



**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

November 5, 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. Water Division 3 Subdistricts

Trial regarding the appropriateness of Subdistrict No. 1's Annual Replacement Plan as approved by the State Engineer took place October 29 and October 30. Objectors waived all but two claims for trial based on pre-trial rulings of the Court. The only two issues tried were the use of Closed Basin Project water as a replacement source in the ARP and the inclusion of wells with augmentation plans in the ARP. In addition to presenting evidence on these issues, the State and Supporters of the Plan presented evidence on the development, consideration, and approval of the ARP. State Engineer Dick Wolfe testified. The Objectors to the ARP did not present a case.

Supporters and Objectors will submit to the court by December 7 their separate proposed findings of fact and conclusions of law.

2. Rio Grande Compact Accounting Dispute and Litigation

The Rio Grande Compact Commission did not approve an annual delivery accounting at its March 21<sup>st</sup> meeting. 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.

In August 2011, NM sued the Bureau over the release credit water and related issues. In August 2012, NM filed a motion for summary judgment, asserting the Rio Grande Compact precluded Reclamation for exercising discretion to make releases from Elephant Butte contrary to recommendations made by the Commission. In an effort to preserve the state's interest without

provoking an interstate dispute, the AG's office filed a one-page amicus notice (instead of motion to intervene), noting that decisions in this case implicate Colorado's interest in the Compact and credit water under the Compact, and that we support the arguments asserted by New Mexico. Texas has since indicated that they may move to intervene, which in turn would force Colorado to be directly involved as well.

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

In this original action, Kansas asserts that Nebraska has willfully violated the Republican River Compact, and requests the Court to compel compliance and impose sanctions/damages. Trial for this interstate water case was held at the federal courthouse in Portland, Maine between August 13th and 18th. The parties submitted post-trial briefs on September 24<sup>th</sup> and responses to each other's briefs on October 15<sup>th</sup>. The parties are awaiting a decision from the Special Master. Additionally, the annual meeting of the Republican River Compact Administration Committee was held in Junction City Kansas on October 16, 2012. During the meeting, the states discussed Colorado's Compact Compliance Pipeline and how to account for releases from the pipeline in determining Colorado's compliance with the Compact. Colorado intends to present resolutions regarding the pipeline to the Committee for its approval in the near future.

4. 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.

DEFENSE OF THE COLORADO RIVER SUBUNIT

5. 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 on Studies for Water Bank Feasibility and Blue Mesa Water Banking;
- Coordination with the Basin States to prepare an alternative for 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; and
- Coordination and consultation with the Bureau of Reclamation and the seven Colorado River Basin states in the development of the Colorado River Basin Study.

Specific negotiations with respect to Colorado River matters:

6. Treaty Minute 319

The US and Basin State representatives continue to work with Mexico representatives to develop language for a Minute 319 that addresses shortage sharing, temporary surplus sharing, salinity, environmental water, and infrastructure efficiency projects that would conserve and/or create new water supplies for both the US and Mexico. In addition to the Minute, the domestic representatives are preparing the necessary implementation agreements among the US, States, and IBWC. It is unclear still whether agreements will be approved and finalized by the December 1 deadline, when a new administration takes over in Mexico. Nonetheless all parties are working toward that goal.

WATER RIGHTS MATTERS

7. Applications for Water Rights of Montrose County (Consolidated Case Nos. 10CW164, 165, 166, 167, and 169)

The Applicants and the CWCB signed a stipulated settlement that allowed the Applicants to obtain conditional water rights for storage that would include recreation and piscatorial uses within the reservoir and piscatorial, but not recreational uses, below the reservoir. Water released from storage in the Montrose County Reservoirs for water quality and piscatorial purposes will not exceed the rate necessary to bring the flow up to the then-applicable rate of flow of decreed downstream CWCB instream flows and will be used within the stream reaches for present or future instream flow rights in Montrose County.

8. In re Application of Parkville Water District, 09CW149, Water Division No. 2

The Applicant, Leadville's municipal water provider, applied to change its point of diversion for its water supply. Parkville Water District previously took a portion of its water supply from an abandoned mining tunnel that discharged a steady flow of water at a steady (relatively warm) temperature. The discharged mine water was clean and tributary to the upper Arkansas River. The warm water allowed Parkville to provide water service through its municipal system throughout the winter, when use of its other surface water supplies had previously frozen multiple water pipes throughout the town. However, the mining tunnel collapsed several years ago and the discharge dwindled to a small trickle that contained silt and other sediment.

In conjunction with research completed by Assistant Attorneys General on Parkville's options to continue diverting water supply from the collapsed tunnel, Parkville proposed to drill a well into the collapsed tunnel into the bedrock and divert its water right through the well. Parkville completed the engineering analysis and filed the application in 2009.

After several revisions to the decree, Parkville agreed to add protective terms and conditions to ensure no injury to the CWCB's instream flow right on the East Fork of the Arkansas River, and Parkville agreed to contract for replacement water to augment out-of-priority well depletions. A site visit demonstrated Parkville's substantial progress on its new well and pipes connecting the new point of diversion to Leadville's water treatment system. Parkville's decree lessens the risk of frozen pipes in the winter and ensures that Leadville's municipal water supply will serve its customers throughout its harsh winters and that operation of the well will not injure the CWCB's instream flow right on the East Fork of the Arkansas River.