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liquid assets: turning water into gold part IV

Law makes, breaks men

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Bill McCracken watches the years go by with fading hopes for his farm.

He has been unable to harvest a crop since 2002, the last year he had a Colorado permit to pump any water from his wells.

This year, at the age of 79, he made a little money doing construction work up in Wyoming. He paid property taxes with Social Security checks. Slowly, he has been selling off a cattle herd he no longer can afford to feed.

The snow that finally blanketed the Rocky Mountains after a series of dry winters brought him no relief.

Neither does the irrigation canal that runs right through his yard, nor the South Platte River wending past his unplanted fields.

His farm survived the worst drought in a century. But it may not withstand a regulatory reversal that has shut down more than a thousand farm wells across northeastern Colorado.

"I had a farm worth probably close to a million dollars. Now it's worth almost nothing," McCracken said.

Glen Kobobel, a neighboring well user, is only slightly better off. He spent \$61,000 to buy into a plan that let him water less than half his fields this year.

In a year with good snowpack and full reservoirs, "we're sitting here turned off. It doesn't make any sense to me," he said. "We need to be compensated for what's been taken from us."

Colorado law disagreed. And McCracken's and Kobobel's loss is someone else's gain.

In drought years, Vince Gerkin's century-old river rights failed to deliver water to his farm while upstream neighbors with wells pumped away. But a 2003 Colorado Supreme Court ruling that ruined McCracken made Gerkin's rights suddenly more valuable. That ruling didn't just level the playing field. It upended it.

The stakes were enormous.

By one critic's estimate, the wells were taking at least 170,000 acre-feet of water they had no right to use each year, or more than enough water to supply every Denver home.

Now, those with senior river rights have the million-dollar farms, and those who depended on wells are searching for water they can ill afford to buy.

"I feel sorry for them. I know what they're going through. I went through it in the drought," Gerkin said. "The price for water now has just skyrocketed."

The economic and emotional disaster that has struck McCracken and hundreds of other farmers along the South Platte sprang from two hard facts about Colorado water rights. On one hand, its courts vigorously uphold a status quo generated by the "first in time, first in right" logic of 19th-century mining camps. Yet for a generation, its state water regulators kept granting extraordinary yearly permits that enabled farmers to sidestep that same strict seniority system.

As a result, McCracken and his peers have seen their land value drop to as little as one-tenth of its previous worth, while river rights fetch record prices.

Like an earthquake, the disaster along the South Platte sent shudders through the West. Though Colorado is the only state so far that has ordered a massive shutdown of groundwater wells depleting its rivers, similar crises are fast developing on dry prairies, in desert cities and in pristine watering holes that protect some of the West's rarest animals.

In Idaho, potato farmers are going to court against fish farmers who claim well users have drained the spectacular springs that raise most of the nation's trout.

In Arizona, one town faced this dilemma: drill wells almost a mile deep for water - or truck it in.

"All across the West, we're seeing the conflicts erupt," said Karl Dreher, Idaho's Department of Water Resources director. "Generally it's the result of groundwater use. You can't see it. It's sort of out of sight, out of mind. Now, in many cases, years or even decades later we're seeing that the groundwater depletions that have been occurring are taking a toll."

Stricter water law leads farmers to pool resources

For years, irrigation wells keep pumping under the auspices of a group hoping to replace what it pumps.

McCracken was one of many farmers who belonged to an association called GASP - Groundwater Appropriators of the South Platte. It formed after Colorado passed a landmark 1969 law requiring tributary groundwaters to be regulated as part of its rivers, just as creeks flowing into a stream are part of that stream.

That posed an immediate problem for all the farmers who had drilled wells and pumped groundwater to fields stretching from the Denver area to the Nebraska line. The oldest water rights on the South Platte belong to those who dug ditches in the 19th century from the river to their land. Pumps came later. They proliferated in the 1950s and 1960s, turning dry prairie land into prosperous farms growing corn, alfalfa, sugar beets and melons.

Under Colorado's seniority system, the new law put well users in line behind all those who previously took water directly from the river.

GASP offered them a way to save their farms. They could sign up, pay a small yearly assessment and share any water GASP rented or bought to replace what they pumped.

But GASP never owned enough water to replace what its members consumed.

Tim Buchanan, a lawyer who represented senior water rights owners, said he calculated that GASP was "shorting the river about 170,000 acre-feet a year."

But the true amount the farmers pulled from the river was probably higher and impossible to divine, he said, because GASP accounts were riddled with errors and "the state just never kept any records - they would just pat us on the head and say, 'Don't worry about it.'"

For decades, the state Division of Water Resources, headed by the state engineer, let GASP wells

keep pumping about 75 billion gallons of water a year.

With the state engineer's support, GASP submitted yearly applications to replace water it was using - called substitute supply plans - until it could secure permanent sources such as reservoir storage, treated municipal wastewater or senior rights of retiring farmers.

The permanent plan, called an augmentation plan, would require a water court judge's decree that GASP was replenishing the river water the farmers were taking when others should have gotten it first.

Except GASP never went to court.

Each year, GASP renewed its request to keep pumping temporarily. And although state records showed its replacement water fell far short of the water it consumed, the state engineer always granted a permit to pump one more year.

"It worked very, very well for a long, long time," said Jack Odor, GASP's manager for 32 years.

By his estimate, member farmers pumped from the ground 40 to 100 times what GASP owned in the river. GASP made up that difference in two ways: by renting water and by counting on wet months when there was enough water in the South Platte to satisfy everyone.

GASP was always supposed to be a temporary organization, and farmers knew it, Odor said, "but they didn't get out. What would you do if you could spend a couple of hundred dollars a year, or many thousands of dollars to buy your own water, plus attorneys' fees?"

This might have gone on much longer, if not for a feud over a couple of fish ponds far away in the mountains.

South of Leadville, the Empire Lodge Homeowners' Association filled the ponds through the use of yearly permits from the state engineer. The homeowners got into a fight with a ranch downstream over creek water diverted to the ponds, and it escalated into a water court battle in Pueblo.

There, Judge John Anderson issued a scathing assessment of the state engineer's permit system. He declared that the state engineer had approved 528 of the supposedly temporary substitute supply plans but had never forced permit holders into water court. He called the state engineer's testimony in his courtroom "preposterous." He concluded that the homeowners' association "has abused and been allowed by the state engineer to abuse" Colorado water law.

State engineer Hal Simpson was stunned. "That was probably the only decree I've ever seen like that," he said.

Dry year and wet ponds become catalysts for court

Day of reckoning evolved when those with senior rights to scarce water demanded their fair share.

For 30 years, Simpson and his predecessors managed to keep water available to both the farmers who shunted South Platte water into canals and those who pumped it from the ground. The Front Range population was much smaller in the 1970s, and when it began to grow, Colorado enjoyed a string of exceptionally wet years. Often there was enough rain and snow to avoid calls from senior water rights holders to shut down the supply to their juniors.

Simpson knew a day of reckoning would come. But he never denied GASP a yearly permit, as too many family farms were dependent on the wells. Instead, he occasionally sent what he described as "arm-twisting" letters reminding GASP that it needed to find sufficient replacement water and get its

plans approved in water court.

GASP did neither. Meanwhile, the price of water grew.

In 2002, a record drought year, demands for water far outstripped supply, and only the oldest water rights - claimed by Colorado's pioneer families - got their full allotments from the South Platte. The Empire Lodge case struck at the same time.

"It was the perfect storm," Simpson said.

The fish-pond fight caught the attention of city officials - and farmers - who had grumbled for years that groundwater pumping along the South Platte cheated those who held or acquired senior water rights on the river. They also sued.

In a pair of rulings, the Colorado Supreme Court protected the rights of the seniors and limited the state engineer's authority. GASP promptly collapsed, leaving members who had prospered with state permits bone-dry.

The state engineer, compelled to enforce Colorado's seniority system, started "red-tagging" pumps along the river. This year, 1,500 wells on the South Platte were shut down, and many more pumped at reduced rates.

Simpson was a reluctant enforcer. Profound concern for thousands of farmers had kept him from shutting down their wells in the past.

"There are people who, their livelihood is lost," he said. "Their land and their water was their 401(k). It's sad, but that's how our water law operates."

For irrigators with wells, life has changed drastically

Some wonder how they'll be able to to grow food, and the quandary over wells may spread to other states.

"This is my mosquito hatchery." Bill McCracken pauses in a pickup truck beside a big hole in one of his fields. He had spent about \$50,000 on what he hoped would become a court-approved augmentation plan: a storage pond with a pipeline and a flow meter.

If he could get the pond filled somehow, he could contribute a measurable quantity of water to offset the groundwater he would pump in an irrigation season. At the moment, his augmentation pond barely held enough water to breed insects.

"A lot of money for nothing - so far," he said. "This is the third year that I've been out of water."

With water, his 320 acres in Morgan County could have fetched \$800,000. Without it, he figures the land loses 90 percent of its value - and he loses the crops that fed his cattle.

"I about got all my cattle sold," he said. "I had close to 100 head. I'm down to 20-some. Can't afford to buy feed."

Vic Quint, McCracken's friend and fellow farmer, managed to get water from a ditch company to compensate for the groundwater he once freely pumped as a GASP member.

But at the price he paid, he figures he is losing money on every acre he plants.

"I've got my fields wet, but I can't afford it. If we had \$5 corn, I could do it. We've got \$2 corn," he

said. "I'm probably as bad off as Bill is with his wells shut off. I just don't know it yet."

Many GASP farmers jumped to another association, the Central Colorado Water Conservancy District, which was facing its own crisis. The Central district owned better water rights than GASP, but not enough to offset all the groundwater use of its own members.

This year, many long-term members of the Central district were able to pump only half as much water as they once did, a curtailment that created a checkerboard effect of rich, irrigated cropland and dusty fields stretching across the Colorado plains.

New members joined a separate subdistrict and paid a higher price. It cost them \$5,000 per well plus a property assessment to join. That alone cost some farmers \$60,000 or more - for the right to irrigate a fraction of their fields.

The newcomers still need water court approval of their augmentation plans. This year they were able to pump only 40 percent of their previous use, and next year they may get as little as 15 percent.

Tom Cech, the district's executive director, warned farmers at a mass meeting that there would be years when new members might not be able to pump at all.

To get all the water they need, "they'll have to buy their farm a second time. That's how much it will cost," he remembers telling them. "I'll never forget seeing 700 sets of shoulders slump in their chairs. That's how drastic this revision is to our groundwater irrigators.

"Many view this as extremely unfair, and poor public policy," he said. "Others say that's how the system of prior appropriation works, and you've gotten away with taking too much water out of the river for years."

To help save its farmers, Central may sell some of its senior river rights near Denver, which have become extremely valuable, and use the profits to buy cheaper water farther downstream.

According to Cech, one city is offering \$18,300 a share for water his district bought for \$2,400 in 1990. On a volume basis, that's about three times what Central paid for other agricultural water as recently as last year.

Farmer-run ditch companies with 19th-century water rights were among the beneficiaries of the Supreme Court's rulings. So was the city of Boulder.

At times, Boulder had struggled to keep water in its reservoirs - and couldn't figure out why a reservoir with senior rights downstream kept shutting down its access to the river. Finally it found a suspected culprit: The downstream reservoir was not filling because thousands of wells along the river were draining it - and doing so with the state's blessing.

When the drought struck, Boulder clamped down on car washing, lawn watering, swimming pools and commercial uses of water while junior wells irrigated around the clock. In 2003, Boulder estimated that senior rights could claim one-third of its yearly use if the wells kept pumping without replacing water to the river. Permanently acquiring that much replacement water could have cost Boulder \$84 million.

The groundwater wells "jeopardized our ability to make it through drought periods, and it increased the cost of the water that we do have to supply," said Carol Ellinghouse, Boulder's water resources coordinator. "The drought exposed the shell game that was going on."

Boulder has not reduced its water rates, but Ellinghouse said its yearly supply is now more secure.

David Getches, dean of the University of Colorado law school, blames the "hard-edged nature of

Colorado law" for the GASP disaster. As state director of natural resources during the mid-1980s, he reviewed the GASP plan to gradually acquire new court-approved supplies and considered it workable and smart. He laments that Colorado gives its state engineer so little power to negotiate compromises when there are conflicting water claims.

The Supreme Court ruling that led to GASP's demise "was well-reasoned, if not good," he said.

Gregory Hobbs, a water lawyer who became a Colorado Supreme Court justice, said he did not blame the state engineer for his efforts to protect family farms. But he strongly defends the state's "first in time, first in right" doctrine because it protects personal property and brings certainty to a market.

When you buy a senior water right in Colorado, you're not buying just water, Hobbs said. "You're purchasing the enforcement."

He predicts others will soon find themselves in Colorado's predicament. In states that let wells deprive holders of senior water rights, "the crunch time has come," he said.

It's coming to Kansas, where irrigation wells regularly drain the Arkansas River so dry that on weekends, four-wheelers roam the riverbed. State scientists are plotting the extent of the damage and may soon force farmers to use less water so that senior water rights - held by state and national wildlife refuges - can nourish wetlands visited by whooping cranes, least terns and other protected birds.

Protests are sure to follow whatever the state decides. "You call me back in a year, and we'll talk lawsuits," said Sharon Falk, the region's groundwater district manager.

In Arizona, well owners in unincorporated Star Valley are battling the nearby city of Payson, which is coping with a water shortage by letting developers drill wells outside of town.

"They're trying to take our water," said Cris Lecher, a Star Valley fire department captain who fears groundwater raids could make it harder to fight fires. "That's a big worry with us."

The widespread reliance on groundwater in Arizona caused a bigger problem in Williams, a town outside of Flagstaff. A prolonged drought forced it to choose between hauling in water by truck or drilling some very deep wells.

The water it finally found has to be pumped up from between 3,500 and 4,000 feet underground.

In Idaho, the court battles have begun in earnest. At issue is the water that cascades through a canyon wall from a vast aquifer into the Thousand Springs area of the Snake River.

The litigation pits farmers who rely on groundwater to grow Idaho potatoes, corn and cows - and reduce the water flows to the Snake River as a result - against fish farms that rely on the springs to raise most of the trout shipped to the nation's restaurants and supermarkets. Idaho Power Co., which supplies hydroelectricity, jumped into the fight. So did farmers who draw water directly from the Snake River.

Dreher, the state's water resources director, has issued a series of orders, all of which are being appealed. He also faces four lawsuits.

The saddest part, said Lynn Tominaga, who heads a groundwater association, is that most of Idaho's farmers draw from both rivers and wells.

"In essence we're suing ourselves," he said. "All we're doing is taking money from both pockets to

pay for the legal costs."

Post researcher Barbara Hudson contributed to this report.

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