

Senate Bill 36

Amends the Groundwater Management Act to eliminate duplicate evidentiary hearing on appeal of Groundwater Commission Final Decision to District Court.

BACKGROUND : GROUNDWATER MANAGEMENT ACT APPEALS

1. APA Appeals

- a. APA - Standard for due process.
- b. Requires hearing before an ALJ or "if otherwise authorized by law, a hearing officer..." §24-4-105, C.R.S.
- c. "Arbitrary and capricious" standard on appeal to District Court – substantial deference to hearing officer

2. Groundwater Management Act Appeals

- a. Act expressly authorizes appointment of "technically qualified" hearing officer. §37-90-113(3), C.R.S.
- b. Process
 - i. Application – Review – Publication
 - ii. No Objection, process administratively
 - iii. Objection – Assign to Hearing Officer
 - iv. Hearing before Hearing Officer
 1. Full evidentiary hearing, includes discovery, subpoena, cross examination.
 2. Follows Commission's Rules for Adjudicatory Hearings
 - a. Rules of Evidence, CRCP followed, transcript created.
 - b. Hearing Officer not supervised by party with investigative or decision making authority (statute) (draft)
 - c. Alternative Dispute Mechanisms available (draft)
 - v. Hearing before Groundwater Commission.
 - vi. Appeal to District Court
- c. Standard
 - i. De Novo. No deference to Ground Water Commission Decision. Unique to Groundwater Management Act, unlike APA deferential standard.
 1. Current Interpretation: Trial De Novo. Second Evidentiary Hearing. Do-over, as if no proceedings below. Every appellant is given a new trial at District Court.
 2. Senate Bill 36- Proposed Change: Appeal De Novo. No new evidence. De Novo review using evidentiary record created below.

PROBLEM : DUPLICATE EVIDENTIARY HEARINGS

1. **Cost.** Duplicate trials dramatically increase costs to parties and time to resolution. This burden affects applicants, opposers, Groundwater Commission staff and the AG's office, who must all participate in every appeal.
2. **Fairness.**
 - a. Parties bring new evidence and engineering to District Court and get an unfair "second bite at the apple."
 - b. Deep pocket parties with large litigation budgets gain an unfair advantage over agricultural users and budget-limited groundwater management districts.
3. **Policy.** The current interpretation moots all efforts of the Groundwater Commission on every appeal. The Groundwater Commission and its hearing officer are ideally situated to hear complex groundwater matters. Their efforts should be recognized.

SOLUTION

Amend §37-90-115 to require a single evidentiary hearing at the Groundwater Commission level. Preserve the de novo standard on appeals to District Court, but require review based upon the record from the Groundwater Commission (appeal de novo). Permit the District court to remand to the Groundwater Commission if evidence is improperly excluded.

Senate Bill 36 – Can a Hearing Officer Provide Due Process?

Yes, certainly. Colorado's Administrative Procedure Act explicitly recognizes a statutorily appointed Hearing Office as sufficient to meet the requirements for due process:

(3) At a hearing only one of the following may preside: The agency, an administrative law judge from the office of administrative courts, or, if otherwise authorized by law, a hearing officer who if authorized by law may be a member of the body which comprises the agency... §24-4-105 (3), C.R.S.

An APA approved Hearing Officer is not required to be an attorney. The decision of a duly appointed Hearing Officer is recognized as the decision of the agency:

(6) "Initial decision" means a decision made by a hearing officer or administrative law judge which will become the action of the agency unless reviewed by the agency. §24-4-102, C.R.S.

Normally, a Hearing Officer's decision is given substantial deference by the reviewing District Court:

(7) If the court finds no error, it shall affirm the agency action. If it finds that the agency action is arbitrary or capricious... then the court shall hold unlawful and set aside the agency action§24-4-106, C.R.S.

The Groundwater Management Act expressly authorizes the appointment of a Hearing Officer:

(2) In any hearings required to be conducted by the commission, it may, in its discretion, have such hearings conducted before such agent as it may designate, either alone or in conjunction with the appearance of the commission if the agent is technically qualified to conduct or assist in such hearings... §37-90-113(3), C.R.S.

The Hearing Officer appointed by the Commission has unique technical qualifications vital to understanding complex groundwater matters. The current Hearing Officer has not been reversed on appeal.

Unlike other agencies, the Groundwater Management Act has a unique "*de novo*" process that affords less deference to the hearing officer's decision. As currently interpreted, the statute requires two complete evidentiary hearings, one before the hearing officer and one before the District Court on appeal, in addition to affording *de novo* review of all legal conclusions.

Senate Bill 36 preserves this unique "*de novo*" review of both factual and legal matters, but amends the statute to provide for single evidentiary hearing held by the Hearing Officer. This change will substantially reduce costs and address concerns that deep pocket litigants are abusing the current appeal process to gain an unfair advantage over cash strapped groundwater users and management districts, and causing unnecessary expense to state personnel.

In the unlikely event that evidence is wrongfully excluded by the Hearing Officer, the District Court has the authority to remand the matter back to Commission for admission of the evidence. This addresses any criticism that a Hearing Officer may be 'unqualified' to make evidentiary decisions.

The *de novo* aspect of the review is unchanged by Senate Bill 36. The District Court is not bound by and owes no deference to the Hearing Officer's decision on factual or legal matters. The bill simply prevents two complete evidentiary hearings and addresses the associated cost and fairness concerns expressed by the Department of Natural Resources, Ground Water Commission, Groundwater Management Districts, and agricultural well users.