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## MINUTES

### **SECOND QUARTERLY MEETING COLORADO GROUND WATER COMMISSION MAY 15, 2009**

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The Second Quarterly Meeting of the Colorado Ground Water Commission took place on May 15, 2009, at Parker Town Hall, 20120 E. Main St, Parker, Colorado. Chairman Max Smith called the meeting to order at 10:00 a.m. Mr. Rick Nielsen called the roll and determined that a quorum was present. Commission members present were Grant Bledsoe, Carolyn Burr, Dennis Coryell, Corey Huwa, Earnest Mikita, George Schubert, Doug Shriver, Max Smith, Alex Davis, and Dick Wolfe. Staff members present were Kevin Rein, Keith Vander Horst, Rick Nielsen, Chris Grimes, David Keeler, Jody Grantham, H.O., Pat Kowaleski, A.G. and Devin Odell, A.G.

**Review and Approval of Agenda Items** – the agenda was approved as proposed.

**Approval of Minutes for Meeting of February 20, 2009** Chairman Smith asked if there were any corrections or additions to the Minutes of the regular November 21, 2008 meeting. Commissioner Coryell noted that Commissioner Bledsoe recused himself from agenda item no. 5.

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

#### **Report of the Executive Director by Dick Wolfe**

Mr. Wolfe began his statewide updates with the Republican River Basin. On April 28<sup>th</sup> there was a special meeting with the Republican River Administration Commission. As expected the commission voted no on the Compact Compliance Pipeline proposal. The meeting was continued until May 21<sup>st</sup> when a revised proposal will be presented followed by another meeting two or three weeks after that. If there is no approval we will be going to arbitration but he is optimistic that arbitration will not be necessary.

Also in the Republican Basin, Bonny Reservoir has seen a lot of activity. Releases have been made to help with compact compliance and to get detailed information on the effectiveness of the releases at the Benkelman gauge. Mr. Wolfe reminded the Commission that the interests and obligations of State Parks and DOW need to be considered in any plans for the reservoir. Bonnie Reservoir will be maintained for recreational purposes throughout the summer.

In Water Division 2, the Arkansas River Basin, progress is being made on the irrigation consumption rules. It is anticipated that the final rules will be drafted by the end of June for submission to the Water Court in early July.

In Water Division 3, the Rio Grande Basin, the well compliance rules are moving forward with well attended public meetings. The amended plan for water management in Sub-District 1 has been approved and is set for public hearing on June 15<sup>th</sup>. Other districts are forming. It is anticipated that those rules will be drafted and filed with the Water Court by year's end.

Mr. Wolfe next addressed personnel and budget matters. Due to the hiring freeze, the Division currently has thirty five (35) vacant positions. The Governor's office has approved exemptions from the hiring freeze for a few of the Water Commissioner positions as well as the two vacant positions that located in the Republican River Basin. Craig Cotton has been appointed as the Division Engineer for Water Division 3, the Rio Grande. Also, with the severe restrictions in the state budget, furloughs for state employees are anticipated for next year.

Even with significant cuts in the budget we were able to fund the well monitoring program. The Division is fortunate and is not expecting any additional cuts in the budget for next year but that can always change.

The Division is moving forward with putting all of the records online for free. Also, the legislature passed SB-80 which deals with the harvesting of rain water. Information on this piece of legislation may be found on our website.

Mr. Wolfe concluded his report by addressing the issues and concerns raised by the Vance decision. The Vance case dealt with the State Engineer's authority over oil and gas wells that produce water. The Supreme Court found that these wells are subject to the 1965 and 1969 ground water management acts. HB-1603 directs the State Engineer to undertake rulemaking for the administration of these 34,000 wells. Kevin Rein will be the lead in the process and in determining if the wells are tributary or non-tributary, which effects how they are treated.

Commissioner Mikita asked Mr. Wolfe about access to the Federal stimulus dollars. Mr. Wolfe stated that though the Department is working closely with the Governor's office he is not aware of any stimulus funds going directly to various agencies.

The remaining discussion related to the Executive Director's report centered on water well contamination by gas wells, specifically in the Walsenburg area.

Agenda item no. 5 was exchanged with agenda item no. 7.

**Chairman Smith called for agenda item no. 5**, being the petition of Morgan County Water Quality District to initiate the process to amend Rule 5.2.5.2 so as to determine that the Hay Gulch drainage within the Lost Creek Designated Ground Water Basin is over appropriated.

Mr. Jeff Kahn, representing the petitioner, introduced district board members and land owners. Introductions were followed by a brief history of the district and an overview of district operations. Utilizing various maps Mr. Kahn laid out the relation of Hay Gulch to the remainder of Lost Creek Basin, well locations and land ownership.

In support of their request to consider Hay Gulch over appropriated Mr. Kahn provided hydrographs of monitoring wells that show a steady decline in the water table over the past thirty (30) years. He also stated that there has been an unwritten rule for many years that Hay Gulch was over appropriated and no new high capacity wells have been approved for that area until recently.

Mr. Kahn suggested that the Commission assign the rule making process to the Hearing Officer for a "findings of facts" upon which they could make their decision. He further stated that a single hearing to determine the basin over appropriated would be a better approach than conducting a hearing on each new application for a high capacity well permit.

Mr. Kahn responded to questions regarding the northern portion of the basin, long term water supplies and the source of water for feedlots and dairies within the district.

Mr. Kip Barthloma, Mgr. for MCQWD, Mr. John Cortis, as board member of Lost Creek GWMD and Mr. Kingsbury, land owner, all spoke in favor of the petition. Mr. Mike Browning, representing Equus Farms and Mr. Mike Shimmin, representing Lost Creek Land and Cattle Company stated that their clients support the petition. They agreed that the procedural process put forth by Mr. Kahn for handling the petition is satisfactory. They also addressed the possibility of putting forth a similar petition for the northern portion of Lost Creek Basin.

Mr. Steve Larson, representing Yokam Land Holdings, advised the Commission that his client has submitted applications to appropriate ground water in Hay Gulch and that those applications are currently before the Hearing Officer because of objections from Equus Farms and Lost Creek Land and Cattle. He stated that they have no objection to the petition as presented. He believes that it would be best if the hearing for his clients applications proceeded or in fact were completed prior to the study. He also stated that he did not believe that the results of the petition to consider the Hay Gulch over appropriated could be applied retroactively to his clients application.

Mr. Keith Vander Horst, for staff, stated that until the recent application by Morgan County Quality Water for a new well, applications for new appropriations in the Hay Gulch area of Lost Creek and the northern portion of Lost Creek main stem were not favorably looked upon due to language in the designation report. He informed the Commission that staff believes a study to determine if Hay Gulch is over appropriated is warranted.

In response to Commissioner Davis's question regarding the impact of rulemaking on pending applications Mr. Devin O'Dell, attorney for staff, responded by stating that it would be up to the Commission to make the decision at the appropriate time.

Mr. Jeff Kahn, attorney for petitioner, agreed with Mr. O'Dell and provided his interpretation of the comments by Mr. Larson to mean that a single hearing covering the entire Hay Gulch drainage area is the only way to proceed.

Chairman Smith closed the hearing.

Commissioner Shriver moved to initiate the process for rule making for Hay Gulch. Following discussion among the Commission and conflicts counsel Mr. Kowaleski, Commissioner Shriver amended his motion to include direction for the Hearing Officer to perform a fact findings hearing with the Commission to make the final decision.

Commissioner Davis seconded the motion. The motion carried unanimously.

**Chairman Smith called for agenda item no. 6**, and opened the hearing on the Cherokee Metropolitan District's appeal of the Decision of the Hearing Officer regarding Springs East Airport Inc.'s application, Case No. 07-GW-69.

David Shohet, representing Cherokee Metropolitan District, advised the Commission that Cherokee objects to the application because the applicant has not met the burden of proof for a change of water right and because the water rights are under contractual agreement with Cherokee. He went on to say that the burden of proof had not been met because the applicant did not submit crop records, pumping records or aerial photographs in support of the application. They did submit two (2) affidavits regarding the historic use of the well. In explanation of the contractual aspect of their objection, Mr. Shohet provided a detailed history of the well and water rights dating back to the late 1950's.

Mr. Shohet questioned the use of diversions in excess of the contractual volume. He cited recent court cases that say contractual arraignments must be taken into consideration on change cases. He concluded his presentation by requesting the Commission to deny the application because the applicant failed to meet the burden of proof. Barring that, he requested the Commission to recognize the contractual agreements.

Mr. Shohet responded to questions of the Commission regarding his understanding of the change of water right evaluation procedures and the interpretation or limitations of the contract.

Mr. Michael Whedon, President of Springs East Airport, addressed the Commission. He asked the Commission to dismiss the appeal because Cherokee failed to present evidence at the hearing and because the Commission is not bound by private contracts.

Mr. Whedon responded to questions dealing with his understanding of the relationship between consumptive use and the volume of water diverted as well as his interpretation of the contract.

Mr. Devin Odell, legal counsel for staff, addressed Cherokee's arguments on appeal. He stated that Cherokee failed to address their assertion that the applicant did not meet the "burden of proof" at the hearing, the proper place to raise the issue. Mr. Odell pointed out that in the pre-hearing statement Cherokee only asked that the historic consumptive use analysis be limited to the 100 acre-feet in the contract, conceding the factual point. Mr. Odell informed the Commission that the affidavits were not heresy but were based on personal knowledge and that there were 26 years of zeros in the evaluation.

On the matter of the lease agreement, he noted that the Hearing Officer correctly found that there is no basis in statute or rule for the Commission to consider private agreements in their analysis. Mr. Odell advised the Commission that the only court case addressing contractual agreements is not similar to but the reverse of the case before them. He suggested that it is not staff's responsibility to interpret contracts.

Mr. Odell concluded his remarks by noticing that though Cherokee did not enforce the contract for all those years, they are now asking the Commission to retroactively enforce it. He advised

the Commission that Cherokee does have a remedy; they can go to the District Court. The Hearings Officer's decision should be affirmed.

The Commission received answers from Mr. Odell to their questions regarding the analysis that staff used, well pumping since 1972 and interpretation of the contract.

Mr. Shohet restated his client's position on the contractual limit of 100 acre-feet in annual diversions. He then answered questions of the Commission and Conflicts Counsel regarding the contract and well ownership.

Commissioner Burr moved to affirm the Hearing Officer's ruling.  
Commissioner Shriver seconded the motion which passed unanimously.

**Chairman Smith called for agenda item no. 7**, a Hearing on the Proposal by the Southern High Plains GWMD to amend Rule 5.2.3 to allow the aquifers in the Southern High Plains Designated Basin to be administered as a single geohydraulic system.

Mr. Keith Vander Horst, staff, reminded the Commission that this issue came before them at the last meeting at the request of the Southern High Plains GWMD. He reported that staff does support the request.

He further reminded the Commission that staff geologists have reviewed the situation and information provided finding that the area does not have good separation of the individual formations allowing for an exchange of the water between the aquifers. He also noted that it has been estimated that there are currently over 1000 wells that are multiply completed allowing for an exchange of waters between the aquifers. He informed the Commission that existing rules allow for an existing, multiply completed well to receive a new appropriation.

Mr. Vander Horst concluded his presentation by advising the Commission that staff received no statements of opposition or objections to the proposed rule change following publication.

Mr. Vander Horst answered questions on matters of evaluation procedures, half-mile spacing and well to well interference with replacement permits.

Mr. Mike Shimmin addressed the Commission. He raised the question of deepening an existing well without having to get a new permit because the existing permit allows for a total depth deeper than what the well was originally completed.

There was extensive discussion regarding replacement of existing wells and injury to other wells permitting procedures, requiring publication of replacement permits and other concerns.

Chairman Smith closed the hearing.

Commissioner Mikita moved to amend Rule 5.2.3 to allow the aquifers in the Southern High Plains Designated Basin to be administered as a single geohydraulic system.

There was further discussion on the issue of deepening and replacing an existing well.

Commissioner Schubert seconded the motion which carried unanimously.

**Agenda item no. 8.** was postponed until the August meeting.

**Chairman Smith Called for agenda item no. 9, the staff activity report.**

Mr. Keith Vander Horst, staff supervisor, referred the Commissioners to the report in their packet. He addressed the final permit project, noting that staffing levels accounted for the low numbers and that he does not expect this to change until staffing levels are increased. Mr. Vander Horst directed the Commission's attention to page three (3) of his report mentioning the hearing for Cherokee Metro District & Meridian Service District replacement plan and that the parties in the PV Water II hearing have settled so the case was remanded back to staff. On the matter of enforcement he noted that most parties, once notified, do work to get things resolved. Under miscellaneous items he said that Chris Grimes is spending considerable time helping the Republican River team. There were no questions of Mr. Vander Horst.

**Chairman Smith called for agenda item no. 10,** the report of the Attorney General. Mr. Devin Odell said that the focus this year is on Upper Black Squirrel and Lost Creek Designated Ground Water basins. He asked if there were any questions on his report, there were none.

**Chairman Smith called for agenda item no 11,** the management district reports.

Mr. Nate Midcap, reporting for the **Marks Butte, Frenchman, Sandhills and Central Yuma GWMD's**, expressed appreciation for the funding of the static water levels. He measured 168 wells and found the northern districts to be down from 0.3 to 0.5 feet and southern districts down from 0.5 to 1.5 feet depending on the location. He has been working on chemigation and metering inspections. He expressed his districts concerns over the compact compliance pipeline and the administration of Bonny Reservoir. He concluded by reporting 2 ½ to 5 inches of precipitation.

Mr. Jack Dowell, reporting for **W-Y GWMD** reported that planting is almost complete. He has measured the static water levels on 68 wells. He had 36 wells up 7.48 feet and 36 wells down 7.23 feet, one well remained the same. He compared these numbers to previous levels going back to 2005. He has also begun conducting chemigation inspections. He has heard good comments from the irrigators regarding the removal of the Russian Olive and Salt Cedar along the river.

There was no report from the **Arikaree GWMD**.

Deb Daniel reported for **Plains and East Cheyenne GWMD's**, reported that, to-date, they have received 5 inches in the Plains District and 3 inches in the East Cheyenne District. She expressed thanks for the limited funding of the static water level measurement program. The Plains District had an average decline of 1.69 feet and the East Cheyenne had an average decline of 1.1 feet. Because of the late start of the program there were several wells that she could not measure because they had been recently operated or were currently running. Also, in the Plains District several wells have been retired and capped so she will need to replace those program wells. Ms. Daniels reported that the East Cheyenne District continues to work on their measurement rules. She reported that the Plains District remains concerned with the issues of the Republican River Basin and commented on the release of water from Bonny Reservoir. Ms. Daniels has been busy verifying totalizing flow meters and conducting PCC's for compliance issues. She commented on the number of change applications being processed to bring well operation into compliance.

Max Smith reported for the **Southern High Plains GWMD** stated that though things are green they could use more rain.

There was no report for the **North Kiowa Bijou GWMD**.

There was no report for the **Upper Black Squirrel GWMD**.

There was no report for the **Upper Big Sandy GWMD**.

There was no report for the **Lost Creek GWMD**.

Mr. Stan Murphy reported for the **Republican River Water Conservation District**. He noted that the District is waiting for approval of the pipeline by Kansas and Nebraska, the export approval by the Sandhills GWMD and the approval of their change applications. He distributed a map of the basin, using it to demonstrate location of gauging stations. He also handed out a hydrograph of stream flows. Mr. Murphy turned the Commissions attention to spikes in the graphs that relate to the release of water from Bonny Reservoir. He concluded his report by asking for continued releases form Bonny Reservoir.

Commissioner Davis advised Mr. Murphy that administration of Bonny Reservoir is not as straight forward some people believe. First, the reservoir is not a compact compliance reservoir, the water in it is Federally owned surface water rights decreed by the State. Also, the 5 year rolling average administration makes accounting very difficult.

Executive Director Wolfe, advised Mr. Murphy that negotiations with Kansas and Nebraska are ongoing and that the situation surrounding Bonnie Reservoir is being monitored closely.

**Chairman Smith called for agenda item no. 12**, old business. There was none.

**Chairman Smith called for agenda item no. 13**, new business. There was discussion on the location of the August meeting, traditionally out of town, and the location for future meetings.

There being no further business the meeting adjourned.

Respectfully submitted,

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