
MINUTES
THIRD QUARTERLY MEETING
COLORADO GROUND WATER COMMISSION
AUGUST 16, 2013

The Third Quarterly Meeting of the Colorado Ground Water Commission took place on August 16, 2013, at the Pueblo Convention Center, 350 Central Main St., Pueblo, Colorado, 81033. Chairman Cory Huwa called the meeting to order at 8:30 a.m. Mr. Richard Nielsen called the roll and determined that a quorum was present. Commission members present were Carolyn Burr, Larry Clever, Corey Huwa, Steve Kramer, Earnest Mikita, George Schubert, Max Smith, Virgil Valdez, Dick Wolfe and Suzanne Sellers. Staff members present were Kevin Rein, Keith Vander Horst, Richard Nielsen, Chris Grimes, David Keeler. Also present were Jody Grantham, Hearing Officer, Pat Kowaleski, A.G. for the Commission and Jennifer Mele, A.G. for staff. Members of the public were also present.

Review and Approval of Agenda Items, Mr. Pat Kowaleski suggested moving agenda item 9.a to Executive Session, agenda item no. 14 and Mr. Andy Jones requested that agenda item no. 11 include discussion on the Ground Water Management District enforcement legislation being carried over from last year.

Commissioner Valdez moved to approve the agenda as amended.
Commissioner Smith seconded the motion which passed unanimously

Approval of Minutes for Meeting of May 17, 2013, Chairman Huwa asked if there were any corrections or additions to the minutes. There being none,

Commissioner Schubert moved to approve the minutes as presented.
Commissioner Mikita seconded the motion which carried unanimously.

Report of the Executive Director by Dick Wolfe

Mr. Wolfe opened his remarks by acknowledging the efforts of staff in managing the various issues and enforcement actions related to the over pumping in the Northern High Plains last year, especially the Town of Vona.

He next addressed the service of the Commissioners. Specifically Mr. Wolfe noticed that the terms of Commissioners Bledsoe, Huwa and Mikita were completed last May. He asked that the Commissioners and District representatives get the word out to recruit replacements in time for confirmation during the upcoming legislative session. One suggestion he had was to place an advertisement in local newspapers.

Mr. Wolfe advised the Commission that he, Mike Sullivan and Scott Steinbrecher from the Attorney General's office have been busy on matters related to the Republican River. The final phase of a trial between Nebraska and Kansas has been taking place in Portland, Maine. This trial deals with how penalties are assessed for compact violation, a topic which directly affects Colorado. The preliminary ruling in January favored Colorado and he hopes that that will be the final ruling. Mr. Wolfe then noted that Colorado is closely following three arbitrations between Kansas and Nebraska. The first arbitration concerns Nebraska's Rock Creek project which is very similar to Colorado's compliance pipeline and which is operational. The second one deals with Nebraska's desire to change the term of water short years from a two year to a three year average. The final arbitration involves another pipeline, the ENCORP pipeline which moves up to 60,000 acre-feet of water on Medicine Creek. Mr. Wolfe stated that the Republican River Conservation District should be commended for leading the way these past five years with the pipeline project. Their efforts have inspired Nebraska to proceed with their own pipelines.

Mr. Wolfe concluded his comments by bringing the Commission up-to-date on Colorado's own arbitrations, the pipeline and the accounting procedures for Bonny Reservoir. He stated that Nebraska supports Colorado's position and that the negotiations with Kansas have narrowed the matters under dispute down to a couple of issues which will go before the arbiter from September 30th through October 4th. There were no questions of Mr. Wolfe.

Chairman Huwa called for agenda item no. 5, Commissioners reports. Commissioner Kramer noted that residents in the Northern High Plains and the Republican Basin especially are anxious to hear the accounting results on consumption vs. allowable water usage. Mr. Wolfe noted that the numbers for 2011 and 2012 have been finalized and show that consumption was less than projected. Those numbers will be presented to Kansas and Nebraska at the next RRCA meeting in Kansas on September 12th. He noted that Mr. Chris Grimes could provide him with the requested numbers.

There were no additional Commissioner reports.

Mr. Pat Kowaleski, Commission Council, advised the Commission of the District Court's standard of review for de novo proceedings. He stated that the appeal goes to the Ground Water Judge, de novo, meaning as if the matter had never been heard before. This includes the opportunity to present new testimony. Mr. Kowaleski mentioned that the record of the Commission Hearing could, subject to objection, be made evidence in the case. He also notes that most times, the appellants provide the Judge with the record and ask for an opinion without new testimony.

Chairman Huwa called for agenda item no. 6, being a Hearing on a request by Verna Marlene Hill for a variance to Rules 7.3.1, 7.3.2, 7.3.3, and 7.3.4 to allow for the relocation of a well, permit no. 6412-FP.

Mr. Tyler Welch, representing Ms. Hill addressed the Commission. He spoke to the effect that granting each variance request will have for his clients. Further, Mr. Welch provided a detailed history as to the permits issued, 6412-FP and 13208-F, their location, relationship and related farming practices. He also mentioned communication between the original well owner, the Commission and the local Management District.

Mr. Keith Vander Horst addressed the Commission. He said that Mr. Welch provided an accurate summary of the matter. Mr. Vander Horst, continued that staff does not know the reasons for nor are they able to explain the actions of their predecessors. He said that if the final permit were to be processed today, the change in location would be recognized as the permitted location of the water right. Mr. Vander Horst said that staff cannot administratively amend the final permit because it is a water right with a Final Permit. The only method available to amend the right is to obtain a variance through the hearing process.

Commissioner Wolfe asked Mr. Vander Horst about the process if the Commission grants the request. Mr. Vander Horst replied that findings and order would be issued that will correct the location of the water right for permit no. 6412-FP to the constructed location of permit no. 13208-F. He also said that based on evidence in the file procedures would be initiated to expire permit no. 13208-F.

No other parties approached the Commission on the matter and the hearing was closed.

Commissioner Clever moved to approve the variance request as presented.
Commissioner Valdez seconded the motion which passed unanimously.

Chairman Huwa called for agenda item no. 7, Hearing on appeal from the Initial Decision of the Hearing Officer in the matter of water rights applied for by Meridian Service Metropolitan District in Division 2 Water Court Case no. 2010-CW-95, Commission Case no. 12-GW-10.

Commissioner Schubert recused himself from the discussion.

Mr. Wayne Schroder, representing Meridian, began his presentation to the Commission by noting that in 2000 Meridian applied for and received a surface water right through the Water Court which was not objected to by the Commission and which was stipulated to by the Office of the State Engineer. He noted that in the current application, filed with the Water Court in 2010, the Commission again did not object but others did. Those objections asserted that some or all of the surface water applied would recharge the alluvial aquifer and should therefore be considered ground water. The judge agreed and sent the matter back to the Commission to determine what type of water it is. The Hearing Officer determined that the Commission has or should have jurisdiction over the precipitation.

Mr. Schroder went on, asking the Commission to determine if it does have jurisdiction over the precipitation. He asked the Commission to do this by referring to the 1968 Designation Report and 1967 publication for the proposed designation. He said that these documents describe the alluvial aquifer but do not mention precipitation. Mr. Schroder stated that if the Commission decides it has jurisdiction over the precipitation then Meridian will appeal that decision to the District Court to determine if proper notice was given. He noted that the publication and designation report identify the aquifers but do not mention precipitation. Further, he noted that the definition of ground water is "... water that under normal circumstances is not visible on the surface..." Mr. Schroder asserted that as the publication did not notice precipitation and that the designation order did not claim precipitation that the Commission does not have jurisdiction, contrary to the Hearing Officers conclusion.

Commissioner Burr asked Mr. Schroder if there was evidence at the hearing that drains collecting ground water may be adding to the surface water. Mr. Schroder replied in the affirmative saying that there are French drains installed around the houses but that those waters were not claimed.

Ms. Lisa Thompson, attorney for Upper Black Squirrel Management District, began her comments stating that the question is – is the water collected at the Meridian points of diversion designated ground water controlled by the Commission or surface water allocated by the Water Court and administered by the State Engineer? Ms. Thompson agrees with the Hearing Officer in that some of the water collected is designated ground water.

Ms. Thompson continued her comments by providing a short description of the application, noting that the five collection points are at the upper end of the basin. She pointed out that the applicant's experts expect the diversion of 600 acre-feet or more per year.

Ms. Thompson spent the remainder of her time discussing the findings of the Hearing Officer and reminding the Commission of a few key points. That the water has three natures, precipitation, salvage and designated with the precipitation, under natural conditions, being the natural recharge of the aquifer. In the 1965 Act, ground water is defined as water that under normal conditions is not visible on the surface. She went on to say that the Hearing Officer found that the collected water is not under natural conditions and that you cannot protect prior appropriators if the collection of precipitation is allowed. She also noted that the Hearing Officer in looking at the designation order observed that it did address the amount of recharge. Ms. Thompson observed that Meridian did not challenge the idea that precipitation is the natural recharge of the aquifer, nor that the salvage water was not available for appropriation or that the water collected through the French drains could not be appropriated.

Ms. Julian Wooldridge, attorney for Mr. Farmer, approached the Commission. She noted that contrary to Mr. Schroder, it is her opinion that the 1967 – 1968 actions of publication and the designation orders dealt with a Designated Basin and that they made reference to considering recharge as part of the designation and that makes recharge water designated water. Ms. Wooldridge also disagreed with Mr. Schroder's statement that the Hearing Officer found that the water produced from the French drains was not claimed. In her opinion, the Hearing Officer's finding that the water produced from the French drains mixes with waters that will be diverted from the applicant's points of diversion is accurate.

Ms. Wooldridge discussed the idea of preclusion, a legal definition of when a claim or legal issue cannot be re-litigated. She touched on all the areas where preclusion was raised by Meridian. Ms. Wooldridge stated that she agreed with the Hearing Officer in his determination that there is nothing to preclude the Commission from acting in or making a decision in this case.

Mr. Schroder, attorney for Meridian, approached the Commission for rebuttal testimony. He restated his opinion that the publication and designation order did not lay claim to the precipitation. Mr. Schroder, used the Hearing Officers findings to demonstrate that Meridian is not seeking water rights on the water produced from the French drains. He then proceeded to point out that the decrees for the wells in place before designation made no mention of a recharge component and that even today decrees do not have a recharge section. He further

said that at the time of designation the farmers received protection from the farmers using surface water in the Arkansas and are now seeking further protection. Mr. Schroder noted that there is agreement that 4% of the water that falls as precipitation recharges the aquifer. He proceeded to describe how the collection system will work, being piped to a reservoir and stored to be used for irrigation of parks and fields. He said that up to 30% of water applied for irrigation is returned to the aquifer. Mr. Schroder closed his comments discussing the negative effects on development if the Commission pursued the 4% of return flows.

Commissioner Wolfe questioned Mr. Schroder regarding the 1967 notice not claiming precipitation. In response, Mr. Schroder stated that precipitation was not claimed and that he had never heard of well owners claiming the water before it even hits the ground until this case. He went on to say that the Commission has not filed anything, either in the past or now in the court case that would indicate a claim of jurisdiction over precipitation.

Commissioner Wolfe then asked what the source of the underground ground water was. Mr. Schroder responded that the underground water was deposited eons ago and is not replaced annually. He further stated that the existing rights are surface water rights with no recharge component that were grandfathered into the basin at the time of designation.

Commissioner Mikita asked Mr. Schroder if containment ponds had already been constructed. Mr. Schroder responded that yes some have and one has been decreed. The water from that structure is used to irrigate a golf course.

Commissioner Wolfe asked where in the Hearing Officers findings that it states the Commission has jurisdiction. Mr. Schroder directed him to paragraph 57 on pages 19 & 20 where it says that a portion of the precipitation falling in the basin is designated ground water. Upon further questioning by Commissioner Wolfe regarding the portion of precipitation that the Commission has jurisdiction over, Mr. Schroder referred to the Hearing Officers findings on the procedure to calculate those waters. He further stated that he understood it that until such time as those calculations are completed the Commission has jurisdiction over all precipitation.

Ms. Jen Mele, representing staff addressed the Commission. She noted that the though the Hearing Officers decision is not consistent with staff's opinion it is not unreasonable and therefore staff is not participating in these appeal proceedings.

The hearing was closed and Commission discussion ensued.

Commissioner Clever asked Commissioner Wolfe if recharge could be a beneficial use of surface water. Mr. Wolfe responded in the affirmative.

Commissioner Burr stated that this is a complicated matter and that the Hearing Officer sorted through all of the facts and that these facts have not been disputed. She went on to explain her understanding of what the Hearing Officer found as to types of water present and how to calculate that water volume if any that the applicant is able to claim. Ms. Burr concluded her remarks saying that she would vote to uphold the Hearing Officer's decision.

Commissioner Clever said that he does not believe that the Commission can claim all of the precipitation that falls and that it will eventually be decided by the Supreme Court. He also stated that it would appear that the aquifer was getting better with 30% return flow from irrigation then with 4% natural precipitation.

Commissioner Mikita expressed confusion over the matter saying it sounds like the aquifer would be better if they allowed the collection of the surface water but he was not sure. Mr. Mikita went on to question if allowing this collection of the precipitation would be precedent setting and everybody would then want to collect their own from roof tops and wherever eliminating all recharge.

Commissioner Wolfe reminded the Commission of the doctrine of first in time – first in right. He questioned if allowing a new surface water right was protecting the senior rights. Mr. Wolfe noted that there is a system in place to protect those rights, either an augmentation or replacement plan. He went on to say that Commissioner Burr stated things very well when she said that the facts of the case are not disputed. He added that the specifics are not before the Commission today.

Commissioner Burr moved to affirm the Hearing Officer's decision.
Commissioner Valdez seconded the motion which passed with Commissioner Clever voting no.

Chairman Huwa called for agenda item no. 8, the staff activity report. Mr. Vander Horst went over his written report and noted that the change of use applications for the Republican River Water Conservancy District had been finalized and delivered. He also mentioned that except for municipal wells all historic permits have been finalized. Mr. Vander Horst said that the municipal wells will receive the final permit after SB-72 becomes effective at the end of August. He did note a correction in the hearing portion of the report that case no. 13-GW-02 is completed as are all other cases opened in 2013.

Mr. Vander Horst briefly touched on enforcement activity noting that a few commercial wells in the Plains District that did not have meters, (one owned by Schaal Farms will continue to be monitored) and that excavations in Kiowa-Bijou have exposed ground water. Mr. Vander Horst advised the Commission that concerns over the Town of Vona and over pumping have been resolved by use of a back-up well and by connecting into a pipeline of the Town of Seibert.

Mr. Vander Horst concluded his comments with the information that Ivan Franco had been transferred to Team 4, 5 & 6, working on West slope permits.

Mr. Chris Grimes reported on the administration activities in the Republican River Basin. He noted that based on 2012 pumping records that there are 250 wells, after corrections, being monitored in 2013. This monitoring includes pay back for over pumping in 2012, monthly meter readings from April through October with July, August and September being third party readings. Mr. Grimes stated that the intense monitoring has 8 wells that are close to over pumping and will probably go to the Attorney General's Office for action while another 7 may go because they have failed to provide any reports. Staff is presently reading those meters. As to the question raised by Commissioner Kramer at the beginning of the meeting, 2012 pumping records, by District and Basin wide, are published. Those for 2011 will be published in the coming week. The numbers show that 923,000 acre-feet were pumped in 2012 and 678,000 acre-feet had been pumped in 2011.

Chairman Huwa called for agenda item no. 9, the Attorney General's report. Ms. Jen Mele advised the Commission that there are no new cases. However, the Gallegos case which will be discussed in executive session and the Cherokee matter remain active. On the Cherokee matter, involving the use of waste water return flows as replacement water, Ms. Mele said that the reversal of a judge's ruling, may send the case back before the Hearing Officer or it may go directly to the Supreme Court, she is unsure at this time.

Chairman Huwa called for agenda item no. 10, Management District Reports

Mr. Nate Midcap, reporting for the **Marks Butte, Frenchman, Sandhills and Central Yuma GWMD's**, reported that his Districts have had good rain in the last thirty days, Sandhills has received 14 inches. He also reported that his Districts had met with the RRWCD to discuss conservation efforts. Mr. Midcap noted that the pumping numbers Commissioner Kramer asked for would be beneficial in the conservation discussions and planning.

Mr. Jack Dowell, reporting the **W-Y GWMD**, reported that his chemigation inspections are going well with only 2 of 250 failing. He reported that the wheat harvest was spotty but good overall and that the corn and beets look real good. Mr. Dowell said that his District is looking into conservation programs. One is developing a banking reserve and in the other they will follow 60 wells that use end guns for a period of 5 years to help determine efficiencies. Mr. Dowell closed his remarks by noting that the removal of Salt Cedar and Russian Olive from the river is progressing. They have worked at Bonny Reservoir and in Kansas with Kansas wanting more removal.

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

Ms. BreAnn Ferguson, reporting for the **Plains and East Cheyenne GWMD's**, informed the Commission that her Districts have had some rain, about 5 1/2 inches. She has also been busy with a lot of field work performing chemigation inspections and meter verifications. Ms. Ferguson also attended the conservation meeting with the RRWCD and felt that though decisions were made, there was a lot of good discussion.

Mr. Max Smith, reporting for the **Southern High Plains GWMD** advised the Commission that they have received rain, spotty but welcomed. Unfortunately it came too late to help the wheat. He said that the heaviest rain was around Two Buttes where the reservoir is full, the fullest it has been in years. Mr. Smith also said that regulations required that water be released from the reservoir and that the authorities did a great job explaining the why of it at a meeting in Lamar.

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

Ms. Tracy Doran, reporting for the **Upper Black Squirrel and Upper Big Sandy GWMD's**, reported that her District was affected by the Black Forest Fire. They are continuing to assess the full extent of the fire damage within the District. She advised the Commission that the administrative offices of the Upper Black Squirrel and Upper Big Sandy districts are being combined. She anticipates that she will continue at her present location. Ms. Doran stated that the Districts have received a lot of rain turning the pastures green and that some fields have standing water in them.

Mr. John Cordiss, reporting for the **Lost Creek GWMD**, reported that as with other Districts, Lost Creek has received some rain which is helping out. He said that the hardest hit farmers

are those that also use Henry Lynn water. The ditch had only one run this year and that is hurting those farmers who use both the ditch water and well water. Mr. Cordiss also said that the District has, for conservation purposes, modified its rules so that the bedrock aquifers (the Arapahoe and Laramie Fox-Hills) are, from this point forward, required to have a 300-year aquifer life as opposed to the 100-year aquifer life of the past.

Mr. Andy Jones, Council for Lost Creek, informed the Commission on a project the District is working on. The District is concerned about the quality of waters used to replace depletions to Lost Creek and has its own rule on that issue and would like the Commission to adopt their standards. However, research has shown that there is no one to enforce water quality matters inside a Designated Basin. He is working with Commission Staff, other local district council and the Water Quality Control Commission on the matter and will update the Commission on any progress.

There was no report for **Upper Crow Creek**.

Ms. Deb Daniel, reporting for the **Republican River Water Conservation District**, reported that she has been meeting with small, local citizen groups, County Commissioners, agents of the Farm Bureau, NRCS, FSA and others to educate them on the activities, especially conservation efforts, of the RRWCD. She also spoke to the meeting the RRWCD hosted for the local Ground Water Management Districts mentioned by Mr. Midcap and Ms. Ferguson. Ms. Daniel also attended the GWMD Association conference in Colorado Springs. She finds it beneficial to meet with other district managers from around the country to discuss issues common among them.

Chairman Huwa called for agenda item no. 11, old business. Mr. Andy Jones, Council for Lost Creek GWMD addressed the Commission. He asked the Commission for its support of a proposed bill to make it easier for management districts to enforce their rules, impose, collect and keep any fines granted. Mr. Jones reminded the Commission that they supported a similar bill last year that for various reasons was not discussed during the legislative session. He noted that the Upper Black Squirrel and Upper Big Sandy Districts support the bill. Mr. Jones also advised the Commission that he and Mr. Kevin Rein would be presenting the proposed legislation to the interim legislative water committee the following Wednesday. The Commission voiced support for the proposed legislation.

Chairman Huwa called for agenda item no. 12, new business.

- a) Mr. Keith Vander Horst addressed the Commission regarding a potential rule change to allow for the temporary change in use of a water right. He reminded the Commission that under current rules, a temporary change is allowed only in emergency (health and safety) situations and for a period not to exceed 90-days. If the situation exceeds 90-days in length then the change must be made permanent. Mr. Vander Horst provided the example of the problems recently encountered by the Town of Vona, their problem will last longer than the 90-day limit. He also said that staff receives requests for temporary changes for construction (road and pipeline), oil and gas well construction and fracking. Currently, rules do not allow for these types of temporary changes – they must be permanent. Mr. Vander Horst continued with an explanation of how these types of changes are allowed outside of a Designated Basin through the use of a Substitute Water Supply Plan. He explained that notice to other users is required, that plan length

is normally 1-year and no injury is allowed. Following Commission discussion on the matter, staff was directed to obtain input from the Ground Water Management Districts.

- b) Following Commissioner Kramer's statement that he would like to continue as the Commission representative to the Republican River Water Conservation District, Commissioner Clever nominated Commissioner Kramer, said nomination was seconded by Commissioner Burr and passed unanimously.

Chairman Huwa called for agenda item no. 13, public comment – there was none.

Chairman Huwa called for agenda item no. 14, executive session.

Commissioner Clever moved to enter into executive session to discuss the Gallegos case.
Commissioner Mikita seconded the motion which passed unanimously

Commissioner Mikita moved to exit executive session
Commissioner Clever seconded the motion which passed unanimously

There being no further business to come before the Commission, the meeting adjourned.

Respectfully submitted,



Richard A Nielsen, P.E., Secretary
Colorado Ground Water Commission