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INTRO TO GROUND WATER LAW IN COLORADO AND SURFACE -GROUNDWATER CONFLICTS IN THE SOUTH PLATTE

By
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INTRODUCTION

In 1969, Colorado sought to address emerging ground water-surface water conflicts without making major changes to the prior appropriation doctrine. That year the Colorado General Assembly enacted the Water Rights Determination and Administration Act (“1969 Act”),³ in order to give water administrators and water users the tools necessary to integrate surface and ground water administration. Over the next 35 years Colorado water officials have struggled to accomplish the twin goals of the 1969 Act, maximum utilization and prevention of injury to senior water users. This paper describes the struggle.

Before considering the question of integration of ground water with surface water under the Water Rights Determination and Administration Act (“1969 Act”),⁴ it is important to understand that there are several categories of ground water under current Colorado law and that ground water in some of these categories is not subject to regulation under the 1969 Act. The categories of ground water identified by the authors for purposes of this paper are: designated ground water; nontributary ground water and Denver Basin not nontributary ground water outside designated ground water basins; and tributary ground water outside designated ground water basins. Each category is described and discussed below.

Designated ground water, including Denver Basin ground water within the existing designated basins, is not subject to the 1969 Act and the issue of integration of designated ground water with surface water is beyond the scope of this paper. Nontributary ground water, Denver Basin not nontributary ground water, and tributary ground water outside the designated basins are subject to the 1969 Act and the issue of their integration with surface water will be discussed in subsequent sections of this paper.

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³Sections 37-92-101, *et seq.*, C.R.S.

⁴Sections 37-92-101, *et seq.*, C.R.S.

CATEGORIES OF GROUND WATER

Designated ground water

The most comprehensive statute enacted in Colorado to deal exclusively with ground water was the Colorado Ground Water Management Act, § 37_90_101, *et seq.*, C.R.S., adopted in 1965 (“1965 Act”). The 1965 Act established a procedure for designating ground water within the State and also established the Colorado Ground Water Commission to regulate and administer designated ground water.⁵ The Ground Water Commission is a 12-member board, nine of which are appointed by the Governor according to a statutory formula which is weighted heavily towards agricultural interests. The other three members are the Executive Director of the Department of Natural Resources (voting member) and the State Engineer and the Director of the Colorado Water Conservation Board (non-voting members). The bulk of the Commission’s day-to-day work is carried out by the State Engineer, who acts *ex-officio* as its Executive Director, and his staff. There are currently eight designated ground water basins, all of which are located in eastern Colorado.

Ground water can be designated and a designated ground water basin formed where the ground water fits within one of the following definitional tests: (1) the ground water, in its natural course, would not be available to and required for the fulfillment of decreed surface rights; or (2) the ground water is in an area not adjacent to a continuously flowing natural stream and ground water withdrawals in that area have constituted the principal water usage for at least 15 years prior to the date of the first hearing on proposed designation of the basin.

Once a designated basin is formed, resident taxpaying electors have the statutory option to petition the Ground Water Commission to conduct an election on whether to form a ground water management district in any part of the basin. The management district is a quasi-municipal corporation akin to a water and sanitation district, which is authorized to exercise powers of taxation (including limited *ad valorem* and well capacity levies), regulation, research, and administration of designated ground water. There are currently 13 ground water management districts within the eight designated ground water basins.

⁵For a more comprehensive discussion of designated ground water, see Veronica A. Sperling and David M. Brown, *Outline of Colorado Ground Water Law*, 1 University of Denver Water Law Review 275 (1998); *see also*, *Upper Black Squirrel Creek Ground Water Management District v. Goss*, 993 P.2d 1177 (Colo. 2000) and *Colorado Ground Water Commission v. North Kiowa-Bijou Groundwater Management District*, Colorado Supreme Court Case No. 02SA216, slip opinion, issued September 8, 2003.

After a ground water basin is designated, legal disputes with the Ground Water Commission and ground water management districts are heard in the District Court of the county in which the dispute arises or, in the case of an appeal from a rule adopted by the Ground Water Commission, in the Denver District Court. A single district court judge is appointed annually as “designated ground water judge” for each designated basin.

The definition of designated ground water encompasses some ground water which would otherwise satisfy the legal test of tributariness. Unresolved controversy remains over whether the pumping of wells in designated basins can be curtailed to satisfy downstream senior surface rights and, if so, by whom (Ground Water Commission, State Engineer or ground water management districts). As noted above, designated ground water is not subject to regulation under the 1969 Act and the issue of integration of designated ground water with surface water is beyond the scope of this paper.

Nontributary Ground Water and Denver Basin Not Nontributary Ground Water Outside Designated Basins

Today, ground water in Colorado is, by statute, legally nontributary to a natural stream if its withdrawal will not deplete the flow of a natural stream within 100 years of the time of pumping to the extent of 0.1% of the annual rate allowed to be pumped.⁶ Prior to 1985, however, there was no statutory definition of nontributary ground water, which resulted in a substantial amount of litigation and generally added to the uncertainty concerning the rights associated with nontributary ground water and the effect of its withdrawal on surface water rights.

Prior to 1963, it seemed clear that nontributary ground water was merely one hydrologic category of “developed water,” *i.e.*, water which, but for specific human efforts, would never have become part of surface flows, and which therefore legally became the private property of the developer free from the demands of senior tributary rights. In 1963, the Supreme Court decided the landmark case of *Whitten v. Coit*,⁷ which held that such ground water belonged exclusively to the owner of the overlying surface estate, subject only to the doctrine of reasonable use.

In 1973, the legislature passed Senate Bill 213 (an amendment to the 1965 Act),⁸ which constrained the use of nontributary ground water to the volume of water in storage underlying

⁶§ 37-90-103(10.5), C.R.S. (enacted on June 6, 1985 as part of Senate Bill 5, 1985 Colo. Sess. Laws 1160). For historical background to this statutory definition, *see District 10 Water Users Ass’n v. Barnett*, 599 P.2d 894 (Colo. 1979) and *Kuiper v. Lundvall*, 529 P.2d 1328 (Colo. 1974).
⁷153 Colo. 157, 385 P.2d 131 (1963).

⁸1973 Colo. Sess. Laws 1520, enacted on July 6, 1973 (formerly codified at § 37-90-137(4), C.R.S.).

the landowner's property, and to a rate consistent with a 100-year economic useful life. Numerous questions arose concerning the validity, effect and interpretation of Senate Bill 213, and their importance was underscored by a huge number of claims filed in all seven water courts on the last business day of 1978 by several small groups of individuals. Many of these claims, most notably those filed by John Huston and his associates, contended that Senate Bill 213 unconstitutionally required land ownership or control as a qualification on use and that only a prior appropriation system free of such constraints could satisfy Article XVI, § 6 of the Colorado constitution (which guarantees the right to appropriate the waters of all "natural streams"). These claims were the subject of the Supreme Court's 1983 decision in *State v. Southwestern Colorado Water Conservation District*⁹ (referred to as "*Huston II*" to distinguish it from its procedural precursor, *Southeastern Colorado Water Conservancy District v. Huston*, 197 Colo. 365, 593 P.2d 1347 (1979)). In *Huston II*, the Court principally held: (1) landowners do not own nontributary ground water merely by virtue of their ownership and occupation of the overlying surface estate – to the extent it indicated otherwise, *Whitten v. Coit* was overruled; (2) nontributary ground water is not subject to the constitutional doctrine of prior appropriation as set forth in Article XVI, § 6 of the Colorado constitution, but instead is subject to the "plenary control" of the legislature in accordance with any minimally rational resource allocation scheme it might establish from time to time; (3) rights to nontributary ground water cannot be determined by the water judges under the 1969 Act; (4) as of 1983, nontributary ground water was subject only to the provisions of the 1965 Act, including the specific criteria set forth in Senate Bill 213; and (5) Senate 213 was a constitutional enactment.

Huston II reached only the most fundamental property issues surrounding nontributary ground water. Many questions remained unresolved. These questions included what judicial and administrative structure best promotes any desired level of use or nonuse and what amount, if any, of depletions to surface water rights resulting from the pumping of the minimally tributary Denver Basin aquifers¹⁰ should be considered "*de minimis*."

Senate Bill 5, enacted on June 6, 1985,¹¹ resolved a number of questions concerning allocation of nontributary ground water and Denver Basin not nontributary ground water and concerning integration of that ground water with surface water. As noted earlier, Senate Bill 5 for the first time provided a statutory definition of nontributary ground water. It also confirmed that Denver Basin ground water outside of designated basins is within the judicial jurisdiction of the water

⁹671 P.2d 1294 (Colo. 1983).

¹⁰The Denver Basin aquifers include the Dawson, Denver, Arapahoe and Laramie-Fox Hills bedrock aquifers that underlie all or portions of the area from Greeley on the north to Colorado Springs on the south and the foothills on the west to Limon on the east.

¹¹1985 Colo. Sess. Laws 1160, enacted on June 6, 1985 (codified primarily at § 37-90-137, C.R.S.).

judges and the administrative jurisdiction of the State Engineer.¹² In addition, it established that all of the ground water in the Denver Basin aquifers would be allocated on the basis of a 100_year aquifer life and land ownership or consent of the landowner, specifically including the portions of those aquifers that are not nontributary (*i.e.*, fail to meet the 100_year/0.1% depletive effect test). It also directed that the depletions caused by the withdrawal of not nontributary ground water from the Denver Basin aquifers must be replaced in accordance with plans for augmentation approved under the procedures of the 1969 Act, using specific statutory criteria set forth in Senate Bill 5.

Many such plans for augmentation have subsequently been approved by the water judges in Water Division 1 (South Platte River Basin) and Water Division 2 (Arkansas River Basin). These augmentation plans generally require not only replacement of depletions during the pumping period pursuant to express statutory criteria, but also the replacement of actual post-pumping depletions, which continue to occur for hundreds of years after pumping ceases. The number of these approved plans for augmentation might appear to indicate that a successful integration of Denver Basin not nontributary ground water with surface water has occurred under the relevant provisions of the 1965 Act and the 1969 Act. However, controversy remains concerning the effect of the withdrawal of Denver Basin not nontributary ground water on surface water and the appropriate extent of the augmentation obligation that should be associated with use of this not nontributary ground water. These and other Denver Basin issues are to be addressed by the Water Resources Legislation Review Committee, a committee of legislators that is the successor to the special water committee originally created by the legislature in 1996 as part of Senate Bill 96_074.¹³ Legislation to address some of the currently unresolved Denver Basin issues may result from the work of this committee.

¹²In prompt response to the *Huston II* holding that the water judges did not have jurisdiction to determine rights to nontributary ground water, the legislature enacted Senate Bill 439 on October 11, 1983, which expressly established the jurisdiction of the water judges to determine rights to nontributary ground water outside designated basins and validated decrees previously entered by the water judges for rights to such nontributary ground water. Senate Bill 5 ratified and continued this jurisdiction of the water judges.

¹³1996 Colo. Sess. Laws 1360, enacted on June 1, 1996, as amended by SB 98-201, 1998 Colo. Sess. Laws 1072, enacted on June 1, 1998 and by SB 99-1222, 1999 Colo. Sess. Laws 670, enacted on May 18, 1999; HB 01-1240, 2001 Colo. Sess. Laws 725, enacted on May 31, 2001, as amended by HB 02-1024, 2002 Colo. Sess. Laws 1099, enacted on June 3, 2002 and by HB 03-047, 2003 Colo. Sess. Laws 718, enacted on March 20, 2003; *see also* § 37-90-137(9)(c.5).

Tributary Ground Water Outside Designated Basins

As noted above, ground water is legally “tributary” if its withdrawal will deplete the flow of a natural stream within 100 years of the time of pumping to the extent of 0.1% of the annual rate allowed to be pumped. The 1969 Act put tributary ground water outside designated ground water basins clearly within the judicial jurisdiction of the water judges and the administrative jurisdiction of the State Engineer.

Prior to 1969, however, few wells were adjudicated, and there was not very widespread recognition that junior wells withdrawing tributary ground water were legally subject to regulation (*i.e.*, curtailment) by strict enforcement of the priority system at the behest of senior surface rights.¹⁴ Since 1969, Colorado’s water users and water engineering, legal and political communities have struggled to integrate tributary ground water use with surface water use, with varying degrees of success in various river basins.

HISTORY OF REGULATION OF TRIBUTARY GROUND WATER USE¹⁵

1953 Underground Water Act

In 1953, the legislature took the first step toward regulating tributary ground water when it passed Senate Bill 120¹⁶ (“1953 Act”). The 1953 Act, entitled “Underground Water,” required well drillers to be licensed, the filing of advance notice of well drilling, and the filing of well logs after drilling, all under the supervision of the Colorado Water Conservation Board. It also authorized the Colorado Water Conservation Board to promulgate rules and regulations to govern these licensing and reporting requirements. It did not expressly provide for regulation of wells within the priority system or even for obtaining a well permit prior to constructing a well.

1957 Colorado Ground Water Law

¹⁴See *McClellan v. Hurdle*, 3 Colo.App. 430, 33 P. 280 (1893), for the earliest known case establishing this principle; see also *Nevius v. Smith*, 86 Colo. 178, 279 P. 44 (1929), for an early judicial attempt to coordinate the use of ground water and surface water.

¹⁵See *Simpson v. Bijou Irrigation Co.*, 69 P.3d 50, 54-66 (Colo. 2003), for the Supreme Court’s discussion of the history of tributary ground water regulation.

¹⁶1953 Colo. Sess. Laws 647, enacted on April 17, 1953 (formerly codified at §§ 147-18-1, *et seq.*, C.R.S. 1953).

In 1957, the legislature repealed the 1953 Act and enacted in its place the Colorado Ground Water Law (“1957 Act”).¹⁷ The 1957 Act continued the requirement for licensing of well drillers and for the filing of well logs, but changed jurisdiction over these activities from the Colorado Water Conservation Board to the State Engineer. In addition, it established for the first time a requirement that a permit be obtained from the State Engineer prior to drilling a new well and required registration of all existing wells with the State Engineer. Issuance of a permit was mandatory if the filing fee was paid and if the well was outside of a “tentatively critical ground water district.” The 1957 Act expressly stated that a permit from the State Engineer did not confer a water right and also that the priority date of a ground water appropriation would not be postponed because of the failure to adjudicate the right in a surface water adjudication.

The 1957 Act created a ground water commission to perform the task of designating “tentatively critical ground water districts,” defined as areas where ground water withdrawals appear to have approached, reached or exceeded the normal annual rate of replenishment (i.e., ground water is being “mined”). No further ground water development was to be allowed in these tentatively critical districts until the ground water commission reviewed the available information and removed this restriction. These provisions of the 1957 Act were apparently given little, if any, effect.

Finally, the 1957 Act assigned to the Colorado Water Conservation Board the duty to investigate underground water resources in the state and to study the effect of withdrawal of ground water on both surface water rights and other ground water rights.

By this time, many wells had been constructed to withdraw tributary ground water in the eastern slope river basins (South Platte, Arkansas and Rio Grande basins) and surface water users began to suspect that the wells depleted surface water flows within those basins to the detriment of senior surface water users. A number of federal and state studies confirmed this suspicion in the 1960s and conflict between ground water users and surface water users began to develop.

¹⁷SB 113, 1957 Colo. Sess. Laws 863, enacted on May 1, 1957 (formerly codified at §§ 147-19-1, *et seq.*, C.R.S. 1953 and §§ 147-18-1, *et seq.*, C.R.S. 1963).

1965 Colorado Ground Water Management Act

In 1965, in response to the conflict between surface water users and ground water users, the legislature passed House Bill 1066,¹⁸ an addition to Title 148, Section 11, C.R.S. 1963 which defined the duties of the State Engineer. This new provision authorized the State Engineer to administer state laws concerning distribution of surface waters, including tributary ground water, in accordance with rights of priority of appropriation and gave the State Engineer the first tools for addressing the impact of wells on surface water rights. The same year, 1965, also saw the passage of the Colorado Ground Water Management Act (“1965 Act”).¹⁹

House Bill 1066 and the 1965 Act for the first time allowed the State Engineer to deny a well permit application if the State Engineer found that there was no unappropriated water available or that the proposed well would materially injure other vested water rights. They also required administration of ground water in accordance with the priority system. However, neither required ground water rights for wells to be adjudicated. Thus, although they enunciated a regulatory connection between surface water and ground water, actual priority administration was difficult because many wells had no adjudicated priority date.

Fellhauer Case

The State Engineer’s first attempt under House Bill 1066 to curtail ground water uses for the benefit of surface water rights occurred in the Lower Arkansas Valley in 1966. It was ultimately rejected by the Supreme Court in 1968 in *Fellhauer v. People*.²⁰ In that case, the State Engineer sought to curtail 39 of the 1600 wells in existence in the Lower Arkansas Valley. The Pueblo County District Court enjoined operation of the wells and the well owners appealed. On appeal, the Supreme Court reversed the District Court. The Supreme Court held that the State Engineer’s actions violated the equal protection and due process clauses of the Colorado constitution. The Court further held that, to be constitutional, any such curtailment must be preceded by and be in compliance with reasonable written rules and regulations, cause a reasonable lessening of material injury to senior surface rights, and allow wells to continue to operate, to the extent possible, pursuant to conditions which protect senior users from material injury.²¹

¹⁸1965 Colo. Sess. Laws 1244, enacted on May 3, 1965 (partially repealed and partially amended and now codified at §§ 37-92-501, C.R.S.; formerly codified at §§ 148-11-22, C.R.S. 1963, as amended).

¹⁹SB 367, 1965 Colo. Sess. Laws 1246, enacted on May 17, 1965 (now codified at §§ 37-90-101, *et seq.*, C.R.S.).

²⁰167 Colo. 320, 447 P.2d 986 (1968).

²¹167 Colo. at 334, 447 P.2d at 993.

As part of its holding, the Court in *Fellhauer* articulated the need for “maximum utilization” of the waters of the state and for determining how that doctrine could constitutionally be integrated into the law of vested rights:

These decisions [60 Colorado cases cited in the briefs concerning Article XVI, section 6 of the Colorado constitution] are concerned primarily with the respective priorities of *vested rights* which have been established. It is implicit in these constitutional provisions that, along with *vested rights*, there shall be *maximum utilization* of the water of this state. 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*.

167 Colo. at 336, 447 P.2d at 994 (emphasis in original).

Senate Bill 407 (1967)

Partially in response to the *Fellhauer* case, in 1967 the legislature passed Senate Bill 407.²² This statute required the State Engineer to preserve the *status quo* regarding wells and provided that well appropriators may, but need not, adjudicate their rights in surface water adjudication proceedings without postponement of their priority dates. In addition, this statute called for a water study:

. . . to investigate relationships in the areas where intermingled surface and ground water are commonly used in conjunction with each other on the same lands, or lands immediately adjoining, for the same purpose of irrigation; to determine the need for and content of legislation that would provide for integrated administration of all diversions and uses of water within the state, protect all vested water rights, conserve water resources for maximum beneficial use, and permit full utilization of all waters in the state.

Section 148_2_9(1)(b), C.R.S. 1963, as amended (now repealed).

The 407 studies,²³ as they became known, concluded that pumping of ground water had caused infringement on senior surface water rights and encouraged integrated management of surface and ground water. The studies acknowledged the importance of recognizing vested water rights

²²1967 Colo. Sess. Laws 249, enacted on April 19, 1967 (formerly codified at § 148-2-9, C.R.S. 1963, as amended).

²³Morton W. Bittinger and Kenneth R. Wright, *Report on Engineering Water Code Studies for the South Platte River* (1968).

of surface diverters and placed great emphasis on efficient management of water resources. The 407 studies also reported the difficulties in administration of ground water.

The 407 studies constituted the main technical information considered by the interim committee on water when it met prior to the 1969 legislative session to consider the many bills concerning the integration of surface water and ground water. The interim committee reported out nine separate bills for the 1969 session. One of those bills, Senate Bill 81, eventually became the 1969 Act after substantial modification, and many of the recommendations of the 407 studies were included in the final enactment.

Kuiper v. Well Owners Case

The State Engineer's second attempt to regulate wells came in the form of rules and regulations adopted pursuant to House Bill 1066.²⁴ These rules and regulations applied to ground water statewide, except designated ground water and exempt wells.²⁵ The rules were to be in effect from August 8, 1969 through October 15, 1969, and in general provided for curtailment of well pumping when necessary to protect senior surface water rights, but not to exceed three days per week.

Ground water users in the South Platte River Basin filed an action with the newly-appointed water judge for the South Platte River (Water Division 1), requesting that operation of the rules be enjoined. After a trial, the water judge entered a decree permanently enjoining the State Engineer from enforcing the rules in the South Platte River Basin. The State Engineer appealed and, in 1971, in *Kuiper v. Well Owners Conservation Association*,²⁶ the Supreme Court reversed the water judge and held that the rules were valid (although this was moot because the rules were no longer in effect by their own terms). The Supreme also remarked in *Kuiper v. Well Owners* both that the legislature in the 1969 Act sought to promote in detail the general thought of *Fellhauer* and that there must be change in the operation of wells on the South Platte River. 490 P.2d at 283.

²⁴House Bill 1066, codified at § 148-11-22, C.R.S. 1963, as amended, was amended by Senate Bill 81 (1969 Act) which was enacted on June 7, 1969. The hearing on the proposed rules and regulations was held on April 2, 1969, the proposed rules were sent to the Attorney General for review on April 21, 1969, the Attorney General issued his opinion on July 8, 1969, and the proposed effective date of the rules was August 8, 1969.

²⁵Wells not exceeding 50 gallons per minute and used solely for stockwatering, domestic and irrigation of home lawns and gardens. Section 148-18-3, C.R.S. 1963, as amended, now codified at § 37-90-105, C.R.S. Also see below, for additional discussion of exempt wells.

²⁶176 Colo. 119, 490 P.2d 268 (Colo. 1971), overruled in part in *Alamosa-La Jara Water Users Protection Association v. Gould*, 674 P.2d 914 (Colo. 1983).

1969 Water Rights Determination and Administration Act²⁷

As the previous discussion demonstrates, the depletion of surface flows historically available to senior surface rights caused by wells drilled since the drought of the early 1950s had become so substantial by the late 1960s as to politically compel integrated administration of ground water and surface water uses, in a manner that would both promote maximum utilization of water and protect the vested rights of surface water users. This is reflected in the policy and general principles underlying the 1969 Act, as expressed in Senate Bill 81:

(1) It is hereby declared to be the policy of the state of Colorado that all waters originating in or flowing into this state, whether found on the surface or underground, have always been and are hereby declared to be the property of the public, dedicated to the use of the people of the state, subject to appropriation and use in accordance with law. As incident thereto, it shall be the policy of this state to integrate the appropriation, use, and administration of underground water tributary to a stream with the use of surface water, in such a way as to maximize the beneficial use of all of the waters of this state.

(2) Recognizing that previous and existing laws have given inadequate attention to the development and use of underground waters of the state, that the use of underground waters as an independent source or in conjunction with surface waters is necessary to the present and future welfare of the people of this state, and that the future welfare of the state depends upon a sound and flexible integrated use of all waters of the state it is hereby declared to be the further policy of the state of Colorado that, in the determination of water rights, uses, and administration of water, the following principles shall apply:

(a) Water rights and uses heretofore vested in any person by virtue of previous or existing laws, including an appropriation from a well, shall be protected subject to the provisions of this article.

(b) The existing use of ground water, either independently or in conjunction with surface rights, shall be recognized to the fullest extent possible, subject to the preservation of other existing vested rights, provided, however, at his own point of diversion on a natural water course, each diverter must establish some reasonable means of effectuating his diversion. He is not entitled to command the whole flow of the stream merely to facilitate his taking the fraction of the whole flow to which he is entitled.

²⁷SB 81, 1969 Colo. Sess. Laws 1200, enacted on June 7, 1969 (now codified at §§ 37-92-101, *et seq.*, C.R.S.; formerly codified at §§ 148-21-1, *et seq.*, C.R.S. 1963, as amended).

(c) The use of ground water may be considered as an alternate or supplemental source of supply for surface decrees heretofore entered, taking into consideration both previous usage and the necessity to protect the vested rights of others.

(d) No reduction of any lawful diversion because of the operation of the priority system shall be permitted unless such reduction would increase the amount of water available to and required by water rights having senior priorities.

1969 Colo. Sess. Laws 1200, 1200_1201.

The 1969 Act also introduced the concept of plans for augmentation and this was the primary means provided by the Act for integrating ground water into the priority system.²⁸ The 1969 Act also encouraged the adjudication of ground water rights through applications filed with the water courts and provided that priority dates would not be postponed for wells included in applications filed by July 1, 1971 (later extended to July 1, 1972²⁹). In response, many well owners filed applications to adjudicate their ground water rights and some filed applications for approval of plans for augmentation.

1974 Amendments to the 1969 Act and Subsequent Repeal

In 1974, the legislature adopted Senate Bill 7.³⁰ Senate Bill 7 recognized that plans for augmentation could be used in integrating ground water and surface water and in maximizing the beneficial use of state waters and authorized the State Engineer to approve temporary plans for augmentation while applications under the 1969 Act for approval of plans for augmentation were pending in the water courts.

Only three years later, the legislature repealed the experiment with State Engineer approval of temporary augmentation plans in Senate Bill 4.³¹ This repeal was based on concerns about the constitutionality of Senate Bill 7 raised by the Supreme Court in 1976 in *Kelly Ranch v. Southeastern Colorado Water Conservancy District*.³² Specifically, the Court in *dicta* stated that

²⁸*Simpson v. Bijou Irrigation Co.*, 69 P.3d 50, 60 (Colo. 2003).

²⁹SB 19, 1971 Colo. Sess. Laws 1333, enacted on March 2, 1971 (now codified at § 37-92-306, C.R.S.).

³⁰1974 Colo. Sess. Laws 440, enacted on May 7, 1974 (codified at § 148-21-23, C.R.S. 1973, later codified at C.R.S. 1973, as amended; repealed in 1977).

³¹1977 Colo. Sess. Laws 1702, enacted on June 19, 1977.

³²191 Colo. 65, 550 P.2d 297 (1976).

the lack of notice to interested parties coupled with the presumptive effect to be given to the State Engineer's findings raised due process concerns. 191 Colo. at 76, 550 P.2d at 305.

Many plans for augmentation for wells have been approved by the water judges, particularly in the South Platte River Basin. However, other methods for integrating ground water with surface water were also employed or explored, as described in more detail in the following section.

INTEGRATION OF GROUND WATER WITH SURFACE WATER³³

Today, 35 years after the passage of the 1969 Act, the policy declaration and general principles enunciated in Senate Bill 81 concerning the integration of ground water and surface water remain unchanged. However, it has been a struggle for Colorado's water users and engineering, legal and political communities to integrate tributary ground water use with surface water use, as noted earlier, and progress has been slow at times during that period.

There are three river basins with the State, the Arkansas, the Rio Grande and the South Platte, in which tributary ground water use is most prevalent. The following section of this paper describes the progress that has been made since the 1969 Act toward integrating ground water use with surface water use in those three river basins. As that discussion illustrates, this has included State Engineer rulemaking, new legislation, interstate and intrastate litigation, and water user agreements in different combinations in each of these river basins.

Also included in this section is a discussion of exempt wells which, as the name implies, are exempt from administration under the 1969 Act. As such, exempt wells, although they withdraw tributary ground water, have not been integrated into the priority system.

Exempt Wells

In an effort to protect small agricultural or domestic well water users, the General Assembly created a statutory category for exempt wells that differs from all other water rights. § 37-92-602 C.R.S. (2003); *Shirola v. Turkey Canon Ranch*, 937 P.2d 739, 750 (Colo. 1997).

This special category of wells was first recognized in the 1957 Ground Water Law³⁴. These

³³For an early discussion of the problems associated with integration of ground water and surface water uses under the 1969 Act, see David L. Harrison and Gustave Sandstrom, Jr., *The Groundwater-Surface Water Conflict and Recent Colorado Water Legislation*, 43 University of Colorado Law Review 1 (1971).

³⁴SB 113, 1957 Colo. Sess. Laws 870, enacted on May 1, 1957 (formerly codified at §§ 147-19-8, C.R.S. 1953 and §§ 147-19-8, *et seq.*, C.R.S. 1963)

exemptions were broaden in the 1965 Ground Water Management Act ³⁵ and incorporated into the 1969 Act by amendment in 1971.³⁶ There are five categories of exempt wells:

1. Wells not exceeding fifteen gallons per minute of production and used for ordinary household purposes, fire protection, the watering of poultry, domestic animals, and livestock on farms and ranches and for the irrigation of not over one acre of home gardens and lawns but not used for more than three single-family dwellings;

2. Wells not exceeding fifteen gallons per minute of production and used for drinking and sanitary facilities in individual commercial businesses;

3. Wells to be used exclusively for fire-fighting purposes if said wells are capped, locked, and available for use only in fighting fires;

4. Wells not exceeding fifty gallons per minute which are in production as of May 22, 1971, and were and are used for ordinary household purposes for not more than three single-family dwellings, fire protection, the watering of poultry, domestic animals, and livestock on farms and ranches and for the irrigation of not over one acre of gardens and lawns; and

5. Wells to be used exclusively for monitoring and observation purposes if said wells are capped and locked and used only to monitor water levels or for water quality sampling.

§ 37-92-602 (1)(b)-(f), C.R.S. (2003).

The General Assembly created this exception for agricultural, domestic and some commercial well water users based upon the assumption that their use is of such a minimal nature that it need not be mandatorily subsumed within the administration system. *Shirola v. Turkey Canon Ranch*, 937 P.2d at 750. The separate statutory framework applies to small water users to allow citizens in less densely populated areas to obtain a water supply for in-house and domestic animal uses where other water supplies are not available. See § 37-92-602(1), (6), C.R.S. (2003).

The owners of exempt wells are not required to adjudicate their water rights and when they do they are not subject to the postponement doctrine. § 37-92-602(4) C.R.S. (2003). In the State Engineer well permitting process, these small wells are presumed not injure other vested water rights, § 37-92-602(3)(II)(A), C.R.S. (2003), but the General Assembly has clearly stated that exempt wells were not created with an intention of causing injury to other vested water users. § 37-92-602(6), C.R.S. (2003). The General Assembly has also encouraged these wells to develop plans for augmentation when possible. *Id.*

³⁵ § 148-18-4, C.R.S. (1965).

³⁶ HB 1160, 1971 Colo. Sess. Laws 1341.

When exempt wells uses were first approved in 1957 water users and legislators knew little about the relationship of surface and ground water. Now as the science has become more sophisticated and the number of wells approaches 200,000³⁷, it may be time to re-consider the “minimal” impact caused by that many wells.

Arkansas River Basin (Water Division 2)

In November 1972, the State Engineer proposed rules and regulations governing use of ground water in the Arkansas River Basin. These rules became effective on February 19, 1973 (“1973 Rules”). They provided for curtailment of well pumping for not more than four days per week when necessary to prevent material injury to senior surface rights and allowed well users to avoid curtailment altogether if they had written plans to replace depletions approved by the State Engineer or used the wells as alternate points of diversion for surface rights. The 1973 Rules were not protested and were implemented.

In early 1974, the State Engineer proposed an amendment to the 1973 Rules, to be effective on March 27, 1974. The amendment provided for curtailment of well pumping for five days a week in 1974, six days a week in 1975 and seven days a week in 1976, unless the wells were operated as alternate points of diversion for surface rights or under augmentation plans approved by the State Engineer. Protests to the amendment were filed with the water judge for Water Division 2. After a trial, the water judge disapproved the amendment and held that the 1973 Rules would continue in effect without amendment.

The State Engineer appealed and, in *Kuiper v. Atchison, Topeka & Santa Fe Railway Co.*,³⁸ the Supreme Court upheld the water judge’s decision on the grounds that sufficient operating experience had not yet been obtained under the partial curtailment plan of the 1973 Rules to justify total curtailment. Wells in the Arkansas River Basin continued to operate under the three days on/four days off regime of the 1973 Rules, generally without benefit of court-approved plans for augmentation.

In December 1985, the State of Kansas commenced suit against the State of Colorado in the United States Supreme Court alleging violations of the 1949 Arkansas River Compact³⁹ by Colorado, including depletions of usable state line flows by post-compact wells in Colorado (“Compact litigation”). The trial in the case was bifurcated into a liability phase and a remedies phase. Following a lengthy trial on the liability issues, the Special Master, in July 1994, filed his

³⁷ A cumulative 190,558 exempt well permits have been granted through December 31, 2002. . 155,912 from 1957 through 1997. *Shirola v. Turkey Canon Ranch*, 937 P.2d at 750 footnote 11. 34,540 from 1997 to 2002. Division of Water Resources, Cumulative Yearly Statistics, 2002.

³⁸195 Colo. 557, 581 P.2d 293 (1978).

³⁹Codified at § 37-69-101, *et seq.*, C.R.S.

recommendations concerning that phase of the case with the U.S. Supreme Court. The Special Master concluded “that post compact pumping in Colorado has caused material depletions of the usable Stateline flows of the Arkansas River, in violation of the Arkansas River Compact”⁴⁰ and recommended that the Supreme Court so find. In May 1995, the Supreme Court upheld the ruling of the Special Master.⁴¹

The immediate effect of the Compact litigation on well users was the adoption by the State Engineer of rules and regulations requiring measurement of well pumping in the Arkansas River Basin (“Well Measurement Rules”). The Well Measurement Rules were protested and, after hearing, were substantially approved by the water judge and became effective on July 15, 1994.⁴² They were subsequently amended without protest, primarily to clarify requirements for using the power coefficient method to generate well pumping data, and, as amended, became effective date on June 1, 1996. As amended, the Well Measurement Rules are currently in effect.⁴³ The Well Measurement Rules require that all wells within their scope⁴⁴ be equipped with totalizing flow meters or be rated to determine a power coefficient and that monthly well pumping data for the previous Compact year (November 1 to October 31) be filed with the Division Engineer for Water Division 2 no later than January 31 of each year.

Adoption of the Well Measurement Rules was followed in 1996 by the State Engineer’s adoption of amended rules and regulations governing well pumping in the Arkansas River Basin (“1996 Rules”).⁴⁵ The 196 Rules replaced the 1973 Rules. The 1996 Rules were a product of extensive discussions among water users and the State Engineer and enjoyed broad support. Nonetheless, they were protested by a number of ground water users. After hearing, the 1996 Rules were substantially approved by the Division 2 water judge and became effective on June 1, 1996.⁴⁶ The 1996 Rules impose a full-time augmentation requirement on all wells in the Arkansas Valley, either through augmentation plans approved by the water judge or through replacement plans approved annually by the State Engineer. Among other things, the 1996 Rules establish

⁴⁰Special Master Report, July 1994, *Kansas v. Colorado and United States*, No. 105 Original, U.S. Supreme Court, Vol. II, p. 263.

⁴¹*Kansas v. Colorado*, 514 U.S. 673, 115 S.Ct. 1733 (1995).

⁴²Case No. 94CW12, District Court, Water Division No. 2, decree entered July 5, 1994.

⁴³Amendments to Rules Governing the Measurement of Tributary Ground Water Diversions Located in the Arkansas River Basin, http://water.state.co.us/pubs/rule_reg/arkrule.pdf.

⁴⁴This includes all wells within the Arkansas River Basin, except exempt wells, wells within designated ground water basins, nontributary and Denver Basin not-nontributary wells, and wells permitted and decreed for not more than 50 gallons per minute that are part of a judicially approved plan for augmentation.

⁴⁵Amended Rules and Regulations Governing Diversion and Use of Tributary Ground Water in the Arkansas River Basin, Colorado, http://water.state.co.us/pubs/rule_reg/ark.pdf.

⁴⁶Case No. 95CW211, District Court, Water Division 2, decree entered April 30, 1996.

presumptive stream depletion factors that are used to determine the amount of replacement water required in replacement plans. The 1996 Rules did not become fully effective until 1997. In 1997, well pumping under the 1996 Rules was approximately 120,000 acre-feet; in 1998, it was approximately 97,000 acre-feet; and in 1999, it was approximately 87,000 acre-feet.⁴⁷

In 1996, the legislature enacted Senate Bill 96-124⁴⁸ which was intended to strengthen the State Engineer's administrative powers to enforce the 1996 Rules. In 2003, the legislature expressly ratified the 1996 Rules and confirmed the State Engineer's authority in Water Division 2 to make and amend rules and regulations for administration of wells, including rules that allow the State Engineer to approve replacement plans without the requirement of a judicially approved augmentation plan.⁴⁹

Trial on the final issues in the remedies phase of the Compact litigation was completed in January 2003. The issues tried included the sufficiency of the Well Measurement Rules to determine ground water pumping volumes and the sufficiency of the 1996 Rules to ensure Compact compliance in the future. The Special Master issued a draft Report on August 21, 2003.⁵⁰ He found that the Well Measurement Rules are sufficient to measure well pumping, subject to possible revision following completion of Phase 2 of a USGS study commissioned by the Colorado State Engineer concerning the accuracy of the power coefficient method for measuring well pumping. He also found that implementation of the 1996 Rules had resulted in Colorado's compliance with its Compact obligations during the 1997-1999 period, but that actual implementation of the 1996 Rules over a longer period of time is necessary to determine whether they are sufficient to result in continued Compact compliance. After receipt of comments from the parties, the Special Master will issue a final report, which will then be considered by the United States Supreme Court.

Several well user organizations have formed in the Arkansas River Basin to provide well augmentation services. These include Arkansas Groundwater Users Association which has approximately 400 member wells ("AGUA"), Colorado Water Protection and Development Association which has approximately 800 member wells ("CWPDA") and Lower Arkansas Water Management Association which has slightly less than 800 member wells ("LAWMA"). AGUA and CWPDA are comprised of well users located above John Martin Reservoir. AGUA and CWPDA have obtained annual approvals of replacement plans for their members under the

⁴⁷More than 800 wells in the Arkansas River Basin have been placed on "inactive" status by their owners under the applicable provisions of the 1996 Rules and the Well Measurement Rules.

⁴⁸1996 Colo. Sess. Laws 19, enacted on March 1, 1996 (codified at § 37-92-503, C.R.S.).

⁴⁹SB 03-73, 2003 Colo. Sess. Laws 1446, enacted on April 30, 2003 (codified at § 37-92-308(3), C.R.S.).

⁵⁰Draft Special Master Report, August 21, 2003, *Kansas v. Colorado and United States*, No. 105 Original, U.S. Supreme Court.

1996 Rules, using primarily leased augmentation water supplies from the City of Colorado Springs, the Pueblo Board of Water Works and the Southeastern Colorado Water Conservancy District. They have not filed applications with the Division 2 water court for approval of plans for augmentation. In 2002, AGUA's replacement plan approved under the 1996 Rules authorized well pumping at approximately 60% of past levels.

LAWMA is composed of well users located below John Martin Reservoir. LAWMA has purchased senior agricultural water rights for use for augmentation purposes, with financing through low interest loans from the Colorado Water Conservation Board. In December 2002, LAWMA filed an application with the Division 2 water court for changes of those water rights to augmentation use and for approval of a plan for augmentation for its approximately 760 member wells.⁵¹ Prior to and since the filing of that application, LAWMA has obtained annual approvals of replacement plans under the 1996 Rules. In 2003, LAWMA's approved replacement plan under the 1996 Rules initially did not allow for any new well pumping in 2003, but was subsequently amended to allow pumping at approximately 20% of previous levels.

Rio Grande River Basin - San Luis Valley (Water Division 3)

In 1966, the States of Texas and New Mexico brought suit against the State of Colorado in the United States Supreme Court alleging that Colorado had not met its delivery obligations under the 1938 Rio Grande River Compact⁵² and seeking repayment of an alleged accrued debit of 939,900 acre-feet. Colorado entered into a stipulation with Texas and New Mexico for a stay of the litigation conditioned upon Colorado meeting its delivery obligation on an annual basis and using all available administrative and legal powers, including curtailment of diversions in Colorado, to assure annual compliance. The stay was granted by the Supreme Court in 1968.⁵³ Thereafter, the State Engineer began enforcing the stipulation using annual operating criteria developed for this purpose.

⁵¹Case No. 02CW181, District Court, Water Division 2.

⁵²Codified at § 37-66-101, *et seq.*, C.R.S. See, for background, *Kuiper v. Gould*, 196 Colo. 197, 583 P.2d 910 (1978) and *Alamosa-La Jara Water Users Protection Association*, 674 P.2d 914, 918-919 (Colo. 1983).

⁵³*Texas v. Colorado*, 391 U.S. 901, 88 S. Ct. 1649, 20 L.Ed.2d 416 (1968). Colorado's alleged accrued debit was later cancelled under the terms of the Compact by the hypothetical spill of Elephant Butte Reservoir in 1985 and the lawsuit was subsequently dismissed with prejudice by the U.S. Supreme Court.

By 1975, substantial curtailment of water uses on both the Rio Grande and Conejos Rivers⁵⁴ had occurred and considerable controversy had arisen concerning how the Compact delivery obligation should be allocated between Rio Grande and Conejos water users, between Rio Grande mainstem and tributary water users, and between ground water and surface water users. In August 1975, the State Engineer proposed rules and regulations to address these issues, to be effective on January 1, 1976. The proposed rules fell into three categories: the “separate delivery rules” identifying the respective delivery obligations of the Conejos River and the Rio Grande mainstem, the “tributary rule” allowing the State Engineer to curtail water uses on all tributaries of the Rio Grande to satisfy Compact obligations, and the “underground water rules” providing for curtailment of ground water use over a 5-year period, unless well users obtained water court approved augmentation plans or decreed alternate points of diversion at the wells for surface water rights.

Many protests to the proposed rules were filed with the Division 3 water judge. The water judge initially disapproved the proposed rules on the grounds that the State Engineer had not followed the proper procedures under his “compact rule power”⁵⁵ for adopting the separate delivery rules and the tributary rule and that these rules must be adopted in a separate proceeding from the underground water rules. This ruling was appealed to and ultimately reversed by the Supreme Court in 1978 in *Kuiper v. Gould*,⁵⁶ and the case was remanded to the water judge for further proceedings.

On remand, there was a lengthy trial on the substance of the proposed rules, after which the water judge issued a decision approving the separate delivery rules and the tributary rule and disapproving the underground water rules. The water judge disapproved the underground water rules because they allowed curtailment of wells without an individual determination of the injury caused by each well and because, when formulating the proposed rules, the State Engineer had not considered whether surface water users should be required to use a reasonable means of diversion (i.e., divert tributary ground water) to satisfy their surface rights before seeking curtailment of junior wells.⁵⁷

This decision was also appealed and in 1983, in *Alamosa-La Jara Water Users Protection Association v. Gould*,⁵⁸ the Supreme Court affirmed the water judge’s ruling on the separate

⁵⁴The Conejos River joins the Rio Grande mainstem at Los Sauces. The Rio Grande River Compact contains separate delivery obligations for the Conejos River and the Rio Grande mainstem.

⁵⁵Section 37-80-104, C.R.S.

⁵⁶196 Colo. 197, 583 P.2d 910 (1978).

⁵⁷For historical background concerning the reasonable means of diversion requirement, see *City of Colorado Springs v. Bender*, 148 Colo. 458, 366 P.2d 552 (1961).

⁵⁸674 P.2d 914 (Colo. 1983).

delivery rules and the underground water rules (although on slightly different grounds than the water judge had used) and reversed the ruling on the tributary rule. Accordingly, after eight years of litigation, the proposed rules were remanded to the State Engineer for reconsideration of the reasonable means of diversion policy in connection with the proposed underground water rules. The Court suggested that the separate delivery rules should not go into effect pending the State Engineer's reconsideration of the underground water rules. Because of subsequent developments described below, the State Engineer did not undertake further rulemaking action and neither the separate delivery rules nor the underground water rules were implemented as formal rules.

Following the Supreme Court's second remand of the proposed rules in 1983, the surface water and ground water users on the Rio Grande and Conejos Rivers entered into negotiations which resulted, in 1985, in an agreement referred to as the "60/40 agreement." This agreement is evidenced by substantially identical resolutions of the Boards of Directors of the Rio Grande Water Conservation District, the Conejos Water Conservancy District, the San Luis Valley Water Conservancy District and the Rio Grande Water Users Association. The 60/40 agreement provides that the usable yield of the Closed Basin Project⁵⁹ will be divided between the Rio Grande and the Conejos Rivers, with the Rio Grande receiving 60% of the usable yield and the Conejos receiving 40%, and that, for the duration of the agreement, the parties waive all claims of injury resulting from 1985 use levels of then-existing wells. The agreement further provides that it is void if the Closed Basin Project does not yield a specified minimum amount in any 10-year period. This agreement is still in effect and essentially allows pre-1985 wells to pump at their 1985 use levels without curtailment. However, although not fully tested yet, it is possible that the minimum Closed Basin Project usable yield on which the agreement is premised will not be attained and that the agreement, including the injury claim waiver, may terminate.

The 60/40 agreement does not provide any protection for new ground water uses in the Rio Grande River Basin after 1985 or increased ground water uses from pre-1985 wells. As a result, controversy has continued concerning the conditions under which these uses can be made, due in part to several high profile ground water development projects proposed in the valley and due in part to increased consumptive use from conversion of pre-1985 wells from flood irrigation to sprinklers. In 1998, the legislature adopted House Bill 98-1011⁶⁰ to address at least some of these issues. House Bill 98-1011 requires that any new withdrawal of ground water that affects

⁵⁹The Closed Basin Project is a federal reclamation project in Saguache and Alamosa counties, and is designed to provide water from the unconfined aquifer of the Closed Basin for delivery to the Rio Grande River to help meet Colorado's obligations under the Rio Grande Compact. *See*, for more details, *Closed Basin Landowners Association v. Rio Grande Water Conservation District*, 734 P.2d 627 (Colo 1987).

⁶⁰1998 Colo. Sess. Laws 852, enacted on May 26, 1998 (codified at §§ 37-90-102(3)(a), 37-90-137(12) and 37-90-305(6)(c), C.R.S.).

the confined aquifer system in Water Division 3 shall be permitted pursuant to a water court-approved plan for augmentation that also meets the requirements of rules and regulations to be promulgated by the State Engineer by July 1, 2001. House Bill 98-1011 contains specific criteria to guide the State Engineer in the promulgation of these rules and requires that the rules be based on a specific study of the confined aquifer system. House Bill 98-1189,⁶¹ also adopted in 1998, appropriated \$2 million out of the Colorado Water Conservation Board construction fund for design of a decision support system for the Rio Grande River basin, in part to satisfy this specific study requirement. The Rio Grande Decision Support System (“RGDSS”) has been developed and is expected to be operational by the end of 2003.⁶² The July 1, 2001 deadline for the State Engineer to promulgate the rules mandated by House Bill 98-1011 has been extended several times awaiting completion of the RGDSS. The most recent extension occurred in 2003,⁶³ and the deadline is now July 1, 2004.

In the meantime, water levels in both the confined and the unconfined aquifers have declined from 1985 levels. In some areas, the effect of these water level declines has been significant enough to prompt well users and surface water users to attempt to find a negotiated solution in lieu of costly legal battles. One solution being considered within the Rio Grande Water Conservation District is the formation of a subdistrict that would include about 200,000 acres. The subdistrict would collect annual assessments from farmers within its boundaries and would use the funds collected to pay farmers not to irrigate, with the goal of stabilizing water levels within the aquifer. If successful, this “model” might be followed in other parts of the Rio Grande River Basin to address declining water levels, injury to surface water users from unaugmented pumping of post-1985 wells and, if the 60/40 agreement terminates, injury to surface water users from pumping of pre-1985 wells.

South Platte River Basin (Water Division 1)

In November 1972, at the same time as he proposed rules and regulations for the Arkansas River Basin, the State Engineer also proposed rules and regulations governing use of ground water in the South Platte River Basin, also to be effective on February 19, 1973. In the South Platte River Basin, however, numerous protests were filed to the proposed rules.⁶⁴ Like the unprotested 1973

⁶¹1998 Colo. Sess. Laws 532, enacted on April 30, 1998.

⁶²The Rio Grande Decision Support System is a water management system being developed by the Colorado Water Conservation Board and the Colorado Division of Water Resources to assist in making informed decisions regarding historical and future use of water in the Rio Grande River Basin. More information concerning RGDSS is available on the Colorado Division of Water Resources website at <http://cdss.state.co.us/overview/rgdss/rgdss.asp>.

⁶³HB 03-1005, 2003 Colo. Sess. Laws 1595, enacted on May 2, 2003.

⁶⁴Consolidated Case Nos. W-7209, W-7232, W-7249, W-7289, W-7290, W-7295, W-7296 and W-7298, District Court, Water Division No. 1.

Rules for the Arkansas River Basin, the proposed rules for the South Platte River Basin provided for curtailment of well pumping for not more than four days per week when necessary to prevent material injury to senior surface rights and allowed well users to avoid curtailment altogether if they had written plans to replace depletions approved by the State Engineer or used the wells as alternate points of diversion for surface water rights.

After approximately three weeks of trial before the water judge, but before the trial had been concluded, the protesting parties and the State Engineer reached a stipulation for entry of a decree by the water judge and for adoption of amended rules and regulations by the State Engineer. This stipulation was approved by the water judge and a decree was entered on March 15, 1974. Amended rules and regulations consistent with the parties' stipulation and the water judge's decree were adopted by the State Engineer and became effective as of March 16, 1974 ("1974 Rules").⁶⁵ The 1974 Rules, which are still in effect, provide for total curtailment of well pumping as of 1976 and thereafter, unless the well is operating pursuant to a water court approved plan for augmentation, as a decreed alternate point of diversion or new point of diversion for a surface right, under its own priority without injuring senior appropriators, or under a temporary augmentation plan approved by the State Engineer under the authority of Senate Bill 7.⁶⁶

After passage of the 1969 Act, many well users in the South Platte River Basin filed applications for adjudication of water rights for their wells. Some well users also filed applications with the water court for approval of plans for augmentation and ultimately obtained decrees approving those plans for augmentation. Other well users elected not to file applications with the water court for approval of plans for augmentation, but instead formed and/or joined groups that obtained annual approvals of temporary augmentation plans from the State Engineer. The largest of these groups were the Ground Water Management Subdistrict of the Central Colorado Water Conservancy District ("Central"), which included approximately 1,000 member wells, primarily in Weld and Adams counties, and Ground Water Appropriators of the South Platte River Basin, Inc. ("GASP"), which included approximately 3,000 member wells, primarily in Weld, Morgan, Logan and Sedgwick counties.⁶⁷

⁶⁵Amended Rules and Regulations Governing the Use, Control and Protection of Surface and Ground Water Rights of the South Platte River and Its Tributaries, http://water.state.co.us/pubs/rule_reg/south.pdf.

⁶⁶Originally codified at § 148-21-23(4), C.R.S. 1963, later codified at § 37-92-307, C.R.S. 1973, and subsequently repealed by Senate Bill 4 in 1977. See discussion above.

⁶⁷For a comparative discussion of GASP's temporary augmentation plan, Central's temporary augmentation plan, and other well augmentation plans on the lower South Platte River, see *Colorado's Law of "Underground Water": A Look at the South Platte Basin and Beyond*, by Lawrence J. MacDonnell, published in the University of Colorado Law Review, Vol. 59, pages 579_625 (1988).

Neither the 1974 Rules nor Senate Bill 7 authorized the State Engineer to approve a temporary augmentation plan where no water court application for approval of an augmentation plan was pending. Nonetheless, even after Senate Bill 7 was repealed in 1977, the State Engineer continued to approve the Central and GASP annual operating plans as temporary substitute supply plans under § 37-80-120, C.R.S. This practice continued until the Supreme Court held in early 2002, in *Empire Lodge Homeowners' Association v. Moyer*,⁶⁸ that the State Engineer did not have authority under § 37-80-120, C.R.S., to approve temporary substitute supply plans that allowed out-of-priority water uses. For a number of years prior to the *Empire Lodge* decision, some surface water users had been expressing concerns about the adequacy of the Central and GASP annual temporary substitute supply plans. The *Empire Lodge* decision, combined with the severe drought in 2002, brought those concerns to the forefront and prompted broader discussions among South Platte water users concerning ground water use issues and the State Engineer's role in approving out-of-priority water uses generally.

As a result, the legislature in 2002 passed House Bill 02-1414,⁶⁹ which gave the State Engineer authority to approve substitute water supply plans allowing out-of-priority water uses in four carefully prescribed circumstances. With respect to ground water uses that had previously been allowed pursuant to temporary substitute supply plans under the authority of § 37-80-120, C.R.S., House Bill 02-1414 authorized the State Engineer to approve one renewal of such plans with the renewal not to extend beyond December 31, 2002. House Bill 02-1414 also authorized the State Engineer to approve out-of-priority water uses where a water court application is pending, where the temporary use will not exceed five years in duration, and in emergency situations not exceeding 90 days of use.

Empire Lodge was a case involving a substitute supply plan for an out-of-priority surface water use and the opinion therefore did not directly address the question of the extent of the State Engineer's authority to approve out-of-priority ground water uses. Many well owners, and the State Engineer, interpreted *Empire Lodge* to allow the State Engineer to continue to approve well operation plans pursuant to rules and regulations adopted by the State Engineer under § 37-92-501, C.R.S., which allows the State Engineer to make rules and regulations in aid of his administrative duties and obligations, or § 37-80-104, C.R.S., which allows the State Engineer to make rules and regulations in aid of his compact administration duties. Accordingly, in May 2003, after unsuccessful attempts among wells users, surface water users and the State Engineer to develop an agreed-upon set of amended rules, the State Engineer filed proposed amended rules and regulations governing ground water use in the South Platte River Basin ("2002 Proposed Rules") with the Division 1 water court.⁷⁰ The 2002 Proposed Rules were fashioned

⁶⁸39 P.3d 1139 (Colo. 2002).

⁶⁹2002 Colo. Sess. Laws 459, enacted on May 23, 2002 (codified at § 37-92-308, C.R.S.).

⁷⁰Case No. 02CW108, District Court, Water Division 1.

after the 1996 Arkansas River Rules and authorized the State Engineer to approve annual replacement plans that would allow out-of-priority ground water uses by pre-1972 wells in the South Platte River Basin. The 2002 Proposed Rules did not contain a requirement for well owners to obtain a water-court approved plan for augmentation at any time. Thirty-seven protests were filed to the 2002 Proposed Rules. The threshold legal issue raised by protesting parties was whether the State Engineer had the statutory authority to approve out-of-priority ground water uses, other than as authorized by the legislature in House Bill 02-1414. In late December 2002, the Division 1 water judge held that the State Engineer did not have such authority and that the 2002 Proposed Rules were void in their entirety. The State Engineer and GASP appealed this ruling to the Supreme Court which, upon request of the State Engineer, expedited the proceedings on appeal. On April 30, 2003, in *Simpson v. Bijou Irrigation Co.*,⁷¹ the Supreme Court upheld the water judge's ruling that the State Engineer did not have statutory authority to approve out-of-priority water uses except as provided in House Bill 02-1414.

On the same day, April 30, 2003, the governor signed Senate Bill 03-73.⁷² Senate Bill 03-73 amended the provisions of House Bill 02-1414 which authorized the State Engineer to approve one renewal of substitute supply plans that had been approved under § 37-80-120, C.R.S., prior to the *Empire Lodge* decision. Senate Bill 03-73 was a consensus bill developed jointly by surface and ground water users. It clarifies that the State Engineer does not have authority in the South Platte River Basin to authorize out-of-priority water uses requiring augmentation except as expressly provided in § 37-92-308, C.R.S., as amended by Senate Bill 03-73. It further provides that the State Engineer can approve substitute water supply plans for wells in the South Platte River Basin under the criteria set forth in Senate Bill 03-73 through December 31, 2005, and that after that time, the wells will be curtailed unless they are included in a water court-approved plan for augmentation, are the subject of a pending water court application for approval of a plan for augmentation, or can be operated under their own priorities without augmentation.

As a result of these judicial and legislative actions in 2002 and 2003, applications for approval of plans for augmentation have been filed with the Division 1 water court for all but about 800 of the non-exempt wells operating in the South Platte River Basin. The largest of these filings is Central's application, filed in late December 2002, which includes almost 1,000 wells.⁷³ That case is set for trial in May, 2005. Other cases involving fewer wells have been set for trial throughout 2004 and others will likely be set for trial during that same time frame. These augmentation plans, if approved, will result in full integration of the included wells and ground water uses with surface water uses under the 1969 Act. Substitute water supply plans allowing operation of most of these wells in 2003 were approved pursuant to § 37-92-308(4), C.R.S., and

⁷¹69 P.3d 50 (Colo 2003).

⁷²2003 Colo. Sess. Laws 1446, enacted on April 30, 2003 (codified at § 37-92-308(3), C.R.S.).

⁷³Case No. 02CW335, District Court, Water Division 1.

will likely be requested for subsequent years until the water court applications have been concluded by decrees.

The future of the 800 wells not included in pending applications filed with the water court is uncertain at this time. These wells are owned by members of GASP. GASP requested approval of a substitute water supply plan for 2003 under the provisions of Senate Bill 03-73. However, because of lack of adequate replacement water supplies, the State Engineer approved the plan only for replacement of ongoing depletions from prior years' pumping of these wells and did not approve any new pumping in 2003.⁷⁴

CONCLUSION

Integration of ground water with surface water under the 1969 Act is a work in progress. Integration is most complete in the Arkansas River Basin. In the South Platte River Basin, integration should be complete when decrees have been entered in all of the augmentation plan applications now pending in the Division 1 water court, and any others filed by the December 31, 2005 deadline of Senate Bill 03-73. That will take at least 5 years, and perhaps considerably longer. The pace of final integration in the Rio Grande River Basin is unknown and depends upon whether the 60/40 agreement continues in effect for pre-1985 ground water uses and whether issues associated with post-1985 ground water uses are resolved by cooperative efforts or litigation.

⁷⁴Decision of State Engineer concerning Request for Approval of a Substitute Water Supply Plan, pursuant to § 37-92-308(3) for the Groundwater Appropriators of the South Platte River Basin, dated August 22, 2003. For more information concerning the proposed GASP plan, see <http://www.gaspaugmentation.org>.