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WATER LAW—Procedure of State Engineer in Closing Down Wells Held Contravention of Due Process. *Fellhauer v. People*, 447 P.2d 986 (Colo. 1968).

On June 24, 1966, the division engineer notified the defendant, Fellhauer, to stop pumping and using water from the alluvium of the Arkansas River in due regard to the fact that there was not enough water in the river to fill the adjudicated rights of downstream users having priority dates as early as 1887. The defendant, asserting that the 1965 act authorizing the state engineer to administer the water laws of the state was unconstitutional, refused to comply with the order. Action was brought on behalf of the People of the State of Colorado by the Attorney General, as provided for in the same act, to enjoin the defendant from pumping, with the result that an injunction issued. Thereon, Fellhauer brought an action for review of this injunction and the proceedings upon which it was based. The state supreme court *held* that in acting without any written rules or regulations and without any prescribed guideline in shutting down the defendant's well and 38 other wells out of more than 1,600 major wells in that area, the engineer proceeded discriminatorily in violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution and of the due process clause in Article II, Section 25 of the state constitution.

The 1965 act in question reads in pertinent part that:

The state engineer or his duly authorized representative shall execute and administer the laws of the state relative to the distribution of the surface waters of the state including the underground waters tributary thereto in accordance with the right of priority of appropriation, *and he shall adopt such rules and regulations and issue such orders as are necessary for the performance of the foregoing duties.*¹ (Emphasis supplied.)

The *Fellhauer* Court acknowledged the power and authority conferred upon the state engineer to administer the laws of the state relative to its waters and specifically recognized that there may exist a legitimate and constitutional ground and reason for the regulation of a particular well—

1. COLO. REV. STAT. § 148-11-22(1) (Supp. 1965).
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for example, whenever a court or water administration official can make a finding that the pumping of a junior well materially injures senior appropriators who are calling generally for more water.² But the court went on to conclude that while such delegation of authority by the legislature to the water officials was proper, it was, nevertheless, subject to conditions. Under the decision, for the regulation of such wells in the Arkansas Valley to be valid and constitutional three requirements must be complied with, to-wit:

(1) The regulation must be under and in compliance with reasonable rules, regulations, standards and a plan established by the state engineer prior to the issuance of the regulative orders.

(2) Reasonable lessening of material injury to senior rights must be accomplished by the regulation of the wells.

(3) If by placing conditions upon the use of a well, or upon its owner, some or all of its water can be placed to a beneficial use by the owner without material injury to senior users, such conditions should be made.³

The testimony of the division engineer indicated that the action taken was based upon an oral "consensus agreement" with certain senior appropriators, based in turn upon a "plan" that was presented to them whereby these wells were "distinguished out of the others." However, while he stated that a number of factors were considered, he refused to give the relative weight afforded to each or to show that these evaluative factors applied to the Fellhauer well were applied to any other. The court conceded that the engineer acted conscientiously and in good faith, but determined that even in so doing he proceeded discriminatorily in an unsound foundation.

The chief justice of the court dissented from the majority opinion on the ground that the engineer was merely following procedures used in the distribution of the waters of the Arkansas River for 100 years under command of the constitution, statutes and court decrees fixing the constitutional rights of senior appropriators to require division engineers to stop

2. *Fellhauer v. People*, 447 P.2d 986, 991 (Colo. 1968).

3. *Id.* at 993.

illegal diversions of water which destroy the value of their vested, adjudicated, prior rights. The contention that the engineer acted "arbitrarily and capriciously" was summarily dismissed upon the theory that no appropriation of water was shut down until investigation revealed that the rights of senior appropriators compelled such action. The learned justice also made reference to the increased complexities and uncertainties relative to the administration of the waters of the state to which the majority opinion will give birth.

As if by direct mandate, the Colorado legislature has recently repealed and re-enacted several statutes concerning the power and authority of the state engineer to regulate and administer the water laws of the state. In addition, a complete new water code has been formulated and adopted.⁴ Although the 1965 act referred to in *Fellhauer* is still in effect, it has been refined considerably. It would appear that the intent of the legislature was to strengthen *Fellhauer*, as is evidenced by the abundance of language taken directly from the case, utilized by the legislature, and incorporated into the 1969 act. A reading of the legislation reveals that the three requirements⁵ set forth by the court were integral to the policy formulation.

Section 148-11-3⁶ of the new statutes restates the language of the 1965 act, but at the same time qualifies it by calling for the making of rules or regulations as a prerequisite to the performance of the engineer's duties when a law, compact, treaty, or judicial decree or decision, "by its specific terms," requires the same. This appears to be a direct reflection of the first requirement enumerated, as *Fellhauer*, by its specific terms, does require the implementation of such rules or regulations prior to any action take by the engineer in shutting down wells.

The second requirement—lessening of injury to senior rights as accomplished by the regulation of wells—may be found within the confines of Section 148-21-17(3)(d)⁷ wherein the withdrawal of water is restricted "to the extent neces-

4. COLO. REV. STAT. § 148-21 (Supp. 1969). The new water code, which adds Article 21 to the statutes, is known as the "Water Right Determination and Administrative Act of 1969."

5. *Fellhauer v. People*, *supra* note 2, at 993.

6. COLO. REV. STAT. § 148-11-3, *as amended*, COLO. REV. STAT. § 148-11-3 (1969).

7. COLO. REV. STAT. § 148-21-17(3)(d) (1969).

sary to prevent injury to senior appropriators in the order of their priorities.” Of interest particularly is the consideration of priority rights, as this was strongly suggested in the dicta advanced by the court.⁸

Placing the water of a well to a beneficial use by its owner without “material injury” to senior users, if at all possible, was the third requirement lending itself to the constitutionality of the state engineer’s procedures in regulating the waters of the state. Section 148-21-35(2)⁹ states:

Each division engineer shall order the total or partial discontinuance of any diversion in his division to the extent the water being diverted is not necessary for application to a *beneficial use*; and he shall also order the total or partial discontinuance of any diversion in his division to the extent the water being diverted is required by persons entitled to use water under water rights having senior priorities, but no such discontinuance shall be ordered unless the diversion is causing or will cause *material injury* to such water rights having senior priorities. (Emphasis supplied.)

The legislature in this same section established a foundation upon which the state engineer is to build in constructing a workable plan under which he will carry out his duties in administering the water law of the state. Among the factors to be considered are the current and prospective volumes of water in and tributary to the stream from which the diversion is being made; distance and type of stream bed between the diversion points; the various velocities of this water, both surface and underground; the probable duration of the available flow and the predictable return flow to the affected stream.¹⁰

Taking heed of such auspice, the state engineer of Colorado did make an attempt at promulgating rules and regulations in this area of concern, but at the time of this writing the rules had been suspended as being too rigid and therefore

8. *Fellhauer v. People*, *supra* note 2, at 997. The court stated: “Offhand, we know of no reason why the state engineer cannot take into account the relative priorities of wells, subject to appropriate judicial review.”

9. COLO. REV. STAT. § 148-21-35(2) (1969). ---

10. *Id.*

unworkable,¹¹ which points out the paradox of the *Fellhauer* decision.

It is apparent that this formulation factor, along with its workability factor counterpart, loom as the foremost obstacles to the promulgation of such a plan of administration and regulation in this area of water law. The main hurdle to be crossed is that of finding a means of accurately determining the factors listed by the court, as well as any technical factors which the engineer might determine to be necessarily considered, so as to arrive at a technically accurate, and, at the same time, economically feasible *modus operandi*. One possible aid to the state engineer would be an analogue model of a particular stream and aquifer such as the Arkansas and its aquifer. A computer would be programmed in relation to the river and adjacent aquifer. In this way the computer could aid in answering questions, planning courses of action, and determining such factors as the effect of a diversion upon a senior user's rights and upon the river system as a whole. Some type of a basic formula or plan of regulation could then proceed from such technical basis, resulting in less need for discretion, and, therefore, less chance of abuse of discretion by the engineer. More realistically, at least at the present time, the duty to promulgate such rules and regulations or to attempt to promulgate such will fall upon the state engineer. Compounding the problem is the fact that it is questionable whether even a computer could successfully establish a workable plan which would include all factors relevant to its formulation due to the limitations inherent in computers and due to the fluctuating nature of any individual water system. Perhaps this explains the latitude and the discretionary powers bestowed upon the state engineer throughout the several states. There may very well be no other way to effectuate the policy of the state.

In order to determine the exportability of *Fellhauer* it was necessary to undertake a cursory survey of the statute books of the surrounding states in relation to the authority

11. Interview with Raphael J. Moses, Attorney at Law, Boulder, Colorado, October 17, 1969. There is a letter on file in the Wyoming Land & Water Law Review office dated October 20, 1969, reaffirming Mr. Moses' views on this legislation. Mr. Moses is a noted attorney in the area of water law for Colorado.

given to those responsible for the administration of the water law of the several states.

Prior to 1969 Colorado had little or no procedure for the state engineer to follow. He merely was given the blanket authority to adopt such rules and regulations and issue such orders as he deemed necessary to carry out his duties. The result, of course, was *Fellhauer*, and a new water code.

Montana¹² and New Mexico appear to follow this pre-1969 liberality of Colorado in conferring broad powers upon the water authorities with, again, little or no procedure stated. New Mexico excels in its liberalism toward the state engineer.¹³

The statutes of Idaho,¹⁴ Utah,¹⁵ and Wyoming appear, to some degree or another, to contain either procedures to be followed by the water authority, or to contain the substance of *Fellhauer* already. Wyoming is especially noted here because of the parallelism found in this state's statutes.

The state engineer of Wyoming has promulgated no rules or regulations in this area of water law, none are in the making at this time, nor are any expected to be formulated in the

12. REV. CODE MONT. § 89-132.1 (Supp. 1969). This section is included in the "Montana Water Resources Act of 1967" and states that the director of the state water conservation board shall have power to:

"Promulgate rules and regulations necessary to effect the purpose of this act."

It is interesting to note the similarity of language to that used in *Fellhauer*—the exception being that the latter commands promulgation.

13. N. MEX. STAT. ANN. § 75-2-8 (1953). This section states: "The state engineer may adopt regulations and codes to implement and enforce any provision of any law administered by him and may issue orders necessary to implement his decisions and to aid him in the accomplishment of his duties. In order to accomplish its purpose, this provision is to be liberally construed.

H. Any regulation, code, or order issued by the state engineer is presumed to be in proper implementation of the provisions of the water laws administered by him."

14. IDAHO CODE § 42-237a (Supp. 1969). This section states that the state reclamation engineer is empowered:

"To supervise and control the exercise and administration of all rights hereafter acquired to the use of ground waters and in the exercise of this power he may by summary order, prohibit or limit the withdrawal of water from any well during any period that he determines that water to fill any water right in said well is not there available."

15. UTAH CODE ANN. § 73-10-19, as amended (1969). This section states that the director of the division of water resources is to: "Make studies, investigations, and plans for the full development and utilization and promotion of the water and power resources of the state, including preliminary surveys, stream gauging, examinations, tests, and other estimates. . . ."

immediate future.¹⁶ However, the legislature has recognized the possibility of circumstances arising similar to those found in *Fellhauer* in connection with a river such as the Arkansas,¹⁷ and has provided for the procedure to be followed and the corrective controls to be adopted by the state engineer in such event. Section 41-132 of the Wyoming Statutes provides that:

(a) The state engineer may, on his own motion, and shall on the petition of twenty appropriators or of one-tenth of the appropriators of water from a critical area, cause a hearing to be held. . .to determine whether the underground water in such area is adequate for the needs of all appropriators of underground water in such area. (Provisions are made at this point for publication of notice of the meeting in area newspapers.) If the state engineer shall find after the hearing, and after receiving the advice of the district advisory board, that the underground water in that area is insufficient for all of the appropriators, he may by order adopt one or more of the following corrective controls:

(1) He may close the critical area to any further appropriation of underground water. . . .

(2) He may determine the permissible total withdrawal of underground water in the critical area for each day, month or year, and, insofar as may be reasonably done, he shall apportion such permissible total withdrawal among the appropriators holding valid rights to the underground water in the critical area in accordance with the relative dates of priority of such rights.

(3) If he finds that withdrawals by junior appropriators have a material or adverse effect upon the supply available for and needed by senior appropriators, he may order such junior appropriators to cease or reduce withdrawals forthwith.

16. Interview with Jack Gage, Jr., State Attorney General's Office, October 15, 1969. In addition, Mr. Gage indicated that there are no critical areas in Wyoming at this time in relation to the problems presented in *Fellhauer*.

17. Wyo. STAT. § 41-133 (1957). This section states: "Where underground waters and the waters of surface streams are so interconnected as to constitute in fact one source of supply, priorities of rights to the use of all such interconnected waters shall be correlated and such single schedule of priorities shall relate to the whole common water supply. The state engineer may by order adopt any of the corrective controls specified in section 17 of this act (§ 41-132)."

(4) If he finds that cessation or reduction of withdrawals by junior appropriators will not result in proportionate benefits to senior appropriators, he may require and specify a system of rotation of use of underground water in the critical area.¹⁸

Paragraph (b) of this same section goes on to state that the engineer will encourage agreements among appropriators as to withdrawals, apportionment, rotation or proration of the common supply of underground water.

A 1969 amendment¹⁹ was passed by the legislature in order to broaden these controls in order to permit the engineer to issue such orders "whether in a critical area or not."

It is also interesting to note that to a degree Section 41-132 contains all three of the requirements for constitutionality which the *Fellhauer* court said would be prerequisite to valid well regulation.²⁰ From the standpoint of water law, at least, it would appear that this state has adequately provided for *Fellhauer* without having a "*Fellhauer* case." And from an administrative law standpoint, it would appear that the provisions for a hearing, the added advice of a district advisory board, and, subsequently, a decision by the state engineer, would reduce the chances of "arbitrary and capricious" conduct on the part of the engineer to minute proportions.

As noted previously, the *Fellhauer* court based its reversal on the arbitrary and capricious conduct on the part of the division engineer, which resulted in the violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution and of the due process clause of the state constitution. Section 9-276.32(c) of the Wyoming Administrative Procedure Act²¹ sets forth in its provision for court review of administrative actions that the court must determine, among other things, whether "the decision or other agency action is arbitrary, capricious or characterized by abuse of discretion." And, in this state an agency is so defined as to encompass the state engineer.²²

18. WYO. STAT. § 41-132 (1957).

19. WYO. STAT. § 41-128 (1957), as amended, WYO. STAT § 41-128 (1969).

20. *Fellhauer v. People*, *supra* note 2, at 993.

21. WYO. STAT. §§ 9-276.19-33 (Supp. 1969).

22. WYO. STAT. § 9-276.19 (Supp. 1969). This section states: "Agency means any authority, bureau, board, commission, department, division, officer or employee of the state, a county, a municipality or other political subdivision of the state, except the state legislature and the judiciary."

As has been noted, "it is evident that the primary concern of the American legal profession and the judiciary has been to establish a meaningful concept of due process of law with reference to administrative proceedings, thereby protecting the citizens under the jurisdiction of administrative agencies."²³ *Fellhauer* serves to represent and reaffirm on a more localized basis the settled proposition that "Congress intended that administrative housekeeping regulations should bow to constitutional supremacy,"²⁴ and all concerned would do well to pay homage to its dictates, to the extent *Fellhauer* may affect the constitutionality of present procedures followed.

Kenneth Culp Davis, in his new book, *Discretionary Justice*, states that the greatest and most frequent injustice occurs at the discretion end of the scale, where rules and principles provide little or no guidance, where emotions of deciding officers may affect what they do, where political or other favoritism may influence decisions, and where the imperfections of human nature are often reflected in the choices made.²⁵

In *Fellhauer*, as emphasized by the minority opinion, the engineer shut down the wells only after an investigation revealed that such action was necessary to protect the rights of senior appropriators. However, being unable to subsequently produce and fully explain the precepts of such plan utilized by him, the procedure was denounced as arbitrary and capricious, and, therefore, invalid. This case undoubtedly will serve as persuasive authority for the proposition that an engineer may still exercise the discretion necessary to perform his duties adequately, but he would be well-advised to establish uniform procedures, or follow procedure established by statute, and then be able to account for his actions as being under such procedure and thereby establish the validity of the same.

In conclusion, it is evident that both the Colorado Supreme Court in *Fellhauer*, and the Colorado legislature in its affirmation of said case, had as their ultimate goal a maximum use of the groundwater of the state without affectation of individual rights. This is a worthy goal, and one hopefully to

23. WOLL, ADMINISTRATIVE LAW 21 (1963).

24. *United States v. C. O. Mason, Inc.*, 51 C.C.P.A. 107 (1964).

25. DAVIS, DISCRETIONARY JUSTICE (1969). See preface at v.

be accomplished by all concerned states. But, as is evidenced by the Wyoming Statutes, this may well be accomplished without placing an undue burden on the state engineer to, in effect, set down complex, detailed working rules and regulations in advance of any action taken by him. This is especially true when such rules are practically incapable of formulation, for all practical purposes, due to the very substance and nature of the element sought to be regulated and controlled. It is conceivable that the majority of state engineers are competent, carry out their duties in the best interest of all parties concerned, and, therefore, are ably qualified to rule fairly on a case by case basis according to the dictates of the respective state legislatures. It should be deemed sufficient that the procedure established by statute is followed, and, all things being equal it should follow that the enactments under such statutes would be valid. *Fellhaure* is, therefore exportable to the surrounding states to the degree that its dictates and caveats have, or have not been, pronounced by the respective state legislatures and the water authorities under them.

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