

CYNTHIA H. COFFMAN
Attorney General

DAVID C. BLAKE
Chief Deputy Attorney General

MELANIE J. SNYDER
Chief of Staff

FREDERICK R. YARGER
Solicitor General



STATE OF COLORADO
DEPARTMENT OF LAW

RALPH L. CARR
COLORADO JUDICIAL CENTER
1300 Broadway, 10th Floor
Denver, Colorado 80203
Phone (720) 508-6000

Office of the Attorney General

September 2, 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

This U.S. Supreme Court case over the Rio Grande has moved to the next procedural stage. The Special Master heard oral arguments in New Orleans about both New Mexico's motion to dismiss the complaints of Texas and the United States and the motion by Elephant Butte Irrigation District to intervene in the litigation. New Mexico's motion is based on the premise that the Rio Grande Compact contains no express provisions covering the allegations made by either the U.S. or Texas. The Compact does have a water delivery requirement into Elephant Butte Reservoir, but is silent on New Mexico's obligations, if any, after that point. Once water is delivered to Elephant Butte Reservoir, the U.S. allocates water to two irrigation districts within the Bureau of Reclamation's Rio Grande Project. The alleged injuries all stem from actions or omissions revolving around Rio Grande Project water below the reservoir. Both irrigation districts have moved to intervene based on their Project interests. EBID's motion was heard this month, while El Paso County Water Improvement District No. 1's motion is waiting referral to the Special Master from the Court. The Special Master gave no indication of when the parties may expect rulings.

2. Division 3 - Groundwater Use Rules

Per court decisions and legislative directives regarding groundwater use in the San Luis Valley, the State Engineer and interested stakeholders have been working over the past decade to study the area's complex hydrogeology and develop a regional groundwater model that determines the impact of well pumping on streams. In May, 2015 the State Engineer announced that the model created is sufficiently refined for purposes of implementing new groundwater use rules in the San Luis Valley (for Water Division 3). On August 5, the State Engineer released the final response functions associated with the model to be used to determine stream depletions caused by groundwater withdrawals. Also on August 5, the State Engineer released the latest draft of the rules, which is the final version for public comment. The Unit is assisting the State Engineer Office in reviewing public comments and making final edits to the rules. The rules, which are

expected to be promulgated later this year, will require well users to replace stream depletions caused by their wells that injure senior surface water rights. They will also require achieving and maintaining sustainable water supplies in most of the aquifers of the San Luis Valley.

The Unit also continues to participate with representatives from the Division of Water Resources in working groups aimed at informing water users about administration under the forthcoming groundwater rules. As part of the groundwater administration framework, subdistricts of the Rio Grande Water Conservation District will have the opportunity to develop Annual Replacement Plans approved by the state engineer to help ensure the subdistricts have the water supplies and financial ability to meet their well users' obligations to owners of senior surface water rights. This is a novel approach to groundwater management that will require the cooperation of all groundwater users in the San Luis Valley. The RGWCD is currently progressing on establishing subdistricts, and the Water Division 3 office recently added a specialized position to coordinate the office's work (with the advice of the Unit) with the other subdistricts that may soon form.

3. 2J Ranches 15CW3008

In this declaratory judgment action, Plaintiff challenges the forthcoming Division 3 groundwater use rules and how the groundwater model is used for purposes of the rules. As it is a premature challenge to the rules that have yet to be promulgated, it should be dismissed. The Unit is working with intervenor water user groups to secure a timely dismissal.

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

The Hutton Foundation seeks injunctive and declaratory relief against the Division of Water Resources, Parks and Wildlife and the Department of Natural Resources for administration of surface water (and 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. The Unit moved to dismiss DNR and to have the Foundation join 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). The court has granted both motions. The Foundation recently filed a motion for reconsideration of the order granting the Motion to Join or, in the alternative, to allow service by publication, to which the Unit has responded. Briefing was complete on August 28, 2015 for this motion and is now awaiting the court's determination.

5. Republican River - Colorado's Compact Compliance Pipeline (CCP) and Bonny Reservoir Disputes

Negotiations between Colorado and Kansas continue to progress. At the annual meeting of the Republican River Compact Administration (RRCA), Colorado again approved temporary changes to the RRCA Compact Accounting that allow Kansas to store water in Harlan County Lake, Nebraska, for exclusive use by Kansas water users. As part of those negotiations, Kansas and Colorado developed a framework to approve operation of Colorado's Compact Compliance Pipeline in 2016. The Kansas Secretary of Agriculture has assured Colorado's State Engineer

that Kansas would work with Colorado to approve prior to November 1, 2015. These developments demonstrate significant good-will between the states and demonstrate the trust that has been developed over the past year of negotiations.

6. Republican River Compact Measurement Rules

The State and Division Engineers have proposed amendments to the Republican River Measurement Rules that 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 would have included 300 wells that were excluded from the 2008 Rules. In response to objections from the East Cheyenne Groundwater Management District, the Engineers agreed to exclude from the amended rule, approximately 90 wells located within the East Cheyenne Groundwater Management District. In exchange, East Cheyenne agreed to adopt and enforce its own rules that are nearly identical to the State's proposed amendments. In accordance with the stipulation between the Engineers and East Cheyenne, East Cheyenne promulgated and adopted its rules in June and hired staff to enforce its rule. An uncontested rulemaking hearing is scheduled for September 10, in Burlington, Colorado.

7. Upper Colorado River Basin System Conservation Pilot Program

The Upper Basin System Conservation Pilot Program has been established to, among other things, learn from and evaluate the feasibility of implementing system conservation to protect critical levels at key reservoirs in the Upper Colorado River Basin. In May, the Upper Colorado River Commission and Funding Partners (Denver Water, Southern Nevada Water Authority, the Metropolitan Water District of Southern California, Central Arizona Water Conservation District, and Bureau of Reclamation) entered into a Facilitation Agreement for implementing the program. In June, representatives from the funding agencies and UCRC met to review applications to participate in the pilot program for 2015, and to make recommendations to the UCRC Commissioners for selection and approval. In early July, the Commissioners collectively approved the recommendations, which included projects in both Wyoming and Colorado, and both the Wyoming and Colorado Commissioners noted no objections. Following this approval, the UCRC staff issued Letters of Intent to ten applicants expressing interest in entering into agreements for program participation. Since that time, the UCRC, through its subcontractors and representatives from the Upper Division States, have coordinated contracting documents among the Funding Partners and water users for seven of the ten projects. Contracts, Funding Agreements, and Verification Plans have been negotiated and fully executed for two Colorado projects. Similar documentation for five Wyoming projects is ready for execution following final review by the water user. Three additional Colorado projects are in the process of negotiating document provisions to be applicable to the unique characteristics of each project. Wilson Water Group and the Bureau of Reclamation are assisting the UCRC in implementation and verification of project activities. Administrative costs associated with this program are to be funded via a grant from Reclamation, which is anticipated to be issued in the very near future. Depending on the success of this round of projects, another round of RFPs will be initiated in November 2015 for implementation in 2016.

8. Mexico Minute 32X Development

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 2017.

The United States, 7-Basin States and Mexico met with Mexico in San Diego on May 14, 2015 to provide an update on the progress of Minute 319 implementation and kick off discussion of the process for negotiating the next Minute. At that meeting, the parties agreed that the goal should be to have a draft minute finalized by summer 2016 and ready for execution by the end of 2016. On June 22, a joint US-Mexico meeting of the Minute 32X Negotiating Group was held in Juarez, Mexico to further review the progress of Minute 319 implementation and to identify a process for negotiating another Minute by summer of 2016. At the meeting, the Negotiating Group discussed the “Framework” for negotiations. The two countries have since met again on August 13, 2015 to better understand country and stakeholder goals, needs and objectives.

The state representatives on the Negotiating Group are working to determine terms for the next Minute that are acceptable to the states including issues like: how long this Minute will last; salinity; Mexican storage of water in US facilities; support for projects in Mexico; and environmental provisions (among other things). The Unit is involved in this planning process and US/Basin State negotiations and will support the Upper Basin negotiating team in the months to come.

9. Glen Canyon Dam Long Term Experimental Management Plan EIS

The Department of the Interior, through the Bureau of Reclamation and the National Park Service, is preparing an environmental impact statement for the adoption of a long-term experimental and management plan for the operation of Glen Canyon Dam (Lake Powell). The EIS is intended to evaluate dam operations and provides the basis for decisions that identify management actions and experimental options that will provide a framework for adaptively managing Glen Canyon Dam over the next 15 to 20 years. The 7 Basin States initially submitted a proposed alternative on July 2, 2012, called the Resource Targeted Condition Dependent alternative (RTCD). Over the past year, much time has been spent among the Basin States and DOI to identify the potential for a “consensus hybrid alternative,” which generally melds components and aspects of the Basin States’ RTCD alternative and DOI’s proposed alternative CDAS. The Basin States and DOI have not yet reached consensus on a preferred alternative.

As a cooperating agency, the Upper Colorado River Commission received an Administrative Draft of the EIS on Monday, June 29. Comments are due September 30, 2015. The Unit is working to review the document and numerous appendices to identify key issues for the UCRC to consider commenting on as a cooperating agent. The Unit and CWCB representatives will also continue to meet with DOI and the Basin States in September to further negotiate consensus alternative to include in the public draft for the EIS.

10. Southwestern Water Conservation District, 13CW3011, Water Div. 7

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). Over the last several months, the case has proceeded simultaneously on two different tracks: settlement and litigation. The parties attended mediation over two days in Ignacio, CO with retired Judge John Keunhold. The parties appeared to make significant progress toward settlement. However, they could not reach ultimate agreement in the timeframe allotted. The parties are trying to schedule another mediation session in September early. In the meantime, the parties are preparing for trial conducting numerous depositions of experts and parties in the case.

Endangered Species Act Matters:

11. Upper Colorado River Fish Recovery Program

Representatives from the Unit, CWCB, and CPW attended a management committee meeting of the Upper Colorado River Endangered Fish Recovery Program in August. During the meeting, participants expressed continued uneasiness with the draft Colorado pikeminnow recovery plan, and more generally, with the standards that FWS will use for downlisting any of the four fish species. As a first step to addressing these concerns, the Recovery Program is having a population viability analysis prepared, and hopes to have it completed by late 2015. The Unit will continue to monitor and advise the state agencies as needed.

12. In re: Gunnison Sage-Grouse Endangered Species Act Litigation (State of Colorado v. US Fish & Wildlife Service)

August 3rd was the cutoff date for new parties or claims to be added to the consolidated Gunnison sage-grouse litigation. The initial parties were the State of Colorado, Center for Biological Diversity, WildEarth Guardians, Western Watersheds Project, and the federal defendants. Intervenor now include Gunnison County, the Gunnison County Stockgrowers, the State of Utah, and Utah's San Juan County. FWS has postponed the date for producing the administrative record until mid-September. We anticipate briefing will be complete by mid-2016.

13. Greater Sage-grouse

At the end of May, BLM issued statewide sage-grouse conservation rules for each of the 11 western states where the Greater sage-grouse is found. BLM needs to have these plans in place in order for FWS to issue a "not warranted" decision for Endangered Species Act protections for the greater sage-grouse on September 30. A number of states, including Colorado, have filed formal protests against the plans, and Colorado is currently negotiating with BLM over the plan for management of greater sage-grouse in Colorado. It is also anticipated that a final decision on the state plans will be published by mid-September, with an announcement regarding whether the species warrants protection under the ESA to be made on September 30.

WATER RIGHTS MATTERS

14. Instream Flow Appropriations on the South Fork Purgatoire River (Case No. 09CW88) and Purgatoire River (09CW90), Water Division 2.

On August, 24, 2015, the CWCB signed stipulations with the only remaining objectors to its two applications for instream flow water rights on the South Fork Purgatoire and Purgatoire River. The objectors, Pioneer Natural Resources USA and XTO Energy, are owners and operators of hundreds of coalbed methane (CBM) wells in the Purgatoire River basin. Pioneer/XTO also have pending an application in Case No. 10CW2 for a plan for augmentation to replace out-of-priority depletions associated with its CBM wells. The CWCB's ISF water rights, with a 2009 filing in water court, are senior to Pioneer/XTO's augmentation plan, and the CWCB is an objector to their Case No. 10CW2.

Negotiations between the parties on issues interrelated to all three cases began in 2011, culminating in late August 2015 in a global settlement of the CWCB's opposition to Pioneer/XTO's Case No. 10CW2, and Pioneer/XTO's opposition to the CWCB's Case Nos. 09CW88 and 09CW90. The parties agreed to extensive terms and conditions regarding Pioneer/XTO's depletions that pre-existed the CWCB's appropriations of ISF rights on the two reaches of the Purgatoire River. Pioneer/XTO pumped hundreds of its CBM wells in the decade before the CWCB's ISF appropriations, thus causing lagged depletions that will affect the CWCB's ISF reaches many decades into the future. Because the CBM wells are from very deep formations (but do not meet the definition of nontributary), the maximum depletion to the CWCB's ISF reaches caused by pre-ISF CBM well pumping will occur approximately 10-20 years in the future to the South Fork Purgatoire River ISF, and around 60-70 years in the future for the mainstem Purgatoire River ISF.

Pursuant to section 37-92-102(3)(b), the CWCB agreed that its ISFs are subject to the maximum depletion caused by pre-ISF appropriation CBM well pumping, based on a groundwater model that had been vetted and approved by staff of the State Engineer's Office. The parties negotiated detailed terms and conditions to be included in the 10CW2, 09CW88 and 09CW90 decrees, and stipulated to the entry of those decrees. The parties' agreement requires Pioneer/XTO to work with the CWCB in the future to either ensure that post-ISF appropriation depletions are replaced in time, location, and amount, or a suitable injury with mitigation project is developed and approved in consideration for the depletions to the ISFs. The parties' agreement will allow the CWCB to obtain its ISF decrees from the water court and thereby avoid a trial scheduled for November 2015. The CWCB has filed its stipulated proposed decrees for its ISF water rights in Case Nos. 09CW88 and 09CW90, and anticipates entry of the ISF decrees in September 2015.