2038	EFILED Document CO Weld County District Court 19th JD Filing Date: Apr 1 2005 4:38PM MST Filing ID: 5489779 Review Clerk: Connie S Koppes	
CONCERNING THE APPLICATION FOR WATER RIGHTS OF: GROUND WATER SUBDISTRICT OF THE CENTRAL COLORADO WATER CONSERVANCY DISTRICT,		▲ COURT USE ONLY ▲
IN ADAMS, LARIMER, MORGAND, AND WELD COUNTIES.		
ORDER DENYING HARMONY DITCH CO. ET AL. MOTION FOR DETERMINATION OF QUESTION OF LAW AND GRANTING NCWCD CROSS-MOTION FOR DETERMINATION OF LAW REGARDING C-BT WATER		

This matter comes before the court on a motion by the Harmony Ditch Company, et al. for a determination of question of law regarding use of Colorado-Big Thompson Project Water as a Replacement Source in a Plan for Augmentation and Substitute Supply Plans, filed January 31, 2005. Having reviewed the responsive pleadings, and being otherwise fully advised, the court makes the following findings and determination with regard to this motion.

I. Case History

The Groundwater Management Subdistrict of the Central Colorado Water Conservancy District ("Subdistrict" or "Applicant") filed its Application for Approval of a Plan for Augmentation on December 23, 2002. Subdistrict submitted amendments to its application on September 30, 2003 and July 19, 2004, which this court accepted on October 21, 2004 and July 26, 2004, respectively. This matter is set for a 20 day trial to begin May 16, 2005. Applicant claims numerous sources to be used for augmentation. Included in these sources is Colorado-Big Thompson Project water ("C-BT water"), which Applicant will lease from Allotees holding allotment contracts for C-BT water.

On January 31, 2005, the Harmony Ditch Co. ("Harmony"), the North Sterling Irrigation District ("N. Sterling"), the City of Boulder ("Boulder"), the Centennial Water & Sanitation Dist. ("Centennial"), the City of Thornton ("Thornton"), the Henrylyn Irrigation Dist. ("Henrylyn"), and the Farmers Reservoir & Irrigation Co. ("FRICO") (collectively "Movants") filed a Motion for a Determination of Question of Law Regarding Use of Colorado-Big Thompson Project Water as a Replacement Source in a Plan for Augmentation and Substitute Supply Plans. The Fort Morgan Reservoir & Irrigation Co. ("Ft. Morgan"), the City of Englewood ("Englewood"), and the City of Sterling ("Sterling") joined the motion. Applicant, the State and Division Engineers' Offices ("Engineers"), and the Northern Colorado Water

Conservancy District (“NCWCD”) (collectively “Respondents”) filed individual responses to the motion. In addition to its response, NCWCD filed a Cross-Motion for Determination of Question of Law asking this court to determine that NCWCD has the right and authority in the first instance to interpret and enforce the provisions of the C-BT Repayment Contract.

II. Issues

Movants assert that, as a matter of law, C-BT water may not be used as a replacement source in a plan for augmentation or a substitute water supply plan (“SWSP”). Movants also contend that Applicant may not use C-BT water because some of lands included in the application lie outside NCWCD’s boundaries.

Respondents dispute Movants’ assertion, claiming that there is no prohibition on the use of C-BT water as a replacement source in plans for augmentation or SWSPs. NCWCD further declares that it is the only entity with authority to make a determination regarding allowed uses of C-BT water. NCWCD also maintains that none of the Movants are NCWCD taxpayers and, as a result, do not have standing to protest the use of C-BT water for replacement purposes. In addition, NCWCD asserts that any controversy regarding use of C-BT water in a plan for augmentation is moot because the only C-BT water Applicant proposed to use in its permanent plan for augmentation was subject to a lease that has expired. Finally, NCWCD requests oral argument on these motions.

Movants rebut the argument by NCWCD, saying that NCWCD is without power to make decisions regarding the use of C-BT water. Movants further impugn Respondents for failure to support their responses with affidavits or certified documents.

III. Standard of Review

“Under C.R.C.P. 56(h), a party may move for a determination of a question of law at any time after the last required pleading. If there is no genuine issue of any material fact necessary for the determination of the question of law, the court may enter an order deciding the question. The result is to save time and expense and simplify the trial.” *Jones v. Feiger, Collison & Killmer*, 903 P.2d 27, 33 (Colo. Ct. App. 1994), *rev’d on other grounds*, 926 P.2d 1244 (Colo. 1996).

A Rule 56(h) motion allows the court to “address issues of law which are not dispositive of a claim (thus warranting summary judgment) but which nonetheless will have a significant impact upon the manner in which the litigation proceeds.” *Bd. of County Comm’r. v. United States*, 891 P.2d 952, 963 n.14 (Colo. 1995), citing 5 Robert Hardaway & Sheila Hyatt, *Colorado Civil Rules Annotated* § 56.9 (1985).

IV. Analysis

A. *Motion for Determination of Law Regarding Use of C-BT Water as a Replacement Source in a Plan for Augmentation and Substitute Supply Plans*

NCWCD was organized pursuant to §§ 37-45-101 through 37-45-153 C.R.S. (“Water Conservancy Act” or “WCA”). Pursuant to the WCA, NCWCD is able:

[t]o contract with the government of the United States or any agency thereof for the construction, preservation, operation, and maintenance of tunnels, reservoirs, regulating basins, diversion canals, and works, dams, power plants, and all necessary works incident thereto and to acquire perpetual rights to the use of water from such works and to sell and dispose of perpetual rights to the use of water from such works to persons and corporations, public and private.

§ 37-45-118(e), C.R.S. On July 5, 1938, NCWCD and the United States entered into a contract (“Repayment Contract”) for the construction of the Colorado-Big Thompson Project. *Town of Estes Park v. Northern Colo. Water Conservancy Dist.*, 677 P.2d 320, 323 (Colo. 1984). The terms and conditions of the Repayment Contract dictate the available use of C-BT water. *Id.* at 326.

1. *Use of C-BT water in an augmentation plan*

The Repayment Contract suggests potential uses for C-BT water within the district, but does not limit allowable uses to those listed. ¶ 19 (C-BT water shall be used “...*primarily* for domestic, irrigation, municipal, industrial and recreational uses in the District...”) (emphasis added). NCWCD has enacted rules and regulations to supplement the Repayment Contract for purposes of administering C-BT water. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1, 53 (Colo. 1996); *see also* § 37-45-134(1)(a), C.R.S. C-BT water has not previously been approved as a replacement source in a plan for augmentation or in an SWSP because, historically, NCWCD prohibited C-BT water from such use. *See* Resolution dated September 14, 1973 (“1973 Rule”).

There have been no judicial determinations of which this court is aware determining that there is a *per se* exclusion of C-BT water from use in a plan for augmentation or an SWSP. The discussion in *Estes Park* was strictly limited to the town’s proper use of C-BT water as allowed by the contract between Estes Park and the United States and by paragraph 25 of the Repayment Contract. 677 P.2d at 323-328. Nor did *Thornton v. Bijou* reach the issue of whether C-BT water may be included as a replacement source in an augmentation plan or an SWSP. Instead, the court specifically noted that, because it had already precluded Thornton’s use of C-BT water for the city’s Northern Project on other grounds, the court would not address the use of C-BT water for replacement purposes. *Thornton v. Bijou*, 926 P.2d at 59 n.49. This court also takes

note of the Supreme Court's indication that replacement *may be* a permissible use of C-BT water under the terms of the Repayment Contract. *Id.*

2. *Availability of C-BT return flows to NCWCD constituents*

NCWCD seems to state that the result of including C-BT water as a replacement source in an SWSP would be no different than the result of excluding C-BT water from an SWSP. It appears that NCWCD is arguing that allottees willing to rent their allotment of C-BT water for use as a replacement source in an SWSP have no other use for the water for the duration of the SWSP. Thus, because neither the NCWCD nor its constituents may force an allottee to use water available under an allotment contract, the water would not be put to a beneficial use and would not result in return flows to NCWCD users down-gradient. Where return flows would not be available to down-stream or down-gradient users in the absence of the application of C-BT water to an SWSP, Movants cannot legitimately claim injury to those down-stream or down-gradient users resulting from the SWSP. Although this argument has merit, it impacts a factual determination of injury and is not properly before this court on Movants' motion for determination of law. The argument regarding availability of return flows is more appropriately considered by the State Engineer in determining the adequacy of an SWSP.

3. *Use of C-BT water outside district boundaries*

The Repayment Contract and the WCA together limit C-BT users from applying C-BT water outside NCWCD's boundaries. "...benefits of C-BT water are to be provided only to those users who apply the water within the district boundaries. Both the statute and the contract explicitly limit permissible uses to those within the district." *Thornton v. Bijou*, 926 P.2d at 57 (citing ¶ 19 of the Repayment Contract and § 37-45-118(1)(b)(I)(B), -118(1)(j)). However, notwithstanding the limitations imposed on use of C-BT water by the Repayment Contract and the WCA, there are special circumstances where benefits resulting from application of C-BT water may accrue outside the NCWCD boundaries. *Id.* at 58. Applicant states that it will not use C-BT water as a replacement source outside NCWCD's boundaries. An issue of fact remains to be determined about whether, if Subdistrict's application is successful, any ensuing benefits of C-BT water will result outside the NCWCD boundaries and, if so, whether those benefits fall into the permissible circumstances.

4. *Affidavits on Rule 56 motion*

Affidavits are not required on a motion for determination of question of law. C.R.C.P. 56(h). Further, when responding to a motion for summary judgment, affidavits of the non-moving party are not required unless the moving party initially supported its motion with affidavits. C.R.C.P. 56(b), (e).

Courts have not interpreted these rules to command the non-moving party responding to a Rule 56 motion to submit affidavits or other certified evidence. "It is well established that on a

motion for summary judgment, the moving party carries the burden of proof, and he must show that no genuine issue of material fact exists even though at trial his opponent has the burden of proving the facts alleged.” *Ginter v. Palmer and Co.*, 196 Colo. 203, 206, 585 P.2d 583, 585 (Colo. 1978) (citation omitted). Moreover, “[u]nless the moving party meets his burden, the opposing party may, but is not required to submit an opposing affidavit.” *Id.* at 207, 585 P.2d at 585 (citations omitted). “[W]hile a party against whom summary judgment is sought may take some risk by not submitting controverting affidavits or other evidence, nevertheless, if the moving party’s proof does not itself demonstrate the lack of a genuine factual issue, summary judgment is inappropriate.” *Wolther v. Schaarschmidt*, 738 P.2d 25, 28 (Colo. App. 1986).

5. *Mootness*

Paragraph 7.8 of the Second Amendment to the Application for Approval of a Plan for Augmentation includes as a replacement source a lease dated December 16, 2003 for 45.4 acre-feet of C-BT water. Pursuant to the terms of the lease, the term expired on April 1, 2004. Consequently, Movants’ motion is moot as to that portion of Subdistrict’s application.

B. *Cross-Motion for Determination of Question of Law Regarding NCWCD’s Right and Authority in the First Instance to Interpret and Enforce the Provisions of the C-BT Repayment Contract*

Review of the WCA has not revealed any provision granting this court authority to make determinations regarding use of C-BT water. Instead, that power is reserved to the NCWCD itself. § 37-45-134(1)(a), C.R.S. (“The board has the following powers concerning the management, control, delivery, use, and distribution of water by the district: To make and enforce all reasonable rules and regulations for the management, control, delivery, use, and distribution of water.”). After organization of a water conservancy district, a court’s authority over that district is limited to that enunciated clearly in statutory provisions, such as filling vacancies in the board of directors. *Peaker v. Southeastern Water Conservancy Dist.*, 174 Colo. 210, 215, 483 P.2d 232, 234 (1971). The Repayment Contract firmly places control over distribution of C-BT water in the hands of the NCWCD Board of Directors. *Thornton v. Bijou*, 926 P.2d at 57. Thus, the NCWCD has discretion, limited only by the terms of the Repayment Contract and the provisions of the WCA, to direct the allocation and distribution of C-BT project water. *Id.*

Decisions by the NCWCD Board of Directors regarding permissible uses of C-BT water have no impact on this court’s review of a plan for augmentation or decisions by the State Engineer’s Office regarding an application for an SWSP. This court does not construe NCWCD’s assertion of its decision-making authority over C-BT water as Movants do. NCWCD does not claim authority to determine the adequacy of C-BT as a replacement source in an augmentation plan or an SWSP. NCWCD only declares its authority to determine, as a threshold matter, whether C-BT water may be included as a replacement source in a plan for augmentation or an SWSP. If NCWCD allows C-BT water to be used as a replacement source in a plan for

augmentation, this court will consider the adequacy of that water as a replacement source and conduct an analysis of potential injury resulting from its use as required by § 37-92-305(8) C.R.S. (2004). Similarly, the State Engineer's Office must continue to uphold its responsibilities enumerated in § 37-92-308 before approving use of C-BT water in any SWSP.

Movants state that “the General Assembly has expressly provided that landowners within a district, such as Northern, have the power to appear in proceedings to a contract regarding the district,” citing to § 37-45-143(1), C.R.S. However, this court does not interpret the statute so broadly. Instead, the statute confers upon the *board* the ability to seek judicial determination regarding powers or contracts of the district. Where the board does initiate such judicial action, owners of property located within the districts' boundaries may participate in the proceedings for the limited purpose of seeking to dismiss the action or filing an answer in response to the board's claims. § 37-45-143(2), C.R.S. However, Movants have not provided any authority for the proposition that district landowners may bring a claim directly to a court to challenge decisions by the conservancy district's board. The board has not sought this court's review of its proposal to allow C-BT water to be used in SWSPs. As a result, Movants are unable to challenge the board's decision in this action before this court.

V. Conclusion

This court does not find that there exists authority barring C-BT water from use in augmentation plans or SWSPs. Moreover, there remains a question of fact regarding Applicant's use of the C-BT water and any impacts that use may have outside the NCWCD boundaries or the possibility of injury to other NCWCD constituents. This court cannot, then, grant Movants' motion.

There is insufficient authority for this court to make a determination of law that C-BT water is *per se* prohibited from use as a replacement source in a plan for augmentation or an SWSP. Also, a question of fact remains as to Applicant's proposed use of C-BT water outside the NCWCD boundaries and any potential resulting injury to other C-BT users. Thus, Movants have not met their burden pursuant to Rule 56(h) C.R.C.P.

The WCA clearly retains for the NCWCD and withholds from this court the authority to determine permissible uses of C-BT water. NCWCD's power to establish rules and regulations regarding use of C-BT water in no way impairs the authority of this court or the State Engineer's Office to make determinations regarding prevention of injury pursuant to §§ 37-92-305(8) and 37-92-308 C.R.S.


ORDER

The court does not find oral argument necessary to make its determinations. Thus, the request for oral argument is DENIED.

Based on the foregoing, the court HEREBY DENIES the Motion for Determination of Law Regarding Use of Colorado-Big Thompson Project Water as a Replacement Source in a Plan for Augmentation and Substitute Supply Plan. The court HEREBY GRANTS NCWCD's Cross Motion for Determination of Question of Law Regarding the Right and Authority in the First Instance of NCWCD to Interpret and Enforce the Provisions of the Repayment Contract.

Dated this 1st day of April, 2005.

BY THE COURT:



Roger A. Klein
Water Judge
Water Division No. 1

This order was filed electronically pursuant to Rule 121, §1-26. The original signed order is in the Court's file.

AUGMENTATION PLAN ACCOUNTING PROTOCOL

Division of Water Resources

Division One – Greeley

This document addresses the accounting information and format that should be followed for water court approved augmentation plans. Decreed augmentation plan requirements take precedence in the event of a conflict between the requirements in the decree and this protocol.

1. The accounting must be done using software such as Excel or Access, preferably Excel. During the initial review of the accounting and/or when requested, the applicant will be required to submit the actual Excel file used to perform the accounting so that data relationships and formulas can be confirmed.
2. Accounting for wells that are decreed as alternate points of diversion to a surface water right must be done on a daily basis in order to substantiate when the well is in or out of priority. For the purposes of augmentation plan accounting only, the daily in priority alternate point well diversions may simply be shown as zero. The remaining out of priority daily diversions should then be used to determine the delayed depletions associated with the well operation.
3. Accounting for wells that are not alternate points of diversion to a surface water right may be done on either a daily or monthly basis. If the monthly basis is used, the volume of water diverted for the entire month should be prorated to the number of days in the month and shown as equal daily diversions.
4. Accounting reports must be submitted electronically to the division engineer at Div1Accounting@state.co.us within 30 days of the end of the month for which the accounting is being submitted.
5. Please use the following naming convention for all files submitted pursuant to item 4: "PlanName_Month_Year_Version". As an example, the initial submission for the XYZ augmentation plan for July 2004 would be named "XYZ July 2004 v1.xls". If this accounting is then amended, the amended file submitted would be named "XYZ July 2004 v2.xls", etc. **Please put the name of the file in the subject line of the email.**
6. All diversion information for both wells and recharge structures must be reported using the WDID for the structure, at a minimum. Other information such as well name, permit number, etc. can also be included based on the reporter's preference as a cross check to the WDID **All wells must be either decreed by the Water Court or permitted by the Division of Water Resources.** Unregistered wells for which there is no decree cannot, in the opinion of the Division Engineer, be effectively administered because of the need to know the location, allowable diversion rate and use of the well; information that is only available from the decree or permitting process.
7. The accounting should have a single "**Contact Information**" sheet that shows the contact information for each well. This sheet should also contain the contact information of the person responsible for submitting the accounting.
8. The accounting should have a single table showing "**Past Pumping Depletions**" expected due to previous operations of all the wells covered by the plan, itemized by well.

9. All well diversions should be input into a single **"Pumping Information"** worksheet. The sheet should show the volume diverted from each well and the amount of that diversion made as an APOD on a daily basis. The resulting non-APOD diversion volume in the **"Pumping Information"** worksheet should be the source of pumping information for all other worksheets that use that data such as the depletion modeling input table, any summary of operations sheet, etc. **The "Pumping Information" worksheet is the ONLY place new well diversion data is input into the accounting.**
10. All **"Recharge Information"** input data should be entered on a single worksheet and broken down to show the resulting credit to each well.
11. A single **"Reservoir Releases"** sheet should show the releases made and the credit attributable to each well. Data such as transit losses, reservoir share yield, etc. should be shown for the current month. The accounting must be able to adjust factors such as share yield and transit loss on a month-by-month basis and must not simply rely on the initial beginning of season yield estimate, etc.
12. If there are other categories of replacement water used in the plan such as **"Fully Consumable Effluent"**, **"Changed Irrigation Right Credits"**, **"Ditch Bypass Credits"**, **"Augmentation Wells"**, etc., each of these categories should have a single data input sheet that breaks the information down to show the credit due each well as a result of the subject replacement water. (In the specific case of the augmentation wells, the input volume would simply reference the "Pumping Information" sheet, which is to be the sole source of well diversion data.)
13. A **"Summary Information"** sheet should show the depletions, associated credits and net impact on the river of each well for the subject month. Wells with depletions that impact the same location of the river may be grouped with accounting submitted for the entire group. For instance, accounting may be submitted on a farm by farm basis, etc., with the provision discussed above regarding alternate points of diversion wells.
14. The accounting should contain any other sheet necessary to show how the input data are used to determine the depletions and recharge credits for each well, such as AWAS/SDF program input table and output table, etc.

RECHARGE PROTOCOL
Division of Water Resources
Division One – Greeley

1. The purpose of a "recharge structure" as referenced in this document is to introduce water to the river alluvium that will result in accretions to a live stream. For the purposes of this document, a recharge structure does not include a well that is used to artificially recharge a Denver Basin bedrock aquifer. With that qualification, a recharge structure is defined as:
 - a. A section of ditch, the losses from which can be reasonably characterized by an average SDF value.
 - b. A pond or group of ponds that receive water from the same delivery location and can reasonably be assigned a single SDF value.
2. A written notification for each recharge structure must be provided to the water commissioner and division engineer. **The Division of Water Resources will not acknowledge any recharge activity conducted either prior to our knowledge of its existence or which cannot be corroborated with data by the water commissioner.** The notification must include:
 - a. the section, township and range of the structure (STR).
 - b. the distances of the structure from the section lines.
 - c. if the diversion point for the recharge structure is not located in the vicinity of the recharge site, then also provide the STR and distances from section lines of the metered diversion point.
 - d. for ditch structures, identify the location of the diversion structure. If the ditch is divided into more than one recharge reach, explain how the volume diverted will be allocated to the various sections.
 - e. the maximum water surface area of the structure.
3. Upon receiving written notification, the Division of Water Resources will assign the structure a WDID number. The WDID number is the identification number that will be used for the administration of the structure and must be included in all correspondence and accounting reports. **(Any structure specifically identified by STR and distances from section lines in a Water Court application for water rights or plan for augmentation will be considered to have met the written notification requirements. For structures that were conceptually included in a decreed plan for augmentation but were not physically constructed at the time of the decree, a written notification of the intent to construct the structure must be provided.)**
4. Any structure that intercepts groundwater must be permitted as a well and included in a plan for augmentation or substitute water supply plan approved by the State Engineer. The Division of Water Resources strongly recommends avoiding recharge structures that intercept groundwater, in order to simplify the accounting process.

5. The flow into **EVERY** recharge structure **MUST** be metered and equipped with a continuous flow recorder unless the water commissioner in conjunction with the division engineer determines adequate records may be kept without such equipment. If the recharge structure is designed to discharge water via a surface outlet, such discharge must also be metered and equipped with a continuous flow recorder. Unless provided an exemption from either the water commissioner or division engineer for this requirement, the water commissioner **MUST** approve the meter, recorder and installation and the installation must be completed **BEFORE** the Division of Water Resources will acknowledge any recharge credit to the structure.
6. All recharge ponds must have a staff gauge installed such that the gauge registers the lowest water level in the pond. The staff gauge must be readable from a readily accessible location adjacent to the pond.
7. All recharge areas must be maintained in such a way as to minimize consumptive use of the water by vegetation. **No recharge area may be used for the planting of crops during the same irrigation year that it is used as a recharge site without prior approval from the Water Commissioner or Division Engineer.**
8. The amount of water recharged to the alluvial aquifer is to be determined by measuring the amount of water delivered to the recharge structure and subtracting:
 - a. the amount of water discharged from the recharge structure,
 - b. the amount of water lost to evaporation (see item 9, below),
 - c. the amount of water lost to consumptive use due to vegetation located within the recharge structure, and
 - d. the amount of water retained in the recharge structure that has not yet percolated into the ground.
9. Net evaporative losses from the recharge structure must be subtracted from the volume of water delivered to the pond. Evaporative losses must be taken every day the pond has a visible water level. If the pond does not have a stage-surface area curve approved by the water commissioner, the maximum surface area of the pond must be used to determine the evaporative losses. Monthly loss factors prorated for the number of days the pond had a visible water level may be used as may real time evaporation data from NOAA or a local weather station. If the pond is not inspected on a routine basis through the month, no prorating of monthly factors will be allowed.
10. The amount of accretions to the target stream will be determined using the amount of water recharged to the alluvial aquifer (as described in item 8, above) and lagging the recharge using the Glover equation, USGS SDF contour maps or other methodology approved in advance by the Division of Water Resources.
11. Accounting must be performed on a daily basis with reports submitted monthly within 30 days of the end of the month for which the accounting is being made.

ADMINISTRATION GUIDELINE

Augmentation Plan Exchanges

Division One – Greeley

Many of the plans for augmentation operating along the South Platte River include recharge operations where fully consumable water is placed in recharge sites and then timed back to the river. Some plans include decreed exchanges whereby excess return flows may be exchanged back up to a headgate or well and re-diverted. This document provides a guideline for administering such exchanges. It may also be used as a general guideline for the administration of all exchanges on the South Platte River, however, is specifically designed to address exchanges associated with plans for augmentation.

River condition below the exchange: No Call or Free River

No exchange may operate unless:

- F1. The water commissioner has been given at least 48 hours **advance** notice of the intent to operate the exchange.
- F2. The water commissioner determines there is sufficient exchange potential to operate the exchange.
- F3. The water commissioner has current accounting and is able to verify that there are excess return flows reporting to the river.

River condition below the exchange: Storage Call

No exchange may operate unless:

- S1. The water commissioner has been given at least 48 hours **advance** notice of the intent to operate the exchange.
- S2. The water commissioner determines there is sufficient exchange potential to operate the exchange.
- S3. The water commissioner has current accounting and is able to verify that there are excess return flows reporting to the river.
- S4. The water commissioner determines that the exchange can be operated without injuring water rights that are senior to the exchange.
- S5. The storage-season-to-date¹ (November 1 to the day the return flows report to the river) net impact of the augmentation plan operation on the river is not negative; or, in the opinion of the water commissioner, there is a reasonable expectation the impact will be non-negative by the start of the irrigation season (typically, April 1).
- S6. The timing of the exchange is limited to the day the excess return flow reports to the river unless the water commissioner agrees that return flows can be consolidated such that a larger diversion over a shorter period of time is made without injuring the calling or other senior water rights. If a consolidated diversion is allowed, the volume of the consolidated diversion cannot exceed the volume of excess return flow reporting to the river during the month the consolidated exchange takes place; i.e. excess return flow credits may **not** be carried over from one month to the next.

River condition below the exchange: Direct Flow Call

No exchange may operate unless:

- D1. The water commissioner has been given at least 48 hours **advance** notice of the intent to operate the exchange.
- D2. The water commissioner determines there is sufficient exchange potential to operate the exchange.
- D3. The water commissioner has current accounting and is able to verify that there are excess return flows reporting to the river.
- D4. The water commissioner determines that the exchange can be operated without injuring water rights that are senior to the exchange.
- D5. The irrigation-season-to-date¹ (April 1 to the day the return flows report to the river) net impact of the augmentation plan operation on the river is not negative.
- D6. The timing of the exchange is limited to the day the excess return flow reports to the river. Excess return flows occurring over multiple days may **not** be consolidated into a single exchange and diversion.

¹ The expectation regarding the time period during which the net impact analysis is made is that storage season deficits are reconciled before the start of the irrigation season. Plans that do not reconcile storage season deficits **may** not be allowed to make additional out-of-priority diversions or exchanges until such time as the deficits are made up.