

BEFORE THE GROUND WATER COMMISSION, STATE OF COLORADO

CASE NO. 99-GW-15 (A through N Consolidated)

FINDINGS OF FACT, CONCLUSIONS OF LAW, INITIAL DECISION AND ORDER

IN THE MATTER OF APPLICATIONS FOR 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

THIS MATTER came before the Hearing Officer, Steve Lautenschlager, at a hearing held in Denver, Colorado on January 16, 2001. Having considered all matters contained in the applications, testimony and evidence taken as necessary, statements, stipulations, and written arguments being submitted, the Hearing Officer, being fully advised in the matter and after due consideration of the pertinent law and rules, makes the following Findings of Fact, Conclusions of Law, Initial Decision and Order:

ISSUE

1. Whether the applications for determination of water rights shall be granted pursuant to Colorado Revised Statute (C.R.S.) §37-90-107 and the Ground Water Commission's Designated Basin Rules, 2 CCR 410-1.

FINDINGS OF FACT

2. The Applicants, represented by Mark J. Wagner, Esq., filed their applications for determination of water rights within a designated ground water basin for the Denver, Arapahoe, and Laramie-Fox Hills Aquifers pursuant to §37-90-107(7), C.R.S. on October 27, 1998. The applicants claimed the right to appropriate the maximum allowable annual amount of the ground water in certain aquifers underlying the lands claimed in the applications, as delineated on Applicant's Exhibits 1 and 2 attached hereto. The proposed maximum pumping rates for any well in any aquifer is 200 gallons per minute. On March 16, 1999, the applicants amended the applications to limit use of the water to be appropriated to use for industrial, commercial, irrigation, stock and domestic purposes.
3. Staff of the Colorado Ground Water Commission (Staff) made preliminary findings that certain amounts of designated ground water were available for appropriation from the aquifers and caused publication of the applications for determination of water rights in such aquifers.

4. Timely objections to the applications, as detailed in fourteen separate publications, were filed by Donald F. McClary, Esq., representing the North Kiowa-Bijou Ground Water Management District (District).
5. All fourteen matters were Ordered consolidated into one Hearing on May 31, 2000.
6. The parties have stipulated to the applicants ownership of the land, that notice was sufficient, and to the hydrologic characteristics of the Denver Basin Aquifers underlying the lands claimed in the applications as calculated by the Staff.
7. Prior to the Hearing a Motion for Summary Judgment regarding three issues was filed by the Applicant. On December 4, 2000 the Hearing Officer issued Orders regarding these motions as follows: Applicant's Motion for Summary Judgment that the enactment of Section 37-90-107(7) was a lawful exercise of the General Assembly's plenary authority and thus was not unconstitutional was granted. Applicant's Motion for Summary Judgment that the applications in this case are properly before the Ground Water Commission was granted. Applicant's Motion for Summary Judgment that Bradbury's requests for determination of their rights are not speculative was denied.
8. Prior to the Hearing a Motion to Strike and Protective Orders regarding the Staff's participation in the Hearing was filed by the District. On December 4, 2000 the Hearing Officer issued an Order denying this Motion.
9. Prior to the Hearing a Motion to Quash the District's Subpoena of the State Engineer, Hal D. Simpson, was filed by Assistant Attorney General Patrick E. Kowaleski representing the Staff. At the beginning of the Hearing it was agreed that a decision on this motion would held in abeyance until the District determined whether it would be necessary to call Mr. Simpson. The District did not call Mr. Simpson as a witness and therefore this matter became moot.
10. The following parties attended the hearing: Mark J. Wagner representing the Applicant's, Donald F. McClary representing the District and, Patrick E. Kowaleski representing the Staff of the Commission. Mr. Thomas H. Bradbury testified on behalf of the applicants as agent-in-fact for all the applicants. Also testifying were experts Frank C. Healy and Daniel M. Conway.
11. Applicant's Exhibits Nos. 1 through 7 were accepted by the Hearing Officer. In addition the Staff represented that the determination of water application files previously provided to the Hearing Officer and the other parties were part of the record as operation of law. The Hearing Officer accepted them as part of the record and designated these application files State's Exhibits Nos. 1A through 1N.

12. The Applicants are the owners of the overlying land and propose to appropriate all legally available ground water from the Denver, Arapahoe and Laramie-Fox Hills Aquifers, as indicated in the individual applications, for use on their property.
13. The average annual amount of ground water available for withdrawal, in acre-feet per year, is determined by multiplying the land area in acres times the thickness of the saturated aquifer materials in feet times the specific yield of the saturated aquifer material and then dividing the result by 100 years. 2 CCR 410-1 Rule 5.3.2.3.
14. The parties have stipulated to, and Hearing Officer adopts, as the quantity of ground water available for appropriation the Staff's estimated allowed annual amount of withdrawal from the aquifers derived from the Rules as summarized in Applicant's Exhibit No. 4 attached hereto.

The Commission retains jurisdiction of these determinations for subsequent adjustment of these amounts to conform to the actual aquifer characteristics encountered upon drilling of wells or test holes on the property.

15. The evidence and testimony supports that the withdrawal of ground water from the Denver, Arapahoe and Laramie-Fox Hills Aquifers in the quantities approved herein will not unreasonably impair existing water rights and will not cause unreasonable waste.
16. The evidence and testimony supports that the Applicants intend to use the water, underlying each parcel of land they own, to develop that land. They do not propose to export any of this water outside the boundaries of the Kiowa-Bijou Designated Ground Water Basin or the District, or use the water on any other lands.
17. The evidence and testimony supports that it is economically feasible for the lands owned by the Applicants to be fully developed within the next twenty years. In addition, the quantities of ground water determined to be available would be necessary for the development of the properties under the potential development options, and the uses of water on the developed property would be those uses applied for in the subject applications.
18. The District and the Staff did not present any witnesses. At the conclusion of the Applicant's case the District moved for denial of the applications on the basis that they were speculative in nature.

CONCLUSIONS OF LAW

19. The Ground Water Commission has jurisdiction over the applications and the parties.
20. Notice of the proceedings was given and they were conducted in accordance with the provisions of the State Administrative Procedures Act, §24-4-101 et seq., C.R.S. and the Ground Water Commission's Procedural Rules 2 CCR 402-3.
21. The applicable statute for evaluation of the applications is §37-90-107, C.R.S. This statute has three criteria for granting a determination of rights to appropriate the requested designated ground water: 1) ground water must be available for appropriation, 2) the proposed appropriation must not unreasonably impair existing water rights, and 3) the permitted uses must not cause unreasonable waste.
22. The allocation of rights to ground water in the Denver, Arapahoe and Laramie-Fox Hills Aquifers is based on the ownership of the overlying land and on an aquifer life of one-hundred years, §37-90-137(7)(a), C.R.S.
23. The Rules and Regulations for the Management and Control of Designated Ground Water 2 CCR 410-1 apply.
24. The determination of rights to ground water in the Denver, Arapahoe and Laramie-Fox Hills Aquifers within the designated ground water basins is subject to the anti-speculation provisions of Colorado Water Law.

INITIAL DECISION AND ORDER

25. The Findings of Fact and Conclusions of Law are incorporated herein as if fully set forth herein.
26. The District's Motion to deny the applications based on speculation is denied.
27. The Applicant is granted determination of water rights for the quantities as summarized in Applicant's Exhibit No. 4 attached hereto, subject to adjustment under the retained jurisdiction of the Commission.
28. The property under which water rights are determined herein is located within the boundaries of the North Kiowa Bijou Ground Water Management District. None of the waters allocated herein shall be exported or used outside the Boundaries of said District without the approval of said District in the manner that is required by the

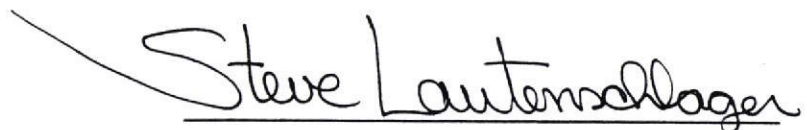
existing rules and regulations of said District and the provisions of §37-90-130(2)(f), C.R.S.

29. The use of ground water from these appropriations is limited to use for industrial, commercial, irrigation, stock and domestic purposes. The place of use shall be limited to the overlying land as specified in each application. Any change in type or place of use requires approval of the Commission.
30. The Staff shall assign a number to each of these determinations and cause the appropriate data to be entered in to the records of the Commission and State Engineer. Subject to the above, well permits for wells to withdraw the authorized annual amounts of water determined herein shall be available upon application subject to approval by the Commission and the following conditions:
 - a. The wells shall be located on the overlying land described in the application.
 - b. The wells must be constructed to withdraw water from only the aquifer authorized by the well permit. Upon application for a well permit, the estimated top and base of the requested aquifer at the proposed well location will be determined by the Commission and indicated on the approved well permit. Plain non-perforated casing must be installed, grouted and sealed to prevent diversion of ground water from other aquifers and the movement of ground water between aquifers.
 - c. The entire depth of each well must be geophysically logged prior to installing the casing as set forth in Rule 9 of the Statewide Nontributary Ground Water Rules, 2 CCR 402-7.
 - d. Each well shall be constructed within 200 feet of the location specified on the individual permit application and approved well permit, but must be more than 600 feet from any existing large-capacity well completed in the same aquifer.
 - e. If more than one well is completed into one aquifer, the wells may withdraw the allowed average annual amount of water from the aquifer in combination. The allowed maximum annual amount of withdrawal may exceed the average annual amount of withdrawal as long as the total volume of water withdrawn does not exceed the product of the number of years since the date of approval of this determination times the allowed average annual amount of withdrawal.
 - f. The maximum pumping rate of each well shall not exceed 200 gallons per minute.

- g. A totalizing flow meter shall be installed on each well and maintained in good working order by the well owner. Average annual diversion records shall be collected and maintained by the well owner and submitted to the Commission or the North Kiowa Bijou Ground Water Management District upon their request.
- h. The well owner shall mark the wells in a conspicuous place with the permit number and name of the aquifer. He shall take necessary means and precautions to preserve these markings.
- i. The Commission may require the owner of any well withdrawing the subject ground water within the areas delineate as NT and NNT (4%) on Applicant's Exhibit 4 to periodically demonstrate compliance with the consumption and return flow requirements as stated in the Rules 5.3.6.2 A and B, 2 CCR 410-1.
- j. The subject ground water within the areas delineate as NNT (< 1 mi.) on Applicant's Exhibit 4 may not be withdrawn without Commission approval of a replacement plan in accordance with applicable statutes and rules.

This Initial Decision and Order shall become the Order of the Ground Water Commission unless an appeal is filed within 30 days after service of the Initial Decision. Such an appeal must be submitted to the State Engineer, as Executive Director of the Ground Water Commission, and copies shall be served upon all Parties.

Dated this 1ST day of February 2001.



Steve Lautenschlager, Hearing Officer
1313 Sherman Street, Room 818
Denver, CO 80203
Telephone: (303) 866-3581
Facsimile: (303) 866-3589

CERTIFICATE OF SERVICE

I hereby certify that I have duly served the within **FINDINGS OF FACT, CONCLUSIONS OF LAW, INITIAL DECISION AND ORDER** upon all parties herein by depositing copies of the same in the United States mail, postage prepaid, at Denver, Colorado, this 2nd day of February 2001 addressed as follows:

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HAND DELIVERED:

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Susan C. Harris

ATTACHMENT

APPEAL PROVISIONS OF THE ADMINISTRATIVE PROCEDURES ACT

Section C.R.S. 24-4-105(14)(a).....An appeal to the agency shall be made as follows:.....

(II) With regard to initial decisions regarding agency action of any other agency (Ground Water Commission), by filing exceptions within thirty days after service of the initial decision upon the parties, unless extended by the agency (Ground Water Commission) or unless review has been initiated upon motion of the agency (Ground Water Commission) within thirty days after service of the initial decision.

Section C.R.S. 24-4-105 (15)(a)(b)

(15)(a) Any party who seeks to reverse or modify the initial decision of the administrative law judge or the hearing officer shall file with the agency (Ground Water Commission), within twenty days following such decision, a designation of the relevant parts of the record described in subsection (14) of this section and of the parts of the transcript of the proceedings which shall be prepared and advance the cost therefor. A copy of this designation shall be served on all parties. Within ten days thereafter, any other party or the agency (Ground Water Commission) may also file a designation of additional parts of the transcript of the proceedings, which is to be included and advance the cost therefor. The transcript or the parts thereof which may be designated by the parties or the agency (Ground Water Commission) shall be prepared by the reporter or, in the case of an electronic recording device, the agency (Ground Water Commission) and shall thereafter be filed with the agency (Ground Water Commission). No transcription is required if the agency's review is limited to a pure question of law. The agency (Ground Water Commission) may permit oral argument. The grounds of decision shall be within the scope of the issues presented on the record. The record shall include all matters constituting the record upon which the decision of the administrative law judge or the hearing officer was based, the rulings upon the proposed findings and conclusions, the initial decision of the administrative law judge or the hearing officer, and any other exceptions and briefs filed.

(b) The findings of evidentiary fact, as distinguished from 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.