
MINUTES

THIRD QUARTERLY MEETING COLORADO GROUND WATER COMMISSION AUGUST 19, 2011

The Third Quarterly Meeting of the Colorado Ground Water Commission took place on August 19, 2011, at Castle Rock Town Hall, 100 N Wilcox, Castle Rock, Colorado. Chairman Dennis Coryell called the meeting to order at 10:00 a.m. Mr. Richard Nielsen called the roll and determined that a quorum was present. Commission members present were Carolyn Burr, Dennis Coryell, Corey Huwa, Earnest Mikita, George Schubert, Max Smith, Virgil Valdez, Alex Davis, Dick Wolfe and Suzanne Sellers. Staff members present were Kevin Rein, Keith Vander Horst, Richard Nielsen, Chris Grimes, Jay Bloomfield, Justina Farris, Ivan Franco, David Keeler, Matt Sares and Ralf Topper. Also present were Jody Grantham, Hearing Officer, Pat Kowaleski, A.G. for the Commission and Jennifer Mele, A.G. for staff. Members of the public were also present.

Review and Approval of Agenda Items, The agenda was approved as presented.

Approval of Minutes for Meeting of May 20, 2011, Chairman Coryell asked if there were any corrections or additions to the minutes. Commissioner Burr noted a typographical error on page 4 and Commissioner Sellers noted the misspelling of a name, also on page 4. There being no further comments,

Commissioner Burr moved to approve the minutes as amended.
Commissioner Schubert seconded the motion which carried unanimously.

Biennial Election of Chair and Vice-Chair

Commissioner Clever nominated Commissioner Coryell for chairman.
Commissioner Bledsoe seconded the nomination.

Commissioner Bledsoe moved to close the nominations and that Commissioner Coryell be elected Chairman by acclamation.
Commissioner Clever seconded the motion which passed unanimously.

Commissioner Clever nominated Commissioner Huwa as Vice Chairman.
Commissioner Bledsoe seconded the nomination.

Commissioner Bledsoe moved to close the nominations and that Commissioner Huwa be elected Vice-Chairman by acclamation.
Commissioner Clever seconded the motion which passed unanimously.

Report of the Executive Director by Dick Wolfe

Mr. Wolfe introduced new staff members of the State Engineer's Office. Mr. Matt Sares replaced Mr. Dave McElhaney as the team lead for the Hydrogeological Section and Mr. Ralf Topper replaced Mr. Michael Schaub, both having retired in June. He also mentioned that Mr. Chris Kucera, a member of the Republican River enforcement team was experiencing some health concerns.

Regarding the Republican River, Mr. Wolfe noted that negotiations with Kansas are ongoing. He also mentioned that the release of the conservation storage in Bonny Reservoir will begin after Labor Day.

Commissioner Davis remind those present that the State will no longer maintain the park amenities and that if no volunteers come forward to do so they will be removed.

Chairman Coryell called for agenda item no. 6, a presentation by Mr. Matt Poznanovic regarding concerns of municipalities in the matter of the development of their water rights. He informed the Commission that current law requires that the water right be based on the first three years of beneficial use, often going back forty (40) years or more. The use of the water then, before growth, was often less than actually permitted. Mr. Poznanovic stated the cities and towns that he represents are in growth corridors and need all the water that they were permitted for. He told the Commission that talks with interested parties would be ongoing and that he hoped to have proposed legislative changes to present them at the November meeting. These changes would allow all municipalities to claim beneficial use of the permitted water volume up to the date that the final permit is processed.

Chairman Coryell called for agenda item no. 7, a presentation by Mr. Mike Shimmin regarding potential statutory changes to allow local management districts enforcement authority over well permits and the ability to impose fines. Mr. Shimmin informed the Commission that he and several interested parties had initiated conversations to amend 37-90-130(4) C.R.S. to give local management districts more authority in enforcing their regulations and the ability to impose monetary penalties. He plans on presenting proposed language at the November meeting. Mr. Shimmin answered questions of the Commissioners.

Chairman Coryell called for agenda item no. 8, a Hearing on a request by Dean Goss for a variance to Rule 7.3.5 to allow the points of diversion of well permit nos. 27565-FP, 27566-FP, and 27567-FP to be changed to a location more than ½ mile from the original permitted sites, consisting of an existing well, permit no. 11090-FP.

Mr. Pat Kowaleski advised the Commission and the parties that the subject matter of the hearing is restricted to the variance request, all other matters would be dealt with in a later hearing if the variance request was granted. He also advised them as to the presentation timelines and procedures that will be followed during the hearing.

Commissioner Schubert recused himself from the hearing.

Commissioner Sellers recused herself from the hearing.

Mr. Andy Jones, representing Mr. Goss addressed the Commission. He opened his remarks providing a history of Mr. Goss's current operations and what he is attempting to accomplish by the variance request. He then described actions that his client took in researching the Wiebe water rights and developing the property. Mr. Jones explained the unusual hardship of his client as being a combination of three factors: an ambiguous order, Commission (staff's) statement that the well could divert 1050 acre-feet and his client's reliance on staff's position in spending money and developing the property. Mr. Jones then developed each of the three reasons for the unusual hardship claim in some depth.

Mr. Jones stated that the order is ambiguous due to the unclear tense of the word "is" in paragraph 2. He also pointed to the lack of any language in the wording of paragraph two of the order that limited the annual withdrawal.

He called Ms. Kathy Hare, former president of the Upper Black Squirrel Creek GWMD to testify as to her knowledge on the matter of the Commission's position on the annual appropriation available to the well. She testified that in response to a complaint received by the District, she contacted staff and was told that the well could divert 1050 acre-feet of water until it was used for the changed uses.

Mr. Jones next called Mr. Dean Goss to testify before the Commission. He testified to a conversation he had with staff about the permit, stating that when he came to Denver he was told by staff that the well could divert 1050 acre-feet for continued irrigation use. He also testified to the hardship he would experience if his request was not granted. Mr. Goss stated that he would not only lose the initial investment and the current crop but his customers as well as it would take one (1) year to develop a new crop elsewhere causing them to go somewhere else for their sod. If the variance is not granted he would be out of business.

Mr. Jones said that the testimony offered by Ms. Hare and Mr. Goss was to demonstrate that staff did take a position on the acre-feet. He next addressed the arguments of the opposer's.

Regarding the opposer's contention that the order is not ambiguous, Mr. Jones argued that if it were not, staff would not have said the well could produce 1050 acre-feet. As to the opposer's contention of no financial hardship, he said that it is relative to the extent of the loss, depending on the wealth of the person involved. Mr. Jones cited several court cases to refute the contention that the Commission is not bound by staff's comments.

Mr. Jones then answered questions of the Commissioners.

Ms. Lisa Thompson, representing the Upper Black Squirrel Creek GWMD, addressed the Commission.

After summarizing the issue before the Commission as she understood it, Ms Thompson said that The Upper Black Squirrel Creek District does not believe that Mr. Goss will suffer unusual hardship because he has alternatives to his plan. She quoted from a report by his expert witness stating that piping water to the property from other sources is a viable option. She provided transcripts of a District Board meeting where Mr. Goss stated that he will pipe the water from the Log Wells to the Wiebe well. Further, Ms. Thompson showed that Mr. Goss had entered into a contract with the Cherokee Metropolitan District, which has a pipeline within approximately ½ mile of the Wiebe property to provide up to 400 acre-feet of water at either his property or the Wiebe property. Ms. Thompson also noted that Mr. Goss was an active witness in the Cherokee Vs Simpson case before the Supreme Court in 2006. In this case the court found that if there is a question as to limits of a permit, the interested person cannot rely on verbal or written statements by Commission staff to accurately interpret the permit limits and should bring the matter to the court for interpretation. Ms. Thompson closed her presentation by asking the Commission to deny the variance request and immediately issue a cease and desist order.

Ms. Thompson answered questions of the Commission.

Mr. Tim Beaton, representing Mr. Booker addressed the Commission. He stated that his client would provide evidence by direct testimony and asked that Mr. Booker be sworn in, whereupon he proceeded to question his client. Mr. Booker testified that he had been in the sod business since 1972. He disagreed with the claim of unusual hardship because he believed that the investment would have been recouped with the first crop and Mr. Goss had already had 2 or 3 crops. He also testified that his request for a variance to move his wells 1700 feet in 2004 was denied. Mr. Beaton concluded his presentation by stating that Mr. Goss failed to prove his claim of unusual hardship and that the hardship was on the Basin. In response to a question by the Commission, Mr. Beaton stated that his client supports an immediate issuance of a cease and desist order.

Mr. Mike Shimmin, representing Schubert Ranches addressed the Commission. He opened his remarks by saying that the Upper Black Squirrel Basin is in the top two of basins experiencing depletions. The water level at Schubert ranches has dropped fifty (50) feet when the original saturated thickness was only from sixty-five (65) to one hundred (100) feet.

He next spoke on the claim that the 1992 order is ambiguous. Among other items he pointed out that paragraph nine (9) on page one (1) states that the annual appropriation shall be limited to 87 acre-feet. On the matter of staff's changing opinion, Mr. Shimmin stated that the water right is not defined by someone's opinion but by the documents. The document in this case is the 1992 order. He stated that it is a matter of law that no one can reasonably rely on staff about their water right. Mr. Shimmin continued on to say that Rule 7.3.5 is there to save the owners of wells that would be affected by another well moving more than one-half mile the trouble and expense of a hearing. He concluded by stating that there is no unusual hardship for Mr. Goss.

Ms. Jennifer Mele, representing staff opened her comments to the Commission by stating that staff is in general agreement with the objectors in the case. She went on to point out that Rule 7.3.5 requires demonstration of unusual hardship, not hardship but unusual hardship, something other irrigators would not experience. Ms. Mele next spoke on the claim of ambiguity in the 1992 Findings and Order. She stated that the document is not ambiguous. It states what all the parties agreed to in 1992, specifically that the annual appropriation of the well shall be limited to 87 acre-feet until it is first used for the changed purposes. On the matter of staff's alleged representation that the well could divert 1050 acre-feet until used for the changed purposes, Ms. Mele stated that typically that is correct for most current change of use approvals and would be mentioned in general conversations. In specific conversations staff would have requested that the question be submitted in written format allowing for a thorough inspection of the file and a written response. She asked the Commission to deny the request because Mr. Goss had failed to show unusual hardship. Ms. Mele provided staff's summary of estimated pumping by the well since 1991 and stated that under any scenario, the Weibe well has over pumped. Ms. Mele concluded her comments by advising the Commission of the administrative action staff would take on the matter after they reached a decision. She said that if the variance is approved, staff would continue to withhold enforcement of the Weibe well limits in anticipation of the log well change being approved. If the request is denied staff will recommend to the Executive Director that a cease and desist order be issued.

Mr. Keith Vander Horst testified before the Commission on behalf of staff. In his testimony he explained staff's interpretation of the various annual appropriation numbers presented in the findings. He noted that the first paragraph under the initial decision and order states that the requested change is approved subject to the following conditions, therefore paragraph no. 2 which was referenced by applicant, is a condition of approval for the permit operation. Mr. Vander Horst next provided a history of the enforcement action on the matter beginning with the letter of complaint from Schubert Ranches in June of 2010 and ending with a meeting with Mr. Goss and other persons in October of 2010. Mr. Vander Horst stated that staff's response to the complaint was to write Mr. Goss and advise him that the well could only divert 87 acre-feet based on his reading of the Findings and Order itself. Mr. Vander Horst denied that staff made the statements as asserted by Ms. Hare and Mr. Goss. He then explained that today, when an applicant applies to change the use of a well, the findings and orders allow for the continued use of the well as originally permitted until such time as the approved change is implemented. However, in this case that is not what the findings and orders state. They state that the annual appropriation is 87 acre-feet until the approved change occurs when it is lowered. It is possible that the current practices led to a misunderstanding.

Ms. Mele and Mr. Vander Horst responded to questions of the Commission.

Mr. Andy Jones, representing the applicant approached the Commission with rebuttal testimony. He opened his remarks by stating that they need to re-focus on what the hearing was about. It is not about interpretation of the order. He then restated his three (3) points, ambiguity, that the Commission through staff took a position on the matter and hardship. Mr. Jones said that the hearing is about Mr. Goss asking for the opportunity to pursue a solution. As to the objectors point of running a pipeline from the Log Wells, he stated that Mr. Goss did look into that possibility but has determined that at \$410,000 it is cost prohibitive and acquiring the necessary

easements for 2 miles would be both time consuming and onerous. He also explained to the Commission the difficulties and other factors related to the suggested interconnect with Cherokee Metropolitan District. In his rebuttal Mr. Jones stated that Mr. Goss is in the middle of his second cutting and at the end of it he would break even, there is unusual hardship to find other lands and plant new crops. He also stated that the reason Mr. Booker's variance request failed is because his wells had not been pumped in ten (10) years. He handed out evidence reporting meter readings for the past twenty (20) years. Mr. Jones concluded his remarks requesting that the variance be granted.

Commissioner Davis noted the invoices for expenses in the file and asked about receipts regarding income since 2007. Mr. Jones stated that there was nothing before the Commission regarding Mr. Goss's income.

There was extensive discussion regarding the validity of the evidence on pumping records submitted by Mr. Jones during rebuttal.

Commissioner Burr moved to accept the evidence submitted.
Commissioner Bledsoe seconded the motion which passed with Commissioner Clever voting nay.

The hearing was closed.

Mr. Pat Kowaleski, conflicts council for the Commission, briefed the Commission on rules 7.3.5 and 11. He explained the effects of a vote for the variance and of one against the request.

Commissioner Smith moved to deny the variance request.
Commissioner Burr seconded the motion.

After further discussion the motion was put to a vote which passed unanimously.

Chairman Coryell called for agenda item no. 9, the staff activity report.

Mr. Vander Horst summarized his written staff activity report accenting the progress on the final permits. He noted that five (5) hearings had been concluded and three (3) had begun in the past quarter. Mr. Vander Horst stated to the Commission that enforcement activity occurred in the Northern High Plains, Kiowa-Bijou and Upper Black Squirrel Basins. He advised the Commission that Ms. Tracy Kosloff had transferred to the South Platte Basin.

Mr. Vander Horst concluded his report by addressing the issues raised at the last Commission meeting by Mr. Dave Doran of the Upper Black Squirrel District. He did let the Commission know that staff had met with the District in July and was willing to meet in the future to work through any difficulties that may exist between them. Mr. Vander Horst did address each concern that has been mentioned by the District to-date and provided a written summary of those issues.

Chairman Coryell called for agenda item no. 10, the Attorney General's report.

Ms. Jen Mele updated the Commission on the status of several hearings that are before the Hearing Officer.

Chairman Coryell called for agenda item no. 11, Management District Reports

Mr. Nate Midcap, reporting for the **Marks Butte, Frenchman, Sandhills and Central Yuma GWMD's**, reported that hail had taken out 250 pivots in his districts. He stated that the Sandhills Board would hold a hearing on the export request of the RRWCD in 4 to 6 months and have a hearing on proposed new rules immediately after.

Ms. Deb Daniel, reporting for Jack Dowell and the **W-Y GWMD**, read the report of Jack Dowell. She reported that the chemigation inspections continue and that the crops are looking good but we need water or they may be lost. She also related that the cattails along the South Fork, West of 385, that were sprayed in July are now dying back.

Rod Mason, reporting for the **Arikaree GWMD**, reported scattered rains with some heavy, dropping 6 inches at a time. He also reported a lot of hail. Mr. Mason concluded his report with the big topic of conversation in the District, Bonnie Reservoir. There are a lot of folks upset about the loss of the reservoir and they are writing letters to the paper opposed to the closure.

Ms. BreAnn Ferguson, reporting for the **Plains and East Cheyenne GWMD's**, informed the Commission that she began her position as District Manager the first of August. Ms. Ferguson reported that the Plains District Board had approved the Leon Silkman application to expand his irrigated acres and that the East Cheyenne Board had okayed the Town of Arapahoe application to relocate their well.

Mr. Max Smith, reporting for the **Southern High Plains GWMD** said that it was hot and dry in Baca County, the driest that he can remember, with the South and East being the hardest hit. He reported that the corn is being cut for silage. Mr. Smith concluded his report with the observation that with the persistent drought, the insect population is rising.

There was no report for the **North Kiowa Bijou GWMD**, instead, Mr. Wolfe advised the Commission that Robert Loose was recovering from a farming accident.

Mr. Dave Doran, reporting for the **Upper Black Squirrel GWMD**, echoed the comments of Mr. Vander Horst regarding the meeting between the two. Mr. Doran is looking forward to the next one for the additional explanation of office procedures. He also stated that the District Board believes there are significant violations occurring on Cherokee Wells 1 thru 8. Mr. Doran next asked the Commission and staff for any help or advice they could provide on the matter of re-districting and the requirement to do so every ten (10) years.

Mr. Dave Tausig, reporting for the **Upper Big Sandy GWMD**, informed the Commission that his District had the opportunity to review the language and is in favor of the statutory amendment discussed by Mr. Shimmin. He advised the Commission that there will be a hearing regarding the new set of district rules, some of which deal with enforcement, on September 14th. He

concluded his report by asking if staff could arrange a workshop on the election process for all the districts.

Commissioner Davis, noting the repeated mention of questions regarding responsibilities in enforcement actions, suggested that MOU's between the Districts and the Commission be drafted which covers all aspects.

Mr. Andy Jones, reporting for the **Lost Creek GWMD**, said that the District supports the legislation as discussed by Mr. Shimmin.

Ms. Deb Daniel, reporting for the **Republican River Water Conservation District**, opened her comments by expressing thanks to Mr. Wolfe for his operating procedures of holding public meetings regarding the Republican River in the Basin, Commissioner Davis for her work with Bonnie Reservoir and Mr. Vander Horst and Ms. Johnson for their work on the permit applications for supply wells for the construction of the pipeline.

Ms. Daniel stated that the pipeline will be built, the bids are out. She invited the Commission to the ground breaking ceremony on August 28th in Wray. Ms. Daniel also invited the Commission to hold their 2012 summer meeting in Burlington and attend a ceremonial opening of the pipeline.

Commissioner Davis asked Ms. Daniel about the status of the conservation group that the Commission had heard from in 2009. She reported that the group has not held any meetings for a year and half. Commissioner Davis encouraged the local districts to resurrect the conservation effort.

Chairman Coryell called for agenda item no. 12, old business.

12-a

Mr. Pat Kowaleski addressed the Commission on the matter of administration and enforcement of the modified priority system, presenting a written summary of the issue. He stated that the legislature recognized the difference between tributary and designated ground water. In tributary areas no injury, not even one drop, is allowed but for the Designated Basins, statute allows for impairment of the aquifer, though not unreasonable impairment. He also noted that tributary water is handled by a Division Water Court while designated water is handled by a Designated Ground Water judge in District Court. Mr. Kowaleski stated that the Districts are separate legal entities from the Commission. They promulgate and enforce their own rules, the Commission is required to comment on the rules but they are district rules. Mr. Kowaleski noted that the Commission and Districts are to act collaboratively on the management of Designated Ground Water.

12-b

Executive Director Dick Wolfe addressed the Commission on the matter of administration and enforcement of the well permits. Mr. Wolfe broke the enforcement discussion into two categories of enforcement, permitting (construction and operation restrictions) and

administrative (priority system). He said that while the State Engineer has statutory authority to enforce the permitting aspects of a well permit, his authority to enforce the administration system (priority), is derived from rule making. In the Designated Basins, that rule making authority lies with the districts. Mr. Wolfe asked Mr. Chris Grimes of staff to explain the permitting enforcement procedures. Mr. Grimes presented to the Commission draft guidelines of the procedures and steps followed when staff is investigating permitting violations. He noted that though recently put on paper these are the same unwritten guidelines that have been in use for many years.

Commissioner Clever stated that he found the information provided very helpful in explaining things. He would like to see it developed further and brought back to the Commission.

Chairman Coryell called for agenda item no. 13, new business. There was none.

Chairman Coryell called for agenda item no. 14, public comment. Mr. Andy Jones addressed the Commission on behalf of his client Mr. Dean Goss.

Commissioner Mikita asked for information on the proposed pipe line from Lamar to Elbert County. Commissioner Wolfe responded that he had no information that was not in the paper before proceeding to explain what he understood to be happening. Mr. Mikita then expressed concerns about the Denver aquifer water in Elbert County being piped into El Paso County.

There being no further business the meeting adjourned.

Respectfully submitted,



Richard A Nielsen, P.E.
Secretary to the Ground Water Commission