

IN THE DISTRICT COURT IN AND FOR

WATER DIVISION NO. 1

STATE OF COLORADO

CIVIL ACTIONS NO. W-7209, W-7232, W-7242  
W-7249, W-7289, W-7290  
W-7295, W-7296, W-7298

IN THE MATTER OF THE PROPOSED )  
RULES AND REGULATIONS GOVERNING )  
THE USE, CONTROL AND PROTECTION ) STIPULATION  
OF SURFACE AND GROUND WATER )  
RIGHTS LOCATED IN THE SOUTH )  
PLATTE RIVER AND ITS TRIBUTARIES )

It is stipulated among the parties to these proceedings that no objection will be made by any of the parties signatory hereto, acting through their respective attorneys, to the entry of the attached "Findings of Fact, Conclusions of Law and Judgment"; nor will objection be made to the adoption of rules and regulations within the principles therefor, as contained in said findings, conclusions and judgment; nor to the "Amended Rules and Regulations of the State Engineer" attached hereto; and it is further stipulated that no further evidence either on direct or cross examination will be offered herein except as may be required pursuant to the "Findings of Fact, Conclusions of Law and Judgment" if entered by the Court in the terms attached hereto.

Each of the parties specifically reserves the right to raise constitutional questions in some other proceeding without in any way being prejudiced in, estopped, or precluded therefrom by virtue of this Stipulation or said Judgment.

Dated this 15<sup>th</sup> day of March, 1974.

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IN THE DISTRICT COURT IN AND FOR

WATER DIVISION NO. I

STATE OF COLORADO

CIVIL ACTIONS NO. W-7209, W-7232, W-7242  
W-7249, W-7289, W-7290  
W-7295, W-7296, W-7298

IN THE MATTER OF THE PROPOSED	)	
RULES AND REGULATIONS GOVERNING	)	
THE USE, CONTROL AND PROTECTION	)	FINDINGS OF FACT,
OF SURFACE AND GROUND WATER	)	CONCLUSIONS OF LAW
RIGHTS LOCATED IN THE SOUTH	)	AND JUDGMENT
PLATTE RIVER AND ITS TRIBUTARIES	)	

All references to statutes herein refer, without specific designation to the Colorado Revised Statutes.

FINDINGS OF FACT

1. These proceedings concern Rules and Regulations adopted by C. J. Kuiper, State Engineer of Colorado on the 16th day of November, 1972 to become effective February 19, 1973. The Rules and Regulations apply to the waters of the South Platte River and its tributaries.
2. Evidence was presented to the Water Court June 4 through 7 and June 11 through 14, October 29 through 31 and November 1, 5 and 6 of 1973. Of the parties bound by these proceedings, a fairly representative cross section has been active through numerous competent counsel supported by well informed engineering advisors. At a time when no party to these proceedings was foreclosed from placing further evidence before the Court, the active parties submitted suggestions for a final judgment herein and have stipulated and agreed, under the supervision of the Court, to these Findings of Fact, Conclusions of Law and Judgment.

3. All protests were consolidated for trial with relevant objections to the consolidation noted and reserved. In the interest of justice and to simplify proceedings under these protests, all objections to the consolidation of these protests were overruled and the protests were consolidated for trial.

4. During the pendency of the proceedings before this Court various parties made various motions. The Court reserved ruling upon certain motions and the admissibility of certain matters of evidence to permit making a complete record in this complex and highly technical proceeding.

5. Ground waters in the alluvium underlying the drainage basin of the South Platte River and hydraulically connected with its surface streams are a part of the river system, and removals either from the surface portion of the system or the underground portion of it, decrease water available in the whole system. A historical background is necessary to an understanding of the derivation of the final determinations herein. Until some thirty years ago, only limited diversions were made of the ground waters and nearly all diversions were made from the surface waters of the Platte River system. Until 1965, there was practically no administration by the State Engineer's office of groundwater diversions while surface water diversions were generally administered according to priority. The Office of the State Engineer, in regulating diversions of various appropriators, endeavored to curtail or shut down junior diversions to the extent necessary to provide a water supply needed for beneficial use by senior appropriators. To facilitate this work, the State Engineer had access to records of surface stream flows at various strategic places in the Platte River system. From experience gained in administration, the State Engineer operated according to practices which were the equivalent of regulations, which

were well understood in his office, and, whether written or not, were acquiesced in by appropriators of water in general.

6. It has been the long practice of the State Engineer in administering appropriations by diversion from surface streams to take into account the time it takes for water to flow along surface streams. When surface stream flows are diminished so that curtailment of upstream diversions becomes necessary to provide water for downstream senior appropriators, the timing and amount of curtailment is ordered on the basis of the well known velocities of flow in the various surface streams involved.

7. The evidence shows that in recent years the Office of the State Engineer has become increasingly familiar with the characteristics of flow of the ground water part of the South Platte River system. His office has undertaken extensive studies of that ground water flow which is at such a slow rate that administration of ground waters is more intricate and requires greater skill and expertise for proper administration.

8. There is evidence that ground water diversions, junior in time and in right to surface appropriators, have resulted in reduction of surface supplies of water which might otherwise have been available to senior surface appropriators. Sufficient facts exist to support the conclusion that a reasonable lessening of material injury to senior appropriators will be accomplished by the proper regulation of diversions by means of wells. The extent that diversions by means of wells shall be regulated to accomplish this reasonable lessening is provided for herein.

9. There are periods of many years when there is an over-abundance of water in the surface portion of the South Platte River system and that over-abundance, together with return flows from bene-

ficial uses, charge and recharge the ground water aquifer of the Platte River. The ground water of the Platte River constitutes a slowly moving body of water, much of which is below the influence of plant transpiration and evaporation. Much of said ground water is susceptible of diversion and application to beneficial use upon imposition of conditions necessary to protect senior rights.

10. The Office of the State Engineer offered evidence that it has developed a set of measurements of the physical characteristics of the ground water aquifer to calculate when diversions from the ground water aquifer by junior appropriators are or may be expected to be injurious to senior appropriators.

11. The time of impact of ground water diversions on the surface stream varies according to varying conditions including the distance of ground water diversion from the surface of the stream, the volume and duration of the diversion, and the elevation of the water in the ground water aquifer at the time the diversion is made. Ordinarily, river conditions are such that provision can be made by the ground water appropriator to provide to seniors the amount of any deprivation due to ground water diversions. Because of the time lag between a ground water diversion and its impact on surface water users, conditions may arise such that a potential injury to surface diverters may not actually occur, but the burden of assuring that there will be no injury to the senior appropriator must fall on the junior appropriator.

12. The evidence shows that the method described in the treatise by Robert E. Glover entitled "The Pumped Well", Technical Bulletin 100, Colorado State University is one of the generally accepted methods of calculating any depletion needed to be replaced in order to avoid injury to a senior exercising a valid call. The evidence

also showed, that because the method (which is sometimes referred to as the "Glover formula") is based on certain assumed factual idealizations, expert judgment must be exercised in its application to account for certain variations from these limiting assumptions. Other methods may be more accurate for solution of the problem in a particular case.

13. The proceedings herein show that this Court has jurisdiction of all water users in Water Division I and, whether present or not, all such water users are bound by the actions of the Court herein. The evidence shows that the factual determinations relied upon herein are the subject of some uncertainty, and that judgments required to be made by the Division and State Engineers in the enforcement and application of these Amended Rules and Regulations could potentially adversely affect the rights of parties hereto. It is necessary, however, to proceed with regulation on the best basis currently possible. Due to the anticipated complexity of the application of the Amended Rules and Regulations to particular fact situations, Jurisdiction should be retained.

#### CONCLUSIONS OF LAW

14. By Section 148-11-22(1), the legislature provided that the State Engineer, in the distribution of water according to priority, "shall adopt such rules and regulations and issue such orders as are necessary for the performance of\*\*\*" his duties in distributing water. In *Fellhauer vs. People*, 167 Colo. 320, 447 P.2d 986 (1968), the Supreme Court held that the State Engineer could not regulate wells in the absence of written rules and regulations and prescribed guidelines. In 1971, by an amendment to Section 148-21-34, the legislature made its intention clear in this regard by repealing 148-11-22(3) and repealing and amending 148-11-22(1) and (2) as set forth in 148-21-34, 148-21-35 and 148-21-36 in the 1969 Water Adjudication and Administration Act. The mandatory word "shall" was removed and now the last sentence of 148-21-34(1) provides "the State Engineer may adopt rules and regulations to assist in, but not as a prerequisite to, the perform-

ance of the foregoing duties." Sections 148-21-34, 35, and 36 when read together now indicate that such a proceeding as this, pursuant to a protest filed in this Court, is not for the purpose of suspending the obligations of the Office of the State Engineer to "order the total or partial discontinuance of any diversion\*\*\*" to the extent the water being diverted is required by persons entitled to use water under water rights having senior priorities\*\*\*" 148-21-35(2), but to assure that rules and regulations be consonant with the basic requirement for implementing the priority system among all appropriators.

15. The State Engineer has the continuing obligation to administer the water supply which is under his jurisdiction and to issue appropriate orders to effectuate such administration whether or not he has adopted rules and regulations to assist him in the performance of his duties. The "Amended Rules and Regulations" attached hereto are in full force and effect from and after the signing of this decree because stipulated to herein, without prejudice to a further determination with respect thereto if required pursuant to protest hereafter filed following their publication as required by law. Administration of the water of the South Platte River pursuant to the Amended Rules and Regulations attached to this decree will be in accordance with the order of this Court dated August 11, 1972 in Case No. W-6958.

16. The legislature has made special provision for integrating ground and surface water use by 148-21-23. In apparent recognition that augmentation plan approval before the Courts may take a considerable time, the legislature specifically provided by 148-21-(3) (148-21-23(4)) in 1971 Session Laws.) that "until the determinations shall have been made under subsection (2) \*\*\*the state engineer and division engineers shall develop tem-

porary augmentation plans\*\*\*to allow continuance of existing uses and to assure maximum beneficial utilization of the waters of this state." Unless water users file augmentation proceedings in the Water Court, the State Engineer may not hereafter authorize temporary plans of augmentation.

17. The Protestants contend that the "Proposed Rules and Regulations" dated November 16, 1972, which are the subject of this proceeding, are not proper as a matter of law; however, as a result of this stipulation to amend the Rules and Regulations it is not necessary to decide this issue.

NOW THEREFORE IT IS HEREBY ORDERED, ADJUDGED AND  
DECREED AS FOLLOWS:

18. The separate protests to the rules and regulations of the State Engineer have been consolidated for trial, and the protections accorded by the Rules of Civil Procedure in the consolidated action are preserved for each party.

19. All requests for rulings by the Court, other than objections to evidence, which were not otherwise formally ruled upon are hereby denied.

20. All objections to evidence not otherwise formally ruled upon are hereby denied, and all evidence submitted herein except as formally excluded is admitted.

21. The Amended Rules and Regulations of the State Engineer attached hereto have been agreed to by virtue of the stipulation of the parties participating in this proceeding and are hereby approved. Said Amended Rules and Regulations are effective herewith and shall remain in effect unless modified or amended in accordance with law. The said Amended Rules and Regulations shall be published as provided by statute, but shall remain in effect during the period of said publication and during the pendency of any protest.

22. Plans for augmentation involving ground water diversions from the South Platte River and its tributaries hereafter filed before this Water Court should utilize the facts and determinations developed in these proceedings to facilitate the administration of water in Water Division One. The method sometimes called the "Glover formula," as described in the treatise by Robert E. Glover and entitled The Pumped Well, Technical Bulletin 100, Colorado State University, may be used for the purpose of calculating replacement water necessary to make up for depletions caused by

diversions of ground water to comport with current practices in the Office of the State Engineer. However, some another appropriate method may be used. Such plans should also provide for meeting the other requirements of this decree.

23. To avoid a deprivation of water to some senior appropriator ground water appropriator shall make replacement water available for delivery as reasonably required by the Division Engineer, in a quantity, during a period, and at a place so as to prevent a deprivation of water to a senior appropriator caused by such ground water diversion. The Division Engineer shall use valid senior water calls as the normal criteria for requiring such replacements. In applying the terms of this paragraph, it is expected that the Division Engineer will be mindful of all applicable law without overlooking that part of 148-21-34 which reads:

(1) "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."

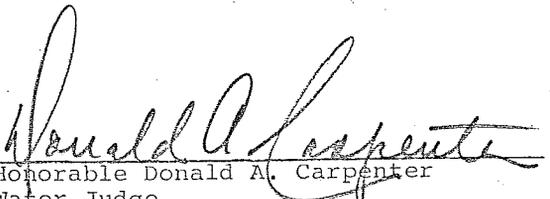
24. This Court shall retain continuing jurisdiction under these consolidated cases for the purpose of providing an immediate hearing to review the validity of a call, or requirement for providing replacement water, the approval or disapproval of temporary augmentation plans, findings of the Division Engineer pursuant to Rule 2(b) of the Amended Rules and Regulations stipulated to herein, or any other matter contained within the said Amended Rules and Regulations.

25. The Amended Rules and Regulations of the State Engineer, stipulated to by the parties hereto and attached to this decree, shall be published as provided by law, and all persons affected by any amendment contained in the Amended Rules and Regulations stipulated to herein other than any party bound by the stipulation herein shall have their statutory right to protest.

26. This order does not constitute an injunctive order, but this proceeding may be used, after appropriate notice, as the basis for securing any appropriate injunctive order. No damage occurring prior to issuance of such an injunction shall be the basis for damages, costs or attorneys fees referred to in '63 C.R.S. 148-21-37.

27. Since this is an action in rem, all who could have participated are bound by this order, judgment and decree.

DONE IN OPEN COURT this 15<sup>th</sup> day of March,  
1974.

  
Honorable Donald A. Carpenter  
Water Judge  
Water Division I

IN THE MATTER OF THE	)	
RULES AND REGULATIONS GOVERNING	)	
THE USE, CONTROL, AND PROTECTION	)	AMENDED RULES AND REGULATIONS
OF SURFACE AND GROUND WATER	)	OF THE
RIGHTS LOCATED IN THE SOUTH	)	STATE ENGINEER
PLATTE RIVER AND ITS TRIBUTARIES	)	

Pursuant to authority vested in the Office of the State Engineer, the State Engineer hereby,

FINDS, that on November 16, 1972 the State Engineer ordered that Rules and Regulations for the South Platte River were to become effective on February 19, 1973. As a result of protests filed to those Rules and Regulations and upon the basis of subsequent proceedings in the Water Court for Water Division I, those Rules and Regulations are hereby amended and changed to read as reproduced below.

The said Amended Rules and Regulations are adopted and shall become effective as of the \_\_\_\_\_ day of \_\_\_\_\_, A.D., 1974, and shall remain in full force and effect unless changed or amended as provided for by law.

"AMENDED RULES AND REGULATIONS"

RULE 1. Except as specifically noted below, these Rules and Regulations shall apply to all underground water of the South Platte River and its tributaries as defined in Colo. Rev. Stat. Ann. 1963, Sec. 148-21-3(4) (Supp. 1969), and reproduced below, as follows:

(4) "Underground water" as applied in this act for the purpose of defining the waters of a natural stream, means that water in the unconsolidated alluvial aquifer of sand, gravel, and other sedimentary materials, and all other waters hydraulically connected thereto which can influence the rate of direction of movement of the water in that alluvial aquifer or natural stream. Such "underground water" is considered different from "designated ground water" as defined in 148-18-2 (3).

These Rules and Regulations shall not apply to water withdrawn from wells, such as domestic and livestock wells, which are exempted from administration under Colo. Rev. Stat. Ann. 1963, Sec. 148-21-45 (Supp. 1972), and these Rules and Regulations shall not apply to water withdrawn from wells which are exempted from administration by Court decree or statute.

RULE 2. (a) Ground water diversions will be continuously curtailed according to the following schedule to provide for a reasonable lessening of material injury to senior appropriators:

- (1) During the Calendar Year 1974, five-sevenths (5/7) of the time;
- (2) During the Calendar Year 1975, six-sevenths (6/7) of the time; and
- (3) During the Calendar Year 1976, and thereafter, total curtailment.

Pumping shall be permitted on every Monday and Tuesday of each week in 1974 and on every Monday of each week in 1975. The Division Engineer shall administer this rule so that the operator of a well, or wells, may have a cycle of operation to make more efficient use of the water available; provided, that senior appropriators are not materially injured thereby.

(b) Ground water diversions shall be curtailed as provided under part (a) hereof unless the ground water appropriator submits proof to the Division Engineer and upon the basis of that proof the Division Engineer shall find:

- (1) That the well is operating pursuant to a

decreed plan of augmentation, that the well is operating pursuant to a decree as an alternate point of diversion, or that a change in point of diversion to the well has been decreed for a surface water right; or

- (2) That the ground water appropriation can be operated under its priority without impairing the water supply to which a senior appropriator is entitled, or
- (3) That the water produced by a well does not come within the definition of underground water in RULE 1.

RULE 3. Any ground water appropriator affected by these rules and Regulations may use a part or all of the water diverted without regard to curtailment described in RULE 2(a) to the extent his ground water diversion is in compliance with a temporary augmentation plan approved by the Division Engineer in accordance with Colo. Rev. Stat. Ann. 1963, Sec. 148-21-23(4) and where there is a plan for augmentation filed in the Water Court in accordance with Colo. Rev. Stat. Ann. 1963, Sec. 148-21-18 (Supp. 1971). The Division Engineer will promptly approve or disapprove such temporary augmentation plans submitted to him. The guidelines for any such temporary augmentation plan will be expected to meet at least the following criteria:

- (1) That replacement water for stream depletion shall be made available to the Division Engineer in an amount equal to 5 percent of the projected annual volume of a ground water diversion, and may be used by him at a rate of flow sufficient to compensate for

any adverse effect of such ground water diversion on a lawful senior requirement, as evidenced by a valid senior call, but at a rate not exceeding 5% of the capacity of the diversion structure.

- (2) Such capacity shall be determined by Court decree, if adjudicated, by application for a water right, if filed in the Water Court, by well permit, or by registration. If none of these means of determination is available, the capacity will be the maximum pumping or delivery rate, which must be substantiated by the appropriator.
- (3) The operation of the temporary augmentation plan 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 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.

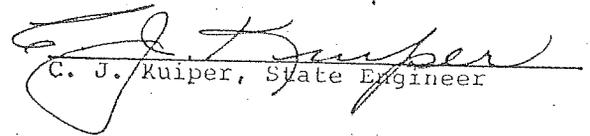
RULE 4. Whenever the Division Engineer is satisfied, upon the basis of competent evidence, that operation of

a temporary plan of augmentation pursuant to RULE 3(1) will not meet the requirements of RULE 3(3) above, modification of the plan will be undertaken by reference to criteria as follows:

- (1) The stream depletion caused by a well will be calculated by the method shown in The Pumped Well by Robert E. Glover, Technical Bulletin 100, Colorado State University or by other accepted engineering formulae appropriately modified to reflect the pertinent physical conditions.
- (2) The transmissivity value will be obtained from the U.S. Geological Survey Open-File Reports, Hydrogeologic Characteristics of the Valley-Fill Aquifer in the South Platte River Valley, Colorado, 1972, or from updated editions, or from calculations using accepted engineering methods.
- (3) The specific yield or effective voids ratio generally descriptive of the material in the aquifer will be assumed to be twenty percent (20%), or a different value may be used when it can be substantiated generally or as to any particularly area or situation.
- (4) The consumptive use, for irrigation purposes will be assumed to be forty percent (40%) of the total quantity pumped for irrigation uses, subject to modification upon proof that a different consumptive use situation exists with

respect to a particular diversion. For  
uses than irrigation, the amount will be  
determined from the actual conditions.

DATED this 15<sup>th</sup> day of MARCH, 1974.

  
C. J. Kuiper, State Engineer