

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

March 9, 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

On February 9, 2017, the Special Master issued his Final First Report regarding New Mexico's Motion to Dismiss and the Irrigation Districts' Motions to Intervene with the U.S. Supreme Court. The Special Master recommends that the Motions be denied, with the clarification that the United States' involvement as a party is out of judicial convenience and not requirement as a Compact party. In arriving at this recommendation, the Special Master provided a detailed history of the Rio Grande Basin and law of the Rio Grande. It remains unclear as to whether such history, a significant amount of which was supported by documentation and evidence that has yet to be submitted by any party, will become the law of the case and influence the parties' positions going forward and/or influence how future compact cases may be handled. For these reasons, the Unit is coordinating with clients and interested stakeholders to assess whether and to what extent to file exceptions to First Report after the Supreme Court issues a management schedule. Concurrently, the parties continue to contemplate settlement options, 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. In preparation for the trial, the Unit has filed the Division of Water Resource's expert disclosures on January 5, 2017, and more recently, the parties' expert witnesses conducted the first meeting of the experts on February 23, 2017. Because the Unit successfully argued for adoption of a case management order that requires objectors to identify their specific protests, the State Engineer has been able to pinpoint and narrow the scope

of the expert involvement. Concurrently, the Unit, in coordination with the Division of Water Resources, continues to conduct settlement discussions with more than 20 parties. The Unit recently negotiated settlement with a significant party, and is close to settlement with several others. 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 Unit continues to participate with CWCB and Division of Water Resources representatives in regular Special Engineering Committee for ARCA. These meetings are intended to address a variety of issues, the primary focus of which is currently on negotiating an agreement to fill the John Martin Reservoir permanent pool. The Unit will continue these efforts in upcoming meetings in Burlington that are scheduled to occur in March.

4. Colorado's Compact Compliance Pipeline (CCP) and Bonny Reservoir Disputes.

Colorado and Kansas continue to discuss additional issues contained in their August 24, 2016 resolution. Those include the future of water in Bonny Reservoir and water short year accounting. The States have exchanged several rounds of information related to the two issues and met in Lincoln, NE to discuss further. The States will meet again at the end of the month for further discussion.

Last month, Colorado and Nebraska met to discuss Nebraska's requests that Colorado to deliver additional water through the Compact Compliance Pipeline to make up for Colorado's past overuse on the North Fork. Colorado explained that, in fact, Nebraska already receives more than its share of water from the CCP. In other words, Colorado is already delivering additional water. This comes from the fact that Colorado replaces ALL of its statewide depletions—including from other sub-basins—by delivering water into the North Fork. Colorado also explained that it will likely be operating the CCP near its capacity for the next three years to meet its 5-year running-average compliance test. Given those circumstances, and the need to resolve the water short year accounting with Kansas, Colorado and Nebraska agreed to resume their discussions after the accounting is finalized.

5. Republican River Compact Rules

The Unit represents the State Engineer in this matter. The State Engineer is considering rulemaking regarding water diversion, use, and administration of water within the Republican River Compact Administration Groundwater Model Domain. The proposed rulemaking would likely require 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. Several parties and their attorneys have commented on draft provisions of the rules that the State Engineer has promulgated for stakeholder input. Counsel for interested parties have requested additional meetings to discuss enforcement of orders for violations related to designated basin wells. The Unit will participate in these meetings and coordinate with the State Engineer to address, if necessary, stakeholder input, and revise the draft rules before the next Advisory Committee meeting on March 21.

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

The Unit represents the Colorado Department of Natural Resources in this review of the EIS prepared by the Army Corps of Engineers for the Chatfield Reallocation Project. 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 worried that construction might begin before the Judge issues his ruling and filed a motion for status conference and site visit with the Judge. Colorado DNR and the Intervenor's opposed the site visit but not a telephonic status conference with the Judge to determine the status of his review. Federal Defendants opposed both. We are awaiting a decision.

7. Upper Colorado River Basin System Conservation Pilot Program

The Unit continues to coordinate funding and contracting agreements to implement Round 3 of the System Conservation Pilot Program in the Upper Colorado River Basin. On February 24, 2017, the Commission approved projects in Utah, New Mexico, Wyoming and Colorado for inclusion in Round 3. The Unit, therefore, is now in the process of negotiating funding and participation agreements with the Funding entities and water user participants, respectively. Because the Commission does not have full staff to coordinate the program, the Unit has also served to help ensure a path forward in the Upper Basin. This involves coordination meetings, accounting, contract development, discussions with water users, Commission briefings and outreach.

8. Drought Reservoir Operations

The Unit continues to await next steps on drought contingency planning throughout the basin before finalizing or revising the Draft MOA for drought operations on Colorado River Storage Project's primary reservoirs (Glen Canyon Dam, Flaming Gorge, Aspinall Unit, and Navajo Reservoir). The purpose of this MOA is to identify a process that will help the Upper Basin and Bureau of Reclamation prepare for declining reservoir storage and help 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. Whether and when this agreement may be edited or executed will be linked to introducing and working with new leadership within the Department of the Interior and consensus among the Basin States and others on the Lower Basin Drought Contingency Plan.

9. Lower Basin Drought Contingency Plan

The Lower Basin has identified key terms of a draft drought contingency plan. Based on initial evaluations, the plan successfully includes California (along with Arizona and Nevada) in conserving additional water to benefit storage at Lake Mead. However, unlike the 2007 Lower Basin shortage guidelines, where water simply stays in Lake Mead for the benefit of the system, this plan incentivizes, through a number of complicated and technical provisions, the voluntary conservation of water to be stored for use in later years. Moreover, the Upper Basin maintains that it cannot be implemented as currently described without Congressional approval that would override current reservoir operations and accounting procedures under the Law of the River. The Unit is prepared to work with clients and colleagues in other states to assess the harm of the plan, if any to the Upper Basin, and identify potential protections or modifications to ensure the plan is not completed at the expense of interests in the Upper Basin. This could include legislation that balances any legislation proposed by the Lower Basin, as well as modifying the draft MOA on Drought Reservoir Operations (see above) to more definitively preserve the Upper Basin's rights and authorities going forward. The success of the plan also depends in part on efforts and approval of new leadership in the Department of the Interior. The 7-States principals are, therefore, working to brief the Department in short order.

10. Mexico Minute 32X Development

Minute 319, which addresses voluntary measures between the countries for sharing in shortages, providing flexibility in available water supplies, and benefits for the environment, will expire on December 31, 2017. The Basin States, U.S. and Mexico utilized extensive resources and personnel to try to finalize a new Minute with negotiating parties who had familiarity and understanding of the key issues before the change in administration. Despite these efforts, a new Minute was not executed. Instead, the states are exploring opportunities with the Department of the Interior and International Boundary and Water Commission to reinitiate discussions in the upcoming months to pursue a new Minute before the end of the year. The Unit stands ready to provide counsel to the Colorado and Upper Basin representatives on legal matters as they arise. In the absence of a new Minute, the

Basin States may have to reevaluate existing arrangements for river operations consistent with the Law of the River.

ESA RELATED MATTERS

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

In February 2015, Colorado filed suit against the U.S. Fish & Wildlife Service challenging its decision to list the Gunnison sage-grouse as threatened. On February 28, the court approved a joint motion to stay the briefing and refer the case to a magistrate judge for mediation/settlement discussions.

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

On July 29, 2016 the Center for Biological Diversity filed suit against the Department of Interior and the U.S. FWS challenging FWS's October 2014 determination that ESA protection for the Rio Grande cutthroat trout was not warranted. Federal defendants filed their answer on October 26. Colorado has been granted leave to intervene on behalf of the FWS. The court granted New Mexico Department of Game and Fish's motion to intervene as a defendant. The court extended the briefing deadlines to provide time for the parties to resolve disputes over the administrative record. Colorado's brief as a defendant-intervenor will likely be due no earlier than July.

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

The U.S. 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. Colorado filed a brief on behalf of 18 amici states. Oral argument was held before a panel of the Tenth Circuit on January 18. The proceedings in the district court are stayed pending a decision from the Tenth Circuit regarding the preliminary injunction. The eighteen amici states have not determined whether to participate in the merits phase.

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 U.S. 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’s program manager for the natural areas program participated in the meet and confer on January 23, and reported that the parties are working towards a revised Conservation Agreement.

INTRASTATE MATTERS

15. Application for Water Rights for Eldora Enterprises, LLC, Case No. 16CW3015

Eldora sought a change of point of diversion and change of place of use and type of use for a portion of the Howard Ditch for use for Eldora’s operations at the ski resort. The CWCB opposed the application and raised concerns regarding, among other things, expansion of use of the changed right, maintenance of historical return flows and overall clarity of the draft decree. The CWCB and Eldora agreed to the form and content of the decree and a stipulation that provides that Eldora shall not divert its changed right at the new point of diversion when the CWCB’s instream flow rights on the affected streams are less than the decreed instream flow rate or when Eldora’s diversions would reduce flows in the affected streams below the CWCB’s instream flow rates. Eldora must also maintain historical return flows when the CWCB’s instream flow right on Boulder Creek, where the return flows historically accrued, is not met.

16. Application for Water Rights for Steamboat Ski & Resort Corp., Case No. 15CW3009, Water Division 6

Steamboat sought a change of conditional water right for the portion of certain priorities of the Four Counties Ditch No. 3 water Steamboat leases from the Upper Yampa Water Conservancy District for diversion at four new points of diversion to allow use in existing and planned facilities at the Steamboat Resort. The CWCB opposed the application to prevent an expansion of use of the subject water rights that would be potentially injurious to instream flow water rights on Beaver and Priest Creek, as well as other downstream instream flow rights. The CWCB and Steamboat stipulated to a decree that imposes reasonable volumetric limits on diversions and allows the Division Engineer some flexibility in how she determines when water is available for diversion under the subject right. The decree also requires that all diversions under the subject priorities of the Four Counties Ditch

No. 3 right be restricted by the amount of water that the Division Engineer determines is available for diversion, which should prevent an expansion of use and prevent injury to downstream users.

17. Rio Blanco Water Conservancy District, Case No. 14CW3043, Water Division 6

The Rio Blanco Water Conservancy District sought conditional water rights for Wolf Creek Off-Channel Dam and Reservoir and the Wolf Creek Reservoir Pump and Pipeline, and the Wolf Creek Mainstream Dam and Reservoir, all three rights with claimed uses that include piscatorial and maintenance and recovery of federally listed threatened and endangered species. At the CWCB's request, the applicant included language in the decree stating that the storage rights cannot be used for release and use instream for the maintenance and recovery of federally listed threatened and endangered fish species absent an agreement with the CWCB or other entity with legal authority for such a use, and stated that such use, along with piscatorial, will be canceled if not made absolute within four diligence cycles. The decree also requires the applicant to provide notice to the CWCB prior to augmentation use above the reservoirs that will require an exchange if the exchange will extend through an instream flow reach.