

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

January 11, 2017

TO: Colorado Water Conservation Board

FROM: Cynthia H. Coffman, Attorney General
Karen Kwon, First Assistant Attorney General
Jen Mele, Acting 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

All parties and potential intervenors submitted comments to the Special Master's draft first report in late summer 2016. The Special Master notified the parties that the final version of his First Report, which decides Motions to Dismiss and Intervene, will be issued later this month. Upon review, the parties can determine whether to file exceptions to the First Report for the Supreme Court to consider. The case can still proceed concurrently with an Exceptions proceeding if the Special Master so desires. The parties also continue to explore the potential for settlement in the meantime, but there are no new developments to report.

2. Division 3 Ground Water Rules, 15CW3024

Trial of the State Engineer's proposed groundwater rules as filed in Water Division 3 is set for three months beginning on January 2, 2018. The Unit, in coordination with the Division of Water Resources, is conducting settlement discussions with more than 20 parties and preparing for trial as appropriate. The Unit currently attends settlement discussions in San Luis Valley monthly. We recently negotiated settlement with a significant party, and are close to settlement with several others. The most recent trip was held on December 14 when State Engineer Dick Wolfe and Deputy State Engineer Mike Sullivan met with the board of the Conejos Water Conservancy District. Concurrently, the case management order requires objectors to the rules to specify their protests so that the State Engineer can identify the scope of disclosures. Specific protest statements were filed on September 15, and the Unit worked with DWR to provide on expert disclosures by January 5, 2017. Finally, the Unit continues to participate with representatives from the Division of Water Resources in working groups aimed at informing water users about administration under the new groundwater rules.

3. Arkansas River Compact Administration

The ARCA held their annual meeting on Arkansas River matters on December 8 and 9. At that meeting, Kansas, Colorado and the Bureau of Reclamation identified and discussed ongoing progress regarding (1) 10 year review of the Trinidad Project; (2) Amendments to the Trinidad Operating Principles; (3) Permanent Pool for the Colorado Parks and Wildlife at John Martin Reservoir; (4) New storage at accounts at John Martin Reservoir; and (5) Ongoing progress to address matters of interstate concern within the Special Engineering Committee. The states and Administration acknowledged progress and identified next steps for the new year.

4. Republican River Compact Rules

The Unit has been coordinating closely with the State Engineer to develop draft rules for water diversion, use, and administration of water within the Republican River Compact Administration Groundwater Model Domain. The proposed rulemaking would likely require all water users within the model domain to offset impacts in excess of Colorado's apportionment under the Republican River Compact as determined under the Final Settlement Stipulation.

The State Engineer has formed a Special Advisory Committee to provide advice and recommendations on the rules. The committee has met frequently in Burlington, CO to discuss the proposed rules. The State Engineer recently produced a new version of draft rules for the committee to review. The State Engineer is currently receiving comments from interested parties. The Unit will work with the State Engineer's Office to consider and incorporate comments for consideration going forward. The next meeting is currently scheduled for February 9th.

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

The Unit represents the Division of Water Resources and the Republican River Compact Commissioner's interests in this case. It also has a separate attorney representing the Groundwater Commission. The Court has granted the Groundwater Commission's motion to dismiss two of the three claims for lack of subject matter jurisdiction. The Foundation has filed an appeal with the Supreme Court regarding the trial court's decision. The trial court has agreed to stay the remainder of proceedings until the appeal is resolved. Because the trial court's on the certification for appeal and stay had some ambiguous language, some defendants (not including the State Engineer) joined in a motion for clarification of the order. The court recently filed a decision explaining why no clarifying order is needed. The Unit will stay active as needed in the case to protect the interests of DWR, Groundwater Commission and the state respectively.

6. Audubon Society of Greater Denver v. United States Army Corps of Engineers, et. al, 14CV02749, D. Colo.

The parties previously briefed several issues related to Audubon's challenge of the Army Corps' decision under NEPA. The Department of Natural Resources supports the Corps. The Judge has not yet issued a decision in the case. Audubon is now worried that construction might begin before the Judge issues his ruling. Colorado DNR and the Intervenor provided an update on the

planned construction activities. Audubon has not yet indicated whether it will seek a restraining order to stop proposed activities that might occur before the Judge issues his opinion.

7. Upper Colorado River Basin System Conservation Pilot Program

Round 2 of the Upper Basin pilot program for 2016 has concluded. Efforts are underway to initiate Round 3. To this end, the Unit has completed an extension of the pilot program for another year and is in the process of evaluating lessons learned so that the Upper Division States can consider whether and how to establish a longer term demand management program for drought contingency in the future. This has involved negotiating and finalizing amendments to the Facilitation Agreement, coordinating completion and issuance of RFPs for new project proposals, and coordinating project funders and the Upper Colorado River Commission on funding and project selection criteria moving forward. Applications for round 3 include 12 applications from Colorado, 5 applications for New Mexico, 8 application from Utah, and 22 applications from Wyoming. The Unit is currently in the process of coordinating evaluation, review and approvals by the Upper Division States and funding entities for projects to be implemented in 2017.

8. Drought Reservoir Operations

At the request of the CWCBC, the Unit finalized a draft Memorandum of Agreement with the Upper Division States, Bureau of Reclamation, Western Area Power Authority, Fish and Wildlife Service and National Park Service on how to utilize storage from the Colorado River Storage Project's primary reservoirs (Glen Canyon Dam, Flaming Gorge, Aspinall Unit, and Navajo Reservoir) to maintain minimum power pool at Lake Powell. The purpose of this exercise is twofold: (1) to protect key operations at Lake Powell, including hydropower production and compact compliance in the face of extended drought consistent with existing laws and regulations for each facility; and (2) to preserve the Upper Colorado River Commissions' role in when and how to accomplish drought response in a manner that preserves collaborative relationships with federal agencies. Although the negotiating representatives have finalized a draft agreement, the decision to modify or execute the agreement is pending results of the Lower Basin's plans for drought contingency Plan and consensus terms for Minute 32x with Mexico. (See below).

9. Glen Canyon Dam Long-Term Experimental Management Plan – EIS

The Department of the Interior issued the Final Record of Decision for the Glen Canyon Dam Long-Term Experimental Management Plan in December 2016. This effort is the culmination of considerable effort within Colorado to consult with the Department of the Interior on next steps, including, but not limited to, the science plan and budgeting of experiments through the Adaptive Management Program as well as the content of the Record of Decision for the LTEMP. The Unit stands ready to monitor these processes to protect the state's interests as the LTEMP is implemented and Science Plan is finalized.

10. Mexico Minute 32X Development

The United States, 7-Basin States and Mexico continue to identify and discuss elements to be included in an updated agreement to Minute 319 of the 1944 Water Treaty. The goal has been to finalize a new Minute before the end of current federal administration in mid-January. However, the likelihood of achieving this goal is quickly dissipating. Among the obstacles in place are disagreement on what will trigger additional shortage sharing in response to drought contingencies, available funding to develop projects that aid in water conservation, terms of domestic agreements, uncertainty in the next administration, and consensus on drafting provisions. The Unit stands ready to provide counsel on legal and policy matters.

11. Colorado River Staffing

It is with heavy heart that Unit said goodbye to Shanti Rosset. She resigned as of January 6 to work on Colorado River matters in another capacity. We thank Shanti sincerely for her dedication, diligence and advocacy in sometimes very trying circumstances. We wish Shanti well and with true appreciation for her making the Basin better as a result of her representation on behalf of the State.

It is with lighter heart and great expectation that we welcome Amy Ostdiek as a new Assistant Attorney General for the Colorado River Subunit. With Shanti's departure, we tease that she is now the senior authority on the River. Seriously, Amy comes with great skills and interest and we look forward to bringing her along in the fun of protecting Colorado's interests in our namesake river.

ESA Related Matters

12. Center for Biological Diversity v. Sally Jewell (D. Colo.) (Rio Grande cutthroat trout)

On July 29, the Center for Biological Diversity filed suit against the Department of Interior and the US FWS challenging FWS's October 2014 determination that ESA protection for the Rio Grande cutthroat trout was not warranted. Colorado Parks and Wildlife's aquatic section has worked closely with NMDGF, ten Colorado counties, and federal land management agencies on a conservation strategy for the species, and FWS acknowledged in its not warranted decision that the multi-party conservation strategy was key to its decision not to list the trout. Federal defendants filed their answer on October 26. *Update:* On December 8, the court granted Colorado's motion to intervene, and on December 19 the parties filed an amended case management plan setting briefing dates. Unless there are challenges to the administrative record, Colorado's brief as defendant/ intervenor will be due April 24, 2017.

13. New Mexico Dep't of Game and Fish v. U.S. Dep't of the Interior (Tenth Circuit) (Mexican wolf)

The US Department of the Interior and defendant-intervenor environmental groups filed an appeal with the Tenth Circuit challenging a preliminary injunction issued by a district court judge in New Mexico halting further introductions of Mexican wolf pups into New Mexico until

FWS secured the required state permits. Briefing is now complete (Colorado filed a brief on behalf of 18 amici states). *Update*: Oral argument will be held before a panel of the Tenth Circuit on January 18. The State of Colorado will have 2-5 minutes of time to argue on behalf of the amici states.

14. Rocky Mountain Wild v. Walsh (D. Colo.) (Graham's and White River penstemon)

On October 25, 2016, a federal judge in the District of Colorado issued an order vacating a US Fish & Wildlife determination not to list two flowers as threatened or endangered under the ESA. The flowers – Graham's and White River beardtongue, or penstemon – are found exclusively in oil shale and tar sands formations in northwestern Colorado and northeastern Utah. FWS elected not to list the two flowers based on a 15-year conservation agreement reached in 2014 to protect the two species. The court found that the Conservation Agreement (a) was too speculative and (b) did not go far enough in protecting the flowers to support a decision not to list them under the ESA. The court also ordered the parties to meet and confer by February 2017 to attempt to strengthen the Conservation Agreement enough to satisfy ESA requirements. Colorado did not sign the original Conservation Agreement (and was not a party to the litigation), but plans to participate in the meet-and-confer to monitor the terms of any new agreement.

15. State of Colorado v. U.S. Fish & Wildlife Service (D. Colo.) (Gunnison sage-grouse)

The court has approved a schedule for merits briefing in this case challenging the "threatened" listing issued in 2014 for the Gunnison sage-grouse. Our opening brief is due February 17.

INTRASTATE MATTERS

16. Chatfield-Amendment to Purchase Agreement with Castle Rock

Castle Rock has requested that the CWCB amend the existing Purchase Agreement for reallocated storage space in Chatfield Reservoir to increase the number of Orphan Shares that Castle Rock is acquiring by the agreement. The existing Purchase Agreement gave Castle Rock the option to purchase up to 1300.339 total Orphan Shares from the CWCB. The amended agreement will allow Castle Rock to purchase a total of 1800 Orphan Shares from the CWCB. The remaining terms of the agreement, including the length of the option term and Castle Rock's commitment to pay all operations and maintenance fees for the entire optioned amount, are expected to remain the same as the original Purchase Agreement. CWCB staff will be asking the Board to approve this amendment to the Purchase Agreement at the January Board meeting.

17. Chatfield-Dominion Water and Sanitation District New Water Provider Purchase Agreement

The Dominion Water and Sanitation District is not currently a member of the Chatfield Reservoir Mitigation Company, which is comprised of the entities that

own reallocated storage space in Chatfield Reservoir. However, Dominion has approached the CWCB to purchase 500 Orphan Shares in the Chatfield Reallocation Project. Dominion would be the first new member to buy into the Chatfield Reallocation Project. Dominion and the CWCB staff expect the purchase agreement to be substantially similar to the Castle Rock purchase agreement. However, now that the Mitigation Company exists, there are several additional steps that the CWCB must take in order to sell the Orphan Shares. The CWCB staff will be asking the Board to approve the new sale of Orphan Shares to Dominion at the January Board Meeting.

18. Grand Valley Water Users, et al., v. Busk-Ivanhoe, Inc., Case No. 14SA303, Colorado Supreme Court

In this high-profile dispute between West Slope water users and the City of Aurora and various Front Range amici, the Supreme Court overruled the decision of the water court in Water Division 2 regarding the change of Aurora's trans-mountain water rights from irrigation to municipal use. On December 5, 2016, the Supreme Court released its opinion that: (1) the water court erred when it interpreted the water rights decree as allowing storage of the water on the East Slope prior to its decreed use for supplemental irrigation along the Arkansas River; (2) because storage of the subject water rights on the East Slope was unlawful, the water court erred in including the volumes of imported water paid as rental fees for storage on the East Slope in the quantification of the historical use of water rights for their changed purpose; and (3) the water court erred in concluding that it was required to exclude from the historical use analysis Aurora's 22 years of undecreed use for municipal purposes before seeking approval for the change of water right. The Court found the unjustified non-use of a decreed right should be considered when quantifying the historical use for change purposes. On December 19, 2016 Aurora filed a petition for rehearing, which was denied on January 9, 2017.