

History of Well Regulation South Platte River Basin

**By
Hal Simpson**

September 6, 2006

- 1960's – Senior surface water right owners began complaining about well pumping impacting stream flow and water rights.
- 1968 – Colorado Legislature authorizes study by consultants to determine impact of junior wells constructed in the 1940's and later. The study found that wells were reducing stream flows by pumping wells outside the priority system.
- 1969 – Colorado enacts the 1969 Water Rights Determination and Administration Act that requires all tributary wells to file for adjudication by July 1, 1972 and further required the State Engineer to administer the wells once adjudicated in the priority system. Furthermore, the State Engineer could promulgate rules to assist in the administration of wells.
- 1970 – State Engineer Kuiper begins rule making to curtail wells on graduated basis, i.e. 1 day per week in 1970, 2 days in 1971 and so on unless wells were operating in accordance with a court approved augmentation plan or a plan approved by the State Engineer under CRS 37-80-120.
- The rules were challenged by a well owner organization and a 4 week trial took place in 1974. The trial was recessed and the parties stipulated to a decree incorporating the rules as proposed that was issued in 1974.
- State Engineer Kuiper in the early 1970's encouraged well owners to form associations or conservancy districts to develop plans to replace well depletions that occurred when there was a call on the South Platte

River, which in the 1970's, 1980's and 1990's was usually just the months of July and August.

- GASP (Groundwater Appropriators of the South Platte) was established in 1972 (3,000 wells) and the Central Colorado Water Conservancy District's Ground Water Management Subdistrict ("Central WCD") was formed in 1973 (1,000 wells). Both organizations operated under annual replacement plans, or substitute water supply plans ("SWSP") approved by the State Engineer. Both plans relied on the fact that the period for senior calls was very limited due to good runoff conditions.
- This practice continued under State Engineer Danielson from 1980 to 1991. State Engineer Simpson continued this annual approval of SWSP's in 1992 with a strong warning in each letter of approval that both organizations needed to prepare for a drought condition and acquire more water. Central WCD did acquire more water since it has a tax base to use to payoff indebtedness. GASP did not have this ability and relied on annual assessments to each well owner based on acre feet pumped.
- In 2000, litigation was initiated in the Arkansas River basin between Empire Lodge Homeowners Association and Moyers. This involved access issues, but a fight over water also developed and the issue was the State Engineer's approval of a SWSP under CRS 37-80-120 that allowed a trout pond to be filled by exchange out of the Arkansas River up a small tributary. Judge Anderson ruled that, in his interpretation of the statutes, the legislature did not give the State Engineer authority to approve SWSP's. This ruling was appealed to the Colorado Supreme Court in 2001. The Supreme Court issued its opinion in late 2001 agreeing with the Water Court. This had a direct impact on the annual approval of SWSP's in the South Platte River basin since the State Engineer no longer had the authority to approve the plans.
- In 2002, the Legislature passed HB 02-1414 which allowed the State Engineer to approve an SWSP if an application for a plan for augmentation was pending in Water Court. This bill also required for the first time notice to interested parties and allowed a plan to be appealed to the Water Court.

- State Engineer Simpson filed new well use rules in May of 2002 that were nearly identical to the rules promulgated successfully in the Arkansas River basin in 1996. These rules would have allowed the State Engineer to annually approve plans SWSP's that met the much more stringent standards proposed in the rules.
- These rules were challenged as unconstitutional by some objectors. The Judge Klein ruled that annual approvals of replacement plans were not allowed by statute and this ruling was appealed to the Supreme Court in late 2002.
- In 2002, the worst drought in recorded history occurred and the call by senior water rights began in June and stayed on the rest of the year. The calls in 2003 were nearly for the entire year and in 2004 the situation was similar. This required considerably more augmentation water and GASP decided to go out of business. It finished its sale of water assets in 2006. The Central WCD's SWSP had to lease additional water to be able to be approved in these years.
- The Supreme Court ruled in March of 2003, regarding the rules proposed by State Engineer Simpson in May of 2002, and agreed with the Water Court that there is not statutory authority for this type of rules for well administration and remanded the rules back to the Water Court for consideration of the portion of the rules that pertained to the South Platte River Compact.
- The Legislature approved SB 03-73 in March of 2003 giving well organizations in the South Platte River basin up to three years to file a plan for augmentation with the Water Court and allowed the State Engineer to annually approve a SWSP after conducting a hearing.
- In 2003, GASP filed for approval of a SWSP under SB 03-73 and the plan was approved to allow for replacement of ongoing stream depletions that resulted from past pumping, but no pumping was allowed in 2003.
- The South Platte Well Users filed two augmentation plans with the Water Court in May of 2003 and sought approval of a SWSP for 380

wells. The plan was approved in June of 2003. This group was composed of former members of GASP.

- In 2004, Central WCD established the Well Augmentation Subdistrict (WAS) which included the above 380 wells and 61 additional wells for a total of 441 wells. A SWSP was approved for the Central WAS in April of 2004.
- In June of 2005, the Central WAS plan was approved for 445 wells.
- In April of 2006, Central WAS petitioned the Water Court to postpone a trial on its augmentation plan that was set for May 8, 2006 to February of 2007. Judge Klein agreed but only after the many objectors who had appealed the approval of the 2003 and 2004 SWSP's were allowed to have a hearing beginning on May 8 to show how the operation of SWSP's had injured their water rights.
- In 2006, Central WAS initially submitted a request for approval of a SWSP with a proposed pumping quota of 20 percent of average pumping and with a projected annual call period of 70 percent of the year. Based on an annual call of only 70 percent, Central WAS projected junior diversions to storage and recharge could provide almost 5,700 acre-feet of replacement water (approximately 50 percent of total replacement water in the plan). The 70 percent annual call period also reduced the amount of out-of-priority depletions that needed to be replaced. After considerable review in April, a preliminary decision was reached by State Engineer staff that based on the above average April 1 snowpack, the plan may work if the number of days of "no call" were reasonable. This would allow the WAS plan to store water under a junior water right in a lined gravel pit (2,359 acre-feet of storage was initially projected for the Shores Pit. Later information revealed only 1,500 acre-feet of storage volume was available and the liner for the pit had yet to complete a test to ensure it did not leak) and to use some recently completed recharge sites. A reduction in the number of days of "no call" required Central WAS to seek to obtain additional replacement sources. At that time, some leases still had not been signed and State Engineer was waiting on these when the May 1 snowpack information became available. That information showed that the snowpack had declined to well below average and Central's projected number of

days of “no call” was reduced to nearly zero. This reinforced the need for Central WAS to obtain additional replacement water. Some of the leased water from Fort Collins (4,000 to 5,000 acre-feet) was not available due to the changing runoff situation. The city wanted to wait until later in the year to see if they could still lease it to WAS. The WAS plan projection was updated on May 5 to include all legally available water. The increasing shortage that resulted from reduced leased water and storage would be made up by pumping augmentation wells by the amount of approximately 8,400 acre-feet. The out-of-priority depletions in 2006 totaled approximately 16,000 acre-feet with a pumping quota of 15 percent. According to the projection provided by Central WAS, for 2007 and 2008, there would be no CBT water available since it can not be used in a permanent plan for augmentation (policy of Northern Colorado WCD). Since CBT water played such a large role in the 2006-year plan, this would require that the augmentation wells would have to be pumped by an even larger amount in 2007 and 2008. This pumping only postpones the timing of replacement water and creates a future obligation that WAS could not meet with existing water rights and assets.

- State Engineer Simpson informed Tom Cech, manager of Central WCD and WAS around 1:00 p.m. on May 5 that he could not approve the plan, and suggested that if he denied the plan, Central WAS could appeal it to the Water Judge to consider with the appeals of the approvals of the 2003 and 2004 SWSP’s beginning on May 8.
- The Central WCD Board, based upon advice from their attorneys, decided to withdraw the SWSP request. They stipulated with the objectors to agree to not pursue approval of the 2006 SWSP if the objectors agreed to withdraw their appeals of the 2003 and 2004 SWSP’s. This stipulation was incorporated into an order by Judge Klein issued on May 8, 2006 after a short hearing that morning. The order also states that the member wells can not be pumped until the Water Court approves an augmentation plan which creates a major problem for Central WAS to pump in 2006
- The Rocky Mt. New published an article on May 10, 2006 describing the events as the State Engineer shutting down the wells.

- Members of NWWCD Municipal Subdistrict offered to allow Central to pump up to 10,000 a-f of Windy Gap water from the Colorado River to the front range if Central paid the pumping costs of about \$70 per a-f.
- Central submitted a request for \$1,000,000 from the Emergency Drought Assistance Fund with the CWCB around May 13 to cover the cost of NCWCD water – Windy Gap and additional CBT shares leased from Central Weld Water District. (3000 a-f)
- On May 15 Central provided new projections of depletions and available augmentation water for 2006 to SEO and objectors. About 9,000 a-f of augmentation credit above that available on May 5 now was available. SEO indicated it could approve the SWSP for 2006 if objectors would let Central out of stipulation not to pump in 2006.
- On May 16 SEO met with objectors to explain criteria for Emergency Drought Assistance Fund application. They indicated that they may seek to funds to pay for additional pumping of Windy Gap water improve S. Platte water supply.
- On May 16, SEO had conference call with CRWCD board members to explain the situation with Central and how Windy Gap water would be used in only in 2006 to assist Central.
- Around May 24, objectors sent letter to Central rejecting request to amend the stipulation not to pump.
- Time truly ran out for these well owners in 2006 and maybe forever.