

ATTORNEY GENERAL'S REPORT

Cases involving the Colorado Ground Water Commission
February 19, 2016

The listing below summarizes matters in which the Office of the Attorney General represents the Colorado Ground Water Commission as of February 5, 2016.

**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: Jen Mele

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 has issued a decision in which they said they upheld the decision of the District Court that under the 1999 Stipulation, but included in the decision ambiguous language as to whether or not 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: Jen Mele

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: Jen Mele

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:

Before: Supreme Court

Attorney: Pat Kowaleski

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-designation a portion of the basin. On April 27, 2015 the Gallegos Family filed an appeal of that order to the Supreme Court. The Gallegos' Opening Brief was filed on November 25, 2015, and the

Commission's brief was filed on February 3, 2016. Oral Argument will likely be held later in the year.

**MERIDIAN SERVICE METRO
DISTRICT**

**Case No. 12-GW-10
14SA302**

**Designated Basin: Upper Black Squirrel
Management District: Upper Black Squirrel
Attorney: Pat Kowaleski & Susan
Schneider**

Subject: An application for junior surface and storage rights was filed in water court (10CW95), however objectors argue that the claimed water is actually designated ground water since if not for the diversion, it would recharge the basin. Since only the Commission has the authority to decide when water is designated basin water, the matter is now before the Commission to make this determination.

Status: The hearing was held January 22 - 24, 2013 before the Hearing Officer. The Hearing Officer issued the Initial Decision of the Hearing Officer on April 25, holding that the applicant must determine what portion of the water claimed in the water court application historically contributed to the water supply of the designated basin and subtract that out from the surface water claim. The Commission upheld the Initial Decision. Meridian appealed the Commission's decision to the district court and trial was held July 29 – 31, 2014. The district court held in favor of the Management District and the Commission, finding that a portion of the water claimed by Meridian is designated ground water over which the Commission has jurisdiction. Meridian appealed the matter to the Supreme Court and oral argument was held on September 30, 2015. The Supreme Court issued its decision on November 16, 2015, upholding the decision of the district court and the hearing officer, and finding that a portion of the water Meridian sought to appropriate was designated ground water. The case was remanded to the district court for further proceedings.

FRONT RANGE RESOURCES

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

**Designated Basin: Lost Creek
Management District: Lost Creek
Attorney: Jen Mele & 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 is now set for trial June 6-16, 2016. The objectors, including the Commission, filed a motion to exclude use of water rights that are tributary to the South Platte as a

replacement source since they are not decreed for use in this replacement plan and that motion was granted. On February 1, 2016 the Commission filed expert reports by Keith Vander Horst and Mary Halstead that covered potential injury resulting from the proposed plan and the issues with the modeling provided by the applicant. Applicant will file rebuttal expert disclosures later this month.

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.

WC RESOURCES

Case No. 15-GW-1

**Designated Basin: Lost Creek
Management District: Lost Creek
Attorney: Jen Mele**

Subject: Applicants filed an application for a change in place of use and type of use for two wells. Objections were filed by the Lost Creek Land and Cattle Co., Equus Farms, Inc., AG Water Alliance, Staff and the Lost Creek Ground Water Management District.

Status: This matter was set for a five day hearing starting December 14, 2015 however prior to the hearing all parties stipulated to the form and content of the Findings and Orders and the hearing was vacated.

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**

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, Earnest Mikita, Robert Alexander, Joe Eurich, Vincent & Jacqueline Eurich, Harold Eurich, Alvin Eurich, Darrel & Carol Dutro, Bob Pemberton and E. Scott Mikita.

Status: A site visit revealed additional ponds that will likely need to be included in the replacement plan. Furthermore, certain objectors are arguing that remodeling of the Denver Aquifer is required in the vicinity of the subject property which could affect the applicant's claim for nontributary water, and Staff has been working on this issue. A status conference is set for April 5, 2016.

GARNER, Robert L., et al.

Case No. 15-GW-8

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

Subject: Application for a change in type of use and place of use for two wells. Objections were filed by the Upper Black Squirrel Creek Ground Water Management District, JT Jonson Properties, Farmer Objectors and Wayne Booker.

Status: A three day hearing has been set for September 12, 2016.

EINSPAHR, Gayln

Case No. 15-GW-10

Designated Basin: Northern High Plains
Management District: Sand Hills
Attorney: Jen Mele

Subject: Staff required the applicant to file an application for reduction in number of irrigated acres and associated annual appropriation in order to obtain a replacement well for one of the applicant's wells. Applicant does not believe a reduction is required and claims an apparent overlap of irrigated acres with another well is a clerical error on the permit for the other well.

Status: This matter is scheduled for a hearing on March 15, 2016.

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: Applicant submitted a Motion for Order Disqualifying Hearing Officer to the Hearing Officer on September 14, 2015 and that motion was denied. Applicant now has different counsel and this matter is scheduled for a five day hearing to begin on February 6, 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 Commission was named as a defendant and Staff filed a motion to dismiss the Commission as a defendant since the matter is before the Commission. That motion was granted. The matter is set for a 5 day hearing scheduled to begin on March 30, 2017.

DENNING, TODD

Case No. 15-GW-16

**Designated Basin: Lost Creek
Management District: Lost Creek
Attorney: Jen Mele**

Subject: Application for change in description of irrigated acres on for three wells. Objections were filed by the Lost Creek Ground Water Management District.

Status: The Lost Creek Ground Water Management District withdrew its objection and the matter was remanded to Staff for processing.

WOODMEN HILLS METRO DIST.

Case No. 03-GW-20

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

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: This matter is scheduled for a five day hearing to begin on October 31, 2016.

KIOWA WATER & WASTEWATER AUTHORITY

Case No. 16-GW-1

Designated Basin: Kiowa Bijou
Management District: North Kiowa Bijou
Attorney: Jen Mele

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 Stasburg Sanitation & Water District, case no. 16GW2, is set for a hearing for four days scheduled to begin on May 22-25, 2017. The hearings are set back-to-back so that the trial in 16GW2 will begin when this one ends.

STRASBURG SANITATION & WATER DISTRICT

Case No. 16-GW-2

Designated Basin: Kiowa Bijou
Management District: North Kiowa Bijou
Attorney: Jen Mele

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. 16GW1, is set for a hearing for four days scheduled to begin on May 22 – 25, 2017. The hearings are set back-to-back so that this trial will begin when 16GW1 is over.

HUTTON EDUCATIONAL FOUNDATION V. WOLFE, ETAL

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, not just surface rights, 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: A status conference is set for February 26, 2016. Counsel will be meeting with the Commission in Executive Session to discuss litigation strategies.