
MINUTES

THIRD QUARTERLY MEETING COLORADO GROUND WATER COMMISSION AUGUST 11, 2017

The Third Quarterly Meeting of the Colorado Ground Water Commission took place on August 22, 2017, at the Garfield County Library, 815 Cooper Avenue, Glenwood Springs Co 81601. Chairman Valdez called the meeting to order at 10:00 a.m. Secretary Nielsen called the roll and determined that a quorum was present. Commission members present were Marc Arnusch, Dan Farmer, Angela Fowler, Blake Gourley, Steve Kramer, Greg Larson, Scott Tietmeyer, Virgil Valdez, Kevin Rein, Ginny Brannon (on behalf of Robert Randall), and Craig Godbout (on behalf of Rebecca Mitchell). Staff members present were Keith Vander Horst, Rick Nielsen, Chris Grimes, Shannon Johnson, Neelha Mudigonda and David Keeler. Also present were Jody Grantham, Hearing Officer, Pat Kowaleski, A.G. for the Commission and Michael Toll, 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 18, 2017, Chairman Valdez asked if there were any corrections or additions to the minutes. There being none,

Commissioner Arnusch moved to approve the minutes as presented.
Commissioner Tietmeyer seconded the motion which carried unanimously.

Report of the Executive Director by Kevin Rein

Mr. Rein opened his remarks commenting on his appointment as State Engineer and Executive Director of the Colorado Ground Water Commission stating that the transition should appear seamless.

Regarding the rulemaking process for compact compliance on the Republican River, Mr. Rein stated that the process has been placed on hold because of some jurisdictional issues. He said that the remedy will require legislation and that his team has already opened the topic with the interim water committee.

Mr. Rein informed the Commission on another rulemaking process, this dealing with HB-1228 from the 2017 legislative session. He said that this law allows for the owner of an agricultural water right to change the use of that right without a non-speculative use and then apply the water to that new use through a substitute water supply plan as needed. The law allows for a temporary change in use without a permanent change in the water right.

In the Rio Grande Basin, Mr. Rein said that the process to resolve the concerns of the objectors to the rules continues.

Mr. Rein closed his remarks speaking to the staff changes at the office of the State Engineer on which matter the Commissioners received a memo in June. He said that Keith Vander Horst had been promoted to a Chief position and that the remainder of the team had been dispersed to other teams. Mr. Rein said that intent of this is to spread their knowledge to other staff members of the office of the State Engineer. He said that he believed the transition was going smoothly.

Chairman Valdez called for agenda item no. 5, Commissioners' reports:

Commissioner Godbout reported that there are five new members on the Colorado Water Conservation Board.

Commissioner Brannon reported that Ms. Rebecca Mitchell, one of the architects of the Colorado Water Plan, had been appointed by the Governor as the Director of the Colorado Water Conservation Board. She said that the Division of Natural Resources had been kept busy with the pipeline explosion in Firestone and that her Division, Reclamation, Mining and Safety, had just received news that the Supreme Court would not hear the lawsuit brought by New Mexico against Colorado over the Gold King mine release of two years ago.

Chairman Valdez called for agenda item no. 6, the staff activity report.

Mr. Keith Vander Horst went over his written report. He noted that the Gallegos case is over and that Cherokee and the two Axton matters had been resolved through stipulations while the Meridian matter went to hearing and the Hearing Officer has filed his initial decision approving the replacement plan.

On the enforcement matters Mr. Vander Horst advised the Commission that marijuana continues to be a major issue in Upper Black Squirrel. He said that the County Sheriff had reported 24 cases of suspected illegal grows, which has been keeping Mr. Chris Grimes busy. Mr. Vander Horst went over the process that Mr. Grimes goes through with each reported violation. He noted that for safety concerns and waiting on interagency coordination no field inspections were being conducted on cases involving marijuana grows. Mr. Vander Horst advised the Commission that illegal impoundments along Brackett Creek in Upper Black Squirrel were also being investigated by Mr. Grimes. He advised the Commission that a report had been received of a possible violation in Kiowa-Bijou were a livestock well was being used in a commercial business. He said that Chris Grimes is working with the owner of the two wells involved to get them properly permitted.

Mr. Vander Horst closed his report by informing the Commission that the general rule making process is progressing. He said that he hopes to have them out by the next meeting if not the middle of September.

Chairman Valdez called for agenda item no. 7, the Attorney General's report.

Mr. Michael Toll reported that the Kiowa and Strasburg cases, case nos. 16-GW-01 and 16-GW-02 are scheduled to be heard at the next commission meeting, November 3rd. He provided a short brief on the issue, noting that there are only legal issues to be decided, no factual issues. Mr. Toll also advised the Commission that the Meridian case, 03-GW-20 is set for a week long hearing on December 4, 2017.

Mr. Pat Kowaleski informed the Commission that the State Supreme Court affirmed the ruling of the District Court on the Gallegos matter. He said that no further appeal is available, the case is closed.

Chairman Valdez called for agenda item no. 8, Management District Reports

Mr. Nate Midcap, reporting for the **Marks Butte, Frenchman, Sandhills and Central Yuma GWMD's**, reported that the crops are good in most places and that some areas received 10 inches of rain in the past week. He said that they continue to work on conservation measures but with people in the field it is difficult to get together.

Mr. Dave Keeler, reporting for the **W-Y GWMD**, reported that an unusually wet and mild summer. He said that Mr. Mc Call will be resigning as manager. Mr. Keeler advised the Commission that the District Board is in favor of amending the Rules for a change in description of acres and considering the historic use if they are going to increase the irrigated acres. He said that they continue to work on conservation plans and have determined that the District had a five year average of 83,742 irrigated acres with an average well production of 225.8 acre-feet.

Rod Mason, reporting for the **Arikaree GWMD**, reported that his District had a wet spring then a dry spell and then rain again, heavy in some areas. He said that he has been busy verifying flow meters and inspecting chemigation systems while working on conservation measures for the district.

Ms. Brandi Baquera, reporting for the **Plains GWMD**, reported that the Plains District has been wet, that she is working on flow meter verification, chemigation system certification and that the conservation plans are on hold due to field work. She did add that the District will be holding a meeting on August 15th regarding some small capacity rule changes.

There was no report the **East Cheyenne GWMD**.

Mr. Blake Gourley, reporting for the **Southern High Plains GWMD** reported that his District has been wet with a dry spell from mid-June till the middle of July. He said that the rain is helping to keep the wells running strong longer than normal.

Mr. Robert Loose reporting for the **North Kiowa Bijou GWMD**, reported that the Board has been busy with investigating all the permit activity and educating the owners of those wells. He said the District would like to get together with staff to find a way to get enforcement to have teeth. Mr. Loose said that the mill levy of .027 is not assessed against the small capacity wells which is not fair for the work that the Board members put into the small wells.

Mr. Dan Farmer, reporting for the **Upper Black Squirrel GWMD**, reported that the Board believes that they are falling behind on enforcement. He said that anything further will be brought up in agenda item no. 9 e.

Mr. David Taussig reporting for the **Upper Big Sandy GWMD**, reported that they have received a lot of rain, with one person near Calhan reporting 20 inches in the past week. He informed the Commission that the study on the alluvial bedrock interface being conducted by the U.S.G.S. is complete and the final report will be heard at the September meeting. Mr. Taussig said that the Board supports the changes to Rules 5.6 and 5.8 but is unsure about the changes to Rule 7.4. The concern being that there are a lot of irrigators that are not irrigating the permitted lands but are irrigating the historic lands. He said that the Board would like to see some flexibility for situations such as that. He also said that the Board thinks that if they are not increasing the number of acres such as adding the corners they should be able to change acres without difficulty. Commenting on the illegal marijuana grows, Mr. Taussig said that he had heard reports of 500 marijuana grows in Eastern El Paso County, some illegal, some run by worldwide cartels. He said there have been reports that some of them are patrolled by armed guards. He believes that most of these are using domestic wells to water the marijuana. Mr. Taussig said that the Board is amending their small capacity rules, reducing the yield to 15 GPM and reducing the annual appropriation to 1 acre-foot with tighter restrictions in subdivisions.

Responding to a question of Commissioner Valdez, Mr. Taussig said that one sub-district has 12 out of 15 wells not irrigating the permitted lands.

Mr. Tom Sauter, reporting for the **Lost Creek GWMD**, reported that the Board, looking to long term aquifer levels, is installing pressure transducers on all non-metered wells, at the District's expense. He said that the District supports the amendments to Rules 5.6 and 5.8. Mr. Sauter said the District agrees with the idea of Mr. Loose to tax small capacity wells.

Responding to a question of Commissioner Farmer Mr. Sauter said that the transducer reports the water level every fifteen minutes and that they are more accurate with the well off.

Mr. Scott Tietmeyer, reporting for **Upper Crow Creek Basin**, reported that the management district formation is progressing slowly. He said that the sub-district areas have been drawn and the directors have been selected but that was all he could report.

Ms. Deb Daniel, reporting for the **Republican River Water Conservation District**, reported that the District is trying to update the 2006 CREP plan. She said that Mr. Mike Sullivan is helping them work with the USDA and FSA in Washington. Once the plan is amended, Ms. Daniel said that the Board will re-focus their attention and a payment program to that area on the South Fork of the Republican that, as agreed upon by the three states, needs to dry up 25,000 acres.

Ms. Daniel advised the Commission that oral arguments before the Supreme Court on the Hutton case are scheduled for November 4th. She also advised the Commission that the Republican River Compact Administration will hold their annual meeting in Burlington on August 22nd. Ms. Daniel said that the Compact Board is talking about storing water in Bonny Reservoir again (farmers in north-west Kansas are pushing for it) and possibly bringing water into the Basin.

Ms. Daniel reported the District Board continues to provide data and other tools to the local Districts and users to help them implement conservation practices.

Responding to a question of Commissioner Farmer, Ms. Daniel said that the CREP program pays farmers \$180.00 per acre, per year, for 15 years, for land that is dried up and that for wells over 4 miles from the river, her District will add \$110.00 per acre, in 3 payments, over that same 15 year period. She said that most of the wells being retired are on their last legs.

Chairman Valdez called for agenda item no. 9, old business.

- a) Status on joint proposal regarding the "Petition For Determination of Jurisdiction Over Surface Water Within the Upper Black Squirrel Creek Designated Ground Water Basin", from Meridian Service Metropolitan District.

Mr. Keith Vander Horst addressed the Commission. He provided the Commission with a short synopsis of the matter adding that the parties have been working on the issue and would like more time to come to an agreement on the wording of the document.

Responding to a question of Mr. Robert Longenbaugh, Mr. Vander Horst said that he was unsure why the AG report says that staff is not a party in the case but that staff is a party.

Responding to a question of Commissioner Arnusch, Mr. Vander Horst said that the water in question was simply water flowing down the channel. It could be precipitation runoff or ground water that surfaced through a spring.

- b) Proposal to initiate formal process to change Rule 7.4 to require a historical withdrawal and depletion analysis for a change of description of irrigated acres.

Mr. Vander Horst addressed the Commission. He provided the Commission with a short synopsis of the matter at hand. He said that staff held an initial stakeholder meeting on July 18th. Mr. Vander Horst said that nobody appeared in person and that three attorneys called in. He said that there was no opposition to the proposed rule change as presented and considering the lack of opposition he was requesting Commission approval to proceed with the formal rule making process which he described.

Commissioner Farmer asked for the reason for a statewide change. He believes that the change should be left to the individual basins because the basins needs are different. Mr. Vander Horst said that in the Northern High Plains, compact obligations are based on the number of irrigated acres. He added that in other basins the alluvial aquifer is over-appropriated and an increase in the number of irrigated acres through a change in description of irrigated acres will lead to additional pumping and depletions. Commissioner Farmer restated his belief that it should be left up to each basin and that he is opposed to the change.

Commissioner Arnusch asked if a District could enact it's own rule that went farther than the proposed change. Mr. Vander Horst responded saying that the Commission has the authority to process change applications. He added that the Districts could implement rules on conservation, pumping of waters etcetera but the Districts do not have the authority to process changes in a water right.

Mr. Pat Kowaleski said that the Districts can adopt their own rules which then come before the Commission for comments. He said that, generally speaking, Keith had provided an appropriate answer.

Ms. Leila Behnampour addressed the Commission saying that the Districts can promulgate rules to deal with a request to change the description of irrigated acres but then there would be two processes for people to go through increasing the costs to all involved. She said that her clients may be open to the idea of making it basin specific.

Mr. Dave Taussig addressed the Commission saying that the concerns of the Upper Big Sandy District are, as he said earlier, more of a correction of irrigated acres to what has historically been irrigated and not a change in description. He said that the District would like to see a way to protect these irrigators from the historical use analysis proposed.

Mr. Pat Kowaleski reminded the Commission that what is under discussion is if the Commission is going to initiate the formal process. Once that process has begun, there will be time during hearings to discuss the specifics of the rule and those discussions may lead to changes in the rule from its current form.

Ms. Leila Behnampour approached the Commission saying that her Districts do not oppose the request of Mr. Taussig.

Commissioner Tietmeyer moved to proceed with the formal rulemaking process.
Commissioner Larson seconded the motion which passed 8 to 1.

- c) Status of stakeholder process, including possible proposal to initiate the formal process, to amend Rule 5.6 regarding replacement plans and Rule 5.8 regarding artificial recharge, storage, and recovery plans.

Mr. Vander Horst addressed the Commission. He said that he has been pursuing the informal process for the past several months. Mr. Vander Horst said that there have been four stake holder meetings which have been well attended. He noted that though substantial progress has been made on the proposed changes there are also differences that remain. Mr. Vander Horst said that he is of the opinion that no further agreement can be had. He identified one of the sticking points as being concern over water quality and how to address that in the rules. There is also discussion on the importation of water to be stored for operation of the plan. Another source of disagreement is if there should be a separate rule for aquifer storage and recovery plans. Mr. Vander Horst said that he does not believe that additional stakeholder meetings will be beneficial and requested permission to proceed with the formal rulemaking. He said that the Commission may want to assign the matter to the Hearing Officer.

Commissioner Farmer confirmed that approval to go forward is not the adoption of the rule as proposed.

Mr. Robert Longenbaugh addressed the Commission. He said that the storage of water in the Basins is a good thing because doing so may increase the life of the aquifers. He wanted to make sure the protection of existing rights for quantity is necessary but that water quality needs to be addressed more forcefully in the rules than it currently is.

Commissioner Fowler said that she works with and respects the Water Quality Control Commission (WQCC). She said that she would like to see the two commissions working together to address the issue of water quality in these types of plans. Ms. Fowler said that she would like to rely on the WQCC to make sure that the concerns are addressed.

Commissioner Farmer said that the Commission is charged with protecting vested water rights and that includes water quality. He believes that the Commission needs to pay more attention to water quality and not let matters drag out for years.

Mr. Steve Sims, representing the City of Aurora addressed the Commission. He said that his clients were ready to support going forward with the rules as presented with the exception that they would like to see the Aquifer Storage and Recovery (ASR) section under its own rule, out from the replacement plan rules. He said most of these plans involve imported water. People want to make sure that they can get the water back out and under replacement plans the water becomes designated water and the matter of export rises. If the water remains "foreign", export is not an issue once the recovery process begins. Mr. Sims provided the Commission with a copy of proposed legislation, that he wrote, to address concerns that the Commission may not have the authority to promulgate ASR Rules. He said that his client is ready and willing to help the Commission get this suggested legislation through once the Commission decides to go forward with it.

Mr. Alan Curtis, representing Lost Creek Land and Cattle LLC, approached the Commission. Mr. Curtis said that the rules as proposed are sufficient and should be moved forward with 2 minor changes, the water quality matter needs to be clarified so that the most protective of the options is used, and the ability to add water to the plan should be reined in, occurring only through the application process. Mr. Curtis provided a copy of the Plaintiff-Appellant's Opening Brief on the matter of Front Range Resources Appeal to the District Court to support his disagreement with Mr. Sims on the matter of a separate rule for an ASR plan or to keep it where it is, under replacement plans..

Mr. Bob Longenbaugh addressed the Commission, saying that the WQCC does not regulate groundwater discharge except in the Upper Black Squirrel Basin. He said that there are 2 standards, potable and agricultural. Agricultural says that the quality is such that it can be used for irrigation and not be detrimental to crops. This could lead to a takings if the standard is set such that it exceeds a crops maximum limit. Mr. Longenbaugh believes that the Commission should ask the WQCC to set standards in each basin.

Chairman Valdez opened the discussion to the Commission.

Commissioner Farmer moved that staff go forward with the rulemaking with ASR's under the replacement plan, with the most protective water quality standard and that waters that are not legally available can only be added through a new application.

Commissioner Gourley seconded the motion.

Commissioner Tietmeyer moved to amend the motion to separate 5.6 and 5.8 with separate rules that address the science and protect the Basins.

Mr. Kowaleski addressed the Commission. He reminded the Commission that this is the start of the process which will be open to the public. It is at the time of the hearing that the rules, as proposed, can, based on public input, be amended by the Commission and adopted or not adopted. He said that the Commission is not putting its blessing on the proposed rule.

Commissioner Rein asked Mr. Kowaleski about the concern of notice issues. Mr. Kowaleski said that the notice should be as broad as possible.

Commissioner Fowler confirmed that once the formal process is initiated that the Commission can provide input and changes to the rules as proposed. She suggested more education on the process for the Commission, perhaps including the WQCC.

Mr. Jody Grantham addressed the Commission and clarified that he does not adopt the rules. He will make a recommendation but that it is the Commission that adopts the rule.

Chairman Valdez reminded the Commission of the amended motion from Commissioner Farmer that is on the floor.

Commissioner Tietmeyer said that his amendment failed for lack of a second. Mr. Tietmeyer went on to say that he would like to see the motion broader because the impact on future generations from their decision on this. He said that the basins will have high capacity wells for agriculture, municipalities even livestock and domestic uses in 2050. Mr. Tietmeyer said that the water plan did not set aside anything to help them administrate aquifer storage and recovery plans. He said that is why he would like to see the motion be broader.

Commissioner Farmer said that the Commission is the first and last line of defense for the vested water rights in the Basin. He said that the legislature does not care about our water rights and that they will make a run on them because of the millions of dollars they represent. Mr. Farmer said that he wants to keep the control with the Commission.

Commissioner Arnusch called for the vote on the question.
The motion failed to pass.

Commissioner Arnusch said that he would like information on the arguments for the rules and they affect the all parties, to bring it to a focus point, to help filter through it at the hearing.

Commissioner Fowler moved to delay the implementation of the formal process for rulemaking on Rules 5.6 and 5.8.

The motion failed for lack of a second.

Commissioner Arnusch moved that staff and the Hearing Officer proceed with the formal rulemaking process for Rules 5.6 and 5.8.

Commissioner Tietmeyer seconded the motion which passed unanimously.

- d) Status of proposed amendments to 2 CCR 402-3, Rules of Procedure for All Hearings Before the Colorado Ground Water Commission, by the Hearing Officer.

Mr. Jody Grantham reported that he has had several consultations with the Attorney General's office and that he has also received public input. He would like to have the hearing on adopting those rules at the February meeting, which means they will be published by the Secretary of State in December or January, beginning the formal process.

- e) Discussion on coordination between Staff and GWMDs, by Commissioner Farmer.

Commissioner Farmer requested a listing of the duties of the Commission that have been delegated to the State Engineer. He said that the Commission is the only protection the average small farmer has to protect their water rights. Mr. Farmer said that many of the Districts are broke from all of the litigation. He said that the Commission, not staff, is doing a poor job because of trying to be fair to the cities which have huge legal departments looking out for their rights and he thinks the Commission should be looking out for the vested rights in the Designated Basins and that should be our primary duty.

Mr. Kowaleski read the statute governing the delegation of authority stating that the Commission may delegate all authority except for the determination of a Designated Basin or a Ground Water Management District. He said that the Commission did delegate to the Executive Director all duties as outlined in statute.

Responding to a question from Commissioner Farmer, Commissioner Rein said that authority has been given to Commission Staff to carry out these duties, in accord with relevant statutes and rules. He said that Staff is under the direction of the Commission. Mr. Rein said that when Staff and the Commission, as a body, disagree then it is time to look at the legal rationale for the actions taken by Staff.

Chairman Valdez called for agenda item no. 10, new business. There was none.

Chairman Valdez called for agenda item no. 11, public comment.

Mr. Robert Loose, speaking on the Republican River, specifically regarding the owners of those lands to be dried up, he said to leave them something to manage. He said that his family had wells taken in 2004 and 3 quarters of land dried up and it is not good.

Mr. Robert Longenbaugh addressed the Commission. He advised the Commission that there are at least 2 studies on the Ogallala aquifer that are in progress. One is looking at the level of cost to impose on pumping groundwater to motivate farmers to pump less water making the aquifer last longer. Mr. Longenbaugh also mentioned a 7 state Ogallala aquifer study that is being headed by Colorado State University. He encouraged the Commissioners to get all the

information that they can in thoughts that the information could help the Management Districts with their conservation measures. He offered to help arrange a meeting for a presentation.

Commissioner Rein said that he would work with staff to get that information and Commissioner Godbout said that he was the CWCB liaison with CSU and would coordinate with staff as well.

There being no further business the meeting adjourned.

Respectfully submitted,



Richard A Nielsen, P.E., Secretary
Colorado Ground Water Commission