

COLORADO RIVER AND WATER SUPPLY COMMITTEE MINUTES

Thursday, February 18, 2021

A meeting of the Colorado River and Water Supply Committee was held on Thursday, February 18, 2021 at 11:01 a.m. via Zoom Meetings.

Chairman Tom Goodwin announced a quorum was present.

COMMITTEE MEMBERS PRESENT:

Tom Goodwin - Chairman, Kevin Karney – Vice-Chairman, Seth Clayton, Pat Edelmann, Mark Pifher, Bill Long, and Jim Broderick

COMMITTEE MEMBERS ABSENT AND EXCUSED:

None

OTHERS PRESENT:

Curtis Mitchell, Andrew Colosimo, Patrick Garcia, Carl McClure, Dallas May, Ann Nichols, Greg Felt, and Alan Hamel, Southeastern Board members; Rachel Duran and Kevin Salter, Kansas Department of Agriculture; Bill Tyner, Division Engineer, Colorado Division of Water Resources; Mike Holmberg, Bureau of Reclamation; Mark Scott, Providence Infrastructure Consultants; Jerry Pena, Kennedy Jenks; Rick Kienitz, Aurora Water; Stephen Leonhardt, Burns, Figa & Will P.C.; Lee Miller, Garrett Markus, Kevin Meador, Leann Noga, Patty Rivas, Margie Medina, and Chris Woodka, District staff.

APPROVAL OF MINUTES:

Chairman Tom Goodwin confirmed that members of the Committee received their copy of the July 16, 2020 minutes, and asked if there were any corrections or additions. Mr. Clayton moved, seconded by Mr. Pifher, to approve the minutes. Motion unanimously carried.

PRESENTATIONS:

Update on Anti-Speculation Law Work Group

Mr. Miller introduced Mr. Leonhardt, explaining that Senate Bill 20-048, requiring the executive director of the Department of Natural Resources to convene a work group to “explore ways to strengthen current water anti-speculation law.” The legislation was prompted by hedge fund acquisitions of water in the Colorado River basin. However, the Arkansas River basin has been involved in anti-speculation lawsuits that have been heard by the Colorado Supreme Court, specifically the Southeastern Water Conservancy District vs. High Plains A&M in 2005. Mr. Miller convinced the state to put Mr. Leonhardt on the work group.

The work group is to report to the Water Resources Review Committee by August 15, 2021, regarding any recommended changes. Much of the impetus for this legislation came from Western Slope concerns about institutional investors making significant investments in Colorado River water rights, as has been the subject of more recent media coverage. Some are

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concerned about the potential for speculation in relation to a Demand Management program such as the CWCB is considering for the Colorado River.

State Engineer Kevin Rein and Assistant Deputy Attorney General Scott Steinbrecher are cochairing the work group. Steve Leonhardt is one of several work group members appointed by DNR Director Dan Gibbs. Steve is on the work group's legal subcommittee, which has drafted a summary of the legal baseline—i.e., the anti-speculation doctrine under current Colorado law, and other laws (including federal reclamation law and counties' "1041" regulations) that may affect speculation in water rights. The work group is identifying the risks posed by various forms of water speculation, and will consider any legal changes that may be appropriate to better protect against such risks.

The work group held its third meeting on February 17, 2021.

There are five attorneys looking at legal issues as a subcommittee of the larger work group. Mr. Leonhardt is part of that group. The state, the Colorado River District, Northern Water Conservancy District and Trout Unlimited also have attorneys on the legal committee.

Mr. Leonhardt said the anti-speculation doctrine is tied to the Colorado River Water Conservation District vs. Vidler Tunnel in 1979, and parallel state legislation. Appropriation of water cannot be based on speculative sale or transfer of water rights for profit. He discussed how this doctrine was applied to other cases, including the High Plains A&M case, in which investors sought to market Fort Lyon Canal water they had purchased. At the time of the case, some water lawyers questioned whether the anti-speculative doctrine applies to changes in water rights. The Colorado Supreme Court upheld Pueblo Water Court Dennis Maes' ruling that a change case requires applicants to identify a beneficial use and location.

Cities and special districts have more flexibility than private investors to claim water rights for reasonable future use under the doctrine.

Short of a change application, there is nothing to re-open a water right to greater scrutiny under the anti-speculation doctrine.

The work group is looking at risks associated with the anti-speculation doctrine, and said the work group is confident the law is strong because an applicant needs to prove changing a water right is not speculative. One hurdle is that, absent an objector such as Southeastern in the High Plains A&M case, the same issues may be handled differently in each of the state's seven water divisions.

The risks of investor speculation the group is looking at:

1. An investor taking control of local water markets by buying large amounts of water, which may mean to control by changing by-laws of a ditch company or pricing others out of the market.
2. Investors taking a profit on non-use of the water, either by providing it for paid demand management programs or allowing it to be used by other downstream interests. The impact of temporary dry-ups in a ditch system can also be harmful to other water users on the same system.

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3. Investors could pump up the historic use of water to claim greater value. This also could threaten the augmentation plans which were put in for on-farm improvements, unique to the Arkansas River basin in Colorado. Those plans are required to preserve historic consumptive use.

Mr. Leonhardt said there are difficulties in making some of the determinations since the state has not finalized the details of a demand management program on the Colorado River, or if there even will be one. The Colorado Water Conservation Board (CWCB) will not decide until after the August 21, 2021 deadline.

The legal subcommittee will report to the larger work group and a full draft report will be issued sometime in the summer.

Update on Colorado River Issues

Mr. Miller gave an update on Colorado River issues. Many recent documents were included in the January report to the entire Board. There is no “confidential information” that would require discussion in executive session.

He referred to five reports that were included in the January 21, 2001 District Board report on Colorado River Issues:

CWCB Demand Management Feasibility Investigation

The CWCB approved its step 2 work plan for a demand management program on November 18, 2020, to determine if a program would be achievable, worthwhile, and advisable for Colorado. The work of the plan was discussed by the CWCB at its January 25, 2021 meeting.

2007 Interim Guidelines 7.D. Effectiveness Review

The Bureau of Reclamation released its review of the effectiveness of the 2007 Interim Guidelines for Lower Basin Shortages and Coordinated Operations on December 18, 2020.

Aaron Million Pipeline Project

Aaron Million’s pipeline (White Horse Resources Green Sun Storage Hydro Power Project) to bring water from Flaming Gorge Reservoir to eastern Colorado was rejected by the state of Utah because there is no indication of Colorado water rights and Colorado River Compact issues would be settled.

Lake Powell Pipeline

The Utah Division of Water Resources and Washington County Water Conservancy District told Reclamation that more time is needed to sift through roughly 14,000 comments on the project. The decision was apparently driven by a letter from the six other states to Secretary of Interior David Bernhardt, asking him to refrain from issuing a final Environmental Impact Statement or Record of Decision on the pipeline.

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Colorado Water Congress Colorado River Project

The District has for several decades participated in the CWC project, which represents water users as partners in the Upper Colorado River Endangered Fish Recovery Program. An option paper on water user funding has been provided by Tom Pitts, who provides technical support for the project to address recent issues that have arisen.

Pat Edlmann asked about the status of oil shale rights on the western slope. Mr. Miller said that there have been challenges to conditional rights by Northern Water, but the rights remain in place. Mr. Leonhardt said the oil shale rights were a topic at the anti-speculation work group. While there has not been a legal challenge since the 1990s, the Colorado Division of Water Resources is raising questions. Energy companies are holding the water for a decreed use, which makes it different from the High Plains A&M case.

OTHER BUSINESS:

None

NEXT MEETING

The date and time of the next meeting is to be determined.

ADJOURN

Chairman Goodwin adjourned the meeting at 11:49 a.m.

Respectfully Submitted,

Chris Woodka

Senior Policy and Issues Manager