

STATE OF COLORADO

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

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July 27, 2006

Re: South Platte Non-Irrigation Season Administration

Dear Water User or Interested Party:

I am writing this letter as a follow up to my May 3, 2006 letter and the public meeting concerning non-irrigation season administration held June 19, 2006. At the public meeting, I presented a PowerPoint presentation which discussed the preliminary decisions and open questions on non-irrigation season administration. I am very appreciative of the active, insightful participation we received at this meeting. Based on this and previous input, we have made the following administrative decisions effective for water year 2006-2007. The decisions set forth below are based upon the unique circumstances presented in Water Division 1 and unless or until the State Engineer decides otherwise are applicable only to Water Division 1.

Out of Priority Storage Under 37-80-120 C.R.S.

37-80-120 C.R.S. states "In every case in which the state engineer finds that water can be stored out of priority under circumstances such that the water so stored can be promptly made available to downstream senior storage appropriators in case they are unable to completely store their entire appropriative right due to insufficient water supply, the state engineer may permit such upstream storage out of priority, but such storage water shall be promptly released on demand of a downstream senior whenever needed by such senior for actual use".

Prior to allowing any out of priority storage against any reservoir on the South Platte mainstem including Julesburg reservoir, our office will require that users submit a plan to our office at least 45 days prior to storing out of priority. We will post this plan on our Internet site <http://www.water.state.co.us/>. We will accept comments on the plan from water users if they believe they will be impacted. Any such comments must be received within 30 days of our posting of the proposed plan.

At minimum, it appears a plan proposed by a user must take into account the following issues:

- the commitment and capability to release out of priority water if directed by our office
- recognition of potential additional replacement requirements associated with transit loss changes between the time the storage occurs and the release (for instance, transit loss on the South Platte may differ between November when the water is stored out of priority in the reservoir and April when it is released)
- appropriate accounting (in Excel format) to keep track of the amount stored out of priority against each senior reservoir
- requirements associated with the out of priority storage to assure that the senior reservoirs stored against have water available for "actual use" as required by 37-80-120 C.R.S. (for instance, releases of 50 cfs for North Sterling would not be of use to North Sterling Irrigation District once the District was out of priority since diversions of 50 cfs at the North Sterling headgate would not reach the reservoir)
- documentation that the user has forwarded their proposed plan to the senior users who they wish to store out of priority against. While not required by statute, we believe users who wish to take advantage of 37-80-120 C.R.S. should attempt to reach agreement with those senior users. We hope

this will help us avoid the potential disputes that may occur as a result of "paper filling" a reservoir, as discussed in the example attached as Appendix A. Note: While our office believes 37-80-120 C.R.S. does not have much practical effect without the concept of "paper filling" and that "paper filling" will not injure the senior reservoir user as it will guarantee the senior its water, we wish to promote agreement amongst water users to the extent possible.

Our office will provide a written response to the proponent of the plan, to parties who comment on the proposed plan, and to users who the proponent would store out of priority against. Our response will also be posted on the Internet. If our office approves the proposal, we will include conditions of approval if necessary.

In determining which reservoir must release water stored out of priority, our office will require the most junior right that stored water out of priority to release the full amount so stored prior to the next most junior right which stored out of priority releasing any out of priority storage.

The use of such plans is experimental. We will revisit the decision to use such plans and the listed requirements, including posting the plan and our response on the Internet, to determine the efficacy and helpfulness of such. As such we may choose not to follow such procedure in the future. The decision by the Division Engineer's Office for Division 1 to utilize the procedure outlined herein is entirely discretionary to the Office and does not guarantee that the Division Engineer's Office will follow this process in the future.

Other Out of Priority Storage

37-80-120 C.R.S. does not allow out of priority storage in reservoirs if the user cannot promptly release water. Nevertheless, as my October 6, 2005 letter states, users have been allowed to store water out of priority without this ability. While historically this has been allowed under the "gentleman's agreement", there is no clear statutory basis for allowing this practice to continue. Most respondents to our letter commented that they did not believe we should continue this practice. Without renewed basin wide cooperation, we agree with these respondents that we cannot allow this practice in the future as the cooperation under which it occurred appears to no longer exist.

Some users, who may not be able to meet the requirements of 37-80-120 C.R.S., proposed the use of an alternative supply to provide replacement of out of priority diversions if necessary. For instance, a user may propose that they would replace out of priority diversions from a lined gravel pit if storage users senior to the out of priority storage did not receive their full entitlement. We appreciate the argument that this should be allowed because it helps assure the maximization of use. It also assures that junior storage rights fill prior to the diversion by more junior priority diverters downstream. On the other side, it is not clear we have the authority to approve this absent specific court or legislative direction. Thus, we will not approve out of priority storage based on replacement of diversions with an alternative supply unless directed by the court.

Aggregation of Well Depletion Replacement

In our October 6, 2005 letter, we stated:

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 of the reservoir owners to allow delayed aggregated replacement, if necessary.

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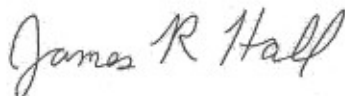
JUL 31 2006

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This continues to be a point of contention. We believe objectors to delayed aggregated replacement should have their day in court on this issue. Thus, for the time being, we will no longer allow delayed aggregated replacement to occur if there is a reservoir call unless it is specifically confirmed by statute or the court.

As stated in previous letters, we will continue to allow limited aggregation to occur in a month during the non irrigation season if no injury will occur for efficiency of replacement purposes. The Water Court has long recognized the practice of limited aggregation of replacement if there is not injury. Unless directed otherwise by the courts we will also allow aggregated prepaid replacement of depletions in the winter to reservoirs if there is no injury.

Sincerely,



James R. Hall, P.E.
Division Engineer

c: Hal Simpson, State Engineer
Ken Knox
Jack Byers
Dick Wolfe
Water Commissioners
Alex Davis
Paul Benington

Appendix A

Example

Paper Fill Accounting for Out of Priority Storage under 37-80-120 C.R.S.

Without out of priority storage, a senior reservoir would have filled sooner. Since out of priority storage is not a decreed right, it has no priority. Thus, out of priority storage should not impact other decreed rights whether junior or senior to the decreed right. To meet the requirements of the out of priority statute and at the same time protect decreed water rights, the Division Engineer's Office should paper fill senior reservoirs as if out of priority storage had not occurred.

For example, assume structure A and B are reservoirs and structure C and D are direct flow recharge rights. In our example, assume reservoir A has a decreed and physical capacity of 1000 acre-feet. Also assume reservoir A has 820 acre-feet stored in priority as of March 1, 2006, transit losses to A from B are 20 acre-feet and reservoir B has 200 acre-feet stored out of priority as of March 1. At this point, we would remove Reservoir A's call and Reservoir A would be paper filled to 1000 acre-feet. Recharge C would be in priority and could take water. Reservoir A could continue to divert any water left in the river under free river unless Recharge D was short and placed a call.

Of note, once Reservoir A has paper filled, Reservoir B could continue to divert water under its 1958 water right and release the out of priority water stored delivering it past C to A even if C or D placed a call.

If there were more than one user storing out of priority, then we aggregate all out of priority storage in determining when reservoir A is paper full.

