



***Vance* Decision Throws Oil and Gas Into Uncharted Waters**

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On April 20, the Colorado Supreme Court issued its ruling in *Vance v. Wolfe*, affirming that the withdrawal of water from coal seams to facilitate the production of coalbed methane is, in and of itself, a “beneficial use” of water. Accordingly, such produced water is subject to requirements applicable to water wells, including prevention of injury to senior water rights. Meanwhile, the General Assembly enacted House Bill 1303 to address the issues raised by the *Vance* decision. On June 25, the State Engineer’s Office will commence its rulemaking process pursuant to HB 1303.

Vance v. Wolfe (No. 07SA293) was a direct appeal to the Colorado Supreme Court from a decision of the District Court, Water Division 7, which determined that the process of dewatering coal seams constitutes an appropriation for beneficial use, and that “consequently, the Engineers cannot allow out-of-priority diversions without a well permit and, where necessary, a decree adjudicating an augmentation plan.” The Supreme Court affirmed, rejecting the argument of the State Engineer and BP American Production Company (intervenor) that the groundwater found in coal seams is a hindrance, the withdrawal of which is incidental to the purpose of producing coalbed methane (“CBM”): “On the contrary, the use of water in coalbed methane production is an integral part of the process itself. The presence and subsequent controlled extraction of water makes the capture of methane gas possible.” (Advance Sheet Headnote).

As the Court noted, methane adsorbed to coal surfaces is held in place by hydrostatic pressure. Withdrawal of water to reduce the pressure allows the gas to desorb and flow up the well. The plaintiff ranchers cited the Draft Environmental Impact Statement for the Northern San Juan Basin Coalbed Methane Project for the proposition that “[b]efore CBM development ...

discharge from the Fruitland [Coal] aquifer to the Animas, Pine and Piedra Rivers totaled approximately 195 acre-feet per year, [and] [m]odeling ... has demonstrated CBM development has and will continue to intercept groundwater that would normally discharge to these rivers." However, the decision of the water court did not turn on proof of tributary status, or evidence of injury to the plaintiffs' water rights. Instead, it began with the assumption, as did the Supreme Court, that the case involved tributary water.¹

Consequently, CBM wells are subject to administration and permitting under the Water Right Determination and Administration Act of 1969, CRS 37-92-101 *et seq.*, and the Colorado Ground Water Management Act, CRS 37-90-101 *et seq.* An immediate question that comes to mind is whether this is also true with respect to water produced from other (non-CBM) oil and gas wells. If the focus is on the "presumed" tributary status of such produced water, the answer would appear to be yes, unless the well operators overcome the presumption. However, it can also be argued that without "beneficial use," such water is not being "appropriated" and is therefore outside the purview of the water rights administration regime (the position of the State Engineer prior to *Vance*).

In this regard, the decision contains helpful language: "... [W]e begin with the central question presented by this case – whether CBM production is a 'beneficial use' giving rise to an appropriative water right subject to water well permitting, water court adjudication and administration by the Engineers. ... That the water used in CBM production is integral to the process itself distinguishes this case from a host of other instances in which nuisance water is merely removed, but not beneficially used." (Slip Opinion, pp. 11, 14). Thus, in the case of "traditional" oil and gas wells, where the produced water is truly incidental and a nuisance, no "appropriative water right" would arise. Query, however, whether subsequent reuse of such produced water via recycling, dust suppression, or even livestock drinking from a disposal pit, would result in beneficial use?

Fortunately, the Colorado General Assembly, anticipating these sorts of issues, adopted consensus legislation during the 2009 session that provides a path forward. HB 1303 was developed by the State Engineer's Office (SEO) in conjunction with the Colorado Water Congress, which formed a Produced Water Subcommittee including the plaintiff attorneys in *Vance*, water users,


¹ See *Safranek v. Limon*, 228 P.2d 975, 977 (Colo. 1951) holding that under Colorado law, all ground water is presumed to be tributary until proven otherwise.

and industry representatives. HB 1303 has three major elements:

- First and foremost, the bill establishes a “timeout” from the application of water well permitting and water rights administration to oil and gas wells until March 31, 2010.
- During this timeout period, the SEO is authorized to conduct a rulemaking to establish criteria for determining the (non)tributary status of oil and gas produced water.
- Those CBM wells determined to be tributary must be permitted as water wells as of April 1, 2010, but will be allowed to operate pursuant to temporary “substitute water supply plans” until 2013, when such plans must be converted to water court-approved augmentation plans.

It is the expectation of the SEO, and, certainly, of the oil and gas industry, that the vast majority of oil and gas wells in Colorado, including most CBM wells, will be determined to be nontributary pursuant to the SEO rulemaking. For example, several CBM producers have submitted sophisticated hydrologic modeling to the SEO showing that most of their produced water is nontributary. For other oil and gas wells, their depth, geology and reservoir characteristics may supply a sufficient basis for a nontributary determination. However, these outcomes cannot be assumed. Moreover, the SEO’s “draft notice” for the HB 1303 rulemaking, which will commence on June 25, indicates that the nontributary determinations are expected to take the form of presumptions. This suggests that water lawyers might well challenge such presumptions in water court.

Thus, the oil and gas industry in Colorado is in a unique situation, facing substantial uncertainty about whether oil and gas wells are also water wells, with the possibility of needing to purchase augmentation water in order to be permitted, or to continue to operate. That this uncertainty has only now arisen in a state where oil and gas drilling dates back nearly 150 years is extraordinary.



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