

SOUTH PLATTE RIVER TASK FORCE
Options for Further Consideration

Comments, Responses and Questions
Prepared by Senior Users and Augmentation Decree Holders
August 22, 2007

In accordance with the Governor's Executive Order entitled "Creating the South Platte River Basin Task Force," the Task Force is charged with clearly articulating the problems faced by water users in the South Platte River Basin and recommending potential solutions. Specifically, the Task Force is to consider whether there are any changes to current water law or policy that will provide relief to junior ground water users without injuring senior water right holders.

Consistent with the executive order, in considering these recommendations, the senior water right holders believe it is important for the Task Force to first clearly articulate the problem faced by all water users in the South Platte River Basin, including junior well owners and owners of water rights which are adversely affected by operation of junior wells, before considering any changes to the law or administration of water rights.

The Task Force discussed certain recommendations for changes in the legal system governing well use at its July 27 and August 13, 2007, meetings. At the close of the August 13 Task Force meeting, Mr. Sherman, the co-chair, proposed that the Task Force give additional consideration to five of the options under discussion at the next meeting on August 27. These options raise important legal and engineering questions which the Task Force should consider in its deliberations, many of which have not been discussed at previous Task Force meetings. With this document, certain Senior Water Right Users and Augmentation Decree Holders are pleased to provide additional information on these options for consideration by the Task Force. The comments provided by the Senior Users and Augmentation Decree Holders follow in italics.

- 1) **Option 1:** Statutory change to provide amnesty on replacement obligations for depletions resulting from pre-1974 pumping.
 - a. *Well depletions reduce the flow of the South Platte River regardless of when the pumping that created the depletions occurred. The failure to replace the current and future depletions still occurring from pre-1974 pumping will injure other water users. This proposal will result in a redistribution of water from senior water users to junior wells and is beyond the scope of the Task Force's charge as set forth in the executive order.*
 - b. *The nature of the proposed amnesty has not been clearly defined for the Task Force. Is this amnesty proposed to apply statewide or only within the South Platte River Basin? Is the amnesty proposed to apply only to wells that do not yet have an augmentation plan in place, or to wells within already-decreed plans? The majority of augmentation plans do not provide amnesty for depletions from pre-1974 pumping. Those that do include amnesty for depletions arising from pre-1974 pumping do so as one of many complex terms and conditions which, taken as a whole, assure that all water users would be protected from injury by the plan. Changing one term of a carefully negotiated decree would undermine the overall protective effect of such decrees.*

- c. *The Task Force is charged with considering the problems faced by all water users on the South Platte River. If the Task Force will consider an amnesty, then it at a minimum needs to consider who will be hurt? What amount of water is involved and where will the depletions affect the river? What water rights are most likely to be injured? How in particular will this affect WD 64 and compliance with the SPR Compact? Moreover, if the intention of the amnesty is to allow wells that don't yet have plans for augmentation because they are short of augmentation supplies, will the amnesty eliminate enough of the wells' pre-existing replacement obligations so that they can get decreed augmentation plans under which all remaining depletions can be replaced?*
- d. *As an example of the potential injury from amnesty for depletions from pre-1974 pumping, the FRICO system depends upon 1909 storage rights for Barr Lake and Milton Reservoir, which are relatively junior in relation to downstream South Platte reservoirs (but which are significantly senior to the wells). It is likely that unpaid depletions would disproportionately impact FRICO's relatively junior rights because the continuing depletions would result in extended downstream senior calls.*
- e. *At the August 13 Task Force meeting, testimony was given that depletions from pre-1974 pumping would be approximately 2.5% of total well depletions to the South Platte River. However, this percentage was never quantified as an acre-foot amount, nor was it clear whether this percentage applies to all wells or only those that are not yet part of augmentation plans. Nor was information provided regarding where these depletions affect the river or what water rights may be affected. Absent this information, the Task Force does not have before it a proper basis to make an informed decision to assure that there is no injury from the proposed amnesty.*
- f. *Selecting 1974 as an amnesty date is arbitrary. Groundwater has long been understood to be a part of surface streams and subject to the doctrine of prior appropriation. In Nevius v. Smith, 279 P. 44, 45 (Colo. 1929), the Colorado Supreme Court recognized that water that is tributary to surface streams is subject to the priorities of senior surface users. Echoing a similar note, in 1953, the Colorado Supreme Court said in Safranek v. Town of Limon, 228 P.2d 975, 977 (Colo. 1951): "Under our Colorado law, it is the presumption that all ground water so situated finds its way to the stream in the watershed of which it lies, is tributary thereto, and subject to the appropriation as part of the waters of the stream." Groundwater users knew long before the 1974 rules were adopted for Water Division 1 that groundwater was subject to the demands of senior surface rights. , Senior water users would suffer injury if any amnesty was granted to ground water users from 1974 to the present.*

2) **Option 2:** Providing more flexibility for using excess augmentation credits.

- a) *We understand this proposal to have the purpose of promoting exchanges of excess replacement credits among augmentation plans in order to promote well pumping. Well pumping creates depletions that can last for decades. As a result, the availability of short-term excess credits appears to have little value as far as allowing additional pumping within an augmentation plan that must replace long-term depletions in order to prevent injury. Moreover, excess credits are not a dependable augmentation supply. Their availability, if any, will vary from year to year based on annual climatic conditions and the changing needs of the*

appropriator of the replacement supplies. Availability of excess credits will be particularly uncertain during times of drought, when appropriators are most likely to need all credits they have generated by their efforts and the potential injury to senior users is at its highest. It would be very unwise to base decreed augmentation plans having well depletions lasting for decades on irregular and unreliable short-term leases of excess credits.

- b) To the extent that excess credits can be of value to replace depletions in specific plans, for example, when a brief and unanticipated replacement supply shortage occurs, many existing decrees already permit this practice. These decrees permit augmentation plan owners to sell augmentation credits to well users on a short-term basis subject to notice to other water users who may be affected by the transfer and well use resulting from it. One way decrees already allow such use of excess credits is by substitute water supply plans and interruptible water supply agreements approved by the State Engineer.*
- c) Consistent with water court decrees, the Colorado water statutes also provide for use of excess credits in decreed augmentation plans. Under C.R.S. 37-92-305(8), water court decrees may provide procedures for the addition of temporary augmentation supplies to decreed augmentation plans on a short-term basis so long as injury is prevented. In addition, C.R.S. 37-92-305(9) allows the State Engineer to approve interruptible water supply agreements so long they do not result in injury to other water users.*
- d) Any use of excess credits must be carefully managed under the terms and conditions of water court decrees. Unless very carefully regulated, use of excess credits can provide the opportunity to play a shell game with replacement water if many different plans claim the right to use excess credits from the same source at the same time. Use of excess credits by more than one water user can result in difficulty in measuring and accounting for the use of excess credits in separate plans. Any use of excess credits needs to be the result of an open and transparent process to protect senior water rights without requiring the owners of senior water rights to bear material costs related to the management and accounting of use of excess credits.*
- e) To the extent that the Task Force may be considering a procedure by which the State Engineer would allow the use of excess credits without notice to potentially affected water users, there is a significant potential for injury to senior water users, which places this option outside the scope of the executive order. Water users presumably would want the ability to use the excess credits to enlarge the amount of well pumping they would otherwise be allowed. Other water users must have the right to notice and a hearing on plans that may affect their water rights. Assignment of excess credits should not be a matter for unilateral administrative discretion, which is why current decrees and statutes provide for due process protections when excess credits are used to supplement the replacement supplies in a water court decree.*

3) **Option 3: Water Court reform.** The memorandum presented to the Task Force by Alexandra Davis at the July 27, 2007, meeting included reference to the following possibilities: streamlining the Water Court process, recognizing specific engineering methods or calculations via rulemaking, increasing the authority of the water referee, and requiring demonstration of actual, not theoretical injury).

- a) The specifics of this option have not yet been presented to the Task Force or public. However, fundamental changes in the structure or authority of the water courts – of the kind in the July*

27 memorandum – require statewide consideration and are well beyond the scope of the executive order.

- b) Even if the Task Force takes this issue on, it is charged to define the problem. What is it that is not “streamlined” about the water court process? If the Task Force pursues this proposal, it should consult with attorneys and engineers who regularly appear and participate in water court proceedings before recommending any changes to the current system.*
- c) The fact is that the vast number of water cases settle while the case remains before the water referee. Referee proceedings present a forum to obtain a decree in a very informal, efficient and highly economical process. Very few water court cases reach trial. According to testimony by Mike Shimmin before the Task Force on July 16, 2007, approximately 96% of cases settle while they are before the referee, 4% are re-referred, and only 1% of cases filed in water court are actually tried to the water judge. Those that do go to trial generally involve novel legal issues that cannot be resolved by the referee and the judge is more able to properly identify the legal issues if he or she knows the facts.*
- d) In Water Division 1, since the Empire Lodge and Bijou decisions, many highly complicated well augmentation plans have been efficiently brought to a decree without trials. Only one case, Central WAS (03CW99 and 03CW77), required a trial. In that case, the applicants acknowledged during the course of the proceedings that they did not have sufficient augmentation supplies in hand to replace all ongoing and future depletions, which made this case unsusceptible to settlement. The water court process has not stood in the way of completing augmentation decrees in Water Division 1. In fact, the water court process has encouraged settlement by setting deadlines for the submission of information critical to the resolution of the augmentation plan cases, such as factual and engineering disclosure and proposed decrees, and by providing a state-sponsored judicial forum to come to agreement on complex proposed decrees.*
- e) The water referee already has the power to hear water right applications in an informal proceeding. What additional authority should water referees be given that would “streamline” water court proceedings? In fact, giving the referee additional authority would carry with it the risk that referee hearings would become more like the proceedings which currently occur before the water judge - more complex, less informal and more costly for litigants.*
- f) Under the present law, cases before the referee can be rereferred from the referee to the water judge for proceedings. Eliminating mandatory rereferral will slow down rather than streamline the water court process. Without mandatory rereferral, neither an applicant nor an objector can move a case forward because there are no enforceable deadlines for proceedings before the referee. Once a case is rereferred to the water judge, the case must be set for trial and pre-trial deadlines, including circulation of engineering reports and proposed decrees, go into effect. The exchange of this information is typically the basis for negotiations leading to settlement of the vast majority of water court cases. For example, in the Central GMS case (02CW335), when the objectors tried to expedite the case by rereferral, Central aggressively resisted a trial setting. On the basis of the facts before him, the Judge went ahead and set a trial. Once a trial was set, the parties were able to negotiate a settlement without a trial.*
- g) Water rights are real property rights which should be treated with the same dignity as other real property rights. This means they should be subject to determination by a judge and not*

only in informal proceedings before a water referee. In some instances, the water referees are not even lawyers and are not fully conversant with the legal concepts governing property or water rights. In any event, if litigants want to keep their cases before the referee, they can do so under the current law. As an alternative to the referee process, under current law parties may hire mediators if they prefer to do so to expedite settlement of water court cases..

- h) If the power of the referee is increased, that will just shift the location of the fight, not the scope or intensity. Any streamlining of the water court process must accord parties a level of due process necessary to protect their property rights. Given that appeals to the water court would clearly still be needed (just as now there are protests to most contested referee hearings), holding separate hearings before both the referee and water judge would be likely to make the water court process less efficient. See, e.g., the ongoing Box Elder litigation, which is currently on its third level of review out of a total of five possible levels of review. In fact, nearly all contested cases are already rereferred because the litigants want to avoid the cost of a duplicative hearing before the referee. Given the informality of proceedings before the referee, a full water court hearing is essential to protect the interests of applicants and objectors.*
- i) Requiring the use of a particular engineering technique would limit the options available to parties and the court to prevent injury. A one-size-fits-all approach to engineering is no benefit to applicants or objectors. Each case brings before the court different factors to consider in evaluating injury, such as wells which are located at various distances from the river, different sources of replacement water, different timing and maintenance requirements for return flows, and different types of infrastructure used to transport and/or store water. The litigants and the court should not be restricted from having the information best-suited to the case at hand when it arises, which would stifle the development of new engineering methodologies or techniques. Regarding the two principal techniques used in tributary groundwater cases, even Mr. Bennett indicated to the Task Force at the July 27 meeting that neither Glover nor Modflow is inherently superior and depended on the accuracy of the data behind the analyses. The use of Glover, Modflow, or any other technique should be evaluated and used by the parties and the court on a case-by-case basis without limitation by an arbitrary legislative mandate to use a particular engineering technique in all cases.*
- j) As to injury, the suggestion by some that the objectors be required to show “actual injury” is a smokescreen for shifting the burden of proof on injury, since it would require the objector to demonstrate “actual injury” rather than require the applicant to show that there will not be injury. Continuing to rely on the existing presumption that failure to replace depletions on an overappropriated stream will cause injury is a reasonable approach to addressing the injury issue in an augmentation plan case. The applicant, and not the objectors, should continue to bear the burden of proving that the applications they have filed with the water court will not injure other water users. Making a fundamental change in the burden of proof would change over 100 years of law on water rights transfers and other cases involving the injury issue, and is beyond the scope of the executive order.*
- k) This proposed change in the law would also require every water user to appear in every case. If an objector has to show “actual injury,” it can only be done in court. If the Task Force wants to increase the litigation burden for all water users dramatically, this suggestion is a perfect way to do so. It is a full employment act for water lawyers and engineers. Instead, water users should be allowed to continue to rely on the applicant’s burden to show non-injury*

as protection for their water rights, rather than having to appear in and litigate every change, exchange and plan for augmentation on the question of whether an objector's individual water rights are "actually" injured.

- l) *In addition to shifting the burden of proof to objectors, some well users may want to impose a rule by this proposal that ultimately requires a court to balance benefit and injury. In other words, they want to be able to argue that the "actual injury" from their well use is so small in relation to the benefit the wells provide that they aren't hurting anyone too much and they should be allowed to pump even if causing some injury. Central has, for example, argued in the Box Elder case that 3,000+ acre-feet of annual depletions to an already-overappropriated stream is negligible. Maximum utilization of water as addressed by the 1969 Act does not include the right to take water from senior water rights for the benefit of a junior right. Such a proposal would be unconstitutional, a major change in law, and well beyond the executive order.*
 - m) *Would the "actual injury" standard apply only in augmentation plan cases, and not other injury cases, such as changes? Does the proposal again favor a select group of well users at the expense of others well users and other water users?*
- 4) **Option 4:** *Increased State Engineer authority as an Alternative to the Water Court. Note: Though included in the July 27 memorandum circulated by Alexandra Davis, this option was not specifically enumerated at the August 13 Task Force meeting as one of the principal options for consideration. Because of the potential relationship of this issue to the option of streamlining the water court process, we have briefly addressed the issue in this paper.*
- a) *If any notion of increased State Engineer discretion is to be considered, the complexities of allowing discretion within the mandate of water court decrees needs a detailed public airing that is well beyond the charge of the Task Force. Some of these issues implicit in this proposal, e.g., paper fill and well call, occupied many days of discussion at the WAS trial. They create complex problems that cannot be resolved without detailed input from all affected interests across Colorado.*
 - b) *It can be credibly contended that State Engineer discretion has contributed to several of Colorado's serious ongoing water problems. On the Arkansas River, the state issued well permits and allowed well pumping to a degree that has resulted in 20 years of compact litigation and \$30 million of damages. On the South Platte River, despite the clear requirement of the 1969 Act and the State Engineer's own rules, the state allowed wells to operate annual augmentation plans for more than thirty years without sufficient replacement supplies to protect other water users. Finally, in the Rio Grande basin, withdrawals in the Closed Basin have lowered water levels so greatly that it may be necessary to pay well users not to pump their wells. The assumption that increased State Engineer discretion will solve problems now facing the South Platte River is not supported by history.*
 - c) *This is an attempt to redo the 1969 Act for the benefit of a minority of well users on the South Platte River. A strong State Engineer with broad discretionary or adjudicative power has never been accepted in Colorado. The legislature rejected making the State Engineer a "water czar" when it adopted the 1969 Act in favor of vesting protection of property rights in the courts. Because a few well owners have still failed to comply with the 1969 Act is no reason to throw out the main concept behind the act – that the courts adjudicate and the state engineer*

administers in accordance with the terms of decrees – which has efficiently served water users over the past 40 years.

- d) *Why should the state engineer be given broad discretion to determine real property rights? That is a matter that rightly should be vested in the courts as a matter of constitutional protection of property rights. As has always been the case in Colorado, the State Engineer should administer decrees in accordance with decree terms in order to protect water users from injury.*
- e) *Regarding the subject of “well calls,” there is a good reason there are not well calls – the “call” does not produce water for a water right that is diverting. The Division Engineer told the Task Force on July 27 that a “call” is a “demand for water by a user.” A well call does not supply water to a well. That is why under the 1969 Act wells are required to replace depletions rather than place a call. If wells think they can prevent injury with less than 100% replacement, they can be so administered, but they don’t need to place a call for that reason.*
- f) *The State Engineer believes the imposition of well calls is a way to manage the South Platte River. The concept of managing the river, especially reservoir fills, is a significant departure from priority administration. If the power to manage the South Platte River is to be granted to the State Engineer, it should be done directly in a manner that provides adequate due process protection of property rights, with all interested parties having the opportunity to address this concept, rather than indirectly through a “well call”*
- g) *Regarding elimination of a paper fill, the Task Force’s July 27 memorandum contains no explanation of how this idea would be applied in the context of the executive order. When and under what circumstances would this be allowed or occur, and to what end? Under most reservoir operational scenarios the failure to impose a paper fill would lead to injury by causing extended senior calls in favor of junior rights.*
- h) *Any exercise of discretion has the potential to lead to a lawsuit by adversely affected water users. Creating the basis for additional water court litigation to review administrative actions would not simplify the judicial process. Compare the Box Elder designation hearing, which has five levels of administrative and judicial review (hearing officer, ground water commission, district court, court of appeals, and supreme court), to water court review, which is completed with a single appeal to the supreme court.*
- i) *Does the state intend to open its wallet when the State Engineer’s exercise of discretion injures a water user? Consider a lawsuit by the owner of a reservoir that fails to fill after aggregation or by a direct flow or storage user adversely affected by a well call.*

5) Option 5: Prepayment of Well Depletions.

- i) *The Task Force has not explained how this proposition would work and it is unclear how it can be made to work. There has been no description of the operation of any prepayment plan to the Task Force, nor have compelling examples of previous successful prepayment plans been presented to the Task Force. Under the executive order, the Task Force has to define the problem that prepayment would solve and define the means by which the solution would work. That has not yet been done.*

- ii) *It appears that prepayment of well depletions assumes that the well user has water currently in hand to use for prepaid replacement of depletions. If the problem under consideration by the Task Force, and faced by well users, is that some well users have a shortage of augmentation supplies, prepayment does not appear to be a realistic solution to the problem well users face.*
- iii) *Colorado water law requires that depletions be replaced in time, location, and amount sufficient to prevent injury to other water users. The Task Force has not defined how the concept of prepayment of depletions would assure that these important legal and engineering standards are met.*
- iv) *If well users have replacement supplies available in the time, location and amount to “prepay” depletions, they should instead incorporate that water into a water court-approved plan for augmentation, and manage their well pumping in accordance with the amount of replacement supplies they actually have. The concept of prepayment should not be used as a method by which replacement of ongoing depletions can be avoided.*
- v) *Prepayment has many of the same problems as aggregation. How will it be determined who should be “prepaid,” how much prepayment is required, and who will make these determinations? If prepayment is made to the wrong water right, how can this be corrected so that the shorted water users are not injured? Can a reservoir owner be forced to release water that it incorrectly received as prepayment, and if so how can it be assured that such a release will be physically possible and sufficient to protect those who have been shorted by the mistake? Would the reservoir forced to release water then be allowed to store an amount of water equivalent to that released? How could the reservoir do this if it was no longer in priority? How would it be assured that historical seepage and return flows are maintained if diversion and storage patterns are changed? These are just a few of the issues that would arise with prepayment of depletions. The Task Force has not considered any of these issues. If the Task Force is to consider this option, reservoir owners should be given notice and a hearing.*
- vi) *Prepayment will not promote stability and reliability of water rights. Approval of prepayment plans will require a costly, time-consuming and ever-changing annual determination of who is to be prepaid and how much is to be prepaid, all subject to the uncertainties identified in the previous paragraph. Repayment of depletions in time, location, and amount under a one-time court-approved augmentation plan provides a more economical, transparent and stable process for the protection and reliability of water rights.*
- vii) *It appears that the prepayment option the Task Force has in mind may call for the State to be responsible for approving and managing any type of prepayment system. It is far from certain that the State has the resources and staff to undertake this effort. It must be assured that senior users will not be responsible for shouldering the financial burden associated with investigating and evaluating prepayment proposals when their interests can be protected simply by adhering to the rule to replace depletions in time, location and amount.*
- viii) *As stated above with regard to aggregation, the prepayment option will open the State up to possible legal action and damages if a water user is shorted by failure of prepayment to prevent injury. Is the State prepared to take measures to compensate users by prepayments or to insure that water users who may be injured do not bear the financial*

burden for any shortage caused by an approved prepayment of depletions? Is the Task Force willing to require water users to exercise costly diligence each time a prepayment plan is submitted, despite the fact that simply replacing depletions, location and amount would otherwise protect that user without the need for considering prepayment options?

- ix) *As prepayment has been discussed, it also seems that senior water users will have the burden of illustrating that they are injured by prepayment, which is a shift in the burden of proof normally required by the water court with regard to an augmentation plan.*

6) **Option 6:** Use of Colorado-Big Thompson water in permanent augmentation plans.

- i) *The Colorado-Big Thompson project was developed by the United States, is now owned and administered by the Northern Colorado Water Conservancy District and is paid for by taxpayers within the District. As such, the constituents of the District, and not the Task Force, should make decisions regarding use of this water just the same as other water users have the right to determine how their water rights will be used. The Northern District made such a determination in 2005 when it adopted a policy that CBT water cannot be used in decreed augmentation plans. The Task Force should not attempt to solve the problems of well users by securing water rights owned by others to that purpose. If importations from the West Slope are an option to assist the wells, then the Task Force should make recommendations for projects to do so, not to take water from existing projects.*
- ii) *The Northern District extends from the foothills to the state line along the South Platte River. The constituent taxpayers of the District are entitled to the benefits of all CBT water available within its boundaries. Many of the District's constituents are able to receive the benefit of the CBT water only by receiving return flows from initial direct delivery of the water. In fact, the only way District taxpayers below Fort Morgan can receive any benefit from CBT water is by the availability of return flows from CBT water in the South Platte River. Dedication of CBT water to augmentation use would remove those return flows from the river and leave downstream taxpayers with no benefit in return for their tax dollars. If District constituents are receiving no benefit from CBT water, then the Task Force needs to consider provisions that would allow them to withdraw from the District.*
- iii) *Use of CBT water is an issue that affects the West Slope as much as the South Platte River Basin and is therefore beyond the scope of the executive order. The majority of CBT water is diverted from the West Slope in Grand County. Among other concerns, West Slope interests may perceive use of CBT water for augmentation as violating Senate Document 80, the 1937 federal authorization for the CBT project; violating the CBT project's 1938 repayment contract; improperly enlarging the CBT project's demand for Western Slope water; and involving complex federal permitting issues. The Task Force cannot consider this proposal without detailed discussions with West Slope interests who are not part of the Task Force.*