



OFFICE OF BOARD OF COMMISSIONERS  
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June 21, 2012

John Suthers, Colorado Attorney General  
1525 Sherman  
Denver, CO 80203

Re: Request for Formal Opinion

Dear Attorney General Suthers:

On Tuesday, June 19, 2012, the Board of County Commissioners of Weld County ("the Board") met with Governor John W. Hickenlooper and various Governor's Office staff members to discuss the Emergency Disaster Resolution ("the Resolution") approved by the Board on Monday, June 11, 2012. The Resolution declared a drought emergency in Weld County, and requested the following of Governor Hickenlooper:

**BE IT FURTHER RESOLVED** that the Board requests Governor Hickenlooper to: 1) FORTHWITH declare a statewide disaster emergency affecting Weld County, pursuant to C.R.S. § 24-32-2104(4); 2) FORTHWITH allow those irrigation wells within Weld County which are in approved augmentation plans or substitute water supply plans approved by the State Engineer under current statutory authority to pump for a period of thirty (30) days and suspending the Restrictions in order to cope with and prevent the drought disaster emergency; 3) require that the irrigation wells allowed to pump be metered, with flow data collected to be reported to an entity or State department as directed by the Governor; and 4) require that monitoring wells be established in the South Platte alluvial aquifer in Weld County to determine the effect of the pumping on the groundwater levels and groundwater return flows to the South Platte River.

**BE IT FURTHER RESOLVED** that the Board also requests Governor Hickenlooper to: a) activate the Colorado Drought Mitigation and Response Plan, and b) convene a Drought Impact Task Force specific to the total South Platte River Basin to create a mitigation, preparedness, and long-term recovery plan.

At our meeting on June 19<sup>th</sup>, Governor Hickenlooper provided the Board with a copy of a Confidential Memorandum written by Casey Shpall, Deputy Attorney General, and John Cyran, First Assistant Attorney General, addressed to James Eklund, Deputy Legal Counsel, Governor's Office ("the Memorandum"). The Memorandum states Ms. Shpall's and Mr. Cyran's opinions that the Governor is without authority to order the items listed in the first above-cited "BE IT FURTHER RESOLVED" paragraph. Three reasons are given as the basis for their opinions.

First, “C.R.S. § 24-32-2104(7) does not authorize the Governor to suspend court orders to allow well owners to pump in a manner contrary to an applicable court decree.” The Memorandum then goes on to state, “Second, the Governor does not have authority to issue the executive order requested by the Weld County Commissioners because such an interpretation of § 24-32-2104(7) would create separation of powers concerns.” The third reason given is that, “the Governor does not have authority to issue the executive order requested by the Weld County Commissioners because such an order would create concerns with respect to the operation of Colorado’s constitutional prior appropriation system.”

While the Board appreciates the effort put into the research for and writing of the Memorandum, we respectfully disagree with its reasoning and conclusions. We have two reasons for our disagreement:

- a. C.R.S. § 24-32-2104(7)(a) authorizes the Governor, after declaring a drought or other emergency disaster, to: “Suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business or the orders, rules, or regulations of any state agency, if strict compliance with the provisions of any state statute, order, rule or regulation would in any way prevent, hinder, or delay necessary action in coping with the emergency.” Contrary to what is stated in the Memorandum, the Board is not asking the Governor to suspend court orders which restrict pumping from their covered wells. Rather, the Board is requesting the Governor, through a statewide emergency declaration, to order the State Engineer to suspend or relax his strict enforcement of the rules and regulations requiring compliance with those court orders for a thirty (30) day period in order to allow farmers in Weld County affected by the drought the opportunity to save their crops. We believe that the State Engineer has such discretion, especially when we see the continued use of water freely taken from farm irrigation reservoirs to fight fires in Larimer County. We know of no concern expressed by the State Engineer regarding the injury to senior appropriators in South Platte Basin caused by the water taken in Larimer County to battle the fires. It appears the State Engineer is using his enforcement discretion to allow such water use in this time of emergency, pursuant to the Governor’s Executive Order D 2012-014. The Board believes that in our drought emergency, the State Engineer has similar discretion to allow the temporary well pumping, especially upon being ordered to do so by the Governor, pursuant to C.R.S. § 24-32-2104(7)(a). By doing so, the Governor will not be violating court orders and/or the separation of powers doctrine; instead, he will be exercising his statutory authority to deal with the drought emergency.
- b. The Board views C.R.S. § 24-32-2104(7)(d) as authorization for the Governor to “commandeer” the senior water rights necessary to allow the temporary well pumping. The senior water rights are considered to be private property. *Kobobel v. State of Colorado, Department of Natural Resources*, 249 P.3d 1127, 1131 (Colo. 2011). Pursuant to C.R.S. § 24-32-2104(7)(d), the Governor, through executive order, has the authority to commandeer the private property interests embodied in the senior water rights to the extent necessary to deal with the emergency drought. Again, it appears that is exactly what is happening with the water being used to fight the Larimer County forest fires. The Board is not asking the Governor to re-determine the use of the water in contravention of the court

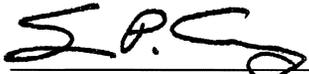
orders. Rather, the request is to commandeer the senior water rights, for which injury may be compensated in accordance with C.R.S. § 24-32-2303. By commandeering the water rights in this fashion, the Governor will not be acting outside of Colorado's constitutional prior appropriation system.

It is for these reasons the Board believes the conclusions reached and the advice given to the Governor in the Memorandum are incorrect. We therefore respectfully request that you issue a formal opinion on this matter, considering the points we have made in this letter.

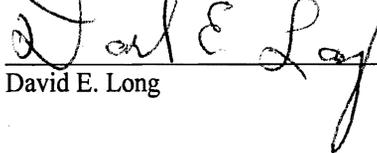
If you wish to discuss this letter, please contact Board Chairman Sean Conway at (970) 356-4000, ext. 4200.

Very truly yours,

BOARD OF COUNTY COMMISSIONERS

  
Sean P. Conway, Chair

  
William F. Garcia, Pro Tem

  
David E. Long

  
Douglas Rademacher

  
Barbara Kirkmeyer

- cc: The Honorable John W. Hickenlooper  
Weld County Attorney Bruce Barker  
Weld Director of Finance & Administration, Monica Mika