
MINUTES
FOURTH QUARTERLY MEETING
COLORADO GROUND WATER COMMISSION
NOVEMBER 15, 2002

The Fourth Quarterly Meeting of the Colorado Ground Water Commission took place on November 15, 2002, at 1313 Sherman Street, Room 318, Denver, Colorado. In Chairman Earnest Mikita's absence, Vice-Chairman Max Smith called the meeting to order at 10:00 a.m. Marta Ahrens called the roll and determined that a quorum was present. Commission members present were Eugene Bauerle, Larry Clever, Dennis Coryell, Ralph Curtis, Richard Huwa, Frank Jaeger, Robert Loose, Max Smith, Ted Kowalski and Hal Simpson. Commissioners Larry Clever, Frank Jaeger, Earnest Mikita and Ex-Officio Member Kent Holsinger were absent.

Review and Approval of Agenda Items - There were no additions or changes to the agenda.

Approval of Minutes for Meeting of August 16, 2002 – Vice-Chairman Smith asked if there were any corrections or additions to the Minutes of the August 16, 2002 meeting. Commissioner Curtis noted that “Rio Grande Water *Conservancy* District” should be changed to “Rio Grande Water *Conservation* District” in the first paragraph of the Report of the Executive Director. Commissioner Bauerle moved to accept the Minutes with the correction noted. The motion was seconded by Commissioner Huwa and carried unanimously.

Mr. Simpson read a resolution and presented a plaque to former Commissioner Anne Castle who served two terms as Commissioner and Vice-Chairman for the Ground Water Commission. Ms. Castle accepted the resolution and plaque and expressed her appreciation for the experience and the opportunity to serve on the Commission.

Report of the Executive Director by Hal Simpson – Mr. Simpson reported that the drought continues to be serious throughout the state and appears to be the driest year of record. Many streams will be 25% of average and most major reservoirs in the state that are used for irrigation are empty or nearly empty. Absence any significant and above average snowpack this season, many reservoirs in the state will not be able to fill because they will not be in priority as the senior reservoirs will fill first.

With regard to the Arkansas River litigation between Kansas and Colorado, Mr. Simpson reported that two weeks in December and one week in January, 2003, has been set aside to complete the litigation. The remaining issue before the court is whether Colorado is in compliance with the steps taken to regulate wells in the Arkansas River Basin. The Special Master will make a decision based on technical testimony on the results of the computer modeling, and written briefs on prejudgment interest, and will make a recommendation to the Supreme Court some time next year.

Mr. Simpson reported that the state budget continues to be a concern. The Department of Natural Resources will have to take another 6% cut in the General Fund, and the Division of Water

Resources is the biggest part of the Department's General Fund. The Division has already taken a 4% cut this fiscal year and has 20 vacant positions that cannot be filled. The Division is currently awaiting for guidance on how to move forward.

Status of the Kansas v. Nebraska and Colorado litigation - Republican River Compact by Hal Simpson – Mr. Simpson reported that attempts are being made to resolve this interstate lawsuit on the Republican River Basin. This is a very important issue to the Ground Water Commission because it consists of the entire Northern High Plains Basin and the Commission has been the policy makers on the use of ground water in the basin since 1965. Mr. Simpson stated that progress on the negotiations is continuing. The Colorado team has been meeting with Kansas and Nebraska almost continuously during the past two weeks. This litigation will be discussed further during the Executive Session. A team of attorneys and engineers will present a detailed status report so the Ground Water Commission has an idea of the potential ramifications and the impacts of the settlement.

Proposed Language for Rulemaking to Require Historic Use Analysis and Administration for Rotational Acres by Suzanne Sellers – Ms. Sellers reported that, at the August meeting, the Commission decided to consider a rulemaking change to require third party administration and additional meter requirements for the practice of rotational acres. On September 26, 2002, the proposed language for this rule change was mailed to the Commissioners and the Ground Water Management Districts. The changes consist of deleting paragraph 7.4.2 from the change of description of acres rule, and removes reference to rotational acres from that rule; rule 7.5 will include rotational acres language in the increase in permitting irrigated acres rule; and rule 8 changes the reference that requires flow meters for rotational acres.

Mr. Mike Shimmin, representing Central Yuma County, Frenchman, Sand Hills, and Marks Butte Ground Water Management Districts, provided an explanation for the language that he wrote. He stated that after staff proposal came out at the last meeting, the Central Yuma District felt strongly that the districts should have local options instead of a uniform statewide approach. The proposed language to 7.4.1 and 7.4.2 was distributed to the Commissioners. The Central Yuma District feels that if only the rotational acres rule is changed, and the description of acres rule is not, that it will leave a loophole that people will use to get around the historic use limits on rotational acres by coming in each year and asking for a change in description of acres. The Central Yuma District is considering a local rule that would put additional limits on the change of acres. This would require the staff to honor the district rule within each district. Mr. Shimmin stated that the Frenchman District does not want strict limits on rotation of acres and they feel that there is no need to change the current policy.

Mr. Aaron Nein, from the Frenchman, Sand Hills, Marks Butte, and Central Yuma County Ground Water Management Districts, reported that rotational acres have been a controversial issue among his four districts. The majority of the districts have voted that if there will be a rule change, they want to keep it a local option. Mr. Nein stated that in the Central Yuma District, a rulemaking process has been started where the districts wants to make a local rule and limit rotational acres to historic use and they also proposed a rule to limit a change of the description of acres so it can be done only once every four years.

Mr. Stan Murphy, District Manager from the Plains and East Cheyenne Districts, reported that the East Cheyenne District recommended meter administration, but did not want the historic use. The Plains District feels that the historic use limitation should be required to assure that there is no material injury.

Mr. Jack Adams, Manager of the W-Y District, reported that his district does not allow rotational acres. He stated that if they want rotational acres, they should go through the process and request expanded acres.

Ms. Sellers reviewed the three options for the Commission: (1) to propose rule change to universally require historic use for rotational acres; (2) to require all areas to be limited to historical use unless the district opts out of the option; and (3) to not require historical use limitations unless the districts opts into the requirement. Ms. Sellers requested the Commission to direct the staff on how to proceed with the rule change.

Mr. Pat Kowaleski, conflicts counsel from the Attorney General's Office, clarified that the Commission is not adopting any rule change at this time but deciding whether the Commission wants a rule change, or whether there will be an alternate proposal, and what will be published for public comments.

Mr. Shimmin reported that there are concerns among some districts that rotational acres pose a threat of material injury. He suggested striking 7.4.2, add the local option, and include the suggested change for 7.4.1 on the change in description of acres. Mr. Shimmin stated that the proposals can be combined so that the uniform state rule is historic use subject to the existing Commission approach on expanded acres unless the local districts do something different.

Mr. Simpson suggested that staff meet with Mr. Shimmin to draft language and circulate it at the February meeting. Discussion took place among the Commissioners regarding whether historical use should or should not apply. The recommendation by the Commission was that the rule change take place by next irrigation season.

Discussion of the Recently Adopted Farm Bill with Respect to Ogallala Conservation by Allen Green of the NRCS and Max Smith of the Southern High Plains Ground Water Management District – Mr. Allen Green distributed material related to the Farm Bill and reported that every five to six a Farm Bill gets enacted nationally which is in place for the next six years. The Farm Bill includes a conservation title which outlines the conservation programs, rules, procedures and regulations, along with authorized dollar amounts, that will be available to farmers and ranchers. Mr. Green discussed the EQIP program, which is a base cost-share program which provides financial assistance to private land owners to help them with conservation. This program was authorized for the first time in Colorado this year. Mr. Green reviewed what the NRCS did last fiscal year and the changes that are anticipated for 2003. The intent of the program is to conserve water, improve irrigation efficiencies, conversion to dry-land farming, mitigate the effects of drought, and institute measures to reduce the amount of water that is being pumped out of the Ogallala aquifer. In 2002, Colorado received and allocated over three million dollars that was distributed to counties irrigated by the Ogallala aquifer. The NRCS is in the process of how to implement this program for 2003. The goal of the program is to show the net savings on a particular farm. Also, there cannot be any more land brought into production or put into irrigation on that farm, i.e., they

cannot expand their operation. There is a cost share incentive for irrigation water management and caps will be placed on dollars and acres, an incentive for well abandonment, 50% cost share will be provided for conversion of new systems, and a 75% cost share rate for retrofitting existing systems. If the program receives \$45 million next year, they will try to ensure that the eight states in High Plains aquifer get at least what they got last year. A concern is the high cost of efficient systems, such as drip systems.

Commissioner Smith reported on his involvement with the program and stated that the intent of EQIP was to save water and that it should be funded, and that the best way to save water is by shutting wells down.

Staff Report by Suzanne Sellers and Megan Sullivan - Ms. Suzanne Sellers presented the Staff Activity Report for the last quarter. She reported on the status of the new and replacement applications, the status of the change applications, a list of objections/hearings that are pending and those that have been completed, and a cease and desist order that was issued. Staff investigated ponds that were potentially intercepting water and it was determined that the ponds were not intercepting ground water; four small capacity wells were investigated in the Upper Black Squirrel Creek area; and a property was investigated with seven mobile homes on one well. Ms. Sullivan reported on the final permitting activities for the last quarter. The request for information from the Southern High Plains regarding statements of beneficial use has been slow in coming in; a second request will be sent out soon by certified mail which will allow them 20 days to respond. The staff reports were included in the Commissioners' packets.

Report of the Attorney General by Matthew Poznanovic - Mr. Matt Poznanovic stated that the report which provides a summary of the cases that the Attorney General's Office is involved in was included in the packets. He also reported that the hearing on the Gallegos application for appropriation of designated ground water from the White River aquifer will be held on December 16-17, 2002.

Management District Reports - Vice-Chairman Smith called for the Management District reports.

Mr. Aaron Nein reported from the **Frenchman, Sandhills, Marks Butte and Central Yuma Ground Water Management Districts**. Mr. Nein reported that it's been a bad year due to the drought. Ten cease and desist orders were issued with possibly more to come. Almost everyone on expanded acres this year has experienced problems. If the drought continues, it is anticipated that well owners with expanded acres may abandon them.

Mr. Jack Adams, from the **W-Y Ground Water Management District**, stated that few people understand that expanded acres is water that has been consumptively used for the ten previous years and that a person will never have as much water as what they started with.

There was no report from the **Arikaree Ground Water Management District**.

Mr. Stan Murphy, from the **Plains and East Cheyenne Management Districts**, posed a question to the Commission whether there is any intent to request stronger enforcement actions from the Legislature in an effort to reduce violations due to the drought situation and budget problems.

Commissioner Max Smith reported for the **Southern High Plains Ground Water Management District** and reported on the recent legislation that was passed by a group of five counties to form a taxing unity to collect tax dollars to compete with front range cities trying to buy water from the Arkansas River drainage. Commissioner Smith stated that one of the counties that passed this taxation is Prowers County, and the southeastern corner is within the boundaries of the Southern High Plains. Land owners in the boundary will have to pay a tax to help protect surface water, but not ground water. The Southern High Plains board members went to the Powers County Commissioners and asked to not allow taxation on that portion of the Southern High Plains in Prowers County, but were denied. They will now bring this issue to the water judge in Pueblo to request to be removed from taxation.

There were no reports from the **North Kiowa-Bijou Ground Water Management District**, the **Upper Black Squirrel Creek Ground Water Management District**, the **Lost Creek Ground Water Management District**, or from the **Upper Big Sandy Ground Water Management District**.

Old Business – Summary of Discussion on Anti-Speculation Doctrine with Regard to the Denver Basin Aquifers in the Designated Basins – Ms. Kelly Custer, attorney from Lind, Lawrence and Ottenhoff, representing Lost Creek and Upper Black Squirrel Ground Water Management Districts, reported on behalf of Andy Jones. Ms. Custer reported that the Commission should take a position on the timing of the anti-speculation test in this appeal because it reflects directly to what the determination of water right means.

Mr. Mike Shimmin stated that he supports the concept of the time at which the anti-speculation test should be applied is during the determination phase because it's the only time in the process when there is any publication or opportunity for a hearing. He recommended that the Commission agree that the time at which the test applies is during the determination phase.

Commission in Executive Session – Mr. Pat Kowaleski stated that the Commission will go into Executive Session pursuant to statute during lunch to summarize the Bradbury case and the comments received regarding the Supreme Court appeal on the North Kiowa-Bijou Ground Water Management District v. Ground Water Commission of the State of Colorado, Case No. 2001CV1652, and the status of the settlement discussions regarding Eagle Peak Farms v. Ground Water Commission of the State of Colorado.

A motion to go into Executive Session was made by Commissioner Huwa and seconded by Commissioner Coryell to go into Executive Session on the Bradbury case and the Eagle Peaks case, then to go back on record in open session, followed by another Executive Session to discuss the status of the case in the Kansas v. Nebraska v. Colorado litigation.

Following the Executive Session, Mr. Kowaleski summarized that the session was held in two matters in the pending litigation on the Eagle Peak Farms case and the Bradbury case. The

Commission was asked at the last Commission meeting was whether they felt they should support the decision of the North Kiowa Bijou District with regard to when the anti-speculation doctrine should be applied. A motion was made by Commissioner Huwa that the Commission support the North Kiowa's cross-appeal that the anti-speculation should be applied at the time the determination of the water right is sought; the motion was seconded by Commissioner Bauerle. For the record, Commissioner Curtis abstained from voting due to his being a new member of the Commission and not having enough knowledge about this case. The motion carried unanimously.

New Business –

Selection of Meeting Dates for 2003 – Ms. Marta Ahrens reported that the dates for the Ground Water Commission meetings in 2003 are as follows: February 21, May 16, August 15, and November 21. All meetings, with the exception of the August meeting, will be held in Denver.

Commissioner Coryell discussed the possibility of the Commission looking into some type of legislative action regarding fines and enforcement actions. Mr. Ken Knox suggested that staff develop a position paper for the Commission's consideration at the next meeting on the venue, structure, how fines may work, including pros, cons, and opportunities. Mr. Shimmin reported that this is a worthy idea to consider; however, due to the drought, a number of bills will be introduced this legislative session dealing with water issues, and this may be more suitable for the Interim Water Resources Review Committee, during the interim review process, to consider for the 2004 legislative session.

Mike Shimmin reported that the Central Yuma County Ground Water Management District may want to change its named to shorten it and ask the district vote to change its name. They may be at the next commission meeting with a request for the name change

Next Meeting - The next meeting is scheduled for Friday, February 21, 2003, in Denver.

The meeting adjourned at 1:30 p.m.

Following the public meeting, an **Executive Session** was held to discuss the status of the case regarding the Kansas v. Nebraska v. Colorado litigation. The topic was subject to attorney and client privilege. A motion was made by Commissioner Coryell to go into Executive Session; seconded by Commissioner Huwa, and approved unanimously.

Respectfully submitted,

Marta Ahrens
Secretary to the Ground Water Commission