

# Oil And Gas Companies Ordered To Comply In Colorado

## Coalbed Methane Subject To Water Law

By Matt Masich  
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DENVER — Water is just as precious a natural resource as oil and gas.

On April 20, the Colorado Supreme Court reaffirmed that notion in *Vance, et al. v. Wolfe*, which ordered oil and gas companies to comply with parts of state water law from which they had thought themselves exempt. Coalbed methane, or CBM, producers must now get water well permits and water augmentation plans for their 4,000 to 5,000 wells in Colorado.

Since the *Vance* decision acknowledges for the first time that oil and gas production can be regulated by the state engineer, the effects could extend further.

Coalbed methane is produced by drilling into deep coalbeds in southern Colorado. The coalbeds are filled with water, the pressure from which holds methane gas against the sides of the coal deposit. When the water is pumped out, the methane gas is released and collected.

The extracted water is put in large storage tanks, then either dumped into streams, open pits, or reinjected into normally inaccessible spaces underground.

### Indeed a beneficial use

The plaintiffs in *Vance*, a group of ranchers from Archuleta and La Plata Counties, took exception to this. They sought a declaration from state engineer Dick Wolfe and division engineer for Water Division Seven, Rege Leach, stating that CBM wells should be subject to water law.

The ranchers were opposed by the engineers and the BP America, one of the largest CBM producers in the state. The water court found for the plaintiffs, and the Supreme Court took the case on direct appeal.

Sarah Klahn of White & Jankowski represented the plaintiffs.

"My clients in the San Juan basin have a very small number of acre feet that they rely on for their farming and ranching operations," Klahn said. "If a CBM well next to them drains the springs and seeps that they rely on — their decreed water rights — that's going to basically put them out of business."

The ranchers have senior water rights, but that didn't stop CBM wells from using the water out of priority. Until last month, CBM producers and the state engineer had argued that because the water is a nuisance byproduct of gas production and not a "beneficial use," it was subject to regulation



PHOTO BY MELANIE CABRAL

**Sarah Klahn of White & Jankowski represented a group of ranchers who had complained that coalbed methane producers had taken water out of turn without replacing it.**

by the Colorado Oil and Gas Conservation Commission but not the Office of the State Engineer.

The Supreme Court ruled that the removal of the water is indeed a beneficial use, as it is a necessary step in extracting methane gas. All beneficial use of water in Colorado is regulated by the state engineer and falls under the jurisdiction of water courts.

### 'It was somewhat ironic'

Mark Squillace, the director of the Natural Resources Law Center at the University of Colorado School of Law, said he would have been surprised if the Supreme Court had

found CBM wells' use to be anything but beneficial use.

"It was somewhat ironic that the industry representatives argued that it was not beneficial use," Squillace said. "One could well ask why they were allowed to take the water if it's not a beneficial use, because you're only allowed to take water for beneficial use."

Squillace said the oil and gas industry's opposition to being regulated by the state engineer highlights some of the problems of Colorado's court-based system of allocating water rights.

"If you read between the lines of the concerns that the defendants had here, it really

wasn't that they didn't want to try to manage their water extractions to protect land owners and owners of other water rights, but rather they didn't want to go to water court because it's expensive and takes time. They just didn't want to do that — and in most jurisdictions, you don't have to do that."

The court didn't weigh in on whether water extracted non-CBM methods of oil and gas production would be considered beneficial use.

"If the court had said that all oil and gas produced water is beneficial use of water, then all 38,000 oil and gas wells would be required to at least get a water well permit," said Beatty & Wozniak attorney Ken Wonstolen, who represents the Colorado Oil & Gas Association.

### Buying time

CBM wells would normally have 60 days to come into compliance, but the state legislature, working with all sides of the *Vance* case and other stakeholders, has taken steps to ease the transition. House Bill 1303, which passed the General Assembly last week and is expected to be signed by Gov. Bill Ritter, would give CBM producers until March 31, 2010 to get water well permits and until the end of 2012 to finalize in water court their long-term augmentation plans to replace the water they use.

This additional time would give CBM producers time to comply with water law, as well as prevent the water courts from being overburdened.

The bill would also give the state engineer rulemaking authority to determine which wells tap into tributary water and which wells are nontributary. This is important, because under Colorado law all water is presumed tributary until proven otherwise, and all tributary water must be replaced under an augmentation plan. If a CBM well is found to be nontributary, it won't have to go to water court to get an augmentation plan.

While CBM producers seemed content with the old system, Wonstolen doesn't think *Vance* will hurt the oil and gas industry.

"I suppose there could be an isolated case here and there where you have a remote group of wells that are not particularly productive and would require a lot of augmentation water. For them it could be straw that breaks camel's back," Wonstolen said.

"Obviously it's another cost at a tough time in the economy, but it's not a prohibitive cost to put these things together."