
MINUTES

THIRD QUARTERLY MEETING COLORADO GROUND WATER COMMISSION

AUGUST 16, 2002

The Third Quarterly Meeting of the Colorado Ground Water Commission took place on August 16, 2002, at the Sheraton Steamboat Resort and Conference Center, Steamboat Springs, Colorado. Chairman Earnest Mikita called the meeting to order at 8:45 a.m. Marta Ahrens called the roll and determined that a quorum was present. Commission members present were Eugene Bauerle, Larry Clever, Ralph Curtis, Richard Huwa, Frank Jaeger, Robert Loose, Ted Kowalski and Hal Simpson. Commissioners Dennis Coryell and Max Smith, and Ex-Officio member Kent Holsinger, were absent.

Review and Approval of Agenda Items - Mr. Pat Kowaleski proposed that the Commission go into Executive Session at the end of the meeting to discuss development regarding the litigation on Eagle Peak Farms.

Approval of Minutes for Meeting of May 17, 2002 - Chairman Mikita asked if there were any corrections or additions to the Minutes of the May 17, 2002 meeting. Corrections noted were: on the first page, first paragraph, change "reclused" to "recused", and in the third paragraph, change "First" Quarterly to "Second" Quarterly. Commissioner Clever moved to accept the Minutes with the corrections noted. The motion was seconded by Commissioner Bauerle and carried unanimously.

Report of the Executive Director by Hal Simpson – Mr. Simpson welcomed two new Commission members, Mr. Ralph Curtis, a long-time rancher and farmer from the San Luis Valley and Manager of the Rio Grande Water Conservation District, and Mr. Frank Jaeger, Manager of the Parker Water and Sanitation District. Mr. Simpson thanked Marta Ahrens and Mr. Bob Plaska, Division Engineer for Division 6, for setting up the tours of the Hayden Power Plant and Carpenter Ranch, arrangements for the dinner, and the meeting.

Mr. Simpson stated that the Governor imposed an additional 4% restriction in the budget for the current fiscal year, in addition to the budget reductions from the previous year. The Division started the fiscal year about \$1,400,000 under-funded, mostly in Personal Services which affects salaries, and has taken actions which include holding several positions vacant all year to offset the under-funding, but some important water commissioner positions will be filled. Additional reductions were taken in the Operating and Legal Services budget.

Mr. Simpson stated the rules were promulgated for the pilot water bank in the Arkansas River Basin and filed with the Water Court. There were no protests and the rules are in effect. The Southeastern Colorado Water Conservancy District has agreed to be the operator of the pilot water bank and are now developing some of the operating criteria of the water bank. This bank deals with only stored water in the Arkansas River Basin.

Mr. Simpson reported that in May, the amended rules for tributary ground water in the South Platte River Basin were filed. Those rules were challenged, and the process has started to determine which water judge will handle the case. The trial will take place early next year. The rules will primarily deal with large capacity wells constructed prior to 1972 that will be operating pursuant to the rules under a replacement plan that will be approved annually by the Division.

In the litigation regarding Kansas v. Colorado on the Arkansas River Basin, Mr. Simpson reported that the trial on the final phase began on June 24, 2002, and the recent testimony is regarding addressing compact compliance from 1997 forward. Presentations were completed to the Special Master showing that Colorado is in compliance with the compact. Two weeks were set aside in December to complete the trial.

Mr. Simpson reported that Colorado is dealing with an extraordinary drought. The Division has been tracking streamflows and comparing it with 1977, which, prior to this year, was the driest year of record. Streamflows are extremely low and most of the irrigation reservoirs will be dry or empty by the end of August. This year is indicating to be the driest year of record in all seven water divisions in the state, in some cases by 10% to 20%, and is also the third dry year in a row. Unless there is good snowpack this winter to refill the reservoirs, Colorado will face an extremely serious situation. In the plains, serious water level declines are being reported. In the Denver metro area, significant ground water exists in the Denver Basin aquifers and may be considered in a drought protection plan.

Status of the Kansas v. Nebraska and Colorado litigation - Republican River Compact by Hal Simpson – Mr. Simpson stated that per the confidentiality agreement that was signed by the Ground Water Commission Members, he could only report that settlement discussions are continuing, progress is being made, and a stringent timeline has been set to have negotiations completed by December.

Report on the Decision of the Commission Concerning the Bradbury Case by Pat Kowaleski Mr. Kowaleski stated that page 7 of the legal report summarizes the status of the Bradbury Case. Appeals have been filed and the issues that will be presented before the Supreme Court are the issues that the Ground Water Commission has already heard. A decision could be received later than anticipated because there are issues with the court reporter getting the transcript out. It will be presented to the Supreme Court in the spring or early summer with a decision to follow shortly thereafter.

Discussion and Decision on the Test to Determine Whether the Withdrawal of Ground Water from the Denver Basin Aquifers of the Designated Basins is Speculative by Rich Cooper - Mr. Cooper reported on the current application procedures for determinations of water right regarding beneficial use and place of use, and how it may be related to the issue of speculation. Mr. Cooper stated that the concept of appropriation from Denver Basin aquifers, based on ownership of overlying land and a 100-year aquifer life, was adopted by the Commission in November 1973, and provided some background on the current procedure for determination of water rights. He provided to the Commission members a copy of the application form that was developed by staff. The staff decided that the requirements of the statutes that they operate under for appropriations within designated basins may apply to appropriations for determination of water right. Mr. Cooper discussed the current application process and addressed only the issues of beneficial use and place of use. The Commission will only consider approval of applications where

proposed uses are defined such as industrial, commercial, domestic, and irrigation. The proposed place of use will not conflict with replacement water requirements of Rule 5.3.6. Mr. Cooper stated that it is the staff's opinion that the current application process adequately addresses the issues regarding the anti-speculation doctrine and that no changes be made until the Bradbury case is resolved. Staff does not feel that they should place themselves in a position of changing the procedure at this time and until it is resolved by the Colorado Supreme Court.

Mr. Andy Jones, representing Upper Black Squirrel Creek and Lost Creek Ground Water Management Districts, reported that the position that the Commission is taking in the Bradbury litigation is that they are taking no issue with the District Court's ruling that the speculation test applies in the permitting stage. He stated that the determination phase of the permitting process is the final determination of the water right. Mr. Jones stated that once the determination is issued, there is no publication and no opportunity for a hearing, and this is contrary to what was discussed in May. If speculation is looked at in the permitting stage, the districts have no opportunity to appeal and that is acquiescing in the court's decision. He stated that the districts are discouraged and believed that they had the support of the Commission. The districts are asking the Commission for a resolution to instruct the staff attorney to find a way to preserve this issue in the pending appeal for the Commission to support the application of a speculation test at the determination stage because it was what was decided in May.

Mr. Kowaleski reminded the Commission that, at the last meeting, a motion was made that the Commission recognized that the anti-speculation doctrine applies within the Denver basin aquifers of the designated basins.

Mr. Don McClary, representing the North Kiowa Bijou Ground Water Management District, stated that he is not here to litigate, but stated that this is an opportunity for the Commission to accept the duty and responsibility to preserve and protect the water rights in the state of Colorado. Mr. McClary stressed that the definition of speculation in Section 37-92-103 applies to a specific use, a specific quantity of water, and a specific time. He urged the Commission to consider not keeping the status quo, but to use the speculation doctrine and require the applicant to be specific as to how they intend to use it, how much is needed and when.

Mr. Kowaleski stated that there is a major disagreement with regard to the nature of water rights in the designated basins that they are not subject to the same provisions as applies to surface water. He recommended that a position not be taken on this until it is decided by the Colorado Supreme Court. He stated that the staff recommends that the Commission not develop an independent speculation test, but wait for the Supreme Court to provide direction on this matter.

Mr. Mike Shimmin, attorney, stated that there cannot be a final determination of the water right without consideration of the anti-speculation test. The point of confusion is what is the status quo and when the anti-speculation test is applied, at the determination phase or after the permit is issued.

Chairman Mikita stated that the Commission will not take any further action at this time but will place it on the agenda for the next meeting as an Executive Session for discussion and clarification on where the Commission stands.

Legal Analysis on Whether the Commission and its Staff Should Incorporate Local GWMD Rules in its Orders for New Water Rights and Change of Water Rights by Pat Kowaleski –

Mr. Kowaleski referred to his memorandum to the Ground Water Commission dated July 31, 2002, and discussed the Commission's general authority in addition to acknowledging and implementing certain district rules. He reviewed issues regarding interrelations of the Management Districts with the Commission, the rules of the districts, the commission rules, and the powers of each entity. Mr. Kowaleski reported that intergovernmental agreements could be broadened to go beyond certain matters such as integrating the requirements of the districts with the requirements of the Commission. He stated that the staff had concerns about whether the rules have been properly adopted and would be recognized as intergovernmental agreements.

Mr. Andy Jones stated that the intent of the Ground Water Management Act is to give local control of ground water to the people who live in the area. The original intent is that it would be a cooperative effort and that each entity would support the other. He reported that the staff and the Commission have not honored the district rules in certain instances, i.e., replacement plans, small capacity wells, and existing wells, and stated that an intergovernmental agreement is not needed.

Mr. Jones, on behalf of the Lost Creek and Upper Black Squirrel Creek Ground Water Management Districts, requested that this item be placed on the agenda for the next Commission meeting. He also asked the Commission to instruct the staff to honor all existing rules in the permitting process, and if the districts and staff cannot come to terms on specific rules, that they be discussed at the next Commission meeting. If there are fundamental differences between the districts and the Commission on specific rules, there is an appeal process for determination.

Commissioner Clever stated it would be impossible for the staff to sit down with all of the districts to review rules within the next three months. Mr. Simpson responded that the Upper Black Squirrel and the Lost Creek districts are more time sensitive than the other districts and should focus on these rules prior to the next meeting. Review of the other districts' rules will follow.

General discussion ensued between Commission members, attorneys, and the audience regarding clarification of district rules, implied problems regarding staff not complying with the rules, whether the district rules are binding, and the friction between the districts and the staff.

Discussion on Whether to Require Historic Use Analysis and/or Administration for Rotational Acres by Suzanne Sellers –

Ms. Sellers reported that at the last meeting the Commission directed staff to survey the Ground Water Management Districts to find out if they would be interested in leaving the rules as is, whether rotational acres should be limited to historical use, or require increased meter administration and report this information to the districts and the Commission. The results of this survey are included in the packet, six out of thirteen districts did not respond. Ms. Sellers stated that the staff requests, at the direction of the Commission, to come back at the November meeting with a procedural memo to consider, at a minimum, that rotational acres require increased meter administration to all districts and potentially draft rule change language for a historic use limitation.

Discussion ensued regarding recommending that all districts be limited to historic use and metered when rotating acres. Mr. Kowaleski stated that should any Commission Members feel it appropriate to adopt a rule change, that they develop a proposal for a rule change. Commissioner Jaeger made a motion to instruct the staff to put together information necessary for a rulemaking hearing, under the first bullet of potential Commission action, and include the proposed language for historic use and increased meter administration. The motion was seconded by Commissioner Clever and approved unanimously.

Mr. Shimmin added that this must be drafted 45 days prior to the Commission meeting to allow the districts time to review it at their board meetings.

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 introduced board members Marvin Pletcher from the Central Yuma District and John Newbanks from the Sandhills District. Activities in the Central Yuma District include: extremely dry conditions; six cease and desist orders were issued on expanded acre well permits; on August 1, the district adopted a two-for-one payback policy; the district is in the midst of adopting an under-appropriated well policy; and one well went bad in the case of co-mingled wells. There was some rainfall in the Marks Butte and Frenchman districts.

Mr. Jack Adams the **W-Y Ground Water Management District** reported that it is dry in his area and he reported that the Ground Water Management District Association met in June and are enticing farmers to not irrigate by paying them a certain amount per acre; some wells are going to be shut off and the concern is whether it will be done by priority date or beneficial use.

There was no report from the **Arikaree Ground Water Management District**.

Mr. Stan Murphy, from the **Plains and East Cheyenne Management Districts**, reported that static water levels declined 3.3 feet in one year. The farmers are seeing large drops in gallons per minute and wells are being co-mingled for survival. The drought has been severe and the harvest looks bleak for corn and wheat crops, and has forced some businesses on Main Street to close down. Mr. Murphy stated that his districts are concerned about exporting water to other towns.

There were no reports from the **Southern High Plains Ground Water Management District**. or from the **North Kiowa-Bijou Ground Water Management District**.

Mr. Andy Jones, from the **Upper Black Squirrel Creek Ground Water Management District**, reported that most of the large irrigation wells are pumping about one-third of normal and the district is considering restrictions on lawn watering and non-essential uses. There are preliminary discussions on a recharge project with the Cherokee and Metropolitan District and the City of Colorado Springs which may help recharge the basin. Mr. Jones also reported for the **Lost Creek Ground Water Management District**, and stated that Sherry Wailes has worked with the staff on enforcement actions and irrigators who have been storing water.

Mr. David Taussig, on behalf of the **Upper Big Sandy Ground Water Management District**, reported that water levels are in good shape.

Staff Report by Suzanne Sellers and Megan Sullivan - Ms. Suzanne Sellers presented the Staff Activity Report for the last quarter. She reported on the new and replacement applications, change applications, objections/hearings, enforcement items and actions, and other miscellaneous items. Ms. Sullivan reported on the final permitting for the last quarter. 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 on the two upcoming hearings.

Old Business – None.

New Business – Mr. Simpson reported on enforcing the modified priority system for regulating wells in the individual districts.

Executive Session – A motion was made by Commissioner Clever to go into Executive Session to discuss pending litigation on a settlement proposal on the Eagle Peak farms case. Motion was seconded by Commissioner Jaeger.

Next Meeting - The next meeting is scheduled for Friday, November 15, 2002, in Denver.

The meeting adjourned at 3:35 p.m.

Respectfully submitted,

Marta Ahrens
Secretary to the Ground Water Commission