



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

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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. Tamarack Ranch State Wildlife Area, Case Nos. 96CW1063 and 98CW463, Water Div. 1

This case involves for a plan for seventeen wells and associated recharge ponds on a state wildlife area (SWA) near Crook, Colorado. The uses applied for by the Colorado Division of Parks and Wildlife (CPW) are for wildlife habitat on the SWA using up to 20,000 acre feet of water pumped from the alluvium of the South Platte River. The water will be used on the SWA and the recharge from the ponds flowing back to the river at a later time will offset the well depletions during the irrigation season. Excess flows will be available for lease to help defray operating costs. In addition, the retiming of flows in the river will unavoidably help meet the endangered species mitigation requirements under the Platte River Recovery Implementation Plan (PRRIP). In this way this project will allow coverage under PRRIP for municipalities, industry, and agriculture that would otherwise be required to find their own mitigation water, at a considerably higher cost. The only remaining opposing party in the case is Harmony Ditch Co. Harmony filed an unsuccessful motion to determine that the Tamarack Project was in violation of the state's water export statute, C.R.S. 37-81-101 et seq., which the Court denied last month. The case is proceeding to trial on July 12, 2012.

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

Trial for this interstate water case will be held at the federal courthouse in Portland, Maine beginning on August 13th and is set to conclude on August 31st. The Special Master has imposed a tight pre-trial schedule. Colorado filed a motion to dismiss on May 15th and a reply in support of that motion on June 22nd related to (1) proper remedy; (2) measurement of remedy; (3), election of remedy; and (4) the appointment of a river master. On June 15, Colorado filed a response opposing Kansas' motion for an order holding Nebraska in contempt, and on the same

date opposed Kansas's motion for summary judgment on Nebraska's accounting procedure changes. Three days of depositions were held at the end of June. Depositions of two Colorado experts are scheduled for the week of July 16. Written direct examination questions are due to the Special Master in July.

3. 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 and requires further information before the State will give written approval to operate the Plan. Four Objectors filed a joint appeal to the Division 2 water court – LAWMA, Tri-State, District 67 Water Users, and the Amity Canal. They raise legal arguments relating 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, and to special requirements for rotational fallowing contracts. The State Engineer and Super Ditch Company have filed motions to dismiss the appeal due to the lack of final agency action. The State Engineer's Office cannot finish compiling the Administrative Record for this APA review because it is still awaiting recharge pond tests and other information required from the Applicant before the State Engineer can issue a final approval. In a related matter, in responding to Tri-State's extensive CORA request related to the Super Ditch SWSP application, the SEO is protecting the ability of the agency's employees to exchange frank and efficient pre-decisional emails as they consider the numerous applications the agency receives.

4. Arkansas River Compact Compliance, Irrigation Improvement Rules

The State Engineer approved the Lower Ark District's second annual Rule 10 Compact Compliance Plan on June 28th. Engineers for Tri-State and LAWMA had filed the only comments on the April 2nd application, which were constructive. Using the 2002-03 dry conditions as the assumption underlying hydrological projections, the Plan estimates 1525 acre feet of increased consumption due to the approximately 90 members' sprinkler improvements. The Plan provides up to 2500 acre feet of maintenance flow water in Pueblo Reservoir and Lake Meredith. Lower Ark will make monthly releases that match the reductions in return flows from their improved irrigation systems in the Arkansas River Basin, with extra "transit loss" water to carry the maintenance flows to the proper location.

5. Animas La Plata Project

The Division 7 water court's retained jurisdiction over the water court decrees confirming the two Ute Tribes' allocations of water from the A-LP Project ends on December 31, 2012. The Tribes have not begun using water from the Project. The State has asked the United States, Ute Tribes, and Southwestern Water Conservation District to support a motion to extend the water court's retained jurisdiction.

6. Water Division 3 Ground Water Rules

The Rio Grande Decision Support System (RGDSS) ground water model peer review team continues to run and evaluate the RGDSS ground water model and calibration is proceeding. Water users in the San Luis Valley are increasingly anxious for model results that estimate the injurious depletions caused by their irrigation well pumping. The next Special Advisory Group meeting will be scheduled when modeling results are completed, and the State Engineer has updated the San Luis Valley Rules Advisory Committee members of the progress being made.

Pressure on the State Engineer to promulgate rules that would allow him to curtail well pumping in Division 3 has increased on reports that the ground water in the Unconfined Aquifer in the West-Central San Luis Valley North of the Rio Grande will almost certainly reach its lowest-ever recorded level this year. The State Engineer and the Attorney General's Office are developing a strategy for promulgating ground water rules without overextending their resources given the ongoing Subdistrict No. 1 litigation.

7. Water Division 3 Subdistrict 1

Subdistrict No. 1 submitted its Annual Replacement Plan (ARP) to the State Engineer on April 13. The State Engineer approved the ARP on May 1. Subdistrict No. 1 acquired the necessary portfolio of water rights to replace or otherwise remedy injurious stream depletions caused by Subdistrict well pumping. The Subdistrict has been replacing injurious stream depletions pursuant to the ARP since May 1. Objectors to the ARP filed challenges in the Division 3 Water Court on May 15. Trial is set for two weeks starting October 29. The supporters of the AWP have moved to dismiss portions of the challenges because they were already decided in the court's approval of the Plan of Water Management. As noted in the previous section, when the RGDSS model results are ready, other Subdistricts will be able to begin work on their plans of water management and annual replacement plans.

8. Rio Grande Compact Accounting Dispute

The Rio Grande Compact Commission did not approve an annual delivery accounting at its March 21 meeting but directed the Engineer Advisors for each state to meet and again attempt to agree. At issue is about 30,000 acre feet of NM and CO credit water (CO share is 2,000 acre feet) that the U.S. Bureau of Reclamation released to TX farmers from Elephant Butte Reservoir during the 2011 irrigation season and replaced with inflows later in the year, without the permission of NM and CO. TX is insisting on an accounting that does not recognize that credit water was released and that, in NM and CO's view, violates the terms of the Compact. In August 2011, NM sued the Bureau over the release and related issues.

The Engineer Advisors for each state met as the Commission directed, but were again unable to agree on an accounting. The Engineer Advisors expect to call a special meeting of the Commission to attempt to resolve this issue.

DEFENSE OF THE COLORADO RIVER SUBUNIT

9. 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, as well as the High Flow Experimental Protocol and the Non-native Fish Control Environmental Assessments and related Findings of No Significant Impact.
- 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/consultation on intrastate water rights administration in 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

10. 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 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. Farmers sought to delay the appeal and the CWCB objected because: (1) there is no rule allowing stays for appellate court cases; (2) the stay was dependent on a ruling that could have taken years to receive; (3) the appellate court lacked jurisdiction over the matter. The CWCB informed Farmers that it would seek attorneys' fees to answer the motion to stay, but Farmers filed it nonetheless and the CWCB opposed it. The appellate court denied the stay. Farmers agreed to pay the CWCB's attorneys' fees and the case was dismissed by the appellate court after the parties filed a joint motion to dismiss.