

ATTORNEY GENERAL'S REPORT

Cases involving the Colorado Ground Water Commission
August 11, 2017

The listing below summarizes matters in which the Office of the Attorney General represents the Colorado Ground Water Commission as of July 25, 2017.

**CHEROKEE METROPOLITAN
DISTRICT**

**Case No. 08-GW-71
13SA330**

**Designated Basin: Upper Black Squirrel
Creek**

Management District: Upper Black Squirrel Creek Before: Jody Grantham, Hearing Officer

Attorney: Michael Toll

Subject: An application for approval of a replacement plan to make new appropriations from the alluvial aquifer within the basin. Objections were submitted by the District, along with four other water users in the basin. A hearing was held for two weeks in Denver beginning on June 8, 2009 during which the Applicants completed their initial presentation and the objectors began their presentations. An additional week of hearing scheduled for August 3 through 7, 2009 was vacated following a ruling from the Division 2 Water Court regarding Cherokee's use of some of its wells, subject to further negotiations and amendment of the proposed replacement plan. This case was consolidated with change cases 08GW78 and 09GW15, and the trial was set to continue in January 2010.

Status: In November of 2009, the Upper Black Squirrel Creek Ground Water Management District filed in district court, in Case No. 98CW80, for a declaratory judgment asking the court to determine whether under a 1999 Stipulation Cherokee is required to use its waste water as recharge for the basin or if that waste water can be claimed as replacement credit under a replacement plan. On June 17, 2013 the Court found that neither Cherokee nor Meridian is prohibited from claiming wastewater return credits for its replacement plan. UBS filed an appeal on December 18, 2013. The Supreme Court upheld the decision of the District Court under the 1999 Stipulation, but included in the decision ambiguous language as to whether Cherokee can use effluent as a source of replacement water in a replacement plan. Staff has not heard from Cherokee as to how they plan to proceed with the application still pending before the Hearing Officer.

**CHEROKEE METROPOLITAN
DISTRICT**

**Case No. 08-GW-78
09-GW-15**

**Designated Basin: Upper Black Squirrel
Creek**

Management District: Upper Black Squirrel Creek Before: Jody Grantham, Hearing Officer

Attorney: Michael Toll

Subject: Applications to change the type and place of use of wells. Objections were submitted by the District and other water users in the basin. Both cases were consolidated with 08GW71.

Status: See above.

**MERIDIAN SERVICE METRO
DISTRICT**

Case No. 09-GW-11

Designated Basin: Upper Black Squirrel

Management District: Upper Black Squirrel **Before:** Jody Grantham, Hearing Officer
Attorney: Michael Toll

Subject: Application for a change of water right. Two parties filed objections.

Status: The hearing set for February 25 and 26, 2010 has been stayed because the water rights to be changed were for use in the replacement plan in 08GW71. The matter is stayed pending resolution of the issues in Case No. 98CW80 as described above for Cherokee Metro District's replacement plan.

GALLEGOS, REINALDO, ET AL

**Case No. 03-GW-06
03CV1335
15SA118**

Designated Basin: Upper Crow Creek

Management District:

Attorney: Pat Kowaleski

Before: Supreme Court

Subject: Petition to de-designate portions of the Upper Crow Creek Designated Ground Water Basin.

Background: The petitioners originally sent letters to the State Engineer in 2002 and 2003 seeking curtailment of wells within the Basin. The State Engineer declined to curtail wells and the petitioners appealed the issue of the Commission's jurisdiction over surface water rights first to District Court and eventually to the Supreme Court. The Supreme Court held that the Commission has jurisdiction over surface water rights only to the extent the holder of surface rights seeks to change a boundary of a designated basin, in which case the surface rights owner must show, using information that was not before the Commission at the time of designation, that pumping of the designated ground water has more than a de minimis effect on the surface rights and is causing injury to those rights. The matter was remanded to the Commission, and this petition to de-designation a portion of the designated basin was filed with the Commission on August 11, 2010.

Status: A 7 ½ day trial was held in February 2014, and on March 9, 2015 the District Court issued its decision denying the Gallegos Family's petition to de-designate a portion of the basin. On April 27, 2015 the Gallegos Family filed an appeal of that order to the Supreme Court. Oral Argument before the Supreme Court was held on December 6, 2016, and on June 19, 2017, the Supreme Court upheld the Commission's decision. On July 3,

2017, Gallegos filed a Petition for Rehearing with the Supreme Court and there has been no decision on that Petition.

FRONT RANGE RESOURCES

**Case No. 13-GW-7
15CV30493
16SA243**

**Designated Basin: Lost Creek
Management District: Lost Creek
Attorney: Michael Toll & Pat Kowaleski**

Subject: Front Range Resources filed for a replacement plan. Objections were filed by Equus Farms Inc., Lost Creek Land and Cattle Company, the Lost Creek Ground Water Management District and Staff.

Status: The matter was dismissed by the Commission and appealed to the District Court where it was set for trial June 6-16, 2016. Defendants, including the Commission, filed a motion dismiss the application on the grounds that it is speculative because there are no binding contracts with actual end users for the water. On May 26, 2016 the Court ruled that Front Range Resources was seeking to appropriate and change water rights and that the anti-speculation doctrine does apply to the application. The Court further found that Front Range Resources' existing contracts were not binding and do not constitute obligations to provide water, and that the proposed replacement plan did not detail how or if water would be used on land owned by Front Range Resources. Front Range Resources filed a notice of appeal with the Supreme Court on September 2, 2016, on the issue of speculation and whether the District Court erred in determining the Designated Ground Water Rules require that water rights be legally available for use in replacement plans in order to be included in replacement plan application. On September 19, 2016 Lost Creek Land and Cattle, Equus Farms and the Lost Creek Ground Water Management District filed a notice of cross appeal. Briefing has concluded and the case is waiting to be assigned a date for oral argument. The Ground Water Commission is not participating in this appeal.

MERIDIAN SERVICE METRO. DIST.

Case No. 14-GW-2

**Designated Basin: Upper Black Squirrel
Management District: Upper Black Squirrel
Attorney: Jen Mele**

Subject: Applicants filed an application for six new wells, which are French drains that were discussed in Case No. 12-GW-10. Objections were filed by Staff, Farmers and Upper Black Squirrel Ground Water Management Dist.

Status: The matter was dismissed by the Hearing Officer after the applicant presented its case at the hearing that began on January 14, 2015 because the applicant did not have a replacement plan for its new appropriations. See below Case No. 15GW14.

AXTON (Rocky Mountain Roosters)

Case No. 15-GW-5

Case No. 15-GW-6

Designated Basin: Kiowa Bijou

Management District: North Kiowa Bijou

Attorney: Jen Mele and Philip Lopez

Subject: Applicants filed an application for determination of water rights and a replacement plan. Objections were filed by the North Kiowa Bijou Ground Water Management District, and Earnest Mikita, Robert Alexander, Joe Eurich, Vincent & Jacqueline Eurich, Harold Eurich, Alvin Eurich, Darrel & Carol Dutro, Bob Pemberton and E. Scott Mikita.

Status: The parties stipulated prior to the June 5, 2017 hearing. The Hearing Officer approved the Replacement Plan on June 8, 2017

MERIDIAN METRO DISTRICT

Case No. 15-GW-14

Designated Basin: Upper Black Squirrel

Management District: Upper Black Squirrel

Attorney: Jen Mele

Subject: Application for replacement plan to replace depletions of underdrains that were the subject of 14GW02. Objections were filed by Pain Brush Hills Metro District, Upper Black Squirrel Creek Ground Water Management District, Woodmen Hills Metro District, the Wayne E. Booker Revocable Living Trust and the Frances G. Booker Revocable Living Trust, Dan Farmer, Joe Farmer, Jr., Jerry Farmer, Teresa Farmer, Edna Farmer and the Farmer Pipeline Company, LLC, and Staff of the Ground Water Commission.

Status: A five day hearing was held in February 2017 and after the trial parties negotiated a manner in which to calculate evapotranspiration arising from use of the recharge structures. The Hearing Officer issued his Findings of Fact, Conclusions of Law and Initial Decision of the Hearing Officer on May 16, 2017, and amended Exhibit 5 to the Initial Decision on May 31, 2017.

**CHEROKEE METRO DIST v. GROUND
WATER COMMISSION and UPPER BLACK
SQUIRREL CREEK GROUND WATER
MANAGEMENT DIST**

Case No. 15CW3028

15GW15

Designated Basin: Upper Black Squirrel Creek

Management District: Upper Black Squirrel Creek

Attorney: Jen Mele

Subject: Cherokee Metropolitan District originally filed a Complaint for Declaratory Judgment in district court seeking a determination as to the legal uses of Cherokee Well Nos. 1-8, specifically a finding that those wells can legally be used both inside and outside the designated basin and that irrigation use is not limited to the acreage that was specified in the statement of claim filed with the original application. Defendants filed a Motion to Dismiss, arguing that the Ground Water Commission has jurisdiction over this determination since the subject rights are designated ground water. The motion was granted and Cherokee has submitted the Complaint for Declaratory Judgment to the Hearing Officer.

Status: The matter was set for a 5 day hearing scheduled to begin on March 30, 2017. On January 9, 2017, both Cherokee and the Upper Black Squirrel Creek Ground Water Management District filed motions for summary judgment asking the Hearing Officer to decide the main controversy in the case, the proper place of use of Cherokee Well Nos. 1-8. The parties requested and received a stay in the proceedings to allow time to negotiate a resolution. On July 12, 2017 the parties submitted a stipulated proposed Findings of Fact, Conclusions of Law, and Initial Order of the Hearing Officer for the Colorado Ground Water Commission to the Hearing Officer and that Order was signed by the Hearing Officer on July 17, 2017.

WOODMEN HILLS METRO DIST.

Case No. 03-GW-20

Designated Basin: Upper Black Squirrel
Management District: Upper Black Squirrel
Attorney: Philip Lopez

Subject: Application for a replacement plan for depletions resulting from the pumping of 16 wells. Objections were filed by the Upper Black Squirrel Creek Ground Water Management District, Wayne E. Booker Revocable Living Trust and the Frances G. Booker Revocable Living Trust, Dan Farmer, Joe Farmer, Jr., Jerry Farmer, Teresa Farmer, Edna Farmer and the Farmer Family Pipeline Company and Staff. This application is technically a republication required by the hearing officer in 2005 to include additional structures to the replacement plan filed in 2003 and therefore the original case number was used.

Status: The applicant filed a motion to postpone the hearing that was set for October 31, 2016 in order to include additional structures causing depletions and the concept of using recharge facilities in its replacement plan. A five day hearing is set for December 4, 2017. Applicant filed their 26(a)(2) expert disclosures on May 17, 2017, and supplemental disclosures on June 19, 2017. Opposers' 26(a)(2) expert disclosures are due August 14, 2017.

STRASBURG SANITATION & WATER DISTRICT

Case No. 16-GW-1

Designated Basin: Kiowa Bijou
Management District: North Kiowa Bijou
Attorney: Michael Toll

Subject: Objection by the applicant to the requirement that the well be subject to final permitting requirements and to the reduction of the annual appropriation upon issuance of the final permit for the well with permit no. 2642-F.

Status: This matter in conjunction with the Kiowa Water & Wastewater Authority, case no. 16GW2, is set for a four day hearing scheduled to begin on May 22 – 25, 2017. The hearings are set back-to-back so that the hearing in 16GW2 will begin when the hearing in this case ends. The applicant filed a motion for summary judgment on August 23, 2016, seeking a determination from the Commission that the original permit issued for the subject well in 1960 is the final permit and therefore the requirements of § 37-90-107, i.e. issuance of a final permit based on actual beneficial use of the well, do not apply. Staff argued in its response that all wells, including the subject well, are subject to diversion limits based on actual beneficial use. The Hearing Officer denied the applicant's motion. Staff and Strasburg reached a settlement, agreeing that the maximum amount of water Strasburg put to beneficial use was 15.4 acre feet, but reserving Strasburg's right to appeal the denial of its Motion for Summary Judgment. Strasburg filed its Notice of Appeal on May 30, 2017. Oral argument before the Ground Water Commission will be held at the November 3, 2017 meeting.

KIOWA WATER & WASTEWATER AUTHORITY

Case No. 16-GW-2

Designated Basin: Kiowa Bijou
Management District: North Kiowa Bijou
Attorney: Michael Toll

Subject: Objection by the applicant to the requirement that the well be subject to final permitting requirements and to the reduction of the annual appropriation upon issuance of the final permit for the well with permit no. 2794-F.

Status: This matter in conjunction with the Strasburg Sanitation & Water District, case no. 16GW1, is set for a four day hearing scheduled to begin on May 22-25, 2017. The hearings are set back-to-back so that the hearing in this case will begin after the hearing in 16GW1 ends. The applicant filed a motion for summary judgment on August 23, 2016, seeking a determination from the Commission that the original permit issued for the subject well in 1960 is the final permit and therefore the requirements of § 37-90-107, i.e. issuance of a final permit based on actual beneficial use of the well, do not apply. Staff argued in its response that all wells, including the subject well, are subject to diversion limits based on actual beneficial use. The Hearing Officer denied the applicant's motion and because the applicant indicated it intended to offer evidence at trial as to intended future use of the well, on February 3, 2017 Staff filed a motion for summary judgment arguing that evidence considered by the Commission must be limited to evidence of the extent of actual beneficial use of the water and that evidence of future projected water demand is not relevant for the purpose of issuance of the final permit. The Hearing Officer denied Staff's Motion, holding that the great and growing cities doctrine applies to Kiowa's final permit, and that the hearing should proceed to hear evidence of Kiowa's future

projected water use. A hearing before the Hearing Officer was held on May 22, 2017. On June 9, 2017, the Hearing Officer entered an Initial Decision holding that the maximum amount obtainable through the final permitting process for Kiowa's well is 132.5 acre-feet per year. Kiowa filed its Notice of Appeal on July 6, 2017. Oral argument before the Ground Water Commission will be held at the November 3, 2017 meeting.

Meridian Service Metropolitan District

Case No. 16-GW-05

Designated Basin: Upper Black Squirrel

Management District: Upper Black Squirrel

Attorney: Michael Toll

Subject: Petition for determination of jurisdiction pertaining to surface water in Pond B and Pond C.

Status: This matter was filed on December 16, 2016 and no deadlines have been set. Upper Black Squirrel Creek GWMD and Booker Trusts are the only parties that have expressed interest in being parties, and Booker Trusts only to monitor the case. The Staff met informally with Upper Black Squirrel Creek GWMD and Meridian on May 15 to attempt to resolve all issues. The parties agree that the subject water is designated ground water, and are now just working on drafting a stipulated proposed order of the Ground Water Commission.

HUTTON EDUCATIONAL FOUNDATION V. REIN, ET AL.

Case No. 15CW3018

Designated Basin: Northern High Plains

Management District:

Attorney: Chad Wallace, Pat Kowaleski

Subject: Lawsuit filed by the Hutton Educational Foundation in an effort to make the State Engineer administer designated ground water rights and surface rights together for the purpose of compact compliance under the Republican River Compact. Complaint also alleges that SB-52, which revised 37-90-106 to limit how designated basin boundaries may be modified, and the Colorado Groundwater Management Act of 1965, are unconstitutional. The Ground Water Commission filed a Motion to Intervene and an Answer to the Hutton Complaint on December 16, 2015 and such Motion was granted on January 18, 2016.

Status: The Commission filed a motion to dismiss the second and third claims in which Hutton asserted that the Management Act and SB-52, amending the Act, were unconstitutional. The water court agreed and dismissed the second claim and part of the third claim. The water court held that it does not have jurisdiction over designated ground water and that the Commission must first determine whether designated ground water is implicated, and therefore the issue was not ripe. Hutton sought certification of the dismissal for appeal to the Colorado Supreme Court. The trial court certified its order of dismissal for appeal and stayed the remaining claims until the appeal is resolved. Hutton

has identified the issues for appeal to include the trial court's dismissal and the underlying question of whether SB 10-52, amending the Management Act, is unconstitutional. Some of the defendants, joined by the Commission, filed a motion with the Supreme Court to limit the issues on appeal to the dismissal, and to exclude any arguments on the constitutionality of Management Act statutes. The Supreme Court granted the motion to limit the appeal to the water court's dismissal. Briefing on the appeal is now completed. The Supreme Court has not yet set a date for oral argument.

LOST CREEK DAIRY, LLC

Case Nos. 17GW02 and 03

**Designated Basin: Lost Creek
Management District: Lost Creek
Attorney: Philip Lopez**

Subject: Applications by Lost Creek Dairy for change of use of wells to add irrigation use.
Objection filed by Lost Creek Ground Water Management District.

Status: Parties have reached settlement and are waiting for Management District board's final approval of stipulations.