
MINUTES

SECOND QUARTERLY MEETING COLORADO GROUND WATER COMMISSION

MAY 17, 2002

Ground Water Commission in Executive Session concerning North Kiowa-Bijou Ground Water Management District v. Ground Water Commission of the State of Colorado: Hal D. Simpson, State Engineer/Executive Director of the Ground Water Commission and Thomas H. Bradbury et al., Case No. 2001CV1652 (Arapahoe District Court, June 27, 2001); and also concerning the litigation regarding Kansas v. Nebraska and Colorado. Commissioner Castle moved to go into Executive Session at 9:00 a.m.; the motion was seconded by Commissioner Bauerle and passed unanimously. Mr. Kowaleski, Conflicts Counsel, from the Attorney General's Office, stated that the Executive Session did not need to be recorded on tape because it involves privileged attorney-client information. Commissioner Loose recused himself from the Executive Session due to conflict of interest as his district is a party to the litigation. Mr. Kowaleski provided a briefing on the status of the litigation regarding the Bradbury matter which is pending in Arapahoe County District Court.

Kansas v. Nebraska and Colorado – Ms. Carol Angel, from the Attorney General's Office circulated a confidentiality agreement for all attendees to sign to safeguard the progress of the settlement. She provided a briefing regarding the settlement process and discussions between the three states.

Public Meeting

The Second Quarterly Meeting of the Colorado Ground Water Commission took place on May 17, 2002, at 1313 Sherman Street, Room 318, Denver, Colorado. Chairman Earnest Mikita called the meeting to order at 10:20 a.m. Marta Ahrens called the roll and determined that a quorum was present. Commission members present were Eugene Bauerle, Anne Castle, Larry Clever, Dennis Coryell, Richard Huwa, Robert Loose, Max Smith, Ted Kowalski and Hal Simpson. Ex-Officio member Kent Holsinger was absent.

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

Approval of Minutes for Meeting of February 22, 2002 - Chairman Mikita asked if there were any corrections or additions to the Minutes of the February 22, 2002 meeting. Commissioner Castle moved to accept the Minutes. The motion was seconded by Commissioner Loose and carried unanimously.

Report of the Executive Director by Hal Simpson – Mr. Simpson reported on the current status of the Division's budget. He stated that Colorado has been taking drastic actions to balance the budget to cut in excess of one billion dollars from this year's approved budget. A number of positions will be held vacant to generate vacancy savings; there are currently 15 vacant positions that cannot be filled, most of which are water commissioner positions. The Division was asked to prepare scenarios to cut the budget by 5% and 10%, which includes a potential of furloughing staff.

Mr. Simpson stated that the Governor declared a statewide drought emergency. Colorado is looking at some very unusual dry conditions, possibly the driest year of recorded history, if we do not get sufficient rain. The key will be what happens this summer with respect to rains and moisture flow from the southwest. Absent rains, every irrigation reservoir in the state will probably be drained. The wells in the Arkansas and South Platte basins may have to be limited drastically unless additional replacement water is found. In western Colorado, there are calls on streams by senior water rights that have never been experienced to date.

With regard to substitute supply plans and the Empire Lodge v. Homeowners Association case, Mr. Simpson stated that there is good news to report. HB-1414 is awaiting signature by the Governor. With the help of Mike Shimmin and the Colorado Water Congress, a bill was drafted that gives the State Engineer limited authority to approve substitute supply plans. This bill will, hopefully, enable the Division to better deal with the drought.

Mr. Simpson stated that two days of rulemaking on the Pilot Water Bank for the Arkansas River Basin were completed last week. These rules will allow a water bank to be operated for a 5-year period on the Arkansas River Basin and only deals with stored water. The pilot water bank will allow some of the well augmentation associations in the Arkansas River Basins to lease reservoir water if needed. A party could put their water into the bank and see what kind of bids they get for that water. Mr. Simpson stated that the rules will be finalized and submitted to the Secretary of State for publishing by July 1, 2002.

The State Engineer's Office is in the final stages of promulgating rules for the use of tributary ground water in the South Platte River basin for large wells to offset their depletions. Extensive amendments are being made to the existing rules. The rules will be in final form for publication in approximately one week and will become effective in 2003. Protests to these rules are anticipated and a lengthy trial is anticipated sometime this fall.

With regard to the Kansas v. Colorado litigation, Mr. Simpson reported that he recently completed an intensive deposition for one full day by Kansas. All experts submitted their expert reports in rebuttal to Kansas' reports. The trial is set to begin on June 24 and will continue for up to 11 weeks in Pasadena. The trial will be a battle over the model that determines the impacts of post compact well pumping.

Status of the Kansas v. Nebraska and Colorado litigation - Republican River Compact by Hal Simpson – Mr. Simpson reported that settlement discussions are continuing. The Special Master granted a stay in the trial schedule until December. The states will continue to meet over the next several months to attempt to reach settlement. Since the issues are under a confidential order by the Special Master, Mr. Simpson could not report on the progress but hope to have settlement by December.

Discussion on the Geology of the Denver Basin Aquifers by George Van Slyke – Mr. Van Slyke reported on the geology of the Denver Basin. The Designated Basin overlays between 40 to 50% of the Denver Basin. The Denver Basin is defined by the outcrop of the base of the Laramie-Fox Hills aquifer. The deepest is the Laramie-Fox hills (approximately 250 feet thick), then the Laramie Formation (400 to 600 feet thick), the Arapahoe is about 400 feet thick, followed by the Denver which is 1,000 feet thick and then the Dawson formation. The base of the Fox Hills is about 3,500 feet below the surface. Mr. Van Slyke passed rock samples around to the

Commissioners from the various formations. He stated that water pumped from an unconfined aquifer comes out of storage in excess of what is going in, resulting in a gradual decline over time. In a confined aquifer, there is a rapid decline until water table conditions are reached and then there is a gradual decline. Mr. Van Slyke stated that water levels are declining about 30 feet per year in the Tech Center area. A significant change in the past 25 years in water availability in the Parker area is not how much water is available, but how little a person is going to get.

Discussion on the Legal Development of the Distinctive Issues Concerning the Administration of the Denver Basin Aquifers within the Designated Basins by Bill Fronczak

Mr. Fronczak reported on how the statutes have changed over time and how the Denver Basin water outside of the Designated Basins have been administered by the Division and the Commission. He stated that ground water development in the state of Colorado has evolved over time and Colorado is on the leading edge of how to utilize ground water. The Commission was formed to solve a problem with regard to the ground water resources of the state and how to manage this resource. The water districts were formed to give local control to how the water is administered. In 1973, SB-213 affected the withdrawal of ground water from the non-tributary Denver Basin aquifers outside the Designated Basins and placed a limitation of the amount of ground water that is withdrawn. In 1985, SB-5 was enacted to give the State Engineer power to issue determination of the quantity of ground water rights to non-tributary ground water within the Denver Basin outside of the Designated Basins. In 1988, the Commission was given statutory authority to allocate Denver Basin ground water based upon overlying land and withdrawal over 100 years. In 1992, the Commission adopted its rules pursuant to Section 37-90-111, C.R.S., which gave the Commission authority to allocate Denver Basin ground water and replace depletions to the alluvial aquifers of the affected Designated Basins. In 1998, the Commission was given authority to issue determination of water rights for the allocation of designated ground water within the Denver Basin and clarified that Statements of Beneficial Use were not required on wells issued in the Denver Basin of the Designated Basins after 1991. Historically, the Commission has followed the statutory and regulatory guidelines established for Denver Basin ground water outside the Designated Basins. Designated ground water basins were not formed with respect to the Denver Basin aquifers but on the alluvial channels. In conclusion, Mr. Fronczak stated that the designated ground water basins are unique ground water and that the Commission, the State Engineer, and the state of Colorado should be acknowledged for their visionary attitude with respect to ground water of this state.

Discussion and Commission Resolution on Whether the Anti-Speculation Doctrine Applies Within the Denver Basin Aquifers of the Designated Basins by Bill Fronczak

– Mr. Fronczak reported that the Commission is aware of the position of the staff but added that regardless whether the speculation applies or not, the staff needs direction on where the Commission is heading and how the Commission wants to apply that determination. Commissioner Castle wanted to disclose on record that her law firm represents a client that could be affected by the outcome of the decision on this issue.

Mr. Don McClary, attorney, representing the North Kiowa Bijou Ground Water Management District, stated that, from a legal standpoint and contrary to the opinion of the State Engineer's Office, the anti-speculation doctrine applies to the Denver basin aquifers and staff is legally bound by it. He stated that all they are trying to assure is that this water is properly used and that the final water right has limitations on it.

Mr. Andy Jones, attorney representing the Lost Creek and the Upper Black Squirrel Ground Water Management Districts, spoke in favor of the anti-speculation doctrine. Also he stated that, on behalf of his clients, he appreciates Mr. Simpson's efforts.

Mr. Lee Miller, attorney, representing clients who are potentially affected by this (namely, the Boy Scouts of America, Denver Area Council), reported that he represented the state in the case regarding Chatfield East and the decision regarding the speculation doctrine and the issue concerning severance from the land owners. Mr. Miller stated that he would not put as much significance on this issue unless someone is trying to take water from the overlying land. He is supportive of the State Engineer's decision.

Mr. Mike Shimmin, attorney, stated that the arguments made by the staff confuses the statutory definitions and the legal concepts that govern the categories of ground water; that this issue is regarding non-tributary ground water, not designated basin ground water. He expressed concerns about the precedent this presents. Mr. Shimmin stated that the existing statute provides the basis for the anti-speculation test and it applies in the designated basins, and that the Commission does not need to develop a resolution.

Mr. Simpson explained the staff's position and the background regarding this issue. When HB-1151 was passed in 1998, the purpose was to provide consistency in creating a determination for ground water rights for the Designated Basins without having to drill a well. This resulted in a definition of speculation and whether the proper test is applied.

Commissioner Castle reported that two decisions need to be made. First, advise the staff what to do with determinations and how they should evaluate the applications for determination of Denver basin water rights within the Designated Basins, and the second is what to do in connection with the Bradbury case in light of the judge's order. The Commission needs to direct the staff to comply with this order in the Bradbury case to the best of their ability and not take a contrary position to the judge's order until the Commission gets better guidance. Commissioner Castle suggested that the Commission participate in the appeal and decide what decision to take. The reason for the speculation doctrine is to prevent people from typing up water resources that others can use.

Discussions ensued between the Commission members regarding whether they should take a position on anti-speculation and whether speculation applies. Mr. Simpson stated that he feels that it is important that the Commission take a stance. Commissioner Clever made a motion that the Commission recognizes that the anti-speculation doctrine applies within the Denver Basin aquifers of the Designated Basins. The motion was seconded by Commissioner Huwa, and passed with seven in favor and one against (Commissioner Castle).

Following this motion, discussion followed regarding putting the water to beneficial use. Mr. Fronczak asked the Commission for the direction they want the staff to take on the individual applications. Mr. Shimmin suggested that the Commission and staff use the anti-speculation test that is currently in the statutes in Section 37-92-103(3)(a). Mr. Kowaleski stated that the staff review the applications as they come in and decide how specific it is until they get further direction. If it is speculative or questionable, deny it and it would come to the Commission for a decision. In the interim, the judge's decision will be applied. Mr. Simpson stated that prior to the next meeting, the staff put in writing, the criteria that they are operating under for review and approval at the next meeting. Also, if the judge's decision has a misinterpretation on the decision regarding final

permits, where there is a conditional determination of water right that they don't believe exists, and there is a provision that a well permit has to be issued within one year of determination and it is a statutory criteria, it will need to be clarified by the court. In an appeal, the Commission will take the position of being supportive of the anti-speculation doctrine applying in the Denver Basin aquifers.

Discussion on Whether to Require Historic Use Analysis and/or Administration for Rotational Acres by Suzanne Sellers – Ms. Sellers distributed a memo regarding the current status of rotational acres. Ms. Sellers reported that the staff's recommendation is to take a poll of each Ground Water Management District on whether they want to limit the wells to historic use or increase meter administration.

Staff Report by Suzanne Sellers and Megan Sullivan - Ms. Suzanne Sellers presented the Staff Activity Report for the last quarter. She reported on the applications, objections/hearings, enforcement items and actions, and other miscellaneous items. She welcomed Eric Thoman back to the Designated Basin staff and stated that Ms. Ioanna Comanicui has transferred to the Division 1 Team. Ms. Sullivan reported on the final permitting for the last quarter. She reported that the phone call process will begin soon to alert well owners that a request for information packet will be arriving by mail. Both of these reports were included in the Commissioners' packets.

Report of the Attorney General by Matthew Poznanovic - Mr. Matt Poznanovic stated that the report which provides a summary of the matters that the Attorney General's Office is involved in was included in the packets, and reported that the next hearing on the Larry Ride case will be July 24 and 25.

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

Mr. Aaron Nein reported from the **Frenchman, Sandhills, Marks Butte and Central Yuma Ground Water Management Districts**. Mr. Nein reported on Ben Saunders' condition. He stated that Ben is doing well and has almost fully recovered from the sores and leg amputation. He reported that he and Ben performed water nitrate sampling at the Community Firehall in Wages. It has been dry throughout their four districts, however, substantial rainfall occurred in the past few days. Mr. Nein stated that Mr. Harry Blecha will step down from board on the Sandhills District after serving for 36 years. The Central Yuma District is in the process of developing a policy for under-appropriated wells similar to that in the Frenchman and Marks Butte districts where under-appropriated well administration will continue.

There were no reports from the **W-Y Ground Water Management District** or the **Arikaree Ground Water Management District**.

Mr. Stan Murphy, from the **Plains and East Cheyenne Management Districts**, reported on the dry conditions, neighbors reporting stolen water, and the water tables going down.

Mr. Max Smith reported for the **Southern High Plains Ground Water Management District** and stated that they had only 2.65 inches of moisture since September of 2001, and he has never seen it this dry. Everyone in his district has already pumped water to get a crop established.

There was no report from the **North Kiowa-Bijou Ground Water Management District**.

Mr. Andy Jones, from the **Upper Black Squirrel Creek Ground Water Management District**, reported that the District passed a new set of rules and extended an offer to the Commission members to provide him with contact information and he will pass them around. With regard to the MOU that Lost Creek, Upper Black Squirrel and others are developing, Mr. Jones invited the other districts to review the draft and get in process if they are interested.

There was no report from the **Upper Big Sandy Ground Water Management District**.

Ms. Sheryl Wailes, from the **Lost Creek Ground Water Management District**, reported that they recently had moisture.

Old Business – Providing Commission Meeting Packets to Ground Water Management District Members – Ms. Suzanne Sellers stated that at the last meeting, Mr. Fronczak reported on the packets that the staff assembles for the districts. Copies are currently made for the managers and members and are available for pick up during the meeting. It was decided that the staff will make only one copy and mail it to each manager in the districts, and the managers will make the packets available to their board to save on copying costs.

New Business – Location of August 16, 2002 Commission Meeting – Ms. Marta Ahrens reported on several locations and costs. Commissioner Huwa made motion to hold the August meeting in Steamboat Springs. The motion was seconded by Commissioner Castle and approved unanimously.

Mr. Bill Fronczak stated that Commission direct the staff to ask the Attorney General's Office to write a legal opinion on what the Commission can and cannot do with regard to enforcement and adoption of district rules. The example Mr. Fronczak provided was that if a district were to pass a rule for a change of water right, whether the Commission is bound to look at the rule and enforce it. It was agreed unanimously by the Commissioners to obtain an Attorney General opinion regarding Commission involvement of district rules.

Next Meeting - The next meeting is scheduled for Friday, August 16, 2002, at the Sheraton Hotel in Steamboat Springs, Colorado. Information on a tour and dinner on Thursday, August 15, will be forthcoming.

The meeting adjourned at 3:35 p.m.

Respectfully submitted,

Marta Ahrens
Secretary to the Ground Water Commission