



JOHN W. SUTHERS
Attorney General

CYNTHIA H. COFFMAN
Chief Deputy Attorney General

DANIEL D. DOMENICO
Solicitor General

**STATE OF COLORADO
DEPARTMENT OF LAW**

OFFICE OF THE ATTORNEY GENERAL

STATE SERVICES BUILDING
1525 Sherman Street - 7th Floor
Denver, Colorado 80203
Phone (303) 866-4500

May 4, 2012

TO: Colorado Water Conservation Board

FROM: John W. Suthers
Attorney General

Karen Kwon
Susan Schneider
First Assistant Attorneys General

RE: Report of the Attorney General

FEDERAL & INTERSTATE MATTERS

1. Platte River Recovery Implementation Program

Colorado, Nebraska, Wyoming, U.S. Department of Interior, and Central Nebraska Power and Irrigation continue to negotiate terms regarding a reservoir project in Nebraska. This reservoir project is anticipated to help retine water flows in the Platte River in Nebraska for habitat mitigation for several endangered and threatened species. Colorado is aiming to have its participation credited to its obligations under the Endangered Species Act and cover the current and future impacts of water development in the state. Because of budgeting and contracting concerns, the parties are trying to finalize an agreement this year.

2. Tamarack Ranch

Although this water rights application, 96CW1063 and 98CW463, is on behalf the Division of Parks and Wildlife, there is an impact to Colorado's participation in the Platte River Recovery Implementation Program. The Tamarack Project consists of alluvial wells diverting water for wildlife habitat on the Tamarack Ranch state wildlife area. Return flows from use in ponds on the state wildlife area will unavoidably retine water in the South Platte River and may receive credit under the Platte River Recovery Implementation Program. Colorado's anticipated operations of the Tamarack Project will generate up to 20,000 acre feet in credits to reduction in shortages to target flows in designated habitat. This will cover numerous existing projects as well as anticipated impacts caused by population growth in the South Platte River basin. A trial is set to begin in early July 2012. Currently active objectors include the City of Boulder, Centennial Water and Sanitation District, and Harmony Ditch Company. Harmony has recently filed a motion claiming the Tamarack Project violates Colorado's export statute, 37-81-101, C.R.S. The state is opposing that motion.

3. Kansas v. Nebraska and Colorado, No. 126, Original (Republican River)

Discovery concluded April 16th but additional time is being allotted in May for the deposition of two federal witnesses. The Special Master recently issued a ruling on a discovery dispute between Kansas and Nebraska that favorably affirmed Colorado's position on privilege and remedy. The Special Master has also issued a Case Management Order that establishes pretrial deadlines for motions, exhibits, and direct trial testimony. Colorado is considering filing dispositive motions, which are due on May 15, on the issues of: 1) proper remedy; (2) measurement of remedy; (3), election of remedy; and (4) the appointment of a river master. Trial for the interstate water case will be held at the federal courthouse in Portland, Maine. It commences August 13th and is to conclude August 31st.

4. Super Ditch Pilot Project

After reviewing comments from 15 objecting parties and circulating a draft approval letter for a second round of comments, the State Engineer issued a partial conditional approval of a Substitute Water Supply Plan for this Pilot Project on May 2. It contains 45 detailed terms and conditions to prevent injury. At least one Objector is expected to file an appeal with the Division 2 water court within 30 days. Tri-State is expected to appeal based on its legal challenge to the State Engineer's authority to approve this Plan under 37-92-308(5), which is for approval of temporary projects that cause no depletions beyond five years. The approval letter explains the State Engineer's position that this Plan causes no depletions (because recharge operations during the one-year plan will maintain all return flows in time location and amount), so the Plan is within the limits of 308(5) regardless of the fact that a fraction of the deep percolation portion of those return flows will migrate toward the stream over longer than five years.

5. Arkansas River Compact Compliance, Irrigation Improvement Rules

Tri-State filed objections on May 2 to Lower Ark's Rule 10 Compact Compliance Plan application. The Plan is intended to prevent depletions to usable stateline flow and in-state water rights from the increased consumption by crops under sprinkler irrigation and other irrigation system improvements. This Attorney General's Office will work with Division 2 to address the comments.

DEFENSE OF THE COLORADO RIVER SUBUNIT

6. Legal counsel regarding Colorado River matters

The Subunit continues to provide the Colorado Water Conservation Board, Division of Water Resources, Department of Natural Resources, and the Upper Colorado River Commission legal research, counsel, and/or advice on the following topics:

- Legal and policy implications of US and Basin State negotiations with Mexico on voluntary efficiency, augmentation, and shortage sharing projects, and domestic coordination of legal authority and compliance to accomplish bi-national agreements (a/k/a Minute 319);

- Legal and policy implications regarding the Aspinall Unit Operations FEIS;
- Coordination with Colorado's Advisors to the Colorado Commissioner to the Upper Colorado River Commission;
- Coordination on the Colorado River Compact Compliance Study;
- Coordination with the Water Bank Working Group;
- Coordination with the Basin States on scoping and preparing an alternative for the Long-Term Experimental Management Program EIS process;
- Coordination with the Upper Colorado River Commission on processes and concepts for implementing the Upper Colorado River Basin Compact;
- Coordination and consultation on intrastate water rights administration within the Colorado River Basin;
- Coordination and consultation with the Bureau of Reclamation and the seven Colorado River Basin states regarding Colorado River management under the Interim Guidelines;
- Coordination and consultation with the Bureau of Reclamation and interested Colorado parties regarding Ruedi Reservoir debt retirement; and
- Legal and policy implications of U.S. Senate Bill 2109 regarding approval of the Settlement of water rights claims of the Navajo Nation, the Hopi Tribe, and allottees of the Navajo to the Little Colorado River in Arizona.

WATER RIGHTS MATTERS

7. Farmers Water Development Co. v. Colorado Water Conservation Board (11CV7019)

The Denver District Court dismissed Farmers Water Development Company ("Farmers") Complaint for a Declaratory Judgment, holding that the Water Court has jurisdiction. Farmers has appealed that dismissal and sought to supplement the record on appeal. The CWCB opposed supplementing the record and the District Court agreed that supplementation was inappropriate.

8. Application for Water Rights of the Colorado Water Conservation Board in San Miguel County (11CW129)

Following dismissal of its Complaint from Denver District Court, Farmers Water Development Company ("Farmers") amended its statement of opposition in Water Court to include several counterclaims for declaratory judgment. Farmers alleges the statute authorizing the Board to appropriate instream flow rights, as well as the Board's Rules, and the procedures followed in this case violated Farmers' statutory and constitutional rights. Farmers alleges the Board's decision to appropriate an instream flow right is a quasi-judicial matter requiring full due process, including published notice in the water court resume and direct and cross examination of witnesses during the Board's public deliberation. The CWCB filed a motion to dismiss several of Farmers' claims because Farmers failed to attend the Board's public deliberation, failed to request cross-examination, and failed to request additional notice. Farmers filed its response claiming it raised those issues in its rebuttal statement to the Board, but that the Board did not have authority to resolve those issues. The CWCB filed its reply on March 9.

9. Decree Granted for CWCB'S Second Transaction with the Colorado Water Trust

On April 12, 2012, the Division 5 Water Court entered a final decree for CWCB's change of water right application in Case No. 5-07CW277, which was the second water right transaction between the Colorado Water Trust (Water Trust) and CWCB. Vail Associates had donated the Hat Creek water rights to the Water Trust following a land and water exchange between Vail Associates, the United States Forest Service and a private party.

In 2007, the Water Trust donated the Hat Creek water rights to CWCB to preserve the natural environment of Hat Creek and East Brush Creek in Eagle County. The CWCB filed an application with the water court to change the Hat Creek Ditch water right to instream flow use by the Board, which was opposed by Diamond S Ranch, Inc., and the Town of Eagle. The Water Trust reserved the right to bring about the use of the consumptive portion downstream of CWCB's instream flow segments. After years of negotiating issues such as return flows, the CWCB and the Water Trust stipulated with the Town of Eagle to purchase the consumptive use portion of the donated water rights for use downstream. The Town of Eagle will file a separate application with the court to decree its separate change in use for its Hat Creek Ditch water rights.

The Water Court decree allows the CWCB to use the water to preserve approximately 0.5 miles of Hat Creek and 4.7 miles on East Brush Creek. This water will be used to supplement the previously decreed instream flow rates on Hat Creek decreed in Case No. 5-87CW271 and East Brush Creek decreed in Case No. 5-77W3627.

10. Application of Denver Water, 04CW121

Denver Water filed an application to quantify its lawn irrigation return flow (LIRFs), to use those LIRFs in existing augmentation plans and an exchange, and to decree points of diversions for those LIRFs, and 36 parties filed statements of opposition to the application. Trial was scheduled to begin April 30 however all objectors, including the State and Division Engineers, consented to entry of the decree prior to the start of trial. The impetus to the majority of the stipulations was a recent ruling from Judge Hartmann on a motion for determination of question of law from Denver Water regarding whether or not Denver was entitled to use those LIRFs in an exchange that was decreed in 1972. A number of objectors, including the State and Division Engineers, argued that Denver did not have the intent to use LIRFs as a source of substitute supply at the time Denver applied for the exchange. Judge Hartmann found that Denver can use LIRFs in that exchange because there is evidence that Denver anticipated using transmountain effluent, and the court found there is no distinction between reusable, imported LIRFs and reusable, imported effluent. A number of objectors made it clear in their stipulations that they intend to appeal that decision.