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What Does HB1303 DO?

Current Regulation of oil and gas wells by the State Engineer

The Division of Water Resources, whose director is the State Engineer, historically has not administered wells constructed to produce oil and/or gas ("oil and gas wells"). Although it is a known fact that oil and gas wells generally produce water from the oil and gas formations – sometimes incidentally, and in the case of Coal Bed Methane ("CBM") wells, as a necessary part of the process – the State Engineer has regarded this production of water to be under the administrative purview of the Colorado Oil and Gas Conservation Commission. What this has meant is that, as long as the oil and gas producer ("Producer") does not put the water to beneficial use, the State Engineer has not required that these oil and gas wells obtain a water well permit and, importantly, that their production of water not be curtailed if the result of water production could cause injury.

On the other hand, if the Producer were to put the water to beneficial use, the State Engineer would require that the Producer obtain a water well permit. Further, since according to case law, all ground water in Colorado is presumed to be *tributary* to natural streams, the water well permit would need to address injury to senior surface water rights through a water court-approved augmentation plan. If the source of the produced water is not *tributary* the Producer would not need the augmentation plan.

Tributary versus Nontributary ground water

Much of Colorado's ground water is *tributary* to natural surface streams. This means that the ground water is constantly interacting with surface water, either adding to its flow or depleting its flow. As a result, withdrawal of *tributary* ground water impacts the surface streams and, therefore, senior water rights on the surface streams. This impact may take place even at a great distance from where ground water is being withdrawn. It is possible, however, that some ground water is so isolated from surface water that the impact is minimal. Colorado statute acknowledges this type of ground water and distinguishes it from *tributary* ground water with the term "*nontributary*". The particular statute states a quantitative definition for this term and generally, a water user must use a mathematical model to demonstrate that ground water is *nontributary*.

Transition and Pending Developments

Recent case regarding Coal Bed Methane wells

In 2007 a couple of water users in southwest Colorado filed a legal action against the State Engineer, challenging this long-held approach of not administering oil and gas wells that produce ground water. In this case, the wells in question were a CBM wells. The district court found in favor of the plaintiff in this legal action. During the litigation the State Engineer determined that, contrary to past practice, he did indeed have the statutory responsibility to administer the produced water from oil and gas wells, due to the potential for injury to senior surface water rights. However, the State Engineer appealed the part of the district court decision that determined that the State Engineer must issue a water well permit for all oil and gas wells that produce ground water. This case before the Supreme Court has become known as the "Vance Case."

Supreme Court decision in the Vance Case

The Supreme Court has not issued a ruling in the Vance Case; however, the State Engineer believes that the ruling could be issued soon. The State Engineer also believes that it is prudent to anticipate that the ruling could affirm that production of water through an oil and gas well will require that the State Engineer administer all oil and gas wells that produce water. This could require that all the wells acquire a water well permit and court-approved augmentation plan, or its temporary equivalent, a substitute water supply plan approved by the State Engineer. This potentially applies to more than 34,000 wells.

Application of the Supreme Court decision to produced water that is nontributary

Current Colorado Water Law states that a water well permit is not required for oil and gas wells that produce *nontributary* ground water unless the ground water is put to a beneficial use. As stated above, the oil and gas wells that produce *nontributary* ground water would also not require a court-approved augmentation plan, since *nontributary* ground water is, by law, not administered in the prior appropriation system. Therefore, if produced ground water can be shown to be *nontributary*, the need for water well permitting can be avoided for the wells producing that ground water.

What does HB-1303 Accomplish?

HB-1303 allows a reasonable period of delay before administration

A current statute [Section 37-90-138, C.R.S.] requires that the State Engineer take action on wells withdrawing ground water out of compliance with the law. Section 4 of HB-1303 clearly states that this statute shall not apply to oil and gas wells until March 31, 2010. This allows time for the Producers to react to the outcome of the Vance Case ruling and its implications on ground water administration for oil and gas wells.

HB-1303 provides for rule making by the State Engineer

Section 3 of HB-1303 provides that the State Engineer may adopt rules to assist in the process for determining that ground water meets the definition of *nontributary*. Again, if the produced water can be shown to originate from a *nontributary* source, and if the Producer does not put the water to beneficial use after its withdrawal, there is no need for a water well permit or administration by the State Engineer.

HB-1303 provides an additional transition period of nearly three years, only for Coal Bed Methane wells that produce tributary ground water

Section 4 of the bill exempts all oil and gas wells from administration through March 31, 2010. After that date, all oil and gas wells producing *tributary* ground water will be subject to the State Engineer's administrative authority. That means that, along with a water well permitting requirement, the wells would be subject to operation under a court-approved augmentation plan, or its temporary equivalent, a substitute water supply plan approved by the State Engineer. Section 6 of HB-1303 provides that beginning April 1, 2010, and until December 31, 2012, CBM wells may operate under a new substitute water supply plan statute that allows operation without a water court application. This simply allows a period of nearly three years for developing a workable augmentation plan without the requirement of first submitting an application to water court.