



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

January 9, 2013

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 on challenges to Subdistrict No. 1's first Annual Replacement Plan as approved by the State Engineer took place October 29 and October 30. The trial was truncated to address 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. On December 7 the parties submitted to the Court their separate proposed findings of fact and conclusions of law, and they await the Court's ruling.

2. Water Division 3 Groundwater Use Rules

The State Engineer and the Attorney General's Office have resumed developing groundwater use rules for Water Division 3 and will likely present a final draft of the rules to the San Luis Valley Rules Advisory Committee early next year. The most challenging work remaining to be done is deciding the extent to which individual water users must contribute to the sustainability of the aquifer from which they are diverting.

Now that the trial on challenges to Subdistrict No. 1's first Annual Replacement Plan has concluded, the Rio Grande Decision Support System peer review team has resumed its work on developing response areas and response functions for the entire groundwater model domain (the San Luis Valley). Finalizing these response areas and response functions is a prerequisite to promulgating groundwater use rules. The team met in December and will meet again in January.

Finally, in November the State Engineer published a draft policy aimed at more effectively holding ground water users to the volumetric limits of their well permits to reduce draft on the aquifer. The public comment period is over, but the State Engineer's office continues to meet with water users and other interested parties who have concerns about the proposed policy.

3. Rio Grande Compact Accounting Dispute and Litigation

The Rio Grande Compact Commission did not approve an annual delivery accounting at its March 21, 2012 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 of 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 developing an protracted 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 interpretation in general and credit water under the Rio Grande Compact in particular, and that we support the arguments asserted by New Mexico. The Court has not yet indicated whether it will accept Colorado's amicus information. This litigation is likely to be affected by Texas' recent filing of the Rio Grande Compact Litigation (see below).

4. Rio Grande Compact Litigation

On January 8, 2013, Texas filed a Motion, Complaint and Brief with the U.S. Supreme Court against New Mexico and Colorado concerning Compact interpretation and administration. In its Complaint, Texas asserts that New Mexico is violating and frustrating a primary purpose of the Rio Grande Compact because it is depleting surface water flows that should flow to Texas via groundwater pumping downstream of Elephant Butte Reservoir and interfering with the storage of usable water that should be intended for Rio Grande Project release. Texas does not allege any claims against Colorado, and instead notes that Colorado is named in the lawsuit because we are a signatory to the Compact. However, because of the claims asserted, Colorado's interests are directly implicated.

5. 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 Special Master has announced that he will issue a draft ruling by January 9, 2013. He has scheduled a hearing on January 24, 2013 to discuss the draft decision. Scott Steinbrecher from the Attorney General's Office and Mike Sullivan from the Division of Water Resources will attend the hearing.

6. Animas La Plata Project – Ute Water Rights Settlement

The State Engineer is in the process of developing an administrative protocol for the A-LP water rights. CWCB is a member of the A-LP Association with rights to A-LP water and also serves as the policy branch for managing water from the A-LP for compact purposes. In this dual role, the CWCB has joined in comments to the State Engineer's Administrative Procedures and will assist to the extent practicable in facilitating discussions among the stakeholders and State Engineer to the extent practicable to finalize these procedures.

The Tribes and United States agreed to extend the Court's retained jurisdiction over the tribal change cases for a limited time - until August 30, 2012 – and the Court granted our stipulated motion on December 20. We are now focused on using the next eight months to negotiate a stipulation that ties up the loose ends in the Water Rights decrees so that the water court can find conclusively that the changes to the tribal decrees do not cause injury.

7. Arkansas River Compact Administration

The annual ARCA meeting, held in Garden City, KS on December 5-6, was uneventful. Kansas agreed to our request to prioritize in this coming year talks to resolve its 2008 list of compact-related concerns about the Colorado water court decrees that changed the Lower Arkansas Water Management Association's water rights to well-augmentation purposes.

DEFENSE OF THE COLORADO RIVER SUBUNIT

8. 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 Secretary of the Interior creating a Leadership Forum on Colorado River issues that includes stakeholders other than those with entitlements to water supply;
- Legal and policy implications regarding the Aspinall Unit Operations FEIS;
- Legal and policy implications associated with a potential Arizona Settlement with Navajo and Hopi concerning the Little Colorado River;
- 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 7-Basin States on Response to Planned High Flow Experiment Pursuant to the HFE Protocol.
- 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 and finalization of the Colorado River Basin Study.

9. Litigation

On January 4, 2013, the U.S. Supreme Court granted certiorari in *Tarrant Regional Water District v. Hermann*, involving interpretation of the Red River Compact between Texas, Oklahoma, Louisiana and Arkansas. Specifically, the Supreme Court will decide on:

- (1) Whether Congress’s approval of an interstate water compact that grants the contracting states “equal rights” to certain surface water and – using language present in almost all such compacts— provides that the compact shall not “be deemed . . . to interfere” with each state’s “appropriation, use, and control of water . . . not inconsistent with its obligations under this Compact,” manifests unmistakably clear congressional consent to state laws that expressly burden interstate commerce in water; and
- (2) Whether a provision of a congressionally approved multi-state compact that is designed to ensure an equal share of water among the contracting states preempts protectionist state laws that obstruct other states from accessing the water to which they are entitled by the compact.

As a headwaters state, Colorado relies on nine interstate water compacts to provide security and certainty in the availability and administration of water within its borders. Depending on how the Supreme Court decides application of the Dormant Commerce Clause to state water laws as a result of compact interpretation and the actual interpretation of the compact to decide whether state water law is preempted, Colorado’s interests in interstate water compacts could be directly implicated. Accordingly, the Attorney General’s Office is strategizing on how best to participate as *amicus curiae* (*friend of the court*) in this case.

WATER RIGHTS MATTERS

10. Application of Norwood Water Commission, 10CW202, Water Division No. 4

Applicant Norwood Water Commission applied for conditional water storage rights, conditional direct flow rights, and a change of a senior conditional water right, in order to provide a reliable water supply for future growth. CWCB and several other parties, including the State and Division Engineers, filed statements of opposition to ensure that the claimed rights were not speculative or injurious to vested water rights. The case had been at a relative standstill pending the outcome of applications of Montrose County for related water rights. After the Montrose County cases concluded, Applicant began extensive negotiations with several opposers. CWCB and the State and Division Engineers worked with Applicant to develop “reality check” provisions to ensure that the water rights would not become speculative, and other terms and conditions to prevent expansion of the changed senior water right. The State and Division

Engineers stipulated to a draft decree on December 3, 2012, and CWCB stipulated to a slightly revised version of the decree on December 21, 2012. Though the case remains set for trial, most of the major issues have been resolved, and settlement is likely.