
MINUTES

THIRD QUARTERLY MEETING COLORADO GROUND WATER COMMISSION

AUGUST 15, 2003

The Third Quarterly Meeting of the Colorado Ground Water Commission took place on August 15, 2003, at the Comfort Inn, Gunnison, Colorado. Chairman Earnest Mikita called the meeting to order at 8:30 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, Robert Loose, Max Smith, and Hal Simpson. Commissioner Frank Jaeger and Ex-Officio members Kent Holsinger and Ted Kowalski were absent.

Review and Approval of Agenda Items - Mr. Simpson recommended that Item 8, Motion for reconsideration of May 16, 2003 Commission decision concerning the petition for reinstatement of a well permit no. 11744-FP owned by Steve and Ronda Hayes, be deleted from the agenda and to deal with it at the next meeting.

Approval of Minutes for Meeting of May 16, 2003 - Chairman Mikita asked if there were any corrections or additions to the Minutes of the May 16, 2003 meeting. Commissioner Coryell moved to accept the Minutes; the motion was seconded by Commissioner Smith and carried unanimously.

Report of the Executive Director by Hal Simpson – Mr. Simpson suggested sending a letter of appreciation, on behalf of the Ground Water Commission, to the local representative of the Bureau of Reclamation thanking him for the informative tour of Morrow Point Dam. Mr. Simpson summarized the correlation between the Aspinall Unit's three dams and the Colorado River Compact entitlement. The project can provide for consumptive use in Colorado up to 250,000 acre-feet of water per year with some water released for mitigation for endangered species, and is an important component for Colorado's ability to use its unused compact entitlements. Of the 15 million acre-feet of water presumed to be available from the Colorado River Compact, Colorado is entitled to 51.75 percent of the 7.5 million acre-feet of the upper basin's entitlement. This is about 3.8 million acre-feet of water, which is not fully being utilized, and two studies are currently underway to potentially bring additional water to the front range to deal with growing demands.

Mr. Simpson reported on Federal Senate Bill 212, of which a copy was included in the packets. This bill was passed in Senate and they are currently looking for house sponsors to authorize additional studies of the Ogallala aquifer by the federal government and other state agencies. A special panel would be created to authorize additional data collection and models to understand how this aquifer could be managed better. They are looking for sponsors from eight states, and the lead sponsor will be a representative from Kansas. Mr. Simpson recommended that if the Commission Members feel this is important legislation, to contact Representative Musgrave in the U.S. Congress, to consider being a sponsor.

Mr. Simpson reported on the Colorado State Fair and stated that the Commission Members, along with Legislators, are invited to attend the luncheon on August 22. He encouraged the

Commissioners to attend this luncheon and tour the water exhibit depicting the hydrologic cycle.

Mr. Simpson reported on a special study called the Core Mission project that began the first of July. The Department of Natural Resources decided to study how the Department can become more efficient and more effective and brought in an outside consultant. The staff has invested numerous hours with very tight timelines and will come forth with suggestions on how to operate more efficiently by the end of September. A possible outcome would be to combine the Division of Water Resources with the Colorado Water Conservation Board and to look at whether this makes sense or saves money. Mr. Simpson stated that the Commission may be involved with giving their recommendation of whether they support some of these ideas or not.

With regard to the Arkansas River Compact litigation, the Special Master has not issued his report, but intends to have a draft report sometime this month that will, hopefully, show that Colorado is in compliance with the compact.

Discussion and presentation on the Republican River Compact settlement by Ken Knox

Mr. Knox reported on the parallel efforts between the three states that have occurred since the last meeting. One component was to assess the impacts on terracing and non-federal reservoirs. The intent is to provide the compact administration a scope of work for a detailed study that will be conducted. Another component is the completion of the ground water model that was scheduled to be delivered to the court on June 30 of this year. The model was a success for Colorado. The model showed that in the year 2000, Colorado was approximately 4,000 acre-feet out of compliance, which was compounded by the drought and lack of streamflow. In-house analysis is being done to project what the future will look like by looking at data from previous years. Mr. Knox stated that the Republican River Compact meeting will be held on August 21-22 in Alma, Nebraska. Mr. Simpson added that all three states in certain areas are out of compliance based on the model.

Discussion on a possible moratorium on the issuance of all new well permits within the Northern High Plains Designated Basin by Bill Fronczak – Mr. Fronczak reported that his intent is for this agenda item is for the Commission to look into possibly changing Rule 5.2.2 regarding the three-mile circle evaluation. He stated that new wells compound the problem of depletions in the Northern High Plains Designated Basin, which could impair Colorado's compliance with the Republican River Compact. Discussion ensued on whether this rule should be changed or to leave the rule alone and continue with the three-mile circle. Commissioner Coryell asked whether new appropriations in this area would reflect additional depletions from the Republican River Compact. Mr. Knox proposed to enter hypothetical numbers into the model and bring it to the November meeting. Commissioner Smith agreed with Mr. Knox's suggestion, provide the information to the districts, and then bring it back to the Commission for discussion.

Discussion and decision on the processing of changes of water rights in designated basins where ground water is available for appropriation by Bill Fronczak. Mr. Fronczak reported that this issue is affecting their analysis and final permitting activities in various basins, particularly in the Southern High Plains. There are four basins where designated ground water is still available for appropriation. The issue is how to change or expand the consumptive use of existing wells within said basins without causing material injury to other vested water rights. Mr.

Fronczak stated that staff is considering looking at change of water rights cases where there is no increase in the original well permit's annual withdrawal and limiting the said well to the original permitted amount, and not the currently required average annual historic consumptive use. It is thought that this would not require a rule change, but a policy declaration allowing the staff to look at the change of water right applications and not strictly apply a straight historical consumptive use analysis. Mr. Fronczak proposed to put together a resolution or document for the Commission to sign at the November meeting to continue with the current rules.

Commissioner Smith stated that, as far as the Southern High Plains is concerned, in the majority where there is expanded acres, it was done years ago. If there was going to be any material injury, it would have been going on for quite some time, and no complaints have been brought to his attention.

Mr. Mike Shimmin, attorney, stated that this is a potentially very complicated issue because of the potential for it to affect priority dates of water rights. It's just a matter of time until every designated basin faces the issue of what does the modified prior appropriation system really mean. He stated that expanding the use of existing wells without assigning them a junior water right and a priority date when they can be administered within the modified appropriation system is a complicated issue. Mr. Shimmin suggested that if staff wants to pursue this, it is important to get a draft out for review and comment by the districts and let them know what areas this applies to and how it fits into a priority system.

Mr. Fronczak stated that the new use (the expansion) would be the date on the new application, the original water right is not affected. Chairman Mikita suggested that the staff put together packets and make it available to the districts and present it at the November meeting. In addition, Mr. Fronczak will provide a draft to allow grandfather provisions where permits are completed in multiple wells.

Appeal of the decision of the Hearing Officer in the matter of the petition for appeal of action of the State Engineer and the Colorado Ground Water Commission causing injury to senior water rights of Gallegos, et al., located in the Upper Crow Creek Designated Ground Water Basin, Weld County (Case No. 03-GW-06) by Tim Buchanan – 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:

Mr. Tim Buchanan, represented the Gallegos family on this appeal. He stated that this issue arises out of the issue regarding priority of appropriation and the rights attributable to the rights of prior appropriation. The Gallegos family has a vested water right in the Upper Crow Creek Basin that is entitled to protection by Colorado water law and the Commission. The basis for this appeal was a similar case in the Supreme Court appeal in the Pioneer Irrigation case. It is their position that the Commission has jurisdiction over the designated basin wells and must regulate those wells in accordance with the Ground Water Management Act. They request that the Commission and the State Engineer order curtailment or regulation of the wells in order to insure adequate water supplies owned by the Gallegos family in the Upper Crow Creek Designated Basin.

Mr. Matt Poznanovic, from the Attorney General's Office, representing staff, stated that

designated ground water and tributary ground water are mutually exclusive of administration of the 1969 Ground Water Act and cannot order the curtailment of surface rights. The staff asks that the Commission affirm the decision of the Hearing Officer. The Commission only has jurisdiction over designated ground water and does not include administration of surface rights. The Commission should affirm the decision that administration is according to modified appropriation. The petitioner is asking the Commission to shut off wells that are tributary to their surface water rights. The staff requests that the Commission affirm the Hearing Officer's decision on each issue.

Following discussion by the Commission Members, Commissioner Clever made a motion to deny the appeal by Gallegos and accept the decision of the Hearing Officer. The motion was seconded by Commissioner Smith 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, determinations, the status of change of water right applications, the objections and hearings that are pending before the Commission, enforcement actions, and other miscellaneous items which included staff attending Republican River Compact meetings, the Core Mission Project, and field inspections for statements of beneficial use. Ms. Megan Sullivan reported on the final permitting for the last quarter, and stated that they are still clarifying well permits that were issued prior to 1973.

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.

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 since July 1, it has been very hot and dry, and with the exception of a few isolated areas, they have received very little rainfall. Between the four ground water management districts, there are 200 high capacity wells that are being registered. Mr. Nein requested clarification regarding wells that are out of compliance on the Republican River Compact in his district and the possibility of pumping water from wells into the river to replace depletions. Mr. Simpson offered some solutions and will be setting up meetings this fall with water users and districts to discuss this.

Mr. Jack Adams, from the **W-Y Ground Water Management District**, reported that they had one of the best wheat crops in his area that they have ever had even though it's been dry since July.

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

Mr. Stan Murphy, from the **Plains and East Cheyenne Management Districts**, provided information on the state of affairs on how water management is working at the local level. He reported on violations regarding commingled wells. Mr. Murphy stated that he sent a letter to the staff and received a cease and desist order. He said that the violations continue, however, the staff is too busy to deal with it. Mr. Fronczak stated that they will contact the landlord next

week regarding the illegal use of water and may have to file a contempt action against the well owner.

Commissioner Max Smith, reporting for the **Southern High Plains Ground Water Management District**, stated they had some moisture in June, but it's been dry since then with strong winds. With regard to the EQIP program, the drip systems that were funded are now installed in the county and are operating and getting good yield from the crops. Between 800 to 1000 acres of onions are being grown, along with cantaloupe, cucumbers and peppers. He stated that the EQIP program is working well.

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

Mr. Andy Jones, attorney, reported for the **Upper Black Squirrel Creek Ground Water Management District**. He stated that the new rules have been adopted for small and large capacity wells for subdivisions. They eliminate small capacity wells for domestic and commercial uses that are proposed in over-appropriated aquifers. Denver Basin wells are also limited to one-half acre-foot per residence. With regard to the proposed rule for priority enforcement, the Upper Black Squirrel Creek Ground Water Management District will be first basin that will face this issue. The modified priority system will require written calls by the party who claims they are injured by other wells, and this will need to be accompanied by an engineering report. The wells that are sought to be curtailed will be notified and given an opportunity to provide their own comments. The district would then request a review by staff of the engineering reports. The district would hold a hearing and make a discretionary decision on whether unreasonable injury is occurring and how curtailment would help the complaining senior water user. The district will forward a draft of this process to staff and the State Engineer.

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 – Commissioner Coryell asked whether there is a timetable for the meetings between Senator Hillman and the districts concerning implementation of the Republican River Compact settlement. Mr. Simpson replied that it will be following the Core Mission Project at the end of September.

Mr. Andy Jones requested time to address the Commission prior to going into Executive Session. Mr. Jones stated that at the last meeting, the Commission instructed the district and staff and Eagle Peak Farms to engage in settlement discussions. He provided an update on those discussions. The district met twice with the applicant and staff; there is no settlement at this point. The primary differences have to do with whether certain parcels were irrigated and historic consumptive use. In terms of a proposed course of action for the Commission, the district feels that the Commission has supported them in this issue. The District Court has stated it is out of the Commission's hands. Mr. Jones asked the Commission the following: to request the parties here to continue discussion of the issue and work towards a settlement; to encourage the parties to come forward with the requested information and proof so everyone is on the same page; and

asked the Commission to renew instruction to staff to continue to include the district in settlement negotiations.

Messrs Joel Farkas and Harvey Deutsch, partners and equal managers of Eagle Peak Farms, addressed the Commission. Mr. Farkas reported that they have had at least four formal meetings with the state and corresponded to obtain engineering data, including aerial photography. Mr. Farkas thanked the efforts of the staff for all the work they put into this matter. Their position remains the same in that they have an interest in settling and, in the best interest of the state, to bring this to conclusion. Mr. Harvey Deutsch stated that January of 2004 will be the 10-year anniversary of this case, and it has been in court for the past six years. He stated that the decision on determinations should be made by the Ground Water Commission. They are willing to live with the staff's determinations and want to continue to work with the Commission in the future in the same fashion as in the past.

The public meeting of the Ground Water Commission adjourned at 11:20 a.m.

Commission in Executive Session - Commissioner Bauerle made a motion to go into Executive Session; the motion was seconded by Commissioner Coryell and passed unanimously. The Commission went into Executive Session to discuss settlement negotiations and proposals with respect to the Eagle Peak litigation, Case Nos. 99CV0097 and 98CV1727.

Following the Executive Session, Pat Kowalski reported that the Commission discussed pending litigation against the Commission and, as a result of that discussion, a motion was offered to authorize the staff to act with regard to further proceedings in this matter. Commissioner Clever made a motion that staff is to continue settlement discussions with both parties. If no settlement is reached by September 30, staff may sign a stipulation agreement with the applicant. The motion was seconded by Commissioner Loose and approved unanimously.

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

The meeting adjourned at 12:45 p.m.

Respectfully submitted,

Marta Ahrens
Secretary to the Ground Water Commission