
MINUTES

THIRD QUARTERLY MEETING COLORADO GROUND WATER COMMISSION

AUGUST 18, 2000

The Third Quarterly Meeting of the Colorado Ground Water Commission took place on August 18, 2000, at the Great Divide Lodge, 550 Village Dr., Breckenridge, Colorado. Chairman Earnest Mikita called the meeting to order at 8:30 a.m. Marta Ahrens called the roll and determined that a quorum was present. Commission members present were Eugene Bauerle, Jon Brownell, Anne Castle, Dennis Coryell, Michael Gross, Richard Huwa, Robert Loose, Hal Simpson, Kent Holsinger, and Ted Kowalski. Commissioner Max Smith was absent.

Review and Approval of Agenda Items - There were no additions to the agenda.

Approval of Minutes - Chairman Mikita asked if there were any corrections or additions to the Minutes of the May 19, 2000, meeting. Commissioner Castle suggested a change on page 2 to reflect the request for variance by Mr. "Kelling" rather than by Mr. "Lefferdink". Commissioner Castle moved to accept the Minutes with the correction. The motion was seconded by Commissioner Brownell and carried unanimously.

Executive Director's Report - Mr. Hal Simpson thanked those who participated in the rainy field trip of the South Park Conjunctive Use Project. Mr. Simpson provided a heads-up of a potential meeting in Denver in the latter part of January of several boards and commissions, including the Wildlife Commission, the Water Quality Control Commission, Colorado Water Conservation Board, the Commission on Agriculture, and potentially the Ground Water Commission. The meeting is still in the developmental stages and the purpose will be to discuss the impact of Federal water quality policies. Mr. Simpson asked that some Members of the Ground Water Commission participate in the discussion to stay abreast of how the Commission may be impacted.

Mr. Simpson reported on the Federal legislation that was introduced by Senators in Oklahoma and New Mexico addressing the Southern High Plains Aquifer. The legislation would provide funds for a study of the aquifer, the water use, and water level declines. The purpose of the legislation would be to better manage the aquifer in this area, farmers could receive up to \$50 per acre if they did not irrigate, and it could have an impact on the Southern High Plains area in Colorado. Mr. Simpson will try to get the Commissioners a copy of this legislation.

Mr. Simpson stated that there has been a significant decline in precipitation and streamflows lately. Due to yesterday's rain, the Henderson gage near Brighton peaked at 8,000 cfs and additional rain today could produce additional flows to help with the shortages in the lower and Middle South Platte.

Mr. Simpson provided an update of the Kansas v. Colorado trial on the Arkansas River. Special Master Littleworth issued a draft report and recommends that Kansas be compensated in dollars, not in water. The Special Master did not go with a water remedy and he did not determine the amount of damage. The basis of the computation would be that prejudgment interest would be awarded from 1968 forward and that damages will include the damages to Kansas' farmers. Both states have been asked to comment to the Special Master on the draft report and then he will issue a final report by the end of August.

Status of the Kansas v. Nebraska and Colorado litigation - Republican River Compact by Hal Simpson

- Mr. Simpson reported that significant events have occurred since his last report. Kansas alleged that Nebraska depleted streamflows greater than is allowed by the Compact on the Republican River Basin. Colorado and Nebraska argued that the Compact does not include ground water. A hearing was held in late 1999 and the Special Master issued a report that all tributary ground water is included in the allocations of the Compact. Colorado and Nebraska filed exceptions to that report early this year. The Supreme Court remanded the case back to the Special Master and, therefore, agreeing with his recommendation that all tributary (hydrologically connected) ground water is included in the compact allocations. Nebraska filed a cross claim against Colorado stating that if Nebraska violated the Compact, so did Colorado and that Colorado has allowed thousands of wells to be constructed into the Ogallala and Republican River basin and potentially injured Nebraska. A status conference will be held on October 16 in Kansas City. The Special Master wants to put this on fast track. Discussions have started on how Colorado will defend its case, start collecting data on wells, and bring in outside consultants to collect this data. A model for the entire Republican River basin may need to be constructed by the end of next year. Colorado is considering filing cross claims against Nebraska and Kansas because their pumping on the east side of the border where Colorado's points of delivery are measured could impact the flow. Mr. Simpson stated that he will keep the Commission informed as this process moves forward.

Discussion on Eagle Peak Farms and the Town of Limon's petitions with regard to the pending Commission Rulemaking on Rule 11 for consideration by the Commission and for determination by the Commission on which petitions are related to and not related to the pending Rulemaking for Rule 11

- Mr. David Hayes, Assistant Attorney General, served as conflicts counsel for the Commission. He reviewed what has happened with the rulemaking and what decision needs to be made today. At the May meeting, the Commission adopted the proposed changes to Rule 7 since there was no controversy. With respect to Rule 11, due to concerns raised by Limon and Eagle Peak, the Commission decided to defer it until today and address Eagle Peak and Limon's petition to determine what aspects are related to the proposed rule changes. If all or some of the items are related, they will be considered substantively at the November Commission meeting.

Mr. Dave Taussig, attorney representing Eagle Peak Farms, Prospect Valley Farms, and the Town of Limon, supports the notion of publication of variances. Mr. Taussig distributed a copy of statute CRS 24-4-103(7) and Exhibit No. P-1, Eagle Peak's and Limon's Proposed Changes for Rule 11. Mr. Taussig proposed that a definition regarding unusual hardship be added. Mr.

Taussig stated that the proposals that Eagle Peak and Limon have made have a direct or indirect impact on the current variance rulemaking, therefore, they are related. He asked that the Ground Water Commission republish the rules to include their proposals, provide notice, and allow others opportunity to participate in the process, and to schedule the matter for the November meeting.

Mr. Pat Kowaleski, Assistant Attorney General representing the staff, reminded the Commission of the staff's concerns when this matter was brought to the Commission in May and what has transpired since. The matters that the Commission determines are related will be published and acted on at the November meeting; anything that is not related will be considered as a request to initiate rulemaking. The staff will provide a definition of unusual hardship for the November meeting. The substance of the proposals will not be discussed at this time, only the matter of whether they are related or not.

Mr. Kim Lawrence, attorney representing the Upper Black Squirrel, Lost Creek, and the Southern High Plains Districts, addressed the issue of related matters, definitional changes, and the half-mile rule. Mr. Lawrence requested that the Commission deny the relation of the other items with the exception of items 1, 2, 5, 6 and 7 in the document that he provided to the Commission.

Mr. Mike Shimmin, attorney representing Marks Butte, Frenchman, Sand Hills and Central Yuma County Districts, focused on the five issues that have no relationship to what is currently in the rules and are radical proposals to restructure the whole process of handling applications before the Ground Water Commission. They are proposals 3, 4, 8, 9, and 10. He stated that the half-mile rule proposal is unrelated and they are concerned about the precedent. With regard to the five proposals that Eagle Peak has made that are not related, Mr. Shimmin requested that the Commission decide that they are not related to the rulemaking; and then in November dispose of them without beginning a formal rulemaking process on those issues.

Mr. Don McClary, attorney representing the North Kiowa Bijou Ground Water Management District, agreed that it is a common sense approach for the Ground Water Commission to determine what is related and not related. If there are any doubts, the decision should be that it is not related.

In response to Commissioner Gross' question regarding definitions, Mr. Bill Fronczak, from the staff, reported that the staff's opinion in how the Commission should look at applications and how variances should be filed, are handled in Commission Rules 5 and 7 and they are not needed in this variance request. The language changes in proposals 1 through 6 are related and are clarification type items that change the language of the original proposals.

Commissioner Castle stated that the Ground Water Commission needs to consider the decisions on the table in the context of how the rulemaking was originally proposed, and the policy that was already adopted. The half-mile rule is not related to publishing notice of variance requests. Proposal numbers 4 and 9, which allows an applicant to go to district court, is a significant change in the procedure that the Ground Water Commission has been operating under and should be considered separately. Number 3, the definitions of application

and variance requests, is not needed if 4 and 9 are not included, so it's not related. Number 8, the standard for granting a variance is related to the procedural change and the applicant's options if they lose the variance request. Commissioner Castle suggested including in the November meeting the changes to proposals 1, 2, 5, 6 and 7 as part of previously proposed Rule 11 changes and considering the others separately.

Commissioner Gross supported taking action to allow 1, 2, 5, 6, and 7 to go forward in this rulemaking and to leave the others for another rulemaking if anyone petitions the Commission for that purpose. Mr. Kowalski agreed with Commissioners Castle and Gross.

Chairman Mikita stated that this is a result of the Kelling variance and he has strong feelings about making changes in how the rules read. It has worked well in the past and the staff has done a good job, and he feels that this will open up more loop holes which will result in more requests for variances. Chairman Mikita stated that this should be continued at the November meeting.

Commissioner Castle moved that the Ground Water Commission determine that the issues designated as 1, 2, 5, 6, and 7 be considered related for the purpose of a November rulemaking on changes to Rule 11. Following the motion, a discussion was held to review the proposed rule changes to clarify what should and should not be included. Commissioner Gross seconded the motion. The motion carried unanimously.

Commissioner Castle asked for clarification on how this was going to be published. Mr. Kowaleski responded the intent is to state narratively what has happened and ask that these proposals be published. The publication would go to the Secretary of State and everyone on the mailing list would be notified that rulemaking was initiated with regard to publication of variance requests, it would state what has happened, and put people on notice of what the issues are.

In light of the above, Mr. Taussig stated that he needs to discuss with his clients regarding whether they want to pursue this matter further, particularly on the unrelated components. Mr. Lawrence stated he will be out of the country until November 17 and requested that discussions on this matter be rescheduled. Mr. Kowaleski stated that it is staff's intent to put the non-related proposals on the agenda for discussion at the November meeting if this goes forward.

Staff Report - Mr. Bill Fronczak, of the staff, presented the Staff Activity Report for the last quarter. He introduced Suzanne Sellers who will be working on water rights. Chris Grimes will start on August 21 as the new water commissioner who will assist with enforcement actions and the final permit process. Mr. Fronczak stated that they are finally fully staffed. Mr. Fronczak reported that the staff started the final permit process, currently working on the Northern High Plains, and are scheduled to work on the Southern High Plains and then the Upper Black Squirrel Creek. Mr. Fronczak recognized his staff for their hard work in eliminating the backlog in well permitting, they are up-to-date on changes of water right, and are staying current on the new applications.

Report of the Attorney General - Mr. Pat Kowaleski presented the report of the Attorney General. Mr. Kowaleski stated that Rule 7.10.4(b) was published and is effective. The Upper Black Squirrel objections to determinations of water rights filed by the district have been resolved before going to hearing and objections have been withdrawn. They met with the District to work through issues and are looking into resolving disputes with regard to the proper role for determination of water rights. With respect to the Bradbury matter in the North Kiowa Bijou District, it is a challenge to the statutory enactment with regard to determination of water rights and the authority of the Ground Water Commission for determining rights in the designated basins. The District is claiming that some portions of the statutes are unconstitutional; it will go to the Hearing Officer and then before the Commission.

Management District Reports - Chairman Mikita called for the Management District reports.

Mr. Ben Saunders reported for the **Frenchman, Sandhills, Marks Butte and Central Yuma Districts**. Mr. Saunders thanked Hal Simpson for the tour yesterday.

Mr. Jack Adams, from the **W-Y Ground Water Management District** reported that he's been in the ranching and farming business all his life and stated that if it doesn't need fixing, don't fix it.

No report from the **Arikaree Ground Water Management District**.

Mr. Stan Murphy, from the **Plains and East Cheyenne Management District** reported that they are measuring the static water levels on about 14 wells in the two districts, and comparing the water level this year to the same time last year, it has dropped about three feet. Many of their sprinklers have had to be renozzled in the early summer. Over the next two weeks, he will be performing about 100 water quality samples.

There were no reports for the **Southern High Plains Ground Water Management District**, the **North Kiowa-Bijou Ground Water Management District**, the **Upper Black Squirrel Creek Ground Water Management District**, the **Upper Big Sandy Ground Water Management District**, or the **Lost Creek Ground Water Management District**.

Old Business – None

New Business – With regard to the potential meeting in Denver in January with some boards and commissions to discuss issues that cross several jurisdictions, notices will be mailed to the Ground Water Commission members and Ground Water Management District for interest in attending.

Mr. Mike Shimmin reported on the impacts of the tax initiative reduction proposed by Doug Bruce. He stated that every taxing entity in the state of Colorado will be impacted by this tax reduction initiative. It will wipe out the budgets of the Ground Water Management Districts

within a period of two years because most of their budget is collected through tax revenues in relatively small increments. The tax initiative will have a drastic impact in rural Colorado where all special purpose districts perform services that are very important.

Next meeting - Friday, November 17, 2000 in Denver, Colorado.

The meeting adjourned at 11:40 a.m.

Executive Session - An Executive Session was held to discuss the status of pending litigation with regard to Eagle Peak Farms and how the half-mile rule dismissal may affect the pending litigation. Commissioner Castle moved to go into Executive Session. Commissioner Huwa seconded, and the motion carried. Following the Executive Session, Commissioner Castle moved to come out of the Executive Session. Commissioner Brownell seconded and the motion carried.

Respectfully submitted,

Marta Ahrens
Secretary to the Ground Water Commission