



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, 2015

TO: Colorado Water Conservation Board

FROM: Cynthia H. Coffman, Attorney General
Karen Kwon, First Assistant Attorney General
Susan Schneider, First Assistant Attorney General

RE: Report of the Attorney General

FEDERAL & INTERSTATE MATTERS

1. Rio Grande - Texas v. New Mexico and Colorado, No. 141 Original.

Texas filed this U.S. Supreme Court suit over the allocation of Rio Grande water, with claims against New Mexico for violation of the Rio Grande Compact. Colorado is named only as a compacting party. The case is now before Special Master Grimsal of New Orleans. The Special Master is scheduling oral argument on New Mexico's motion to dismiss for some time in August. Although it did not participate in briefing the motion, Colorado was granted leave to participate in rebuttal to the extent its compact interests or interstate compact jurisprudence is implicated during the argument. The U.S. has intervened in the suit as the operator of a Bureau of Reclamation project. Additionally, the two irrigation districts served by the Reclamation project have both filed motions to intervene. One motion to intervene has been referred to the Special Master, while the other is still being briefed.

The Unit also continues to coordinate with the Division of Water Resources and other client agencies to determine the State's legal strategy and to outline Colorado's overall approach to the litigation, assuming it moves forward. Currently, this entails fleshing out the details for contracting with various experts, coordinating with Texas and New Mexico on apportioning responsibilities for Special Master costs and fees, and advising Colorado's Commissioner on next steps during Rio Grande Compact Commission meetings.

2. Groundwater Rules

Following years of extensive modeling and fine-tuning, the State Engineer publically announced the Rio Grande Support Decision System Groundwater Model is sufficiently refined in its current version for purposes of implementing the forthcoming groundwater use rules for Water Division 3. The State Engineer's meeting with the San Luis Valley Groundwater Rules Advisory Committee during the first part of May could be the last meeting before the rules are adopted.

3. Arkansas River – Compact matters

In April, Kansas submitted a letter to Mike King, Executive Director of Department of Natural Resources (DNR) and Dick Wolfe, State Engineer and head of (Division of Water Resources (DWR) raising concerns with application of SB212 –Stormwater Facilities Causing No Injury – in the Arkansas River basin. The Unit is coordinating with DNR and DWR to investigate the potential for conflict and address Kansas’ concerns.

4. Republican River -Colorado’s Compact Compliance Pipeline & Bonny Reservoir Disputes

Negotiations between Colorado and Kansas are beginning to focus on regional solutions to preserve groundwater levels in the Ogallala Aquifer. The States are exploring options to increase incentives for farmers to voluntarily cease irrigation in Colorado and Kansas. Kansas has requested to meet with John Stulp (Water Advisor to Gov. Hickenlooper) and James Eklund (Director of CWCB) among others during a meeting in Denver on June 15 or 16 to further discuss options for regional conservation plans. The States are also negotiating long-term approval of the Compliance Pipeline (CCP) and a plan to allow Kansas to store water in Harlan County Lake, Nebraska.

5. Republican River Compact Measurement Rules

The State and Division Engineers have proposed amendments to the Republican River Measurement Rules they adopted in 2008. The original rules require water users to install flow meters (or an approved substitute) on all wells within the Republican River drainage basin. The proposed amendments include additional wells excluded from the 2008 Rules.

6. Hutton v. Wolfe, et. al, 15CW3018

The Hutton Foundation recently filed claims for injunctive and declaratory relief against the Division of Water Resources, Parks and Wildlife and the Department of Natural Resources regarding administration of surface water (and alleged lack of administration of groundwater) in the Republican River basin. The Foundation also claims that the inability to de-designate the Northern High Plains Designated Basin is unconstitutional and that the Groundwater Management Act, to the extent it is used to circumvent prevention of injury to surface water users, is also unconstitutional. As part of the legal strategy for this case, the Unit coordinated with counsel for Parks and Wildlife to file a joint Answer to the administrative and constitutional claims on April 17. The Unit also filed a Motion to Dismiss the Department of Natural Resources as a party in this action, and a Motion for Joinder that asks the Court to order Plaintiff to identify and serve all indispensable parties (all well owners in the designated Basin who would incur significant expense if they are forced to administer in priority with surface water rights). Plaintiff’s responses to these motions will be due this month.

7. Colorado River - Contingency Planning

Contingency planning in the Upper Basin continues to focus on preparing for the low probability but high risk associated with reservoir storage going below minimum power pool at Lake Powell. Technical and legal personnel from the CWCB and Unit continue to lead and participate in meetings with representatives from the other Upper Division States, Upper Colorado River Commission, Department of the Interior, Western Area Power Administration and interested stakeholders as appropriate to help the Commission develop plans for: (1) expanding weather modification operations; (2) extending operation at the initial units authorized by the Colorado River Storage Project (CRSP) Act; and (3) exploring the feasibility of implementing a demand management program for conserving water for the benefit of the system. To this end, the Bureau of Reclamation has confirmed via modeling the utility of extended CRSP reservoir operations to preserve minimum power pool at Lake Powell. The Unit is currently preparing a Draft Memorandum of Agreement for State and Commission to consider that addresses the terms that both the Department of the Interior and Commission would support to determine whether and when to extend reservoir operations, and what processes and operations to implement to accomplish such operations.

8. System Conservation Pilot Program

The Unit has coordinated with CWCB staff and Upper Colorado River Commission to prepare draft documents and agreements for the Commission to consider when deciding whether and how to assist in implementing a system conservation pilot program in the Upper Colorado River Basin. At the Commission's direction, the Unit and CWCB drafted and coordinated finalization of an agreement on the goals, purpose and roles of the parties. This agreement has been approved as to form and is currently before the necessary boards and Commissioners for final approval. The Unit is also coordinating the Commission, CWCB and advisors to Colorado to develop a Request for Proposal that will solicit interest in project participation. Assuming these antecedent activities will be finalized in early May, the Unit is also coordinating with funding entities and interested stakeholders to identify sources for administrative funds and to outline the legal, political and technical considerations that must be addressed for the program be implemented successfully in Colorado.

The pilot program, which is funded by Denver Water, the Southern Nevada Water Authority, the Central Arizona Water Conservation District, the Metropolitan Water District of Southern California, and the Bureau of Reclamation, is intended to explore and learn about whether demand management (voluntary, compensated reduction of consumptive use for a temporary period) could be a viable method to protect critical water levels at Colorado River storage facilities (i.e., Lake Powell and Lake Mead). Specific pilot projects in the Upper Basin could potentially involve compensating water users (municipal, industrial and agricultural) for affirmative efforts taken to temporarily reduce consumptive use of Colorado River water to learn whether a combination of such efforts could positively impact the Colorado River system and storage at Lake Powell.

While the Pilot Program is not formally part of the Upper Division States' drought contingency planning effort, the Commission recognizes that the Program may help provide critically important information related to the feasibility of demand management for the Upper Division States to consider. Recognizing that there are a number of legal, technical and policy matters to consider in implementing the Pilot Program in the Upper Basin, the Unit is coordinating the effort to research the legal issues and advise the Commissioners on the opportunities and risks associated with this process.

9. Treaty Minute 319

In November 2012, the United States and Mexico entered into a Minute to the 1944 Water Treaty. The Minute includes voluntary mechanisms for Mexico sharing in shortages and surpluses on the Colorado River, storing water in United States facilities, providing flows to sustain environmental resources, and other related topics. Since its execution, the parties have successfully implemented the environmental pulse flow and established work groups to explore opportunities for system efficiency projects that can benefit both countries. The Minute is set to expire in December, 2017. The United States, 7-Basin States and Mexico are preparing for a workshop in May to discuss the lessons learned in implementing Minute 319 and exploring opportunities for developing a new Minute. The Unit is directly involved in this planning process and will likely continue to advise Colorado and the Upper Colorado River Commission on any future negotiations.

10. Southwestern Water Conservation District, 13CW3011, Water Div. 3

In this case, Southwestern has applied to the Water Court for a decree confirming that a portion of its water rights have been made absolute and that the remaining water rights should be continued as conditional. The water rights are associated with the Animas-LaPlata Project (Project). This Project serves to provide water to the Southern Ute and Ute Mountain Ute tribes in Colorado as well as entities and the Navajo Nation in New Mexico. The CWCB also holds right to water stored in the Project. The CWCB and Division of Water Resources (as well as other parties) have stipulated with Southwestern to make a portion of the ALP water rights absolute. The Water Court recently ruled on motions concerning scope of discovery and the legal determination of diligence for conditional water rights. Because the parties have been unable to make significant progress towards a stipulated settlement on the remaining conditional water rights, they have agreed to pursue mediation. A telephone conference has been scheduled for May 5 with potential mediator and former water court judge, John Kuenhold.

Endangered Species Act Issues

11. Gunnison Sage Grouse

In January, two environmental NGOs (Center for Biological Diversity and WildEarth Guardians) filed separate suits in federal court in the District of Colorado challenging the Fish and Wildlife Service's decision to list the Gunnison sage-grouse as threatened instead of endangered. On February 10, Colorado filed its own complaint against the FWS, also in the District of Colorado, arguing that the Gunnison sage-grouse does not warrant protection under the ESA and should not

have been listed. Colorado also challenged the designation of critical habitat on the ground that FWS designated unoccupied and unsuitable habitat without fulfilling the statutory prerequisites for doing so. The Gunnison County and the Gunnison Stockgrowers Association has moved to intervene in the WildEarth Guardians case. Thus, there are currently three cases involving multiple parties against the United States regarding designation of the Gunnison Sage Grouse.

The Center for Biological Diversity filed an amended complaint on April 20 to challenge a relatively new interpretive policy that FWS relied upon in deciding to list the Gunnison Sage Grouse as threatened rather than endangered. It is known as the “significant portion of the range policy.” A procedural component of the policy arguably steers FWS toward threatened rather than endangered listings in certain factual situations. The Center for Biological Diversity brought the claim in this case because they believe the Gunnison Sage Grouse listing was directly impacted by the policy they are challenging.

On April 22, the State filed a supplemental 60-day notice of intent to sue to Secretary Jewell and FWS Director Dan Ashe regarding a claim under section 4(i) of the ESA, stating that FWS had violated the ESA by failing to respond, in a separate document (other than the Final Rule) to all of the State’s comments regarding the proposals to list the Gunnison sage-grouse and designate critical habitat for it. Following the 60 day period, the State plans to file an amended complaint stating the 4(i) claim. In conferences with counsel for the other parties, the State agreed to file the amended complaint on or after June 22, and agreed to extend Federal Defendants’ deadline to file an answer in the State case until 3 weeks after the amended complaint (i.e., July 13).

The parties have also begun negotiating over case management issues, including a deadline for the administrative record and briefing dates. On April 29, Judge Kane ordered the parties to negotiate a Joint Case Management Plan in the WildEarth Guardians case. The State has not yet intervened in that case, but once all three of the Gunnison sage-grouse cases are consolidated, Colorado will be part of case management negotiations regardless whether it has intervened in the NGO cases yet. The parties filed a joint motion to consolidate on April 30.

WATER RIGHTS MATTERS

12. Opposition of the CWCB to the Application of K2 Family Property LLC and K2 Family Property Deux LLC in Case No. 13CW3105-5.

K2 Family Property applied for a conditional storage right, a conditional underground water right, a plan for augmentation and an appropriative right of exchange to augment storage rights for a pond and water feature on its property. The replacement water will be provided by the underground water right and a Basalt Water Conservancy District contract. The CWCB filed a statement of opposition to protect its instream flow water rights on Maroon Creek and the Roaring Fork River, and has since entered a stipulation to a proposed decree that contains terms and conditions that will prevent injury to those instream flow water rights.

13. Farmers Water Development Company v. Colorado Water Conservation Board, Case No. 13SA173 & 11CW129 (Water Division 4).

In a decision published in April 2015, the Colorado Supreme Court affirmed the Division 4 water court's holding that the Colorado Water Conservation Board's decision to appropriate of an instream flow water right is a quasi-legislative action that does not constitutionally require full procedural due process protections. The Supreme Court's decision affirms the CWCB's decree for an instream flow (ISF) water right for a segment of the San Miguel River in southwestern Colorado.

Beginning in 2009, Farmers Water Development Co. (FWDC) challenged the CWCB's appropriation of the ISF, contesting the appropriation, along with numerous other opponents at an administrative hearing before CWCB on the proposed ISF. After the hearing, the CWCB voted to approve the appropriation in the amounts recommended by CWCB staff. During the water court proceedings to adjudicate the appropriation, FWDC and the CWCB filed competing cross-motions for summary judgment. FWDC argued that the CWCB's administrative appropriation was a quasi-judicial proceeding, requiring full due process protections (notice and hearing), because an opponent to an ISF is not afforded a statutory right to a de novo trial on the CWCB's "three determinations" it makes under 37-92-102(3)(c). By statute, the CWCB makes those determinations (natural environment exists, would be preserved to reasonable degree by CWCB's appropriation, and could exist without injury to other rights) at an administrative level, and the water court reviews those findings based on the state Administrative Procedures Act. Upon FWDC's challenge to the CWCB's process on constitutional grounds, the water court held that the CWCB's determination to appropriate an ISF water right is a quasi-legislative decision not subject to the same constitutional due process requirements as a quasi-judicial decision. FWDC appealed.

In a unanimous opinion authored by Justice Allison Eid, the Supreme Court held that "when the CWCB decides to make an ISF appropriation, it acts in a quasi-legislative capacity," because the CWCB's ISF appropriation "is a policy decision to preserve the natural environment on behalf of the people of the state of Colorado." The opinion closely tracked the language and argument of the CWCB's brief on these issues, and affirmed many principles from previous Colorado Supreme Court decisions on the ISF program. The decision affirms the constitutionality of the CWCB's administrative process for appropriating contested ISFs, and will be important precedent as the CWCB begins this summer moving forward on 5 contested 2015 ISF appropriations across the State.