
MINUTES
SECOND QUARTERLY MEETING
COLORADO GROUND WATER COMMISSION

MAY 16, 2003

The Second Quarterly Meeting of the Colorado Ground Water Commission took place on May 16, 2003, at 1313 Sherman Street, Room 318, Denver, Colorado. Chairman Earnest Mikita called the meeting to order at 10:10 a.m. Marta Ahrens called the roll and determined that a quorum was present. Commission members present were Eugene Bauerle, Larry Clever, Dennis Coryell, Richard Huwa, Frank Jaeger, Robert Loose, Max Smith, Ted Kowalski and Hal Simpson. Commissioner Ralph Curtis and Ex-Officio member Kent Holsinger were absent.

Review and Approval of Agenda Items - Mr. Simpson suggested that discussion on Item 11, Status of Eagle Peak Farms, be taken up prior to lunch since it will be discussed during the Executive Session at noon.

Approval of Minutes for Meeting of February 21, 2003 - Chairman Mikita asked if there were any corrections or additions to the Minutes of the February 21, 2003 meeting. Commissioner Smith noted a correction on the Southern High Plains report on page five to delete the wording "east of the state line" and replace with "from Pueblo east to the state line" in the first sentence. Commissioner Coryell moved to accept the Minutes with the correction; the motion was seconded by Commissioner Huwa and carried unanimously.

Report of the Executive Director by Hal Simpson – Mr. Simpson reported that the Senate Ag Committee voted to recommend the reappointment of Commissioners Max Smith and Robert Loose for a second term. Mr. Simpson stated that water supply conditions throughout the state are varied. As of May 12, the status of the snow-water content throughout most of the state is above average, with the south and southwestern parts of the state at well below average. There is a good chance of filling most of the major irrigation reservoirs on the South Platte Basin by the time the snowmelt runoff is over in late June. Mr. Simpson discussed the legislation that has passed this session and those bills that are still awaiting the Governor's signature. With regard to the Arkansas litigation, Mr. Simpson reported that the draft report by the Special Master has not yet been received. Mr. Simpson thanked the staff for their work and the short turn-around time in publishing the report on the ground water level measurements.

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

Mr. Simpson reported that work continued with Nebraska and Kansas to finalize the ground water model for the entire Republican River Basin. He stated that they had an agreement in concept to the model and are now doing final calibration to achieve improved calibration in the eastern part of the basin and in Nebraska. The timeline is to have model finished by mid-June for endorsement so the model can be in place by July 1st of this year. The Special Master submitted to the Supreme Court his recommendation, which basically endorses the stipulation and related material approved by the three states in December of last year.

Hearing on the Objection to the Hearing Officer's Initial Decision and Ruling in the Matter of an Objection to the Applications for Change of Water Right to Combine the Allocations of Two Determinations of Water Right and to Change the Place of Use and Type of Use in Each Determination from the Kiowa-Bijou Ground Water Basin and North Kiowa-Bijou Ground Water Management District in Arapahoe County, by Don McClary – Chairman Mikita called the hearing to order. Mr. Pat Kowaleski, Assistant Attorney General, was Conflicts Counsel representing the Commission.

The following persons addressed the Commission regarding the motion to strike and for protective orders: Mr. Don McClary, attorney representing the North Kiowa Bijou Ground Water Management District (District), stated that staff and their attorney present the legal briefs regarding how they should rule. Mr. Matt Poznanovic, from the Attorney General's Office, representing the Commission staff, stated that the Commission previously decided that staff may participate in these hearings and suggested that the motion is without merit and should be denied.

Discussion took place regarding the staff's validity of presenting facts and entering a legal brief in the matter, and concluded that the staff has played an important role in providing facts to the Commission to enable them to make decisions. After deliberation by the Commission Members, Commissioner Clever moved to deny the motion to strike staff's response to the District's exceptions and for protective orders; the motion was seconded by Commissioner Jaeger. Commissioner Loose abstained from voting; the motion passed.

Mr. Don McClary stated that this would open a Pandora's box and the determinations should not be granted. Ms. Carrie Ciliberto, attorney representing the Town of Bennett, stated that the town is asking to combine two determinations and that this change will not cause material injury to any vested water rights, and, in addition, they are seeking attorneys fees. Mr. Poznanovic, representing the staff, asked that the Commission uphold the initial decision of the Hearing Officer that 111(1)(g) applies to changes of determinations of water right.

Commissioner Jaeger made a motion to deny attorneys fees. The motion was seconded by Commissioner Clever and carried unanimously. Commissioner Jaeger stated that compelling reasons to overturn the decision of the Hearing Officer has not been heard. Following discussion by the Commission Members, Commissioner Jaeger made a motion to affirm the Hearing Officer's decision. The motion was seconded by Commissioner Clever and passed with eight in favor and one opposed (Commissioner Coryell).

Status of Eagle Peak Farms Ltd. v. Colorado Ground Water Commission (Case No. 99CV0097) and Eagle Peak Farms Ltd. v. Lost Creek GWMD (Case No. 98CV1727) both in Adams County District Court by Bill Fronczak – Mr. Fronczak, from the staff, briefed the Commission regarding updates on the Eagle Peak litigation. Mr. Joel Farkas, on behalf of Eagle Peak Farms Ltd. and Sweetwater, thanked the staff and Mr. Simpson for their efforts in responding to their voluminous and extensive questions to assist them in assembling facts on this case. Mr. Andy Jones, on behalf of Lost Creek Ground Water Management District, updated the Commission on the litigation and provided several reasons why they should not settle the case today. The reasons include: the summary judgment pending in the District Court could settle the entire case; the gist of the case is defense of one of the Commission Rules 7.7.4; Sweetwater is not a party to this case; budgetary and staffing concerns; attorney's time is minimal; political influence should be

no substitute for the rule of law; affects the relationship between the District and the Commission; the only potential for settlement is a potential for dismissal of the case by Eagle Peak Farms; what Sweetwater is proposing is entirely different than what Eagle Peak proposed; has implications on the progress of the case – it would be remanded to the Commission for what the consumptive use of the wells was. Mr. Jones stated that the benefit of settling is minimal and would result in wasted resources and the only settlement would be unconditional dismissal by Eagle Peak.

Mr. Walraven Ketellapper, whose property is surrounded by Eagle Peak, stated that the majority of the district does not represent his thinking and has heard misrepresentation of facts. He sees no reason for not going forward with the consumptive use issue and is more comfortable with the Commission settling the issue.

Mr. Mike Shimmin, attorney representing the Lost Creek Land and Cattle Company, stated that Lost Creek was not a party to this nor informed of the settlement discussions and has relied on the Commission's Rule 7.7.4.

Executive Session - Commissioner Clever made a motion to go into Executive Session at 12:40 p.m. to discuss settlement negotiations and proposals with respect to the Eagle Peak litigation, 99CV0097. The motion was seconded by Frank Jaeger and passed unanimously.

Following the Executive Session, Commissioner Jaeger moved to continue this issue at the August meeting and suggested to all of the parties, including the District, the applicant, and the state, to get together and negotiate this matter. Commissioner Clever seconded the motion and it was approved unanimously.

Petition for Reinstatement of a Well Permit Regarding Expanded Acres on the Well with Permit No. 11744-FP in Yuma County by Randy Fair, Attorney for Well Owners – Commissioner Clever made a motion to deny the petition because the parties failed to appear, but leave it open for the Commission to consider any extenuating circumstances as to why the Hayes were not present. In response, Mr. Ted Kowalski indicated that the parties do not need to be present at the hearing according to the rules. Commissioner Clever withdrew the pending motion and the hearing commenced.

Mr. Fronczak provided brief background information and the status of the application. The issue before the Commission is to determine whether the staff acted properly in not accepting the late statement of beneficial use for the subject expanded acres under Section 37-90-108(3)(c). Mr. Poznanovic stated that the Hayes should submit a new application for expanded acres for evaluation under Section 37-90-111(1)(g). Mr. Aaron Nein, District Manager for the Sand Hills Ground Water Management District, recommended that the existing expanded acres claim be reinstated as there was a permit issued on it and it was put to use prior to 1980. Mr. Stan Murphy, for the Plains and East Cheyenne Ground Water Management Districts, stated that the Commission should deny the request or it will set a precedent. Many of his constituents have had to live by these same laws and they would also want similar treatment if this request is approved. Commissioner Coryell made a motion to deny the variance request; Commissioner Clever seconded the motion. The motion passed with eight in favor, and one opposed (Commissioner Bauerle). Commissioner Jaeger suggested that the Hayes should submit an application by the August meeting if they want to continue to irrigate the expanded acres.

Discussion and Decision on the Processing of New Well Permits and Changes of Water Rights in the Southern High Plains by Bill Fronczak -- Mr. Fronczak brought this before the Commission due to numerous questions from the applicants on how they can make right what they are currently doing. Mr. Fronczak stated that he has had several discussions with Commissioner Smith and staff regarding how they can make the situation easier for the irrigators within the caveats of the laws and rules. He proposed to bring language to the Commission to pass a resolution that would give staff flexibility to review applications for expanded acres and water rights on a case-by-case basis and not have it mandatory to apply historic use. Commissioner Smith stated that the board is waiting for the final permits to be completed before making a management decision. Doug Melcher, secretary to the board, suggested that a resolution be written to seal the abandoned wells.

Repromulgation of Rule Adopted on February 21, 2003 Requiring Historic Use Analysis and Administration for Rotational Acres by Suzanne Sellers – Ms. Sellers requested that the Commission repromulgate the rules on rotational acres due to a problem in obtaining a signature from the Attorney General within the required twenty days. The rules in question are 7.4, 7.5 and 8. Commissioner Bauerle made a motion to repromulgate the rules. The motion was seconded by Commissioner Loose and passed 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, the complaints investigated by staff on small capacity wells, a field investigation, and other miscellaneous items which included staff attending water quality meetings. Ms. Megan Sullivan reported on the final permitting for the last quarter. She also stated that the clarification process continues. 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 the next hearing that is set is regarding the Gallegos petition and will be held on June 11 and 12. Mr. Kowaleski reported that the Bradbury Case is set for oral argument before the Supreme Court on June 9, and there might be something from the Supreme Court in regard to Bradbury and the determination of water rights.

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 stated that they are still feeling the affects of the 2002 drought with water level declines and provided the average declines in each of his ground water management districts. He stated that 2003 is off to a better start and reported on the current precipitation reports in his districts.

There were no reports from the **W-Y Ground Water Management District** or from the **Arikaree Ground Water Management District**.

Mr. Stan Murphy, from the **Plains and East Cheyenne Management Districts**, stated that the district performed a joint project with the Kit Carson County Farm Bureau and held a water meeting

with over 200 people in attendance. He reported on the shared effort with the City of Burlington to measure irrigation wells for nitrate levels.

Mr. Doug Melcher, reporting for the **Southern High Plains Ground Water Management District**, stated they attended the water symposium in February and completed water level measurements in March. The district experienced approximately six-foot declines in water levels. Commissioner Smith suggested drafting a resolution to exclude the district from the Lower Arkansas Water Conservancy District, and asked if the staff can look into the pros and cons of whether the Commission can adopt such a resolution. Mr. Melcher offered that the Southern High Plains and the Frenchman Ground Water Management Districts present a resolution on this matter at the August meeting.

Commissioner Loose reported for the **North Kiowa-Bijou Ground Water Management District**. He stated that they have been investigating illegal wells on the Kiowa basin and appropriate directors have been dispatched to meet with the violators. They are busy with many development projects with the county planning commissions on converting irrigation wells to domestic use, in addition to making sure permits are completed correctly before they are submitted.

Upper Black Squirrel Creek Ground Water Management District – Mr. Andy Jones reported on the development of new district rules. He also reported on the new subdivisions in El Paso County, which are taxing the limited resources in the aquifer. The alluvial aquifer is essentially exhausted and there is a heavy reliance on the Denver Basin to supply water to these subdivisions. The district created a rule to limit water used in residential areas to a reasonable amount. The essence of this rule is to limit residential uses to one-half acre-foot per residence. Another part of the rule will eliminate the potential for small capacity wells into the Dawson or alluvial aquifers in the basin. Mr. Jones has a draft of these rules and will provide it to anyone interested. It will go to publication in about two weeks.

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

Old Business – None

New Business – Mr. Reiner Haubold, from the audience, reported that the American Ground Water Trust Workshop on ground water recharge and conjunctive use will be held in Denver on June 13 and encouraged the Commission and others to attend.

Next Meeting - The next meeting is scheduled for Friday, August 15, 2003, in Gunnison.

The meeting adjourned at 3:45 p.m.

Respectfully submitted,

Marta Ahrens
Secretary to the Ground Water Commission