

**PROPOSED STATEMENT OF BASIS, SPECIFIC STATUTORY AUTHORITY, AND
PURPOSE FOR THE AMENDMENT OF RULE 7.4 OF THE
RULES AND REGULATIONS FOR THE MANAGEMENT AND CONTROL OF
DESIGNATED GROUND WATER
2 C.C.R. 410-1**

January 30, 2018

I. STATEMENT OF BASIS AND PURPOSE

This matter concerns the Rules and Regulations for the Management and Control of Designated Ground Water (“Designated Basin Rules” or “Rules”) of the Colorado Ground Water Commission (“Commission”). Designated Basin Rule 7.4 gives the Commission’s standards of evaluation and approval for changing the description of irrigated acres served by a permitted well.

Rule 7.4 currently allows the Commission to approve a change of description of irrigated acres served by a permitted well without consideration of historical acres irrigated, and the associated historical withdrawals from and depletions to a designated groundwater aquifer. The purpose of the amendment to Rule 7.4 is to prevent an increase in the number of acres to be irrigated when changing the description of acres to be served by a permitted well, and thereby increasing the withdrawals and depletions of designated groundwater beyond the withdrawals from and depletions to the aquifer that would occur if the number of acres were limited to those historically irrigated.

The number of applications submitted for changes of description of irrigated acres served by a permitted well have increased in recent years. Approximately two dozen such applications were submitted in 2016. Most of these applications involve wells that had irrigated less than the permitted number of acres for many years, often for decades. A typical example is where a well that is permitted for 160 acres (a quarter section) has been irrigating only a circle (130 acres), and not the corners of the quarter section (30 acres). The application will seek to change the description of irrigated acres from the 30 acres that have not been irrigated to a different 30 acres. So, where in the past only 130 acres were historically irrigated, now 160 acres would be irrigated. These types of applications currently are being approved under Rule 7.4, effectively allowing for an increase in the number of acres irrigated by a well, and an increase in withdrawals from and depletions to the aquifer, compared to the number of acres that were historically irrigated.

Pursuant to Statute, 37-90-111(1), C.R.S., the policy of the State is to conserve its designated groundwater resources and protect vested rights. To that end, section 37-90-111(1)(g) C.R.S., and Rule 7.1.1 of the Designated Basin Rules, allow the Commission to authorize a change in description of irrigated acres to be served by a permitted well, but only upon such terms and conditions as will not cause material injury to the vested rights of other appropriators.

The current practice under current Rule 7.4 has the potential to cause material injury to the vested rights of other appropriators. Nearly all the aquifers for which this rule would apply (this rule does not apply to changes in water rights in Denver Basin Bedrock aquifers subject to Rule 5.3 or other rights in aquifers based on overlying land ownership subject to Rule 5.4) are determined to be over appropriated, with the amounts of water contained in those aquifers decreasing and their water levels declining. Allowing an effective increase in the number of irrigated acres under current Rule 7.4, with accompanying increases in withdrawals from and depletions to these aquifers, results in an increase in the rate of reduction of water contained in these aquifers and the rate of decline in water level, which results in less water available to the vested rights of other appropriators in the future than would be allowed under the changed rule.

Nearly all the Ground Water Management Districts in the Northern High Plains Designated Ground Water Basin, and the Lost Creek Ground Water Management District, have expressed a desire to stop the practice under the current Rule 7.4.

The change is intended to prevent the effective increase in number of acres to be irrigated, with accompanying increases in withdrawal from and depletion to the aquifers, which occur under the current rule and thus prevent material injury to the vested rights of other appropriators.

The basis for each amendment to the Rule is as follows.

7.4.1

- Using an average of ten or more years of historical number of acres irrigated adapts and applies the similar standards of Rule 7.10.1, which gives the standards for evaluation of historical use for changes of water rights that require a determination of historical withdrawal from and depletion to an aquifer.
- The rule places on the applicant - as is the standard under Colorado water law - the burden of demonstrating that the proposed change will not materially injure the vested rights of other appropriators by demonstrating the historical average number of acres irrigated, but allows the Commission to use all available information to establish the historical average number of acres irrigated.

7.4.1.1

- Not allowing credit for historical irrigation of acreage which exceeds the number of permitted acres prevents an increase in permitted number of acres and thereby prevents an increase in the withdrawals and depletions of designated groundwater.

7.4.1.2

- In the general case, not allowing credit for historical irrigation of acreage that is not within the permitted description of irrigated acreage adapts and applies the similar standards of Rule 7.10.2.

- In some cases, where the description of irrigated acres on the permit did not describe the actual acres that were irrigated, credit is allowed for the number of historically irrigated acres that are those under which the irrigation right was established by placement to beneficial use and have been continued to be irrigated since the irrigation right was established (but not exceeding the amount of permitted acreage), and the change is not resulting in an actual change in irrigated acreage.

7.4.1.3

- Allowing years when a well was placed into a federal set aside or conservation reserve program to be excluded from computation of the historical average adapts and applies the similar standards of Rule 7.10.4(a).

7.4.1.4

- Allowing the owner to exclude years from computation of the historical average, subject to there being at least ten years available to compute a historical average, upon prior written request, adapts and applies the similar standards of Rule 7.10.4(b).
- Making 2018 the year when this provision is allowed to be first used follows the concept of Rule 7.10.4(b) where the ability to exclude a year from the averaging computation of Rule 7.10 began in the year when Rule 7.10.4(b) was added to the Rules, which was 1997.

7.4.1.5

- In its November 16, 2012 meeting, the Commission decided that it did not want to eliminate the duty of water requirements of Rule 5.5 on new conditional permits.
- As new wells must have a duty of water that establishes a maximum duty of water, it is reasonable that rights undergoing a change in the description of irrigated acres should also be limited to that same maximum duty of water.

II. STATEMENT OF SPECIFIC STATUTORY AUTHORITY

A. Relevant Provisions of Statute and Rule

The Colorado Ground Water Commission (“Commission”) is empowered under section 37-90-111(1)(g), C.R.S., to authorize changes of rights to designated groundwater, including changes in the description of irrigated acres to be served by a permitted well. A change can be approved only upon such terms and conditions as will not cause material injury to the vested rights of other appropriators.

B. Specific Statutory Authority Concerning Rule Making

The Commission’s Rules, including Designated Basin Rule 7.4 and any amendments thereto, are promulgated pursuant to section 37-90-111(1)(h), C.R.S., to carry out the authority and responsibilities of the Commission to supervise and control the exercise and administration of rights acquired to the use of designated groundwater. The proceedings were conducted pursuant to the Commission’s Rules for Procedure for All Hearings Before the Colorado Ground Water Commission, 2 CCR 402-3.

The Commission announced its contemplated rule-making under section 24-4-103(2), C.R.S., and invited public comment and participation during the stakeholder process. The Commission provided notice of the proposed rule-making under section 24-4-103(3), and the proposed rule and a proposed statement of basis, specific statutory authority, and purpose were made available at least five days prior to the public hearing as required by section 24-4-103(4)(a), C.R.S.

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