

WELL REGULATION IN THE SOUTH PLATTE RIVER BASIN OF COLORADO¹

South Platte River Task Force Briefing Document June 2007

I. Chronology of Key Events Leading to Current Situation on the South Platte

The current conflict between surface and ground water uses has been a long time in the making. The same tensions have existed for decades, and the legislature and state water officials have struggled to integrate uses of tributary ground water into the priority system while protecting vested rights. The following chronology illustrates the long history of these issues, and the many legislative, administrative and judicial developments over the years.

1940s and 50s: Well Development

- Late 1940's – REAs brought electric power to rural areas and turbine pump technology became available, making diversions of ground water significantly more feasible.
- Drought in early 1950s reduced surface supplies, leading to the construction of thousands of wells in South Platte, Arkansas and Rio Grande river basins.
- Legislation in 1957 required State Engineer to permit wells prior to construction, but was administrative only with no evaluation standards and therefore no basis to deny.

1960s: Passage of the Ground Water Management Act and Early Attempts at Regulation

- The General Assembly, in 1965, in response to the conflict between surface and ground water users passed §148-11-22, C.R.S. (1963, as amended). This new section gave the State Engineer the first tools for addressing the impact of wells on other vested water users. §148-11-22(1). The same year saw the passage of the Colorado Ground Water Management Act, §148-18-1 *et seq.*, C.R.S. (1963, as amended) (now codified at § 37-90-101 *et seq.*, C.R.S. (2006)) ("1965 Act"). These statutes put ground water within the regulatory authority of the State Engineer and 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. Well permits were not issued in over-appropriated basins of the South Platte, Arkansas, and Rio Grande.
- Although the 1965 Act subjected new wells to an injury analysis, it did not require wells to get a decreed water right, and did not provide for administration in priority of permitted wells. Thus, while the 1965 Act enunciated a regulatory connection between surface and ground water, actual priority administration was not possible because many wells had no adjudicated priority dates.

¹ This article was prepared for the South Platte River Task Force based on information provide by several staff members the Colorado Division of Water Resources including Hal Simpson, Dick Wolfe, Kevin Rein, Jeff Deatherage, Jim Hall, Dave Nettles, Scott Cuthbertson, staff of the Attorney General's Office, Alex Davis of the Department of Natural Resources and outside counsel of Jim Lochhead, Anne Castle and Bill Caile.

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- During the mid-1960s dry conditions and low streamflows resulted in complaints by senior surface water rights on South Platte River and Arkansas River, claiming wells were causing depletions and should be regulated within the priority system like surface water rights.
- In June 1966, the Division Engineer in the Arkansas River basin attempted to regulate a limited number of wells, in response to complaints by holders of senior surface water rights.
- This led to the important 1968 Colorado Supreme Court decision in Fellhauer v. People, 167 Colo. 320, 447 P.2d 986 (1968). In Fellhauer, the Supreme Court held that any regulation of wells must be preceded by the promulgation of reasonable rules and regulations, and that wells should only be regulated to the extent that it resulted in a reasonable lessening of material injury to senior water rights. The Court stated that wells should be allowed to operate, to the extent possible, pursuant to conditions that protected senior users.
- Fellhauer contained the now-famous statement by Justice Groves that “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 added).
- In 1968, the General Assembly authorized two studies by consulting engineers to determine if unregulated wells were causing depletions to stream flows. Both studies found that the declining stream flow was related to increased well pumping since the 1950s.

Passage of the 1969 Act and Subsequent Regulations

- In 1969, the Legislature enacted the Water Right Determination and Administration Act, now codified at C.R.S. § 37-92-101, et seq. (“1969 Act”). Among other things, the 1969 Act required all tributary wells to file for adjudication in water court by July 1, 1972 and further required the State Engineer to administer the wells, once adjudicated, within the priority system. The 1969 Act also gave the State Engineer the authority to promulgate rules to assist in the administration of all wells. The provisions of the 1969 Act applied to all tributary wells in addition to any proposed wells. There was no provision to exempt existing wells from the new laws.
- The legislative declaration of the 1969 Act provides that “it is 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.” C.R.S. § 37-92-102(1)(a).
- The 1969 Act introduced the concept of a “plan for augmentation,” by which a well or other junior water right could divert or operate out-of-priority so long as replacement water was supplied in time, location, and amount sufficient to prevent injury to senior water rights.
- The 1969 Act placed jurisdiction for administration of the water rights of the state completely within the control of the State and Division Engineers. Section 148-21-34, C.R.S. (1963, as amended) (now codified at § 37-92-501, C.R.S.). In 1970 State Engineer

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Kuiper began rulemaking to curtail wells on graduated basis, i.e., one day per week in 1970, two 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 C.R.S. § 37-80-120 (“1969 Act Rules”). The 1969 Act Rules were challenged by a host of protesters that raised numerous objections. The most vocal objectors were well owners that wanted no regulation or curtailment of wells whatsoever. The water court agreed with the well owners and permanently enjoined the operation of the 1969 Act Rules. The Supreme Court reversed the judgment of the water court, holding:

We suggest that there is a slight indication of a feeling upon the part of plaintiffs and on the part of the trial court that changes should not be required in the operation of wells on the Platte River. There must be change, and courts, legislators, the State Engineer and users must recognize it. Kuiper v. Well Owners Conservation Ass'n, 176 Colo. 119, 150, 490 P. 2d. 268, 283 (1971).

- The General Assembly reacted to the water court dismissal of the 1969 Act Rules by enacting HB 71-1205. This was the bill that established State Engineer’s rule-making authority for water rules. HB 71-1205 added the following policy statement to what is now C.R.S. § 37-92-501:

It is the legislative intent that the operation of this section shall not be used to allow ground water withdrawal which would deprive senior surface rights of the amount of water to which said surface rights would have been entitled in the absence of such ground water withdrawal and that ground water diversions shall not be curtailed nor required to replace water withdrawn, for the benefit of surface right priorities, even though such surface right priorities be senior in priority date, when, assuming the absence of ground water withdrawal by junior priorities, water would not have been available for diversion by such surface right under the priority system. The state engineer may adopt rules and regulations to assist in, but not as a prerequisite to, the performance of the foregoing duties. 1971 Colorado. Sess. Laws, 1330, 1331, ch. 372, § 1 (amending § 148-21-34, C.R.S. (1963 as amended)).

- Because the 1969 Act Rules had already expired before the Supreme Court resolved the Kuiper v. Well Owners appeal, the case was not remanded for a new trial, but the State Engineer immediately began work on new rules.

1970s: Development of Augmentation Plans and Temporary Supply Plans

- The 1969 Act Rules would eventually become the 1974 Amended Rules. After they were proposed, the rules were challenged by a well owner organization, and a four-week trial took place in 1974. During trial, however, the parties stipulated to a decree incorporating the rules as they had originally been proposed, and the Amended Rules were issued in 1974.
- The 1974 Amended Rules were also influenced by legislation passed that year. The bill, SB 74-7, encouraged the promulgation of rules to act as guidelines for the temporary augmentation plan process that had been authorized by statute earlier that same year. SB 74-7 also authorized the State Engineer to grant temporary plans for augmentation where an applicant had filed an application for a plan for augmentation in the water court.
- Only three years later, the General Assembly repealed the experiment with temporary augmentation plans in 1977 Colo. Sess. Laws 1702, 1704, ch. 483, § 6 (SB 77-4). This repeal was based on concerns raised by the Supreme Court in Kelly Ranch v. Southeastern Colorado Water Conservancy District, 191 Colo. 65, 550 P.2d 297 (1976)

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about the constitutionality of the procedures. Specifically, the Supreme Court stated in dicta that the lack of notice to interested parties, coupled with the presumptive effect to be given to the State Engineer's findings concerning the adequacy of an augmentation plan, raised due process concerns. 191 Colo. at 76, 550 P.2d at 305.

- Because the 1974 Amended Rules included guidelines for use of the temporary augmentation plan statute, the State Engineer considered that aspect of the 1974 Amended Rules to be obsolete as a result of the repeal of § 37-92-307. However, the basic replacement criteria included within the 1974 Amended Rules continued to be followed by the State Engineer as required by § 37-92-501.5.

GASP and Central

- In the early 1970s State Engineer Kuiper 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 1970s, 1980s and 1990s was usually only during the months of July and August.
- GASP (Groundwater Appropriators of the South Platte) was established in 1972 (approximately 4,000 wells) and the Central Colorado Water Conservancy District's Ground Water Management Subdistrict ("Central GMS") was formed in 1973 (approximately 1,000 wells). Both organizations operated under annual SWSPs approved by the State Engineer under C.R.S. § 37-80-120. Both plans relied on the fact that the period for senior calls was very limited due to generally good runoff conditions.
- This practice continued under State Engineer Jeris Danielson from 1980 to 1991. While State Engineer Hal Simpson continued this annual approval of SWSPs starting in 1992, he included in each letter of approval a strong warning that both organizations needed to prepare for a drought condition and acquire more water. Central GMS did acquire more water since it had a tax base to use to secure and pay off indebtedness. GASP did not have this ability and relied solely on annual assessments to each well owner based on acre-feet pumped.

2000-2003: Empire Lodge and Simpson v. Bijou Decisions; HB 02-1414

- In 2000, litigation was initiated in the Arkansas River basin between the Empire Lodge Homeowners Association and Anne and Russel Moyer. The dispute involved access issues, but a fight over water also developed, and the issue was the State Engineer's approval of a SWSP under C.R.S. § 37-80-120 that allowed a trout pond to be filled by exchange out of the Arkansas River up a small tributary. The water judge ruled that the legislature did not give the State Engineer authority to approve SWSPs. This ruling was appealed to the Colorado Supreme Court, and in December 2001, the Court's decision in Empire Lodge Homeowner's Association v. Moyer, 39 P.2d 1139 (Colo. 2001), affirmed the water court's decision that the State Engineer did not have legal authority to approve SWSPs under the statute (C.R.S. § 37-80-120) that had historically been relied upon. The Empire Lodge case had a direct and immediate impact on the administration of water rights in the South Platte River basin, since the State Engineer no longer had authority to approve SWSPs, including the large plans covering thousands of wells that were operated by Central GMS and GASP.
- One remaining question was whether the operation of the pre-1972 wells had to be adjudicated by the water court under augmentation plans, or whether operation of these

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wells could continue under annual plans approved by the State Engineer, without water court adjudication. The owners of many surface water rights believed that water court adjudication was required. The State Engineer and GASP did not, and responded to the Empire Lodge decision by proposing amended rules and regulations pursuant to § 37-92-501, under which annual State Engineer approval would have continued without water court adjudication.

- Concurrently, during the 2002 session, the General Assembly responded to Empire Lodge by enacting HB 02-1414 (C.R.S. § 37-92-308). This legislation granted the State Engineer specific authority to review and approve SWSPs under four circumstances: (1) all previously approved SWSPs could be re-approved for 2002 only; § 37-92-308(3); (2) augmentation plans filed with the water court could be approved as SWSPs while the water court adjudication was pending; § 37-92-308(4); (3) short duration water uses (not exceeding 5 years) could be approved as SWSPs without water court adjudication; § 37-92-308(5); and (4) water use necessitated by a public health and safety emergency could be approved as SWSPs without water court adjudication for a period not to exceed 90 days. § 37-92-308(7). HB 02-1414 acknowledged the pre-existing rulemaking authority of the State Engineer under § 37-92-501, but it did not address the question of whether that rulemaking authority was broad enough to include annual approval of out-of-priority depletions without water court adjudication.
- State Engineer Simpson filed proposed new rules in May 2002. The rules, which were nearly identical to the rules promulgated successfully in the Arkansas River basin in 1996, would have allowed the State Engineer to annually approve “replacement plans” under much more stringent standards.
- 2002, however, also brought the worst drought in recorded history. The call by senior water rights began in June and stayed on throughout the rest of the year. The calls in 2003 lasted nearly the entire year, and in 2004 the situation was similar. As a result, replacement of depletions caused by wells required considerably more augmentation water and GASP ultimately went out of business in 2006. Central GMS had to scramble to lease additional water in order to obtain approval of its SWSP during those years.
- With the drought as a backdrop, more than 30 water user entities and individuals opposed the State Engineer’s proposed rules. Only a handful supported them. The parties agreed that there were threshold legal issues that could be briefed and decided as questions of law, prior to trial. Accordingly, several motions were filed in the Division 1 Water Court, challenging the State Engineer’s authority to adopt the proposed rules, and arguing that they could not take effect until after a full trial on the merits had been completed (the State Engineer wanted the rules to become automatically effective December 31, 2002, regardless of the status of water court review). These issues were briefed in the fall of 2002 and argued in December.
- In separate rulings, the water judge held that: 1) the rules could not take effect until after review by the water court had been completed; and 2) the rules must be dismissed in their entirety because the State Engineer lacked statutory authority to review and approve annual replacement plans outside the statutory framework of express authorization granted by § 37-92-308.
- The final dismissal by the water judge was signed on December 30, 2002. The State Engineer filed an appeal the next day, and requested expedited review by the Supreme Court. That request was granted, the case was fully briefed in approximately five weeks, and oral argument was held on February 19, 2003.

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- Also in December of 2002, Central GMS filed an application with the Division 1 Water Court for approval of a large plan for augmentation to cover depletions associated with nearly 1000 wells in the South Platte River Basin. Case No. 02CW335, Water Division 1.
- The Supreme Court ruled on April 30, 2003, regarding the rules proposed by State Engineer Simpson in May 2002. Simpson v. Bijou Irrigation Co., 69 P.3d 50 (Colo. 2003). The Supreme Court agreed with the water court that there was no statutory authority for this type of rules for well administration. The Court remanded the rules back to the water court for consideration of the portion of the rules that pertained to an interstate compact.
- The majority of the Simpson v. Bijou decision was devoted to analysis of the scope of State Engineer authority under the water rule power of C.R.S. § 37-92-501. After detailed analysis of existing statutes and legislative history, the Supreme Court concluded that the replacement plans contemplated by the proposed rules were the functional equivalent of temporary augmentation plans, that the State Engineer did not have legal authority to review and approve such plans except for the authority expressly granted to him by the General Assembly in § 37-92-308 (and a couple of other statutes not relevant here), and that review and approval of augmentation plans is within the exclusive jurisdiction of the water court. After reaching these conclusions, the Supreme Court held that the State Engineer does have authority to enact rules and regulations to enforce the South Platte River Compact under the compact rule authority, but that such rules must also fall within the scope of the water rule power.
- On the same day that Simpson v. Bijou was decided, the Governor signed SB 03-73, giving well organizations in the South Platte River basin three years to file a plan for augmentation with the water court, and allowing the State Engineer to annually approve an SWSP after conducting a hearing. The basic structure was patterned after the SWSP process already contained in § 37-92-308.

2003 to Present: Demise of GASP; Central GMS and WAS Augmentation Plan Litigation

- In 2003, GASP filed for approval of a SWSP under SB 03-73. The plan was approved to allow for replacement of ongoing stream depletions that resulted from past pumping, but did not allow any new pumping in 2003. GASP went out of business shortly thereafter, leaving hundreds of wells without augmentation coverage.
- Also in 2003, The “South Platte Well Owners” filed two applications for augmentation plans with the Water Court and sought approval of an SWSP for 380 wells. The SWSP was approved in June 2003. This group was composed of former members of GASP.
- In 2004, Central Colorado Water Conservancy District established the Well Augmentation Subdistrict (“Central WAS”) which included the above 380 wells and 61 additional wells, for a total of 441 wells. An SWSP was approved for Central WAS in April 2004, and Central took over prosecution of the combined WAS cases, Consolidated Case Nos. 03CW99 and 03CW177 in the water court.
- Meanwhile, the Central GMS application (Case No. 02CW335) was being prepared for a 2005 trial in the Water Court. The case was opposed by numerous water users, including a diverse group of municipalities, ditch companies, and other holders of senior surface rights.
- In May of 2005, the Central GMS case settled on the eve of trial. The resulting consent decree was the result of extensive settlement negotiations and contained numerous restrictive terms and conditions for the protection of senior water rights. The Central GMS decree utilized a “projection tool” to forecast future depletions and anticipated replacement

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supplies, resulting in an annual “quota” of allowable well pumping by the nearly 1000 Central GMS member wells.

- In June 2005, the Central WAS SWSP was again approved for 445 wells, while Central WAS began to prepare for a 2006 trial in the Water Court. The Central WAS case was again opposed by most of the same water users that had litigated the Central GMS case.
- In April 2006, with the May 2006 trial date approaching, Central WAS petitioned the water court to postpone trial on its augmentation plan. Many water users opposed the postponement, arguing that their water rights were presently being injured by the operation of the WAS wells under the State Engineer-approved SWSPs. The water judge agreed to postpone the trial to February 2007, but only after the objectors who had appealed the approval of the 2003 and 2004 SWSPs were allowed to have a hearing beginning May 8, 2006, to show how the operation of SWSPs had injured their water rights.
- During the spring of 2006, Central WAS engaged in an increasingly challenging and contentious effort to secure the ability of its member wells to pump during the 2006 irrigation season. Central WAS’s struggles during this period illustrate the challenges involved in the operation of a large-scale augmentation plan during a period of extended drought.
- Central WAS initially submitted a request for approval of a SWSP for 449 wells with a proposed pumping quota of 20 percent (of average historical pumping), based on a projected annual call period of 70 percent of the days of the year. Based on the projected 70 percent call, Central WAS projected that 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). Importantly, the 70 percent annual call assumption also reduced the amount of out-of-priority depletions that would need to be replaced.
- In April, after considerable review, a preliminary decision was reached by State Engineer staff that based on the above-average April 1 snow pack, the plan could work if the number of days of “no call” was reasonable. Periods of no call, or “free river,” would allow the Central 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; however, 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). The plan also proposed to use some recently completed recharge sites. A subsequent reduction in the projected number of days of “no call” required Central WAS to seek to obtain additional replacement sources. By May 1, the snow pack had declined to well below average and the State Engineer’s anticipated number of days of “no call” was reduced to nearly zero. This exacerbated the need for Central WAS to obtain additional replacement water. Some of the water expected to be available by lease, for example from Fort Collins (4,000 to 5,000 acre-feet), was no longer available due to the changing runoff situation.
- The Central WAS projection was updated on May 5, 2006 to include all legally available water. The increased shortage that resulted from reduced lease water and storage was proposed to be made up by pumping “augmentation wells” by the amount of approximately 8,400 acre-feet. The out-of-priority depletions from Central WAS wells in 2006 totaled approximately 16,000 acre-feet—with a pumping quota of only 15 percent. The projection provided by Central WAS for 2007 and 2008 also provided that there would be no CBT (Colorado-Big Thompson Project) water available since CBT cannot be used in a permanent plan for augmentation (policy of Northern Colorado Water Conservancy District). As CBT water played a large role in the replacement supply for the proposed

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2006 plan, the effect was to require that the augmentation wells would have to be pumped by an even larger amount in 2007 and 2008. Pumping of augmentation wells creates an immediate supply of replacement water but only postpones the timing of depletions, and it created a future obligation that Central WAS could not meet with existing water rights and assets.

- State Engineer Simpson informed Tom Cech, manager of Central Colorado Water Conservancy District, on May 5, 2006 that he could not approve the Central WAS SWSP as proposed, and suggested that if the plan was denied, Central WAS could appeal it to the water judge to be considered together with the appeals of the approvals of the 2003 and 2004 SWSPs that was set begin on May 8, 2006.
- Instead, the Central Board, based upon advice from their attorneys, decided to withdraw the 2006 SWSP request. Central stipulated with the objectors that Central WAS would not pursue approval of the 2006 SWSP if the objectors agreed to withdraw their appeals of the 2003 and 2004 SWSPs. This stipulation was incorporated into an order by Judge Klein issued on May 8, 2006. The Order also stated that the Central WAS member wells could not be pumped at all until the water court approved an augmentation plan. The result was severe: barely a month into the 2006 irrigation season, the Central WAS wells were ordered not to pump until further notice.
- Consistent with the withdrawal of the 2006 SWSP and the Water Court's order, the Division Engineer ordered all of the 449 Central WAS member wells to cease pumping. Notification was done primarily via certified mail. Division staff posted notices on the well sites when certified mail was not accepted. Division staff field inspected the great majority of Central WAS wells, collecting power meter and flow meter information to verify compliance with the stop-pumping order. As with other wells, Division staff have continued to monitor these wells and have filed complaints with the water court when a user has violated the order.
- After Central WAS withdrew its SWSP request for 2006, the Division of Water Resources has received approximately 11 individual SWSP requests from former or existing members of Central WAS.
- As the February 2007 trial date neared in the Central WAS augmentation plan cases (03CW99 and 03CW177), Central WAS dropped 230 wells from the applications, leaving approximately 219 wells in the plan. A disputed issue was whether or not Central WAS would still be responsible for replacing depletions associated with the past pumping of wells that were dropped from the plan. The water judge ruled that Central WAS did not have to replace any depletions associated with dropped wells, except for those depletions associated with operations under the 2003, 2004, and 2005 SWSPs. Central WAS later asked for a reconsideration of that ruling, which is still pending.
- Approximately 6 weeks of trial for the Central WAS augmentation plan began on February 5, 2007. The majority of the trial was held in February, with portions also held in March, April, and May. The last day of trial was held on May 3. On the last day of trial, Judge Klein set a schedule for the filing of a proposed decree and briefs from the parties. This briefing was completed and proposed rulings submitted on June 14, 2007. No ruling has been entered.

Box Elder Creek Basin and Efforts to Create a New Designated Ground Water Basin

- Concurrent with the efforts of Central WAS to adjudicate its augmentation plan in 2006 and early 2007, the Central Colorado Water Conservancy District undertook an effort to create a "designated ground water basin" in the Box Elder Creek drainage basin. See

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C.R.S. § 37-90-103(6). The drainage of Box Elder Creek extends from its origin just south of Interstate 70 near Watkins, northward to where it joins with the alluvial aquifer of the South Platte River approximately ten miles southeast of Greeley.

- As proposed, the basin would have encompassed a number of the wells included in the Central WAS augmentation plan application, along with many of the wells in the decreed Central GMS augmentation plan. If successful, this effort would have removed the area that was subject of the proposed designated ground water basin from the jurisdiction of the water court and the provisions of 1969 Act. Instead, the subject area would have been under the administrative jurisdiction of the Colorado Ground Water Commission (“Commission”) pursuant to the 1965 Act. This would have had numerous implications, the most important to Central WAS being the fact that well owners would no longer be affected by the South Platte Rules and the augmentation requirements included therein. The details of that effort are as follows:
- On March 6, 2006, John Moser, a well owner in Box Elder, along with the Central Colorado Water Conservancy District (“Petitioners”), filed with the Commission a Petition to create a new designated ground water basin, to be known as the Box Elder Creek Designated Ground Water Basin. This would have been the first such basin created within the last twenty years; most were created during the 1960s and 1970s, under the provisions of the 1965 Act. See C.R.S. § 37-90-106.
- At its regular May, 2006 meeting, the Commission heard argument from concerned water users regarding the appropriateness of the petition. After reviewing briefs from the Petitioners and parties opposing the designation and hearing additional argument, the Commission, at its August 2006 meeting, ordered that the petition be published and referred to a Hearing Officer for determination.
- A nine-day hearing was conducted by the Hearing Officer during the period of January 16 through January 30, 2007. During that time the Petitioners presented a case in support of the creation of a designated ground water basin, including significant expert testimony regarding the hydrogeology of the Box Elder Creek drainage. Numerous objectors also presented evidence and expert testimony. After hearing all of the testimony and evidence, on February 20, 2007 the Hearing Officer issued a decision recommending that the Commission dismiss the petition. On May 18, 2007, at its regular meeting, the Commission voted to affirm the Hearing Officer’s decision, effectively dismissing the petition.
- The effect of this decision is that the wells in the Box Elder Creek basin remain under the jurisdiction of the water court and are subject to the augmentation requirements of the 1969 Act and the South Platte Rules. The petitioners filed a “Notice of Appeal and Complaint for Judicial Review” in the Weld County District Court on June 14, 2007, to appeal the decision of the Hearing Officer and the Commission. There is no additional information regarding the status of that action at this time.

II. Basin Facts and Issues

In addition to this chronological background, following are some pertinent facts and issues regarding the current situation on the South Platte River.

- Basin Description
 - Total South Platte River basin drainage area is 23,138 square miles.
 - Precipitation averages 10 to 17 inches per year

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- Elevation ranges from 3,400 to 14,000 + feet above sea level
- Approximately 1 million irrigated acres
- Native flows for total basin estimated to be 1,400,000 acre-feet annually by the USGS
- Transmountain water provides approximately another 400,000 acre-feet per year
- Ground water pumping from high capacity alluvial wells located along the South Platte River provide just over 500,000 acre-feet annually under full allocation.
- Total surface water diversions equal approximately 4,000,000 acre-feet per year, including multiple uses of return flows from upstream diversions of native water, reservoir deliveries as well as trans-mountain imported water.
- From 1995 to 2007 the number of decreed plans for augmentation has gone from a little over 400 to over 750.
- From 1995 to 2007 the number of mainstem call changes has gone from 40 to 160, year round. This is a result of better streamflow information and increased value of water.
- From 1995 to 2007 the number of water rights for which daily diversions are recorded has gone from 3250 to almost 4900. This is in large part a result of junior recharge projects coming online and decreed augmentation plans and changes of water rights that require daily recording of diversions.
- Operation of Wells
 - Approximately 9,000 decreed high capacity wells² in South Platte River basin and its tributaries on record. Less in actual existence
 - Have inventoried approximately 7,400 large capacity wells
 - Still verifying use of remaining 1,600 wells (verification is starting near the river and moving out; it is estimated that 80% of these wells are in existence, but only 15% are being used)
 - For 2007, the anticipated number of Division 1 Substitute Water Supply Plans (“SWSPs”) with wells that will operate in 2007 is approximately 125. (This only includes SWSPs per 37-92-308 with wells.) Approximately 1,300 wells are included in these 125 plans.
 - The number of wells operating in decreed augmentation plans in Division 1 is approximately 3,700.
 - Some wells are operating at reduced levels in 2007. 968 of these wells are members of Central’s Groundwater Management Subdistrict (“Central GMS”) and are operating at 30% of average.
 - As described in more detail later, the trial regarding the augmentation plan for Central’s Well Augmentation Subdistrict (“Central WAS”) ended on May 3, 2007. A ruling from the Water Judge is not expected for several months. Until then, the 219 wells remaining in this plan are not allowed to operate.
- Well Replacement Requirements During Non-Irrigation Season (Winter, or Reservoir Storage Season)
 - State Engineer will no longer allow delayed aggregated replacement to occur if there is a reservoir call, unless it is specifically permitted by statute or the court. Aggregated replacement means that small daily replacement obligations are not

² The term “high capacity” generally refers to wells capable of diverting at rates of 50 gallons per minute (gpm) and higher. However, many irrigation wells operate at rates of 1000 to 2000 gpm (2.28 to 4.46 cubic feet per second).

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required to be provided on a daily basis, but are instead “aggregated” or accumulated for a month or an entire winter season.

- Will allow limited aggregation to occur during a month for efficiency of replacement purposes
- Also will allow aggregated prepaid (earlier than otherwise required) replacement of depletions if there will not be injury
- Factors Squeezing Water Supply and Driving Debate Regarding South Platte Well Use
 - Increased water demand with population growth
 - Drought/climate change
 - Continued transfer of senior agricultural water rights to municipal uses
 - Increased reuse of transmountain diversions
 - Water Court and Supreme Court decisions regarding regulation of wells and protection of senior surface rights
 - Statute changes- Increase in numbers of SWSPs
 - Earlier calls because of well use limits
 - Heavier use of reservoirs for irrigation
 - Increased installation of sprinklers, reducing return flows
 - Increased value of water and drought conditions have led to less cooperation and tighter administration, for example, no more “Gentleman’s Agreement (historical agreement between reservoir operators to allow upstream, out-of-priority storage during winter fill season).
 - Lining of gravel pits below Denver and on tributaries to recover reusable supplies (pumping or exchange to cities)
 - Increased vegetation in channels due to low flow conditions
- How Have Farmers Responded to These Changes?
 - Augmentation Plans and SWSPs- subject to water court and State Engineer processes
 - Increased use of surface water supplies, especially early in the year
 - Installation of pivot ponds
 - Changes in cropping patterns (more winter wheat, alfalfa, etc.)
 - Increased use of the South Platte River alluvial aquifer for retiming of depletions (recharge ponds, augmentation wells, recharge wells)
 - More use of reusable effluent and reservoir releases for replacement
- Current Enforcement by State and Division Engineers
 - Approximately 2,400 wells have been tagged or issued certified orders to cease pumping. Continuing to field check wells and issue orders as appropriate.
 - Filed or in process of filing complaints concerning 75 order violations to date. The majority of tagged well owners have complied with orders to cease pumping.
 - Issued a large number of notices and orders concerning measurement devices and accounting
 - Enforcement has been at least a year in arrears because of limitations in staffing.
 - Initially, the wells that were curtailed were primarily for supplemental irrigation supply. However, currently, more wells that are critical for farm operations have been ordered to cease pumping, such as those in Central WAS.
- Division of Water Resources (State and Division Engineers) Staffing
 - Legislature approved 4.5 additional people in 2006 (for ground water enforcement purposes mainly associated with wells pumping without an SWSP or augmentation plan).

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- Legislature approved 4.5 additional people in 2007 (3 FTE for ground water enforcement purposes mainly associated with monitoring operation of SWSP and augmentation plans).
- With additional staff, enforcement delays will be reduced and better monitoring of recharge and other measurements and accounting is possible.
- Efforts to Date by Division of Water Resources Have Included:
 - Focus on working with water users as opposed to enforcement
 - Continuing to provide training to users concerning flume and data logger installation
 - Have developed more formal recharge, exchange, and SWSP & augmentation plan accounting guidelines.
 - Have encouraged automatic data collection with data loggers. Have also encouraged additional telemetry to collect data
 - Have moved toward electronic rather than paper accounting
 - Identified need to level playing field with single set of rules that are protective of everyone's water rights. In some cases, may need to move municipal providers to same standard as well user groups.
 - Increased efforts to obtain input on water administration decisions.
 - Increased efforts to make data available.
 - Draft General Administration Guidelines for Reservoirs.
- Facts on Affected Wells:
 - 219 wells in Central WAS not allowed to pump unless and until augmentation plan decree is entered.
 - 2400 wells tagged or issued orders to cease pumping including those in Central WAS.
 - 968 wells in Central GMS with a 30% pumping quota for 2007.
 - Approximately 4000 wells no longer operating in any plan in 2007.

III. Possible Issues for Consideration by the Task Force

While not exhaustive, the following is an advisory list of issues that have arisen during the disputes of the last several years, where discussion could occur regarding creative solutions.

- More flexible wintertime administration of reservoir calls by the State and Division Engineers; aggregate replacement of winter depletions;
- Forgiveness of post-pumping depletion "debt" associated with some period of past well use;
- Grandfather wells prior to a certain date (e.g., "1969 Act");
- Revisit with Northern Colorado Water Conservancy District and other affected stakeholders the use of Colorado-Big Thompson Project water as a permanent augmentation source (currently prohibited by policy adopted by Northern Board of Directors);

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- Encourage and help the lower reaches of the South Platte River to develop water districts and/or water authorities so that the water users can be competitive in keeping some of our water here;
- Investigate growing alternative crops including dry-land farming;
- Investigate potential expansions of historical use by senior surface water rights; and
- Evaluate economic options such as subsidies, buyouts, or programs such as CREP and EQIP.

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