

**SPECIAL MEETING OF THE BOARD OF MANAGERS
OF SPECIAL IMPROVEMENT DISTRICT #5
OF THE RIO GRANDE WATER CONSERVATION DISTRICT
September 24, 2020 at 7:00 p.m.
By Zoom/Teleconference**

Present: David Schmittel, President; George Whitten, Vice-President/Secretary/Treasurer; Dale Gerstberger, Manager; and, Kit Caldon, Manager.

Absent: Corey Hill, Manager; and, Peggy Godfrey, Ex-Officio Member.

Staff and Consultants: Pete Ampe, Hill & Robbins, P.C.; Chris Ivers, Program Manager; Rose Vanderpool, Program Assistant; Allen Davey and Clinton Phillips, Davis Engineering; Michael Carson, Data Base Administrator; and, April Mondragon, Administrative Assistant.

Guests: David Hofmann and Tim Lovato.

Meeting Called to Order

President Schmittel called the meeting to order at 7:06 p.m. A quorum was present.

Approval of the Agenda

President Schmittel asked for additions or a motion to approve the agenda. A motion was made by Kit Caldon to approve the agenda as presented. The motion was seconded George Whitten and unanimously approved.

Executive Session

President Schmittel asked for a motion to enter into executive session to receive legal advice concerning the purchase of real property. A motion was made by George Whitten to enter into executive session. The motion was seconded by Kit Caldon and unanimously approved.

Mr. Ampe stated the Board was entering into executive session to discuss a potential real property purchase. The Board would take no formal action or position during the executive session.

Action on Executive Session Discussion

Pete Ampe stated the Board was in executive session and had voted to come out. Discussion was related to potential property purchases.

Direction for Staff

President Schmittel asked for direction for staff. A motion was made by George Whitten to instruct staff to make an offer on the Woodard property contingent on the appraisal and the financing. The motion was seconded by Dale Gerstberger and unanimously approved.

Tim Lovato asked which Woodard property the Board is discussing and what surface rights the property has. Mr. Gerstberger stated it was just north of County Road X.

Discussion and Approval of Water Activity Enterprise Resolution

President Schmittel asked for discussion and approval of Water Activity Enterprise resolution (copy attached). Chris Ivers presented the Water Activity Enterprise Resolution and Pete Ampe highlighted its purpose as well as its benefits. Mr. Ampe recommended approval of the Water Activity Enterprise.

A motion was made by Dale Gerstberger to adopt the Water Activity Enterprise resolution as written. The motion was seconded by George Whitten and unanimously approved.

Discussion and Action on Rules and Regulations for Subdistrict No. 5

President Schmittel asked for discussion and action on the Rules and Regulations for Subdistrict No. 5. Chris Ivers highlighted the recent changes and Pete Ampe explained why they had not been approved up to this point.

A motion was made by George Whitten to adopt the Rules and Regulations for Subdistrict No. 5 as presented. The motion was seconded by Kit Caldon and unanimously approved.

Discussion and Possible Action on 2021 Budget

President Schmittel asked for discussion and possible action on 2021 budget. Chris Ivers presented the draft 2021 budget. Mr. Ivers provided the number of wells that did not petition into the Subdistrict during formation that may request to contract in. Mr. Ivers highlighted the total administrative fee per Subdistrict well for active and inactive wells. He asked the Board if they are going to assess fees on a flat rate basis or tiered system based on inactivation status, he showed examples of what fees would be using each system. Mr. Ampe highlighted the Subdistrict will be assessing fees in arrears. Mr. Ivers highlighted the changes to the fees if the Subdistrict secures Well Injury Payment agreements. Mr. Ampe explained the next steps in the budget process and reported the budget will be available to the public once it is approved by the Subdistrict Board.

A motion was made by Dale Gerstberger to accept the 2021 budget. Pete Ampe stated the Board needed to take action on how they would be assessing fees prior to a motion to approve the 2021 budget.

Discussion was held on abandoned wells, active and inactive fees per well, flat rate fees and tiered base fees. Mr. Ivers highlighted that the Board may change the way they assess fees next year if they choose to.

A motion was made by Kit Caldon to use the tiered system for the administrative fee per well. The motion was seconded by Dale Gerstberger and unanimously approved.

A brief discussion was held on the “other” category and the consumptive use of a fish farm.

A motion was made by Dale Gerstberger to use the tiered system for the groundwater withdrawal fees. The motion was seconded by Kit Caldon and unanimously approved.

A motion was made by Kit Caldon to accept the proposed 2021 budget as presented. The motion was seconded by Dale Gerstberger and unanimously approved.

Direction for Staff

President Schmittel asked for direction for staff. Chris Ivers reported having a meeting scheduled with NRCS to explain Well Injury Payment agreements. Mr. Ivers also reported he would invite Thad and Sue Englert to present at the next quarterly meeting.

New Business

President Schmittel asked for new business. There were none.

Next Meeting

President Schmittel asked for the next meeting. The next quarterly meeting was scheduled for October 19, 2020 at 1:30 p.m.

Adjournment

The meeting was adjourned at 8:31 p.m.



President



Vice-President/Secretary/Treasurer

RESOLUTION OF THE
SPECIAL IMPROVEMENT DISTRICT NO. 5 OF THE RIO GRANDE WATER
CONSERVATION DISTRICT
(Establishing A Water Activity Enterprise)

RECITALS

WHEREAS, the Special Improvement District No. 5 of the Rio Grande Water Conservation District (“Subdistrict No. 5”) was created pursuant to section 37-48-108, C.R.S., and pursuant to section 37-48-101.3(1), C.R.S., is a body corporate under the laws of Colorado; and

WHEREAS, Subdistrict No. 5 was formed for the purpose of designing and implementing a cooperative plan for water management to assure the protection of senior surface water rights and promote the maximum beneficial and sustainable use of water resources; and

WHEREAS, Subdistrict No. 5 is authorized by section 37-48-149, C.R.S., to issue improvement district bonds to be paid out of special assessments made against all lands in the subdistrict benefited by the improvements financed by the bond proceeds; and

WHEREAS, Subdistrict No. 5, as a local government entity is authorized to establish a water enterprise pursuant to Article 45.1 of Title 37 of the Colorado Revised Statutes; and

WHEREAS, Colorado Constitution Art. X, Sec. 20 includes requirements with respect to financial activities of Subdistrict No. 5 except, generally, insofar as said activities take place within enterprises owned and operated by Subdistrict No. 5; and

WHEREAS, pursuant to the provisions of Title 37, Article 45.1, Colorado Revised Statutes (the “Water Activity Law”), state and local governmental entities which have their own bonding capacity under applicable law are authorized: (i) to establish or continue to maintain water activity enterprises for the purpose of pursuing or continuing water activities, which includes the diversion, storage, carriage, delivery, distribution, collection, treatment, use, reuse, augmentation, exchange, or discharge of water and includes the acquisition of water or water rights; and (ii) to issue or reissue bonds, notes, or other obligations payable from the revenues derived or to be derived from the function, service, benefits, or facility or from any other available funds of the enterprise, the terms and conditions of such bonds or other obligations to be as set forth in the resolution authorizing the same and, as nearly as practicable, as provided in Part 4 of Article 35 of Title 31, C.R.S., relating to water revenue bonds; and

WHEREAS, in order to qualify as an activity enterprise under the Water Activity Law, the enterprise must consist of a government water activity business owned by a governmental entity (such as Subdistrict No. 5), which enterprise receives under 10% of its annual revenues in grants from all Colorado state and local governments combined, and which is authorized to issue its own revenue bonds; and

WHEREAS, it is the intent of Subdistrict No. 5 to formally establish the “Special Improvement District No. 5 of the Rio Grande Water Conservation District Water Activity Enterprise” (“Enterprise”) under the Water Activity Law; and

WHEREAS, Subdistrict No. 5 desires that the Enterprise be qualified as an enterprise and a separate government-owned business as clarified by the Colorado Supreme Court decision in *Nicholl v. E-470 Public Highway Authority*, 896 P.2d 859 (Colo. 1995); and

WHEREAS, the Board of Managers finds that the provision of Subdistrict services through an enterprise will contribute to the health, safety, welfare, and prosperity of Subdistrict No. 5 and its landowners;

RESOLUTION

NOW, THEREFORE, be it resolved by the Board of Managers, as follows:

1. Establishment of Enterprise. The Special Improvement District No. 5 of the Rio Grande Water Conservation District Water Activity Enterprise is hereby established by Subdistrict No. 5 pursuant to the Water Activity Law subject to the approval of the Board of Directors of the Rio Grande Water Conservation District.

Pursuant to section 37-45.1-103(1), C.R.S., the Enterprise is established by Subdistrict No. 5 “for the purpose of pursuing . . . water activities, including water acquisition or water project or facility activities, including the construction, operation, repair, and replacement of water . . . facilities.” The Enterprise will operate as a business as the term is commonly used or judicially defined.

The Enterprise will consist of the business of:

(a) Operations, Services, and Programs: all of the operations, services, and programs necessary or advisable to further the goals of the Plan for Water Management and protect vested senior surface water rights; and

(b) Facilities: all real and personal property acquired, operated, and held in the name of Subdistrict No. 5, through the Rio Grande Water Conservation District, as may be necessary to carry out the operations, services, and programs necessary or advisable to further the goals of the Plan for Water Management and protect vested senior surface water rights; and

(c) Administrative equipment: all billing equipment used in the billing and collection of fees, tolls, rates, charges and penalties for the provision of operations, services, and programs by the Enterprise.

2. Governing Body.

(a) Board. Pursuant to the Water Activity Law, section 37-45.1-103(3), C.R.S., the governing body of the Enterprise (“Governing Body”) is the Board of Managers of Special Improvement District No. 5 of the Rio Grande Water Conservation District.

(b) Governance and By-Laws. The Governing Body is subject to all applicable laws, rules, and regulations pertaining to the Board. The Governing Body may adopt such lawful bylaws for its operations as deemed necessary or convenient by the Governing Body.

(c) Powers. The Governing Body is empowered to exercise all decision-making functions on behalf of the Enterprise except those subject to approval by the Board of Directors of the Rio Grande Water Conservation District.

The Governing Body, when acting on behalf of the Enterprise, may act in the name of the Enterprise or in the name of Subdistrict No. 5.

The Governing Body, in relation to Enterprise business, has all of the authority, powers, rights, obligations, and duties as may be provided or permitted to Subdistrict No. 5 in relation to the purposes of the Enterprise by the Water Activity Law, the Rio Grande Water Conservation District Act, and the Colorado Constitution.

On behalf of the Enterprise, the Governing Body has the power and authority to:

(1) in the name of the Enterprise or Subdistrict No. 5, with the approval of the Board of Directors of the Rio Grande Water Conservation as required by statute, make, execute and perform contracts, take and give instruments of conveyance, and do everything necessary, pertaining or incidental to the powers herein granted, and in so doing may make such special designations in such instruments as will indicate the capacity in which Subdistrict No. 5 is acting when such actions are taken by or on behalf of the Enterprise, such as "the Special Improvement District No. 5 of the Rio Grande Water Conservation District, acting by and through its Water Activity Enterprise;" provided that, notwithstanding the foregoing, no contract, conveyance, or other instrument shall be invalidated as a result of the failure to use any such special designation;

(2) purchase, acquire, construct, lease, condemn and purchase, extend and add to, maintain, conduct and operate services and programs necessary or advisable to protect existing beneficial uses of water within Subdistrict No. 5 and to further the Plan for Water Management;

(3) institute and defend all litigation affecting Enterprise powers and duties or in relation to the operations, services, and programs of the Enterprise and the property rights connected therewith or incidental thereto;

(4) designate, employ, retain, contract for, and discharge a manager and such other personnel and consultants as may be necessary or convenient to execute the policies of the Governing Body and to perform such other functions as the Governing Body may direct, and determine such compensation and conditions of employment or contract as the Governing Body may determine;

(5) adopt and enforce bylaws, rules and regulations of the Enterprise, including the ability to enforce such rules and regulations by the termination of service.

(6) fix and collect rents, rates, fees, tolls, and other charges, which rates, fees, tolls, charges, penalties of Subdistrict No. 5 shall relate to the operations, services, and programs provided and shall apply until such time as the Governing Body acts to change the same.

(7) fix reasonable penalties for delinquencies;

(8) issue bonds, notes, or other obligations payable from the revenues derived or to be derived from the operations, services, and programs of the enterprise, in accordance with the Water Activity Law and other applicable law and subject to the acquisition of such elector approval as may be required by law; authorize the issuance of such bonds, notes, or other obligations in accordance with applicable law, acting as both the Governing Body and the Board of Managers, however, no such bonds, notes, or other obligations shall be secured by the general revenues or taxing power of Subdistrict No. 5.

(9) pursuant to section 37-45.1-103(2)(b), C.R.S., contract with any other person or entity, including other districts or enterprises.

(d) Meetings. Whenever the Board of Managers is in session, the Governing Body will also be deemed to be in session. It will not be necessary for the Governing Body to meet separately from the regular and special meetings of the Board of Managers, nor will it be necessary for the Governing Body to specifically announce or acknowledge that actions taken thereby are taken by the governing body of the Enterprise. The Governing Body may conduct its affairs in the same manner and subject to the same laws, which apply to the Board for the same or similar matters. Public notice of meetings of the Board shall constitute such notice for the Governing Body notwithstanding the existence or absence of a reference in such notice to the Governing Body.

3. Budgeting and Financial Management.

(a) Enterprise Budget Recommendations. The Enterprise will provide budget recommendations to the Board of Managers in accordance with statutory requirements and timing. The budget of the Enterprise will separately set forth recommended fiscal year spending, total revenue, and reserve funds of the Enterprise in such detail as determined appropriate by the Board of Managers. The Enterprise budget will include the estimated dollar amounts that the Enterprise intends to acquire from all sources.

As provided in section 37-45.1-103(1), C.R.S., the Enterprise, as “[a]ny water activity enterprise established or maintained pursuant to this article [45.1 of Title 37, C.R.S.] is excluded from the provisions of section 20 of article X of the state constitution.”

(b) Administration Budget. The Board of Managers will produce a budget for Subdistrict No. 5 administration and Subdistrict No. 5 governmental services not readily attributable to an enterprise (“Administration”).

(c) Final Budget. The Board of Managers will combine the budget for Administration, the budget recommendations for the Enterprise, and such other information as may be available to the Board of Managers to draft the budget for Subdistrict No. 5 for approval by the Board of Directors of the Rio Grande Water Conservation District.

(d) Mill Levies, Ad Valorem Taxes. In its sole discretion and subject to the limitations of law, the Board of Managers will determine the mill levies to be certified for Subdistrict No. 5 operations and debt service. **THE ENTERPRISE SHALL HAVE NO POWER WHATSOEVER TO IMPOSE OR LEVY ANY GENERAL TAX.** No evidence of indebtedness, debt, contract subject to annual appropriation, contract, or other financial obligation of the Enterprise shall be secured by the revenues of Subdistrict No. 5 where “revenues of Subdistrict No. 5” includes all of the sources of revenue authorized for the use of the Subdistrict No. 5 or includes any general taxes of Subdistrict No. 5, regardless of whether Subdistrict No. 5 has exercised the general taxing powers available to it. The general revenue raising powers of Subdistrict No. 5 will not be deemed to be an integral part of any Enterprise financing agreement.

(e) Audit. The Governing Body may cause the Enterprise to be audited separately from Subdistrict No. 5 or as an instrumentality of Subdistrict No. 5 to be included as part of the audit of Subdistrict No. 5. An audit of the Enterprise or application for exemption from audit shall be completed as and when required by Colorado law.

(f) Excess Enterprise Funds. The net earnings of the Enterprise will be appropriated for the necessary requirements of the Enterprise and any remaining surplus may be appropriated to the general revenues or other funds of Subdistrict No. 5 by the Board of Managers in its annual budget and appropriations resolution or any amendment thereof.

(g) Reserves. The Governing Body may provide for such reserves for the replacement of obsolescent or depreciated property or improvements to the System as may be necessary.

(h) Reports. The Enterprise will provide such reports to the Board of Managers or the Board of Directors as those Boards may request from time to time.

4. Reimbursement of Administrative Services Provided to the Enterprise by Subdistrict No. 5, if any. The costs of Administration provided for the Enterprise from the general revenues of Subdistrict No. 5 (i.e., such revenues as are not allocated to the Enterprise), if any, shall be allocated to, accounted for, and paid by the Enterprise in any reasonable manner as determined by the Board of Managers. In its discretion, the Board of Managers may provide for the direct payment of such costs, in which case the Enterprise shall in due course reimburse such costs to Subdistrict No. 5 in any reasonable manner as determined by the Board of

Managers. No direct payment of costs by Subdistrict No. 5 shall be deemed a "grant" to the Enterprise insofar and so long as they are reimbursed by the Enterprise within the same fiscal year.

5. Debt Allocation. As determined by the Board of Managers, the Enterprise will be responsible for its allocation of Subdistrict No. 5 debts, other financial obligations, revenue bonds, or other evidences of indebtedness as shown in bond or contract covenants, documentation of evidence of indebtedness, budget, or resolution of Subdistrict No. 5. Nothing herein permits the general taxing power of Subdistrict No. 5 to secure obligations of the Enterprise.

6. Financial Records. To the extent practicable, the financial records of the Enterprise will be maintained separately from the financial records of Subdistrict No. 5. Provided that accurate records are kept of the amount of funds allocable to the Enterprise and to Subdistrict No. 5, funds of the Enterprise and funds of Subdistrict No. 5 may be commingled for purposes of investment.

7. Instrumentality, Immunity. The Enterprise is deemed to be an "instrumentality" of Subdistrict No. 5 as such term is used in section 24-10-103(5), C.R.S., and as such is a "public entity" entitled to such benefits, burdens, and immunities as may be available to it under the Colorado Governmental Immunity Act, Part 1 of Article 10, Title 24, C.R.S.

It is declared by Subdistrict No. 5 that the existence of immunity under the Colorado Governmental Immunity Act is consistent with the nature of a government-owned business as the term is used in Colo. Const. Art. X, Sec. 20; that immunity from certain tort liabilities are common to businesses, such as the Colorado ski and equestrian industries; and that the mere existence of such immunity does not affect the status of the Enterprise.

8. Insurance.

Subdistrict No. 5 may procure and maintain insurance against personal or property damage or injury arising out of its own operations and the operations of the Enterprise in the following amounts:

(a) Bodily injury and property damage liability insurance with liability limits in amounts not less than the statutory liability limits per person and per occurrence as provided in Part 1 of Title 24, Article 10 of the Colorado Revised Statutes, as the same may be amended;

(b) Replacement level property insurance for the facilities and equipment of Subdistrict No. 5 and Enterprise.

In the event that Subdistrict No. 5 procures such insurance, Subdistrict No. 5 will name the Enterprise as an additional insured on all such liability policies.

In the event that Subdistrict No. 5 does not procure and maintain such insurance for the Enterprise, the Enterprise may do so in its own name and shall name Subdistrict No. 5 as an additional insured on all such liability policies.

9. Maintenance of Enterprise Status. The Enterprise must at all times conduct its affairs so as to continue to qualify as a “water activity enterprise” within the meaning of section 37-45.1-102, C.R.S., and as an “enterprise” within the meaning of Article X, Section 20, Colorado Constitution. Specifically, but not by way of limitation, the Enterprise is not authorized to, and must not, receive 10% or more of its annual revenue in grants from all Colorado state and local governments combined, including Subdistrict No. 5 or the Rio Grande Water Conservation District.

10. Disqualification, Cure. In the event that the Enterprise is disqualified as an enterprise by a court of competent jurisdiction, the Governing Body intends to cure the defects in the organization or operation of the Enterprise as soon as possible following the date of the final judgment of such court; but in no case will such a disqualification of the Enterprise be construed as working a disqualification of any other enterprise that may have been organized by Subdistrict No. 5. Any disqualifying grant may, upon approval of the Board of Managers, be returned to the grantor, or, if appropriate, placed in escrow by the grantor for the benefit of the Enterprise or Subdistrict No. 5 to accomplish the intent of the grantor while maintaining the Enterprise status of Subdistrict No. 5’s disputed Enterprise.

11. Severability. If any section, paragraph, clause, or provision of this Resolution shall for any reason be held to be invalid or unenforceable, the invalidity or unenforceability of such section, paragraph, clause, or provision shall not affect any of the remaining provisions of this Resolution, the intent being that the same are severable.

12. Additional Enterprises. Subdistrict No. 5 may, in its discretion, designate additional enterprises or divide the Special Improvement District No. 5 of the Rio Grande Water Conservation District Water Activity Enterprise into smaller units, in the future as may be in the best interests of Subdistrict No. 5.

RESOLVED this 24 day of Sept, 2020.

ATTEST:

BOARD OF MANAGERS
SPECIAL IMPROVEMENT DISTRICT NO. 5 OF
THE RIO GRANDE WATER CONSERVATION
DISTRICT


Secretary


President