

**BEFORE THE DEPARTMENT OF STATE  
STATE OF COLORADO**

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**FINAL AGENCY DECISION**

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**RE: DOUGLAS COUNTY'S APPLICATION TO DECLARE CERTAIN TOWNS  
ABANDONED PURSUANT TO § 31-3-201, C.R.S.**

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**THIS MATTER** came before the Department of State for a Hearing on October 23, 2007 at 9:00 a.m., on whether the Secretary should declare the following towns in Douglas County abandoned pursuant to § 31-3-201, C.R.S., (2007): Acequia, Deckers, Douglas, Frankstown, Greenland, Hunstville, Lehigh, Louviers, Russelville, and Westcreek. Secretary of State Mike Coffman (“the Secretary”) presided over the Hearing. The Secretary has considered all evidence admitted, including witness testimony and exhibits, and has considered the legal arguments presented. Titles and headings herein are for ease of reference only. The Secretary is fully advised of the premises herein, and specifically finds there is substantial and credible evidence in the record to support his findings and that there is a reasonable basis in the law to support this Decision.

The Secretary makes the following findings and conclusions of law:

**Procedural History**

1. By letter dated June 18, 2007, Douglas County, by and through the Douglas County Attorney, made a written application to the Secretary for determination of abandonment for the following towns: Acequia, Deckers, Douglas, Frankstown, Greenland, Hunstville, Lehigh, Louviers, Russelville, Sedalia, Westcreek and Wheatland (hereinafter referred to as “application”).
2. The Secretary published public notice of the application and Hearing location and time in the Rocky Mountain News on September 23, 2007 and the Douglas County News-Press on October 4, 2007, both of which are newspapers of general circulation in Douglas County. Prior to the time of the Hearing, Douglas County requested that the Secretary not act on its application with respect to Sedalia and Wheatland. The Secretary did not take evidence concerning those two towns, and this decision does not impact those two towns.
3. By letter dated September 13, 2007, attorney John M. Evans representing opponents to a declaration of abandonment of Frankstown requested that the Secretary stay any action regarding the application of the Douglas County Attorney for a determination of abandonment of Frankstown. By letter dated September 18, 2007, the Douglas County Attorney opposed the request. On September 20, 2007, the Secretary issued a written decision declining the request for a stay.

4. The Secretary held a public hearing on Douglas County's application on October 23, 2007 at 9:00 a.m. at the Douglas County Commissioner's Hearing Room, located at 100 3<sup>rd</sup> Street, Castle Rock, Colorado. Present at the Hearing were: Douglas County Attorneys Lance Ingalls and Myron Clark, appearing on behalf of Douglas County; and John M. Evans and Charles R. Free, appearing on behalf of the opponents to a declaration of abandonment of Frankstown ("opponents").

5. In addition, several individuals testified in support of or in opposition to a declaration of abandonment of Frankstown and one person appeared and gave testimony in opposition to declaration of abandonment of the Town of Louviers. No other individual testified or objected to a determination of abandonment regarding the other towns at issue. Thus, the only towns for which abandonment was contested at the Hearing were Frankstown and the Town of Louviers. The Secretary allowed all interested persons to present evidence and argument regarding abandonment of the pertinent towns. All interested parties were also permitted the opportunity to cross-examine all witnesses who testified.

#### **Witnesses**

6. The following witnesses testified under oath before the Secretary: Jack Arrowsmith (Douglas County Clerk and Recorder), Tim Graf (objecting to abandonment declaration for Town of Louviers), Rob Graft, Mike Mullinex, Patsy Moore, Jerald Howell, Dr. Ed Carrier, Jr., Amy Maier, Wes Schulman and Pat Arfsten.

#### **Documentary Evidence**

7. The Douglas County Attorney submitted records concerning Acequia, Deckers, Douglas, Greenland, Huntsville, Lehigh, Louviers, Russelville, and Westcreek which provide historical and geographical information regarding the towns. There was no objection to the admission of such records. The Secretary admitted those records into evidence. For ease of reference, those records have been collectively marked as Exhibit A and are a part of the record in this matter. The Douglas County Attorney requested that the Secretary take administrative notice of public records filed with the Secretary relating to the lack of elections for all the towns at issue at Hearing. No one objected to this request. In addition, the Douglas County Attorney and attorneys Free and Evans requested that the Secretary take administrative notice of the entire record in Douglas County District Court Case No. 07-CV-1342 ("Douglas County District Court case").

8. In the context of an administrative hearing such as this, the concept of "administrative notice" is permitted. *See Archibold v. Public Utilities Commission*, 58 P.3d 1031, 1034 (Colo. 2002); *Walker v. Van Laningham*, 148 P.3d 391, 397-98 (Colo. App. 2006) (public records are proper subject for judicial notice including administrative agency records); *Leprino Foods Co., v. Industrial Claims Appeals Office*, 134 P.3d 475, 479 (Colo. App. 2005); *McCann v. Lettig*, 928 P.2d 816, 819 (Colo. App.1996); *Consol. Freightways Corp. of Del. v. Public Utilities Commission*, 406 P.2d 83, 90 (Colo.1965).

The Secretary grants Douglas County's request that he take administrative notice of records filed with the Secretary regarding whether elections were held in the towns at issue for the five years preceding Douglas County's application. *See Van Laningham*, 148 P.3d at 397-98. Such information is not subject to reasonable dispute and is proper for administrative notice. *See Meredith v. Beech Aircraft Corp.*, 18 F.3d 890, 895 (10<sup>th</sup> Cir. 1994). The records or lack thereof, establish that no elections, special, regular or for town officers, have been held for the five years prior to Douglas County's application regarding all of the towns at issue here. The Douglas County Clerk and Recorder also testified he had no records in his possession showing that any of these towns held elections, special, regular or for town officers for the five years prior to Douglas County's application.

9. The Secretary also grants the parties' request to take administrative notice of the record in Douglas County District Court Case No. 07-CV-1342. As such, the Secretary merely acknowledges the existence of that pending court case, the pleadings (and arguments made therein), the District Court's ruling, and its pending status on appeal before the Colorado Court of Appeals. The Secretary emphasizes that administrative notice can only be used to establish facts, "which, from their nature are not properly the subject or testimony, or which are universally regarded as established by common knowledge." *Meredith v. Beech Aircraft Corp.*, 18 F.3d 890, 895 (10<sup>th</sup> Cir. 1994). In other words, the recognition of certain facts by a judge or an administrative hearing authority is only proper without proof when such facts are not subject to reasonable dispute. *Id.* The opponents to the abandonment of Frankstown urge that the Douglas County Case establishes the fact that Frankstown was never incorporated. However, administrative notice cannot be used to establish that alleged fact because that issue is the subject of dispute in the pending litigation. Indeed, the opponents to the abandonment of Frankstown are presently taking the exact opposite position before the Court of Appeals, arguing that Frankstown *was*, in fact, an incorporated town at one point. *See* Notice of Appeal in Civil Case 07-CV-1342, at 2 ("Having been originally organized, Frankstown has perpetual existence unless formally abandoned by the Colorado Secretary of State . . .").

10. Nonetheless, the Secretary acknowledges that the opponents here sued an unnamed and un-appointed Board of Trustees for the Town of Frankstown and the Town of Frankstown in Douglas County District Court. In that case, the opponents here requested an order mandating that the Board of Trustees and Frankstown hold a special election regarding reorganization pursuant to § 31-2-102. The Secretary acknowledges all the arguments that were made to the Douglas County District Court, and the District Court's ruling against the petitioners (the opponents here), finding that Frankstown was never incorporated.

11. Attorney Free also submitted a document marked as "Plaintiff's Exhibit 1" which included a copy of § 31-3-201, along with the signature portion of the district court's decision in the litigation referenced above. This exhibit was submitted for demonstrative purposes and is admitted for those purposes only.

12. The opponents submitted several additional exhibits with their Supplemental Brief filed on October 24, 2007 (after the hearing). By this, it appears that the opponents request the Secretary admit into evidence these additional exhibits, which includes an affidavit of an individual (Pat Arfsten) who testified at the October 23, 2007 hearing. Because the opponents submitted these exhibits and affidavit after the close of evidence, Douglas County had no opportunity to cross examine the witness who signed the affidavit, or to present rebuttal evidence. Nonetheless, the certificate of service for the Supplemental Brief indicates that the opponents served a copy of their Supplemental Brief with exhibits on Douglas County. Because Douglas County has been provided these exhibits and has not filed any objection to the admission of these additional exhibits, the Secretary will admit them into evidence.

### **Abandonment of Towns**

13. With respect to Acequia, Deckers, Douglas, Greenland, Hunstville, Lehigh, Louviers, Russelville, and Westcreek, the Secretary finds and concludes that the evidence established that all of those towns have been abandoned as contemplated by § 31-3-201, C.R.S. (2007). In particular, no election records appear to exist indicating these towns have held any regular or special election, or elected town officers in the five years preceding Douglas County's June 18, 2007 application. No evidence was presented indicating that any of these towns have maintained any town government in the five years preceding Douglas County's application. Indeed, all evidence presented indicated the contrary, that there has been no town government maintained in the five years preceding Douglas County's application. Thus, the Secretary finds and declares Acequia, Deckers, Douglas, Greenland, Hunstville, Lehigh, Louviers, Russelville, and Westcreek abandoned pursuant to § 31-3-201(1)(d), C.R.S. All books, documents, records, papers, and corporate seals of such towns shall be deposited with the Douglas County Clerk and Recorder for safekeeping and reference in the future pursuant to § 31-3-201(1)(d), C.R.S.

14. Regarding Frankstown, the opponents contend that the Secretary lacks jurisdiction to determine Frankstown abandoned because the Douglas County District Court ruled that Frankstown was never incorporated. *See* Judge Hopf's July 7, 2007 decision in Douglas County District Court Case No. 07-CV-1342. These opponents urge that in order for the Secretary to declare Frankstown abandoned, the town must first be shown to have been incorporated under Colorado law. In short, the opponents submit that there is no jurisdiction to declare a town abandoned unless that town has been determined to have been formally incorporated. In support of this argument, the opponents cited § 31-1-101(13) as defining the word "town" as used in Title 31 as an *incorporated* town. *See* Supplemental Brief. Douglas County responds that formal incorporation is not a prerequisite to declaration of abandonment pursuant to § 31-3-201. Douglas County argues that if the General Assembly intended incorporation to be a formal prerequisite to § 31-3-201, it would have stated so specifically in the abandonment statute. Douglas County relies on *City of Denver v. Coulehan*, 39 P. 425, 427 (Colo. 1894) to contend that a town need not be formally incorporated to exist, and that the Secretary therefore has the authority under § 31-3-201 to declare an unincorporated town abandoned.

15. In these abandonment proceedings, the opponents take a position directly opposite to the position they took in Douglas County District Court 07-CV-1342 and the position they are *presently* maintaining on appeal in that litigation. There, the opponents argued that Frankstown is an incorporated town that is entitled to “re-organize” pursuant to § 31-3-301, *et seq.* “Having been originally organized, Frankstown has perpetual existence unless formally abandoned by the Colorado Secretary of State. . . .” *See* Notice of Appeal in Civil Case 07-CV-1342, at 2. Thus, while conceding the Secretary has jurisdiction to declare Frankstown abandoned in its August 14, 2007 Notice of Appeal, the opponents now take the opposite position.

16. When interpreting a statute, the primary duty is to give effect to the general assembly’s intent and adopt the statutory construction that best effectuates the purposes of the legislative scheme, looking first to the plain language of the statute. *See Progressive Specialty Ins. Co. v. Hartford Underwriters Ins. Co.*, 148 P.3d 470, 472 (Colo. App. 2006). To effectuate the general assembly’s intent, courts will read and consider the statute as a whole, giving consistent, harmonious, and sensible effect to all parts. *In re Marriage of Ikeler*, 161 P.3d 663, 667 (Colo. 2007).

17. Pursuant to § 31-1-101(13), the word “town” as used in Title 31 includes “a municipal corporation . . . incorporated pursuant to the provisions of part 1 of article 2 of this title or reorganized pursuant to the provisions of part 3 of article 2 . . . or pursuant to the provisions of any other general law on or after July 3, 1877 . . . but does not include any town incorporated prior to July 3, 1877, which has chosen not to reorganize. . . .”

18. Section 31-1-101 provides that the definitions therein apply “unless the context otherwise requires.” Certain provisions in Title 31 appear to be focused on technical incorporation. *See e.g.*, § § 31-2-301, 31-2-102. However, the Secretary concludes that the abandonment statute, § 31-3-201, does not focus on whether the town was formally incorporated, but rather, on whether the town has failed to hold elections or maintain any town government in the five years prior to the application to declare the town abandoned. *See* § 31-3-201. Indeed, the Secretary has never required proof of a town’s formal incorporation for purposes of reaching a determination regarding its abandonment under § 31-3-201. Instead, just as the statute expressly requires, the Secretary has focused on whether the town has failed to hold elections or maintain a town government.

19. The Secretary concludes that the statutory scheme as a whole and the plain language of the abandonment statute show that the General Assembly intended the abandonment statute to be an efficient process to clarify the legal status of a town (incorporated or not), and consequently, the identity of its governing body and the owners of its property. *See e.g.*, § 31-3-302 (after determination of abandonment, property and governance of town are vested in the county in which the town’s property is located); § 31-3-201 (allowing formal determination of abandonment only when a town has failed to hold elections or otherwise govern itself for *at least five years* prior to the application); § 31-2-106 (creating a presumption that if a town has in office a governing body, it is deemed incorporated). The procedures set out by the abandonment statute are streamlined, simple and expedient. *See* § 31-3-201(1)(a) to (b) (county attorney makes an

application to the Secretary in no particular form, who must publish notice of the application and of the date and location of the hearing not less than twenty days prior to the hearing date.).

20. Colorado case law supports the Secretary's conclusion that formal proof of incorporation is not required for the Secretary to declare a town abandoned under § 31-3-201. For example, Colorado recognizes *de facto* municipalities, that is, municipalities that are not formally incorporated but which nevertheless are empowered with the authority and responsibility of incorporated towns. *See Enos v. District Court*, 238 P.2d 861, 868-89 (Colo. 1951). In addition, Colorado law presumes a town is incorporated if it has a governing body. *See* § 31-2-106. Thus, a town may be a *de facto* municipality, or it may have appointed a governing body although not even a *de facto* municipality. To require proof of incorporation as a formal jurisdictional prerequisite to determining abandonment under § 31-3-201 would disregard the existence of such towns and certainly would undermine the purposes of the abandonment statute. Because the abandonment statute is intended to clarify the status of a town, the Secretary should not refrain from acting on an application brought pursuant to § 31-3-201 merely because proof of a town's formal incorporation is not presented. Nothing in § 31-3-201 appears to require such proof or any threshold finding by the Secretary before proceeding with a determination of abandonment.

21. Both Douglas County and the opponents presented evidence of the existence of unincorporated Frankstown. This evidence was sufficient for the Secretary to proceed with the determination of abandonment under § 31-3-201. While the Secretary takes administrative notice of the Douglas County litigation, the District Court's ruling in that case has little bearing here for two reasons. First, the issue of formal incorporation remains in dispute, as that litigation is still pending before the Colorado Court of Appeals. Second, the Court's ruling regarding *incorporation* is not dispositive of the issue of *abandonment* under § 31-3-201.

22. The Secretary finds and concludes that the evidence established that Frankstown (whether formally incorporated or not) has been *abandoned* as contemplated by § 31-3-201. Specifically, there are no election records for Frankstown indicating it held any regular or special election, or that it elected any town officers in the five years preceding Douglas County's June 18, 2007 application. The evidence presented showed that Frankstown has not maintained any town government in the five years preceding Douglas County's application.<sup>1</sup>

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<sup>1</sup> The additional exhibits submitted by the opponents with their Supplemental Brief does not alter the Secretary's conclusion. These exhibits do not provide a basis to conclude that a Frankstown town government operated at any point in the five years prior to the application. Evidence of meetings held at Pat Arftsen's home does not establish the existence of a Frankstown town government. At most, this evidence indicates that a few individuals wished to re-organize the town under the belief that the town was once organized.

23. Thus, for the foregoing reasons, the Secretary finds and declares Frankstown abandoned pursuant to § 31-3-201, C.R.S. (2007). All books, documents, records, papers, and corporate seals of Frankstown shall be deposited with the Douglas County Clerk and Recorder for safekeeping and reference in the future pursuant to § 31-3-201(1)(d), C.R.S.

24. Pursuant to § 24-4-106(4) C.R.S., this decision may be appealed by commencing an action for judicial review in the Denver District Court within thirty days of the date of this Order.

Done this 14<sup>th</sup> day of November, 2007.

COLORADO SECRETARY OF STATE

  
Mike Coffman

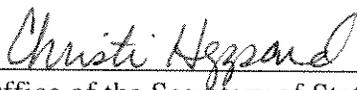
## CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the above FINAL AGENCY DECISION by transmitting same via facsimile and by placing same in the U.S. Mail, postage prepaid, at Denver, Colorado to:

Mr. Lance J. Ingalls, Esq.  
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Mr. John M. Evans, Esq.  
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on this 14<sup>th</sup> day of November, 2007.

  
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Office of the Secretary of State