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**Colorado Aquifer Management
American Ground Water Trust
November 29, 2012
Steve Sims- Denver, CO**

Legal Constraints on Groundwater Use

Main Legal Constraints

- Well Regulation
 - Recharge Limitations
 - Underground Storage

Recharge

- *Board of County Com'rs of County of Park v. Park County Sportsmen's Ranch, LLP*, 45 P.3d 693 (Colo. 2002) Footnote 19

Based upon the principles of Colorado law embodied in the statutes and our case law, the applicant would have to meet conditions to utilize an aquifer for storage of artificially recharged water. The applicant, at least: (1) must capture, possess, and control the water it intends to put into the aquifer; (2) must not injure other water use rights, either surface or underground, by appropriating the water for recharge; **(3) must not injure water use rights, either surface or underground, as a result of recharging the aquifer and storing water in it;** **(4) must show that the aquifer is capable of accommodating the stored water without injuring other water use rights;** (5) must show that the storage will not tortiously interfere with overlying landowners' use and enjoyment of their property; (6) must not physically invade the property of another by activities such as directional drilling, or occupancy by recharge structures or extraction wells, without proceeding under the procedures for eminent domain; (7) must have the intent and ability to recapture and use the stored water; and (8) must have an accurate means for measuring and accounting for the water stored and extracted from storage in the aquifer.

Underground Storage

- Reaction to Blueponds
- Section 37-92-305(9)(c) provides:

No water right or conditional water right for the storage of water in underground aquifers shall be recognized or decreed **except to the extent water in such an aquifer has been placed there by other than natural means** by a person having a conditional or decreed right to such water.

37-87-101(2) provides:

Underground aquifers are not reservoirs within the meaning of this section except to the extent such aquifers are filled by other than natural means with water to which the person filling such aquifer has a conditional or decreed right.

Well Regulations-Early Efforts

- 1965 Well Laws
- *Fellhauer v. People*, 167 Colo. 320, 447 P.2d 986 (Colo. 1968)

As administration of water approaches its second century the curtain is opening upon the new drama of Maximum utilization and how constitutionally that doctrine can be integrated into the law of Vested rights. We have known for a long time that the doctrine was lurking in the backstage shadows as a result of the accepted, though oft violated, principle that the right to water does not give the right to waste it.

Fellhauer Well Regulation Rules

- (1) The regulation must be under and in compliance with reasonable rules, regulations, standards and a plan established by the state engineer prior to the issuance of the relative orders.
- (2) **Reasonable lessening of material injury** to senior rights must be accomplished by the regulation of wells.
- (3) If by placing conditions upon the use of a well, or upon its owner, **some or all of its water can be placed to a beneficial use by the owner without material injury to senior users, such conditions should be made.**

Water Right Determination and Administration Act of 1969

- Integrate Surface and Groundwater Use
- Modernized and Updated Colorado Water law
- Provided process for Well Registration and Well curtailment
- Created new tools (plans for augmentation) (substitute water supply plans)
- Recognized old tools (upstream out of priority storage and exchanges)

Post 1969 Act Actions

- Well Regulations in Division 1 enacted August 8, 1969 but expired October 15, 1969
- Rules enjoined August 27, 1969
- *Kuiper v. Well Owners Conservation Ass'n.*, 176 Colo. 119, 132, 490 P.2d 268, 274 (1971) reversed
- HB 71-1205, codified Well Owners
- *Cache La Poudre Water Users Ass'n v. Glacier View Meadows*, 550 P.2d 288 (1976)
- *Kelly Ranch v. Southeastern Colorado Water Conservancy District*, 550 P.2d 297 (1976)

SEO Informal Regulatory Efforts

- “Gentleman’s Agreement”
- 37-92-501.5
 - **“...the state engineer and division engineers shall exercise the broadest latitude possible in the administration of waters under his jurisdiction to encourage and develop temporary augmentation plans and voluntary exchanges of water...”**
- GASP
- 37-80-120 Substitute Supply Plans
- *Empire Lodge Homeowners’ Ass’n v. Moyer*, 39 P.2d 1139 (Colo. 2002)

Strict Priority Enforcement

- Division 2 Well Rules
- Division 1 Well Rules
- *Simpson v. Bijou Irrigation Co.*, 69 P.3d 50 (Colo. 2003)
- 37-92-308 SWSP provisions
- Large Well Augmentation Plan litigations
- *Well Augmentation Subdistrict of Central Colorado Water Conservancy Dist. v. City of Aurora*, 221 P.3d 399 (Colo. 2009)

Are we Locked in by the Decrees?

<p>DISTRICT COURT, WATER DIVISION NO. 1, COLORADO</p> <p>9th Street & 9th Avenue P. O. 2038 Greeley, CO 80632</p>	<p>FILED Document C O Weld County District Court 19th JD Filing Date: Jun 3 2005 2:30 PM MDT Filing ID: 5948678 Review Clerk: Connie S Koppes</p>
<p>CONCERNING THE APPLICATION FOR WATER RIGHTS OF:</p> <p>THE GROUND WATER MANAGEMENT SUBDISTRICT OF THE CENTRAL COLORADO WATER CONSERVANCY DISTRICT</p> <p>IN ADAMS, LARIMER, MORGAN AND WELD COUNTIES.</p>	<p>▲ COURT USE ONLY ▲</p> <p>Case No. 02CW335</p>
<p>FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECREE OF THE WATER COURT</p>	

Solutions

- Retained Jurisdiction

45.1. Perpetual Jurisdiction. In addition to the general retained jurisdiction set forth above, the Court retains perpetual jurisdiction as described in ¶11.5; ¶13.5.2; ¶14.4; ¶16.3; ¶17.3; ¶17.5.1; ¶17.5.3.2; ¶17.8; ¶19.5; ¶42; ¶45.2.

- Legislation may not be the right approach

- Section 11. Ex post facto laws

No ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges, franchises or immunities, shall be passed by the general assembly.

Final Thoughts

- Adjusting Old Decrees to New Science
- Well to Well Injury an area that Colorado lags the rest of the west