

ATTORNEY GENERAL'S REPORT

Cases involving the Colorado Ground Water Commission
February 16, 2018

The listing below summarizes matters in which the Office of the Attorney General represents the Colorado Ground Water Commission as of February 2, 2018.

**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. Counsel for Cherokee has indicated that they intend to file a Motion for Determination of Question of Law, but such Motion has not yet been filed.

**CHEROKEE METROPOLITAN
DISTRICT
Designated Basin: Upper Black Squirrel
Creek**

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

**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.

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. Oral argument was held on December 5, 2017, and the parties are awaiting a final opinion from the Supreme Court. The Ground Water Commission is not participating in this appeal.

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 was set for December 4, 2017. However, the parties were able to reach a stipulation, and the Hearing Officer entered his Findings and Initial Decision on November 27, 2017.

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 Staff's understanding is that that all parties appear to agree that the subject water is designated ground water, and are working on drafting a stipulated proposed order of the Ground Water Commission.

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 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. The Supreme Court heard oral argument on November 14, 2017, and the parties are awaiting a decision. A status conference was held on January 8, 2017, and the parties are still waiting to see how a Supreme Court ruling would affect the Water Court case. A further status conference has been scheduled for May 25, 2017.