

BEFORE THE GROUND WATER COMMISSION,
STATE OF COLORADO

Case No. 99 GW 15

STAFF'S RESPONSE TO DISTRICT'S EXCEPTIONS

IN THE MATTER OF OBJECTION TO APPLICATIONS CONCERNING
DETERMINATION OF WATER RIGHTS TO ALLOW THE APPROPRIATION OF
DESIGNATED GROUND WATER FROM THE LARAMIE-FOX HILLS, ARAPAHOE, AND
DENVER AQUIFERS

THOMAS H. BRADBURY, ET AL, APPLICANTS

Now comes the Staff of the Groundwater Commission, "Staff," through its attorney, and responds to the Exceptions filed by the Objector, North Kiowa-Bijou Ground Water Management District, hereinafter the "District," as follows:

Facts

The applicants, Thomas H. Bradbury, et al, hereinafter "Bradbury," filed applications for determination of water right, pursuant to § 37-90-107(7), C.R.S. on October 27, 1998 and the District filed objections to the applications.

In its Prehearing Statement of August 17, 2000, the District listed the following as the specific factual and legal claim to be asserted:

- 1) The District said that its rules and regulations, as well as the state statute, required that this matter be first submitted to the District for its review and recommendation prior to a hearing. The District said that it had not been afforded an opportunity to investigate and make recommendations to the Commission as required by law.
- 2) The District said that the Staff made findings and recommendations with regard to the applications without affording the District an opportunity to investigate, study and make recommendations.
- 3) The District said that the proposed wells would require conditions for augmentation or replacement plans and until such

augmentation or replacement plans were submitted to the District for its study and approval, any action or hearing was premature and contrary to law.

4) The District said it believed that the wells might be used to transport water outside the District and if this were to happen, it would violate District rules since no hearing had been held.

5) The District argued that any claim of the subject water for beneficial use as stated in the Application was speculative and contrary to the statutes and Constitution. The Constitution, the District argued, guarantees the right to appropriate, not the right to speculate. The right to appropriate, it said, was for use, not merely for profit.

6) The District said that the applications and proceedings by the Commission under § 37-90-197 (7) and the Commission's designated basin rules were contrary to the Constitution, particularly Art. XVI.

7) The District said it had not been give the opportunity to investigate the application and surrounding matters, conduct hearings and invite comments or objection by other interested parties and taxpayers within the District nor had any meaningful communication been had between the Commission and the Board as required by law.

On October 10, 2000 Bradbury filed a Motion for Summary Judgment. The District in its response of Oct 25, 2000 raised the following issues:

- 1) Bradbury's requests for determination of their rights to groundwater were speculative.
- 2)The Enactment of 37-90-107 (7) was unconstitutional both by it own terms as well as in its application.
- 3)The Applicant had failed to comply with the rules and regulations of the District and to afford the District an opportunity to investigate and make recommendations.

In its response the Staff said that the Statute and the rules did not require that this matter be heard first by the District. The Staff further argued that speculation was not a legitimate issue in this case. This is because, the Staff argued, §37-90-107, C.R.S. directs the Commission to allocate designated ground water in the Denver Basin aquifers based on ownership of the overlying land and an aquifer life of 100 years. In its application the applicant indicated the proposed beneficial use of the ground water. The applications were evaluated by the Staff in accordance with 37-90-107 (7) and the Designated Basin Rules. Pursuant to the statute, § (107(2)), the staff did a preliminary evaluation to determine if the application could be granted. They determined that the application could be given favorable consideration by the Commission under existing policies and it was published. Wells to withdraw the allowed allocation were limited with regard to the

place of use and to the uses which had been approved in the determination. Well owners having permits for such wells are specifically excepted from any requirement to submit evidence of timely beneficial use. 37-90-108(2)(a).

On Dec. 4, 2000 the Hearing Officer issued his order on the Motion for Summary Judgment. In that order he:

1. Concluded that he had authority to rule on the Motion for Summary Judgment.
2. Granted the Motion for Summary Judgment with regard to the Constitutionality of the statute, finding the statute to be constitutional.
3. Granted the Motion with regard to the allegation by the Applicant that the case was properly before the Ground Water Commission. He concluded that neither the statute nor the rules of the Commission and the District require the District to receive and act on the applications before the Commission can act.
4. Denied the Motion for Summary Judgment by Bradbury for a determination that his applications for ground water were not speculative as a matter of law. The Hearing Officer ruled that the issue of speculation is a factual matter and the applicant had not yet offered any proof of its intent to appropriate designated ground water for beneficial use. The Hearing Officer also said: "The anti-speculation doctrine works to supplement the statutory permit system and to encourage the fullest use of designated ground water," citing Jaeger v. Colorado Ground Water Comm'n. 746 P.2d 515 (Colo. 1987)

The District had also filed a Motion to Strike the Staff's response and for Protective Order against the Staff taking substantive positions in the proceedings. The Hearing Officer said, on this issue, that the Commission rules clearly provide for the involvement of Staff and it was well settled that Staff may present evidence in a quasi-judicial hearing before the agency, citing Withrow v. Larkin, 421 US 35 (1975).

A hearing was held on January 16, 2001 and the District chose not to present any witnesses. On February 1, 2001 the Hearing Officer, having considered all the evidence, found that the applications were not speculative. He limited the use of the water to certain specified uses which had been applied for, and required that the Commission approve any change in the type or place of use. He also placed additional conditions on the approval, including a denial of export outside the District unless the export were approved by the District.

On March 2, 2001, the District filed Exceptions to the Hearing Officer's decision.

- 1) The District disagreed with the Hearing Officer's conclusion that the applications were not speculative.
- 2) The District disagreed with the Hearing Officer's conclusion that § 37-90-107 is constitutional.
- 3) The District argued that the applicant had failed to comply with the District's rules and had failed to afford the District an opportunity to investigate and make recommendations.
- 4) The District disagreed with the Hearing Officer's decision to allow the participation of Staff in the proceedings.

Argument

**Speculation is not a legitimate issue in this matter, but if it were,
Bradbury's requests for determination of their right to ground water are not speculative**

The Hearing officer cited Jaeger for the proposition that the anti-speculation doctrine should be applied here. Jaeger, also known as the Cornhusker case, involved 6 conditional permits to appropriate ground water in the Lost Creek Designated Ground Water Basin. The Commission denied the applications as speculative and the Supreme Court upheld the District Court's determination that an intent to appropriate designated ground water for beneficial use, not for speculation, must be established. An important distinction, however, is that Jaeger involved alluvial wells and water which would have been available for appropriation by others. It was a case involving the Designated Basins but not the Denver Basin aquifers. It did not involve water where, as here, the right is based on overlying ownership of the land.

Section 37-90-107(7), C.R.S. directs the Commission to allocate designated ground water in the Denver Basin aquifers based on ownership of overlying land and an aquifer life of one hundred years. Rights to allocations from the Denver Basin aquifers may be determined by application to the Commission. In the application the applicant indicates the proposed beneficial use of the ground water. The applications are evaluated by the Commission Staff in accordance with Section 37-90-107(7) and the Designated Basin Rules, 2 CCR 410-1.

After approval of a determination, the Commission retains jurisdiction for subsequent adjustment (increase or decrease) of the allowed annual amount of withdrawal to conform to the actual aquifer characteristics at the site, based on analysis of geophysical logs or other site specific data, Section 37-90-107(7)(c)(III). Well permits to construct wells to withdraw the allowed annual allocation from an aquifer may be issued by the Commission in accordance with the conditions of an approved determination. Such wells must be located on the overlying land, may withdraw the allowed annual amount from the aquifer together in any combination, and are limited to the place of use and uses approved in the determination. The annual amount of withdrawal permitted for the wells shall be less than or equal to the amount approved in the determination and is subject to subsequent adjustment to conform to actual aquifer characteristics found at the site. Section 37-90-107(7)(d)(IV).

Persons having permits for such wells are specifically excepted from any requirement to submit evidence of timely beneficial use. Section 37-90-108(2)(a), C.R.S. The water right and permitted well uses, therefore, are not affected by when the allowed beneficial uses occur. Because of this, concepts such as anti-speculation do not apply.

The purpose of the anti-speculation doctrine is to prevent a person from tying up the rights when another person is ready to put the rights to beneficial use. See Denver v. Northern Colorado Water Dist., 130 Colo. 375, 408, 276 P. 2d 992, 1009 (1954). That concept does not apply here because the legislature, with its plenary authority over nontributary ground water, has determined that only the overlying property owner can obtain the water rights in the Denver Basin aquifers. A water right comes into existence upon the determination being made and there is no requirement to put it to use within any specific period of time, be it 3, 10 or even 100 years. The right is vested and is not subject to another person filing against it. The purpose of the antispeculation doctrine is therefore not present.

Even were the Commission to determine that speculation is a legitimate issue to consider, the hearing officer, after hearing the uncontroverted facts, determined that the application were not speculative. They are not speculative because the applicant is the owner of the property and he lists a place of use, on his property, as well as proposed uses. The Applicant does not need to say when he will initiate the uses because the statute does not require a statement of beneficial use to be filed. Since there is no requirement for a Statement of Beneficial use to be filed, the use can occur at any time into the future. No one else could come in and get a permit to withdraw this water since the establishing of a right requires ownership of the overlying land.

Water rights in the Denver basin aquifers are different from other rights in the designated basins and there are several statutory provisions, which apply specifically to those aquifers. The Colorado Ground Water Act provides at § 37-90-111(5): Notwithstanding any other provision of this article, the commission shall allocate, upon the basis of ownership of the overlying land, any designated ground water contained in the Dawson, Denver, Arapahoe, or Laramie-Fox Hills aquifers. Permits issued pursuant to this subsection (5) shall allow withdrawals on the basis of an aquifer life of one hundred years.

Section 37-90-107(7)(a), C.R.S. likewise provides: The commission shall allocate, upon the basis of the ownership of the overlying land, any designated ground water contained in the Dawson, Denver, Arapahoe, or Laramie-Fox Hills aquifers. Permits issued pursuant to this subsection (7) shall allow withdrawals on the basis of an aquifer life of one hundred years. The commission shall adopt the necessary rules to carry out the provisions of this subsection (7).

The Act further provides as 37-90-107(7)(c)(III): Any such commission approved determination shall be considered a final determination of the amount of ground water so determined; except that the commission shall retain jurisdiction for subsequent adjustment of such amount to

conform to the actual local aquifer characteristics from adequate information obtained from well drilling or test holes.

Also, 37-90-108(2)(a) C.R.S. provides: If the well or wells described in a conditional permit have been constructed in compliance with subsection (1) of this section, the applicant, within three years after the date of the issuance of said permit, shall furnish by sworn affidavit, in the form prescribed by the commission, evidence that water from such well or wells has been put to beneficial use; except that the requirements of this paragraph (a) shall not apply to a well described in a conditional permit issued on or after July 1, 1991, to withdraw designated ground water from the Dawson, Denver, Arapahoe, or Laramie-Fox Hills aquifers.

Another major difference is that there is no requirement for a final permit for certain wells. Section 37-90-108 (3) (a)(II) provides: A final permit is not required to be issued for a well described in a conditional permit issued on or after July 1, 1991, to withdraw designated ground water from the Dawson, Denver, Arapahoe, or Laramie-Fox Hills aquifers. For such a well, a conditional permit, subject to the conditions of issuance of such a permit, shall be considered a final determination of a well's water right if the well is in compliance with all other applicable requirements of this article.

The enactment of C.R.S. § 37-90-107 (7) was a lawful exercise of the General Assembly's plenary authority and thus is not unconstitutional.

The Staff agrees that the enactment of C.R.S. § 37-90-107(7) is constitutional but does not believe that it is appropriate for the Hearing Officer or the Commission to make a determination with regard to the constitutionality of a statute. The Commission's exercise of enumerated powers under the statute is presumed to be valid and constitutional. Moore v. District Court in and for the City and County of Denver, 518 P2d 948 (1974). Any determination with regard to the constitutionality of a statute should be made by a Court and not the Hearing Officer or the Commission.

Any failure by Bradbury to comply with the District's rules are not within the purview of the Commission

The applications for determination of water rights are properly before the Commission, and the District does not have the authority to issue, approve or deny well permits or determinations. The authority to issue approve well permits lies solely with the Ground Water Commission, Upper Black Squirrel Creek Ground Water Management District, v. Goss, 993 P 2d 1177 (2000), and the same rationale would apply to approval of determinations of water rights. If Bradbury has

failed to comply with any of the District's rules, the District has authority to commence its own enforcement action.

The Staff of the Ground Water Commission is a legal entity and is authorized, if not mandated, to participate in these proceedings

The Ground Water Commission has delegated to the State Engineer and his staff its authority with regard to administrative responsibilities of the statute

A review of the provisions of 37-90-101 et seq., C.R.S., makes it clear that the Colorado Ground Water Commission has extensive duties with regard to ground water in the designated basins. In order to support the Commission, which meets only quarterly, the legislature has provided administrative assistance to the Commission. Pursuant to 37-90-104 (6), C.R.S., the State Engineer is ex officio the executive director of the Commission and is to carry out and enforce the decisions, orders, and policies of the Commission. This same section allows the Commission to delegate to the State Engineer the authority to perform many of the functions of the Commission, and it has done so pursuant to Resolution. This Resolution was promulgated May 21, 1993, and a copy is attached. The Resolution recognizes that the day to day operations of the Commission are carried out by the State Engineer and his staff and further provides that, to the extent allowable by statute, the Commission delegates to the State Engineer most of its authority to perform its statutory responsibilities.

The "Staff" of the Ground Water Commission is a recognized entity and is authorized to participate in hearings before the Hearing Officer

Pursuant to 37-90-107 (7)(c) (II), C.R.S., the hearing requirements of the act apply to applications for determination of water rights. Those hearing requirements are contained at 37-90-113, C.R.S. and authorize the Commission to adopt rules and regulations for the conduct of the hearings. Those rules, the Rules of Procedure for All Adjudicatory Hearings Before the Ground Water Commission, can be found at 2 CCR 402.

These duly promulgated adjudicatory rules of the Commission, which have been in effect for over 20 years, are very clear with regard to the Staff's role in adjudicatory hearings. Rule VI of the Rules of provides:

"The staff of the Ground Water Commission may appear to present any testimony or evidence relevant to any matter being heard by the commission or its hearing officer. The staff shall be represented by the attorney general." 2 CCR 402-3.

In addition, Rule 4.2.9 of the Rules and Regulations for the Management and Control of Designated Ground Water, 2 CCR 410-1, provides: "'Commission Staff' or 'Staff', means an

employee or agent of the Colorado Division of Water Resources authorized by the State Engineer to act or assist in discharging the duties of the Commission.”

There can therefore be no question that there is a “Staff” of the Commission, and that the Staff is authorized to participate in adjudicatory proceedings and to present “any testimony” relevant to matters being heard by the Hearing Officer.

There is no conflict of interest in the Staff’s participating in contested matters before the Commission

As pointed out in the previous paragraphs, the Staff of the Commission has been specifically authorized to participate in adversarial proceedings before the Hearing Officer. In such past proceedings the Staff has given the Hearing Officer the benefit of its background and expertise with regard to relevant facts and law. The fact that the Staff and its attorney have frequent contact with the Commission, and have given the Commission opinions on numerous matters, has not, however, prevented either the Commission, or its Hearing Officer, from disagreeing with the Staff with regard to contested matters. In this regard the Staff of the Ground Water Commission does not differ from the staff of any other board or commission. In fact it would be unheard of for the staff of a board or commission to take the position that it should not participate in contested matters before the board. Each staff typically has information and experience which should be utilized by the relevant board or commission in its deliberations.

The District cites the Commission to its Motion to Strike, in which it did not give a single recitation of authority for its positions. There was no recitation of any legal basis for the claim of conflict of interest, nor for the District’s allegation in the Motion that “if this were a normal court or trial proceeding, this action by the Staff and its attorney would be grounds for dismissal or new trial.” These would appear to be critical points but they are totally unsupported by citation to any statute, Court Rule or case law.

Standard of Review and Conclusion

Under the Administrative Procedure Act, when the Commission reviews an initial decision of the Hearing Officer:

“The findings of evidentiary fact, as distinguished from the ultimate conclusions of fact, made by the administrative law judge or the hearing officer shall not be set aside by the agency on review of the initial decision unless such findings of evidentiary fact are contrary to the weight of the evidence. The agency may remand the case to the administrative law judge or the hearing officer for such further proceedings as it may direct or it may affirm, set aside, or modify the order or any sanction or relief entered therein, in conformity with the facts and the law.” 24-4-105(15)(b).

The legal issues which the District raises are without merit and should be rejected. With regard to the Hearing Officer's findings of fact that the applications are not speculative, they are clearly supported by the weight of the evidence and should be affirmed.

Dated: April 20, 2000

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AG ALPHA: NRGWIAMBM
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RESOLUTION*
OF
GROUND WATER COMMISSION

WHEREAS, the Ground Water Commission, at its general meeting, with a quorum present, having considered the facts that the Ground Water Commission meets only four times each year, and that its day-to-day operations are carried out by the State Engineer (the Executive Director of the Commission) and his staff, and that the Commission adopted a resolution on April 1, 1981 delegating its certain authority to the Executive Director; and

WHEREAS, realizing that Section 37-90-104(6), C.R.S. (1973), provides that the Ground Water Commission may delegate to its Executive Director any of the functions set forth in the Ground Water Management Act of 1965, Section 37-90-101, et seq., C.R.S. (1973), except the determination of a designated ground water basin as set forth in Section 37-90-106, C.R.S. (1973), the establishment of priority of claims for the appropriation of designated ground water as set forth in Section 37-90-109, C.R.S. (1973), and the creation of Ground Water Management Districts; and

WHEREAS, wanting to continue what has been the general practice associated with the Commission's functioning, but with some modification;

NOW, THEREFORE, BE IT RESOLVED that all powers granted to the Ground Water Commission in the Ground Water Management Act of 1965, Section 37-90-101, et seq., C.R.S. (1973), except those powers specifically reserved to the Commission in Section 37-90-104(6), C.R.S. (1973), and except adoption of policies and approval of variances from the Commission rules and regulations, are delegated to the Executive Director.

IT IS FURTHER RESOLVED that all rules and regulations and policies of the Commission now in effect or promulgated in the future shall be implemented unless changed by the Commission.

DATED this 21st day of May, 1993.

* As approved by the Commission on May 21, 1993.

CERTIFICATE OF SERVICE

I hereby certify that I have duly served the within Staff's Response to District's Exceptions by depositing copies of the same in the United States mail, postage prepaid, at Denver, Colorado this 20th day of April, 2001 addressed as follows:

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