



## Produced Water Decision Issued

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On September 8, 2011, Water Court Division 1 Judge Hartmann issued his Final Judgment and Decree in the matter of *Pawnee Well Users, et al. v. Wolfe, et al.*, 10CW89. This case involved numerous self-proclaimed “senior water users” challenging the procedure and outcome of the rulemaking conducted pursuant to HB 09-1303. This bill was enacted by the General Assembly to authorize the State Engineer to adopt rules to assist his administration of the Ground Water Act provision applicable to the withdrawal of nontributary ground water for purposes of mineral (including oil and gas) development. C.R.S. § 37-90-137(7).

The statute, as readers will recall, was enacted in anticipation of the Colorado Supreme Court upholding the decision in Water Court Division 7 that the dewatering of coal seams to facilitate the production of coalbed methane is, in and of itself, a beneficial use of ground water. Accordingly, such withdrawals are subject to State Engineer well permitting and water rights administration. The Supreme Court affirmed this ruling in *Vance v. Wolfe*, 205 P.3d 1165 (Colo. 2009). The import of the *Vance* case, it was soon realized, extended beyond coalbed methane wells, to all produced water, because of the presumption that all ground water is tributary (*i.e.* in hydrologic connection) to surface streams. As such, more than 40,000 oil and gas wells in Colorado faced the prospect of needing to be permitted as water wells, with the added complication of obtaining approval of “augmentation plans” to replace depletions to senior water rights.

In 2009-2010, the State Engineer conducted the rulemaking authorized in HB 09-1303, pursuant to which he determined that most of Colorado’s active oil and gas basins and formations are, in fact, nontributary, and therefore exempt from well permitting (except for CBM wells) and water rights

administration. 2 CCR 402-17 (“the Rules”). The plaintiffs in *Pawnee Well Users* sued to overturn the Rules on the grounds that the State Engineer had exceeded his statutory authority, and that the rulemaking was procedurally defective. Supplemental challenges were filed with respect to certain of the basin-specific rules delineating nontributary formations and areas.

In its 2011 session, the General Assembly clarified and affirmed the broad authority it had previously provided to the State Engineer. HB 11-1286. This bill also specified the presumptive legal effect of the basin-specific determinations in any judicial action seeking to curtail the withdrawal of nontributary produced water. Plaintiffs subsequently added to their rulemaking challenge the allegation that HB 11-1286 was illegal “retrospective” legislation.

In his decision, Judge Hartmann rejected all of the plaintiffs’ challenges with respect to the authority of the State Engineer, as well as to the procedural aspects of the rulemaking. Notably, he upheld the authority of the State Engineer to delineate areas and formations as nontributary even though no active oil and gas development is occurring. The decision also affirmed the adjudicatory procedure adopted in the Rules for seeking future nontributary determinations (several of which have been obtained). HB 11-1286 was held to be clarifying in nature, and a valid legislative enactment.

However, the decision was not a total victory for the Rules. In one portion of the ruling, Judge Hartmann neglected to recognize that portion of HB 11-1286 which specified that nontributary determinations are presumptively valid when the withdrawal of produced water is challenged in water court. The “industry defendant/intervenors,” including the Southern Ute Indian Tribe, have filed a motion for reconsideration asking the judge to clarify this portion of the decision.

More significantly, the decision overturned the nontributary rule applicable to the Fruitland Coal formation in the San Juan Basin. This was due to a statement in the Rules to the effect that they are not be construed as resolving all state-tribal jurisdictional issues related to nontributary ground water on the Southern Ute Indian reservation. Unfortunately, this ruling also affects produced water from non-tribal lands, both within and outside the reservation. The tribe and the state have filed separate motions for reconsideration on this aspect of the decision.

While this decision provides a welcome measure of certainty for most oil and gas producers, the issue is not finally resolved. Several basin-specific

challenges, including to the Denver Basin nontributary determination for the Cretaceous Age formations (including the Niobrara play) are still outstanding. In addition, one of the plaintiff attorneys in the case has suggested in an “op-ed” piece that surface owners should seek water court decrees vesting ownership in their underlying nontributary ground water, using the Rules as technical support, presumably so that they can then require consent/payment for the withdrawal of produced water. Stay tuned for future developments.

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