
MINUTES

FIRST QUARTERLY MEETING COLORADO GROUND WATER COMMISSION

FEBRUARY 21, 2003

The First Quarterly Meeting of the Colorado Ground Water Commission took place on February 21, 2003, at 1313 Sherman Street, Room 318, Denver, Colorado. Chairman Earnest Mikita 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, Ralph Curtis, Dennis Coryell, Richard Huwa, Frank Jaeger, Robert Loose, Max Smith, Ted Kowalski and Hal Simpson. Ex-Officio member Kent Holsinger was absent.

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

Approval of Minutes for Meeting of November 15, 2002 - Chairman Mikita asked if there were any corrections or additions to the Minutes of the February 22, 2002 meeting. Commissioner Smith noted a correction on the last paragraph of page 3 to include the words "conversion to" dry-land farming, and on page 5, in the report for the Southern High Plains Ground Water Management District to change "tax" to "buy". Commissioner Coryell moved to accept the Minutes with the changes. The motion was seconded by Commissioner Loose and carried unanimously. Commissioner Yaeger noted for the record that he was absent at the last meeting and abstained from voting on the approval of the minutes.

Report of the Executive Director by Hal Simpson – Mr. Simpson reported that confirmation hearings will take place on February 28 for Commissioners Frank Jaeger and Ralph Curtis. Mr. Simpson reported on the drought and stated that it continues to be very serious with snowpack statewide at 77 percent of average, with similar precipitation in the Plains. Reservoir storage statewide is below average for this time of the year and reservoirs are not filling because water is not available.

Mr. Simpson reported that the budget situation is in a state of flux and it is difficult to project where the Division will be. He reported on what is happening in Legislature to deal with the budget reductions to reduce state budget by \$850 million in FY 03-04. The Division hopes to minimize the impact of the budget cuts through the passage of SB-181, which will increase well permit fees to offset costs of the operations of ground water programs and will free up \$1.3 million this year and \$3.2 next fiscal year for the state to use in other areas. In addition, the Division is holding 30 positions vacant until they can be filled permanently.

Mr. Simpson reported that the Kansas v. Colorado trial on the Arkansas River is winding down after 17 years of litigation. The Special Master stated that Kansas is entitled to \$29 million dollars in damages for the period 1950 to 1998. Colorado finished strong in the final testimony in January regarding compact compliance. The Special Master is evaluating reports regarding the ground water model and compact compliance and will issue a draft report in April.

With regard to the South Platte issue, Mr. Simpson reported that, due to unfortunate legal circumstances, there are a number of wells that will not be able to pump from a legal perspective unless some issues are dealt with through SB-73. It is a contentious bill by Senator Owen and allows the wells that are impacted three years to file a plan for augmentation in the Water Court and sets the criteria for the State Engineer's office to approve plans. The bill is being lobbied hard by both sides. Twenty other water bills are still alive and Mr. Simpson will provide handout of these bills and discuss how they will impact certain locations during lunch.

Kansas v. Nebraska and Colorado litigation - Republican River Compact by Hal Simpson

– Mr. Simpson reported that all three states agreed to a final settlement and he briefed the Commission on the summary of the Final Settlement Stipulation prepared by Carol Angel of the Attorney General's Office. Some of the key features included: (1) waivers by all three states of all claims through December 15, 2002; (2) a moratorium on new well construction in the upper part of the basin; (3) accounting for uses of ground water by a ground water model jointly developed by experts for the three states with assistance from the Federal government; (4) detailed agreements on accounting procedures such as use of averages, accounting in tributary basins; (5) an administration agreement in the lower basin to firm up water supplies for the major surface water user in Kansas, the Kansas Bostwick Irrigation District; (6) a dispute resolution process for the future; and (7) cooperation on several technical studies with the goal of improving understanding of the basin and increasing efficiency.

Rulemaking Hearing to Require Historic Use Analysis and Administration for Rotational Acres by Suzanne Sellers

– Chairman Mikita called the hearing to order, which is recorded on separate record. Mr. Matt Poznanovic, representing Commission staff, provided background on the reason the rules were proposed. At the August meeting, the Commission decided to limit rotational acres to proposed use. At the November meeting, districts proposed additional language to choose whether the well will be limited to historic use or other criteria. The Commission directed the staff to coordinate with the districts to publish the rule. A copy of the published proposed rule was enclosed in packets and additional documents were distributed during the meeting. Mr. Poznanovic stated that the staff recommends that the Commission adopt one set of uniform rules that can be adopted throughout the districts. The staff's position is that the districts rule should only be implemented if the Commission's rules are satisfied. If Commission adopts the District's rules, the District's rules will be held in the same standards as the Commission rules. The staff feels that there should be one set of rules for description of acres and rotational acres and they should be applied to all Districts and Designated Basins uniformly to avoid having to come before the Commission for approval of rules at every meeting.

Testimony was heard from the following:

Mike Shimmin, attorney representing Marks Butte, Frenchman, Sandhills and Central Yuma districts, expressed concern and disagreed with the staff's opinion that one set of rules be applied uniformly. Three of the four districts voted to support a local option. Mr. Shimmin recommended deleting 7.4.2, which is a change in description of rotational acres. He stated that the process for implementing a district rule should be done at the district level. The Commission and Districts should be on the same page on issues when permits are approved, and that the District's rule is

appropriate. He wants to allow local district option.

Mr. Stan Murphy, of the Plains and East Cheyenne Ground Water Management District, stated that granting of rotational acres would increase injury to other water rights; therefore, the Commission should remove the rotational acres rule.

Discussion and deliberation ensued between the Commission members regarding the rotational acres rules, administration and use of metering, local control within guidelines by ground water management districts, and rule language. Commissioner Bauerle moved to accept the staff's preferred rule language but change the last sentence of rule 7.4.2 from "last *three* years" to "*four* years"; the motion was seconded by Commissioner Coryell and approved unanimously.

Hearing on a Request for a Variance to Designated Basin Rule 7 (Including Rules 7.3 and 7.10) Relating to Applications by Wayne E. and Francis G. Booker to Change the

Locations of Five Wells by Peter Boddie, HRS Water Consultants, Inc. – Chairman Mikita called the hearing to order. Ms. Linda Bassi, First Assistant Attorney General, was Conflicts Counsel representing the Commission. The following persons addressed the Commission: Mr. Tim Beaton, attorney, represented Wayne and Francis Booker. The Bookers' request for variance is based on their inability to pump their wells due to lack of enforcement by the management district and junior pumping dried up their wells. They unsuccessfully tried to redrill these wells in the 1980s but could not produce water. Because they could not pump their wells, they requested a variance from Rule 7. Mr. Wayne Booker stated that he irrigated since 1949, there was adequate supply through 1960s, and a decline in the 1970s. Due to lack of enforcement of the priority system by the ground water management district, the Bookers have been unable to use their well. Mr. Beaton stated that the variance request by the Bookers is based upon undue hardship.

Mr. Peter Bodie, with HRS Water Consultants, reported that HRS performed a full analysis of historic use of the Booker wells in 1985 and distributed a report to the Commission Members. The Bookers want to move their wells greater than 50 feet. Mr. Bodie stated that the Bookers have no opportunity to exercise their water rights due to junior pumping and that giving a variance to the two rules is a practical solution.

Mr. Matt Poznanovic, representing Commission staff, stated that the question is whether unusual hardship or injury will develop. The staff asked the Commission to limit its decision during this hearing to whether unusual hardship will result and not take position on the question of injury or the water table. Mr. Bill Fronczak stated that the staff is questioning the unusual hardship claimed by the Bookers because their wells have not been used for the last 15 years and waited until now to come before the Commission. The additional concern is that if the wells are moved to a deeper source, it would create injury at the new site.

Mr. Ted Schubert, of Schubert Ranches, expressed concern if this variance is granted that it would affect his senior water rights as there is a severe shortage of water. He stated that Mr. Booker has 15 wells in the alluvium that are junior to their wells and they have abandoned two wells that have completely dried up.

Mr. Andy Jones, representing the Upper Black Squirrel Creek Ground Water Management District, stated that the District is objecting to this variance request because it is in violation of District Rule 4 regarding drilling wells 50 feet from the existing well. The potential impact of granting this variance request is injury. He stated that the Bookers would have had an option of changing the location of their wells at the time their wells dried out 15 years ago. The District requests that the Commission deny the variance request.

Mr. Forrest Leaf, of Leaf Engineering, also representing the Upper Black Squirrel Creek Ground Water Management District, agrees with the staff's recommendation that consumptive use is quantified. They feel that there will be injury because the consumptive use that has been quantified could result in more water than will be taken out of the saturated alluvium.

Commissioner Smith moved to deny the variance; the motion was seconded by Commissioner Clever and approved unanimously.

Proposed Amendments to the Rules of the Central Yuma County Ground Water Management District by Mike Shimmin, Attorney for the Central Yuma County Ground Water Management District – Mr. Shimmin distributed copies of the proposed rules that Central Yuma is considering. The amendments are to the rules concerning payback of over-pumping, additional administration of wells permitted for less than 2.5 acre-feet per acre, and the rules concerning the limits on changes of description of irrigated acres. The current procedural status of these rules is that they have gone through public notice and the district held a hearing on January 24. Commissioner Bauerle stated that the 2-to-1 payback policy is exercised in other districts and appears to be working. Mr. Fronczak expressed that the staff has no comments regarding the language, however, expressed the concerns of the staff with regard to the definition of over-pumping and administration. Commissioner Clever made motion that the Ground Water Commission support the adoption of the Central Yuma County Ground Water Management District proposed rule concerning the payback of over-pumping and the additional administration of wells permitted for less than 2.5 feet per acre. The motion was seconded by Commissioner Bauerle and approved unanimously.

Staff Report by Suzanne Sellers and Megan Sullivan - Ms. Suzanne Sellers presented the Staff Activity Report for the last quarter. She reported on the small capacity and large capacity applications, well determinations, change applications, the cases before the Hearing Officer or district court, an illegal injunction under enforcement items and actions, and other miscellaneous items. The new Designated Basin well permit forms have been updated by staff and they are available on the Internet. Staff attended meetings with the Water Quality Control Commission, in addition to meetings with the Lost Creek and Upper Black Squirrel Creek to coordinate actions of ground water management district rules. Ms. Sullivan reported on the final permitting for the last quarter. She reported that the response to clarify information from the Southern High Plains has been slow. Both of these staff reports were included in the Commissioners' packets.

Report of the Attorney General by Matthew Poznanovic - Mr. Matt Poznanovic stated that the report that provides a summary of the matters that the Attorney General's Office is involved in was included in the packets. He stated that in the Town of Bennett case, that the Hearing Officer issued its initial decision, has been appealed by an objector in the case and will be heard at the next Commission meeting. The application by Kenneth Pottorff will be heard before the Hearing Officer in mid-May.

Mr. Bill Fronczak discussed the developments in the Bradbury case and reported that the staff filed an initial brief on whether the determination of a water right was a water right. The staff is in process of preparing a reply brief to the cross-appeal. This will be presented before the Supreme Court sometime in August.

Management District Reports - Chairman Mikita 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 thanked Gregg Stults and Duard Fix from the Central Yuma District for coming to the meeting. Mr. Nein reported that well measurements for this year are off to good start. Marks Butte is 100% complete and the average is 2.5 inches decline with the highest decline at 3.5 feet. The Frenchman District average is 4 inches decline and the highest is 3.4 feet. In the Sandhills District, the average decline is 2.7 feet with the highest decline at 4.3 feet. The Central Yuma well measurements are not yet complete.

Mr. Jack Adams, from the **W-Y Ground Water Management District**, complimented the staff, Hal Simpson and Ken Knox on the job they have done in the last year.

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

Mr. Stan Murphy, from the **Plains and East Cheyenne Management Districts**, reported that he took water level measurements of the wells in each township and averaged them; the average decline was 3.5 feet along the Kansas state line. He stated that the wells along the Burlington area have a high nitrate level and they are going to try to locate the source.

Commissioner Max Smith, reporting for the **Southern High Plains Ground Water Management District**, stated that at the last Commission meeting, the newly formed water conservancy district for the five counties from Pueblo east to the state line on the Arkansas River included a portion of their district in their taxation, and the board decided to fight that decision because they are not tributary to the Arkansas. Mr. Mike Shimmin, attorney, was hired after the water conservancy district was formed and reported that the district tried to implement a provision in the water conservancy district act that allows municipalities within a newly formed district to exclude themselves automatically. Violations were discovered in the water conservancy act regarding notice in publishing the formation of new district. Commissioner Smith reported that his district shows five to six feet decline in water level measurements.

There was no report from the **North Kiowa-Bijou Ground Water Management District**.

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

Old Business –

Enforcement Penalties by Bill Fronczak - Mr. Fronczak reported that Section 37-92-503, of the Colorado statutes, allows the State Engineer to impose penalties for certain violations in areas outside of the designated basins. He stated that the Colorado Department of Public Health, under their hazardous waste regulations, have a penalty structure and a grade of fines ranging from a small fine to a very large fine depending upon the violation and disregard of law. Mr. Fronczak suggested that language be proposed for FY 2003-04 to add a penalty statute to the ground water management act for cease and desist orders and fines for violations. Commissioner Coryell agreed with adding a penalty statute because enforcement can become expensive for the State Engineer's office. Mr. Simpson suggested that Commissioner Coryell contact Senator Hillman regarding possible legislation on this issue for 2004 since the Senator has indicated interest in the Northern High Plains. It was consensus of the Commissioners to proceed with this.

New Business – None.

Next Meeting - The next meeting is scheduled for Friday, May 16, 2003, in Denver.

The meeting adjourned at 2:33 p.m.

Respectfully submitted,

Marta Ahrens
Secretary to the Ground Water Commission