

CYNTHIA H. COFFMAN
Attorney General
MELANIE J. SNYDER
Chief Deputy Attorney General
LEORA JOSEPH
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

July 3, 2018

TO: Colorado Water Conservation Board

FROM: Cynthia H. Coffman, Attorney General
Karen Kwon, First Assistant Attorney General
Jen Mele, 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 suit focuses on claims against New Mexico for violation of the Rio Grande Compact. The case will be at issue when Answers are filed no later than July 23. A case management hearing has been set for August 28 at the 10th Circuit Court of Appeals' facilities. While it is a named party to the suit, neither Texas nor the United States have made any claims against Colorado. Nor did New Mexico implicate Colorado in counter claims it has filed. Rather, the current dispute centers on actions in New Mexico and Texas; Colorado has limited factual information. Colorado reached an agreement with the other parties in this case that allows Colorado to avoid filing an answer or any counter claims in the suit. The agreement also permits Colorado to assert any defenses or claims later, should it find it necessary. This allows Colorado to avoid taking a position on issues until it has more information and can avoid expanding the scope of the suit. Colorado filed the agreement with the Special Master and asked that it be made an order.

2. Arkansas River Compact Administration

The Unit coordinated with the Division of Water Resources and the Arkansas River Compact Administration to provide comments to the draft Environmental Assessment for modification of the Repayment Contract for Trinidad reservoir. The Bureau of Reclamation issued the Final Environmental Assessment and Finding of No Significant Impact decision document on June 28, 2018. The Unit will coordinate with DWR and ARCA representatives to review the EA and FONSI and determine next steps, if any, to protect the state's interests going forward. Additionally, the Unit continues to provide legal counsel on Compact matters regarding: (1) legal questions associated with implementing or altering Agreement

B to the Operating Principles to better reflect actual hydrology and administration of water rights accordingly; (2) advising Colorado's representatives on accounting for flood control administration based on questions raised by Kansas and Colorado; and (3) evaluating options and developing a protocol for ARCA to make findings regarding certain water transfers under Article V.H of the Operating Principles in a timely fashion if and when needed in the future.

3. LGS Holding Group 2013, LLC Applications for Appropriations of Designated Ground Water from the Southern High Plains Designated Ground Water Basin, Case No. 18GW02

This case involves an application to install a number of high capacity wells in the alluvium of the Cimarron River, located in the Southern High Plains Designated Basin. A Kansas groundwater district filed an objection to the application, and also requested time with the State Engineer to explain the complications that such wells may have on water uses in Kansas. The applicant has filed a Motion to Dismiss the Kansas district's objections due to lack of subject matter jurisdiction. The Unit also filed Motion to Dismiss on behalf of the Division of Water Resources for lack of standing because the groundwater statutes do not allow for users outside the state to object to applications on grounds of injury beyond state boundaries. Such disputes are to be worked out between state sovereigns. Briefing for both motions should be completed this month.

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

Colorado continues to negotiate settlement with Kansas to resolve Colorado's past over-use of water between 2003 and 2013. Colorado already signed and publicly announced an agreement in which Colorado agrees to repay Nebraska for its over-use. Colorado has reached a conceptual agreement with Kansas that would allow Colorado to settle its past debts, invest additional money in the basin to ensure ongoing and future compact compliance, and close the door on past issues. The Unit is actively working in conjunction with the State Engineer and client agencies to finalize the settlement in a manner that accurately captures the agreement in writing as agreeable to both states.

5. Hutton Educational Foundation v. Rein, 17SA05, 15CW3018

The Foundation filed suit against several agencies alleging that the administration of water in the Northern High Plains Designated Groundwater Basin harmed its water rights. The Groundwater Commission intervened and filed a motion to dismiss a claim that the Groundwater Management Act of 1965 was unconstitutional. The trial court agreed, dismissed the claim, and plaintiff filed a direct appeal to the Colorado Supreme Court. The matter was briefed and argued last year. The Court recently released its opinion, affirming the dismissal of the

claim. It held that the water court lacked subject matter jurisdiction over designated groundwater issues, including determination of whether a statutory remedy was constitutional. The plaintiff is first required to petition the Groundwater Commission to change the status of water in the basin before it can challenge the remedy granted to any such petition.

The Unit subsequently filed a Motion for rehearing to clarify a few elements of the Court's order. Instead the Court issued a modified order that corrects a few factual statements that better explain the decision. The case is now back before the water court to try the remaining claims. Trial has been set for June 3, 2019 and a status conference is set for January 2019.

6. Colorado River Drought Contingency Plans

The seven Colorado River Basin States met in mid-June to discuss whether and how to finalize drought contingency plans for both the Upper and Lower Colorado River Basins that will help protect critical elevations at Lake Powell and Lake Mead in times of extended drought. As the basin experiences its 19th year of drought, the States and Department of the Interior recognize a need to plan for ongoing drought to avoid or mitigate the uncertainties associated with fluctuating water supplies. The Principals directed each of the states to proceed with current drought contingency plans and work through remaining issues. Such plans require intra-state, interstate, regional, interstate and state to federal coordination and agreements that involve a series of negotiations to reach consensus. Following the meeting, members of the Defense of the Colorado River Subunit were tasked with working in a 7-State coordinating committee to identify, and to the extent possible, work through remaining issues before the 7-State Principals and Bureau of Reclamation can consider reaching consensus. The 7-States and Reclamation are set to meet next in Park City at the end of July to further the finalization of these Plans.

7. Upper Basin Drought Contingency Planning - Drought Reservoir Operations Agreement

The Unit continues to work in coordination with the CWCB and Upper Colorado River Commission to have an Upper Basin Drought Reservoir Operations Agreement finalized and ready to implement concurrently with a Lower Basin Drought Contingency Plan, and before risking critical elevations at Lake Powell. This Agreement establishes a process by which the Department of the Interior and Commission will work together to utilize the Colorado River Storage Project's primary reservoirs (Glen Canyon Dam, Flaming Gorge, Aspinall Unit, and Navajo Reservoir) to maximize beneficial use of Colorado River water in the Upper Basin during drought emergencies. In fulfilling this purpose, the Agreement focuses on: (1) protecting target 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) preserving the Upper Colorado River Commissions' role in when and how to accomplish drought response in a manner that preserves collaborative relationships with federal agencies. Following discussion of the draft Agreement with Lower Colorado River Basin States and Department of the Interior as part of the joint efforts to develop Drought Contingency Plans, the Unit has coordinated with the Upper Colorado River Commission to clarify terms and identify processes that provide further assurance on how the system will be operated. These edits to the draft Agreement will be the topic of discussion for the 7-State coordinating committee (See Drought Contingency Plan, *supra*) during the month of July.

8. Upper Basin System Conservation Pilot Program

Since 2015, the Upper Colorado River Commission, and each of the Upper Division States, has been involved in studying the benefits of voluntarily conserving water for the benefit of the Colorado River System through the System Conservation Pilot Program. This program has allowed the Upper Basin to better understand the interest in participating in water conservation activities throughout the basin and identify the mechanisms and complexities associated with implementing such activities in each of the Upper Division States. Although the Program was intended to only last for two years, it was extended twice and has occurred consecutively between 2015 and 2018. To this end, the Unit continues to coordinate with the Upper Colorado River Commission and CWCB staff to implement the fourth round of the Program in Colorado. This has included working with Commission, Upper Basin, and funding representatives to finalize, implement and administer projects that have been approved for 2018.

At its June 20, 2018 meeting, the Commission recognized lessons learned from the Program and the importance of maintaining awareness and momentum regarding the need to voluntarily conserve water in times of drought (See Upper Basin Drought Contingency Plan – Exploring the Feasibility of Demand Management, *infra*). It also noted the need to investigate different issues that would more fully inform activities intended to help assure compact compliance instead of allowing for augmentation of system water. Accordingly, the Commission entered a resolution at its June 20, 2018 meeting directing staff to take a pause as the contracting entity for the System Conservation Pilot Program, as it is currently organized, and focus efforts on investigating activities more geared to informing the feasibility of conserving water for the specific purpose of helping assure the Upper Basin's continued compliance with the Colorado River Compact. The Unit will work in conjunction with CWCB and Commission staff to help assure the exploration of demand management continues in a manner that is informative for the state and the Upper Basin.

9. Upper Basin Drought Contingency Plan - Exploring Demand Management Feasibility

Demand management is a final element for consideration in the Upper Basin's Drought Contingency Planning. It is loosely defined as the temporary, conservation of Colorado River water to help ensure continued compliance under the Colorado River Compact. At its June 20, 2018 meeting, the Upper Colorado River Commission approved a Resolution directing staff to:

- i. Work with interested parties to adapt the existing [System Conservation Pilot Program], or develop new pilots, to investigate outstanding considerations related to demand management;
- ii. Work with interested parties and entities to explore other possible mechanisms or opportunities to investigate outstanding considerations related to demand management; and
- iii. Support intrastate efforts to explore demand management mechanisms and considerations within each of the Upper Division States.

Additionally, the 7-States agreed to consider securing dedicated storage for water created as part of a future demand management program, should such program be finalized and made operational in the future. The Unit is working with the CWCB staff and Commission representatives to identify and explore the terms and conditions to accommodate these directives from both the Commission and the 7-States regarding exploring the feasibility of demand management in the Upper Basin.

Concurrently, the Unit is coordinating with CWCB staff to implement an intrastate demand management outreach program that focuses on informing interested stakeholders of current efforts within the Upper Basin and with the Lower Basin to develop drought contingency plans, introducing the concept of demand management and its potential relevance in Colorado, and identify concepts, issues and concerns that stakeholders may have with the demand management concept. The CWCB staff and Unit are coordinating to compile the input from these outreach efforts to inform potential positions or obstacles for the State to consider if pursuing demand management in Colorado and the Upper Basin. The goal is to utilize this and other information to inform the state's position for providing more certainty in water uses on the Colorado River into the future and for promoting ongoing compact compliance consistent with the values and goals of Colorado. Initial outreach began in March, continued through April, May and June, and will extend through the Summer.

10. Lower Basin Drought Contingency Plan

The Lower Division States, primary water user entities, and Bureau of Reclamation have drafted an agreement on key terms of a draft drought contingency plan for the Lower Colorado River Basin. The plan, as currently drafted, successfully includes California (along with Arizona and Nevada) in conserving additional water to benefit storage at Lake Mead. However, unlike the 2007 Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead, where water simply stays in Lake Mead for the benefit of the system, the plan incentivizes, through a number of complicated and technical provisions, the voluntary conservation of water to be stored for use in later years. Moreover, 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 has been coordinating with the CWCB and Upper Colorado River Commission to evaluate the plan, and to identify potential protections and mechanisms protect the Upper Basin. The completion of the plan depends in part on consensus among the 7-Basin States and the Department of the Interior on both the Upper and Lower Basin Contingency Plans. The 7-States coordinating committee is working to identify any outstanding issues or concerns with the Lower Basin Drought Contingency Plan as part of the package of agreements being vetted in anticipation of the 7-States Principals meeting at the end of July, beginning of August.

11. Central Arizona Water Conservation District (CAWCD) Position

In early April, it became known that the CAWCD adopted a policy to promote the greatest releases possible from Lake Powell under the 2007 Interim Guidelines by making calculated water orders that make sure the reservoir conditions are in a sweet spot to allow bonus water to be released to Lake Mead. Such releases are at the expense of storage at Lake Powell and the Upper Basin, and contrary to the spirit and expectations for successful collaboration and problem solving among the 7-Colorado River Basin states during an 18+ year drought. The Unit helped the Upper Colorado River Commission draft a letter to Arizona's principle representative for Colorado River matters and copied to CAWCD, rejecting the CAWCD policy and putting them and the other stakeholders on the river on notice that such actions threaten the health of the system and the foundation upon which solutions are achieved on the river. CAWCD subsequently met with the Commission on April 30, and apologized for the insensitive use of words to describe its complicated management decisions. Since then, and after meeting with the Lower Basin States and Bureau of Reclamation, CAWCD and the Arizona Department of Water Resources have committed time and resources to address internal differences and avoid further interference with basin wide efforts to protect the Colorado River system under drought conditions. They recently kicked off an outreach effort within Arizona to discuss drought contingency planning with its stakeholders with the hope of identifying a path to agreement of the Drought Contingency Plans for both the Upper and Lower Colorado River Basins.

12. Colorado River Basin ESA Compliance Programs

While federal legislation seeking extension of funding for the Upper Colorado River Fish Recovery Program through 2023 has been introduced, guidance in the President's FY19 budget and a directive from the Office of Management and Budget redirects approximately \$23 million in Colorado River Storage Project (CRSP) power revenues from the Western Area Power Administration to the Treasury rather than transferring these funds to the Bureau of Reclamation (Reclamation) to continue support for important basin-wide programs (i.e., San Juan Fish Recovery Program, Glen Canyon Dam Long-Term Experimental Management Program, Upper Colorado River Fish Recovery Program). The 7-Basin States plan to submit a letter to be issued the week of July 2, 2018, seeking rescission of this directive because, among other things, loss of funding for the basin-wide programs will create greater uncertainty in multiple federal CRSP reservoir dam operations, including the operation of Glen Canyon Dam. This, in turn, will create insecurity for many municipal, industrial, and agricultural water suppliers in the basin and impact numerous Reclamation projects upstream of Lake Powell.

13. Expanded Non-Native Aquatic Species Management Plan Environmental Assessment

Due to an increase in green sunfish and brown trout in the Colorado River between Glen Canyon Dam and Lake Mead and its tributaries, the National Park Service is in the process of conducting an Environmental Assessment relating to non-native species management. The Upper Colorado River Commission is participating as a cooperating agency. The Unit is working with CWCB to staff the cooperating agency meetings and calls and reporting results to the UCRC. NPS provided preliminary draft management alternatives to the cooperating agencies and held webinars going over the alternatives. UCRC has submitted multiple comments for consideration. The EA is currently in the public scoping phase. The timeline for completion of the EA has been delayed, and at this point it appears an administrative draft, for review by cooperating agencies, will be released in late July, followed by a public EA.

14. Animas La Plata Project Application for Change of Water Rights Case No. 17CW3002 Water Division No. 7

This change of water rights application is a product of the settlement between Southwestern Water Conservation District and the ALP Association and individual members of the Association following the Diligence proceeding for water rights related to the Animas La Plata Project in 2013. A stipulation between the Association and Southern Ute Indian Tribe was approved on May 2, 2018. A stipulation between the Association and the remaining Opposers, the San Juan

Water Commission and the La Plata Conservancy District (New Mexico), was approved on May 8, 2018. The final decree was signed by the Water Judge for Water Division No. 7 on May 16, 2018. Lain Leoniak x 6313.

15. Navajo Nation v. Department of the Interior, et al., D. Arizona, No. CV-03-507 PCT-GMS

The Navajo Nation filed suit against the Department of the Interior and several agencies in 2003 for failure to exercise the federal government's trust responsibilities and pursue quantification and protection of the Navajo Nation's reserved water rights in the Lower Colorado River Basin. Following the withdrawal of a failed settlement agreement among the Navajo and Arizona in 2012, the District Court of Arizona lifted the stay that had been applied to the litigation. The Navajo subsequently amended its complaint to include claims that challenged the 2007 Interim Guidelines for Lower Basin Shortages and Coordinated Operation of Lake Powell and Lake Mead. Because the Guidelines link operations at Lake Mead and Lake Powell, and thereby affect interests in Colorado and the Upper Colorado River Basin, Colorado moved to intervene upon the Court deciding to accept the amended complaint. Colorado was the only upper division state to intervene because there were not enough resources in other states to participate at that time. The Federal Defendants and Defendant Intervenors subsequently filed Motions to Dismiss. Colorado joined the Federal Defendant and Defendant Intervenor Motions filed by Nevada and Arizona, concluding the California defendants' motion was too specific and not necessarily in line with policies that Colorado would like to maintain.

The court granted the motions to dismiss in the Summer of 2014, and the Navajo subsequently appealed to the 9th Circuit Court of Appeals. The parties completed briefing before the Circuit Court in the Spring of 2015 and the Court heard oral argument in February 2017. Colorado joined briefs filed by the Nevada and Arizona intervenors, similar to the approach at the district court level. Colorado also monitored but did not directly participate in the oral argument. The Circuit Court issued an opinion, affirming the district court's ruling with the exception of its holding regarding breach of trust claims asserted by the Navajo against the United States. It remanded the case in January 2018 for consideration of the Breach of Trust claims.

On April 13, the Navajo filed a Motion to Amend the complaint, and asserts new claims that may appear to relitigate issues settled in the prior proceedings. The US Defendants opposed the motion to the extent it sought to argue issues other than the breach of trust claims remanded by the Circuit Court. Some Defendant Intervenors also opposed on grounds similar to those asserted in prior proceedings, including that the Navajo are attempting to obtain a quantification of a reserved

water right through inappropriate forums. Colorado joined the Federal Defendant's response. The Unit will continue to monitor the case as it develops.

16. 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, a Defendant-Intervenor, in this appeal of the District Court's decision upholding the EIS prepared by the Army Corps of Engineers for the Chatfield Reallocation Project. Shortly after appealing the decision below, Audubon sought a preliminary injunction to halt construction necessary to store additional water under the proposed reallocation. The case has been fully briefed and is set for oral argument on September 24 at 9:00am. The Unit will coordinate and strategize oral arguments with the Federal Defendants and the water provider intervenors.

17. Hill v. Warsewa, 18-cv-300069, Fremont County District Court, Colorado

Plaintiff fisherman filed a complaint against the Defendant landowner in state court over fishing access on Defendant's property. The Complaint names the State of Colorado as an "interested party." The fisherman again alleges that the State of Colorado, rather than the landowner, holds title to the riverbed of part of the Arkansas River because the Arkansas River was navigable at the time Colorado became a State. At its core, the complaint seeks to determine the State's title in lands and is barred by Eleventh Amendment Immunity. Plaintiff also lacks standing to assert title on behalf of the State. Plaintiff earlier filed a similar case in federal court, but voluntarily dismissed the case after we sought to intervene in order to have the case dismissed.

INTRASTATE MATTERS

18. Maroon Creek, LLC, Case Nos. 14CW3179 & 16CW3063, Div. 5

The CWCB entered stipulations in both cases on May 11, 2018. The applicant in Case No. 14CW3179 was seeking an augmentation plan for a golf course pond. During the course of negotiating resolution for the augmentation plan, a dispute arose regarding the meaning of a 1989 decree as it pertains to refill for the pond. Applicant filed the application in Case No. 16CW3063 seeking interpretation of the decree by the court. Applicant argued that the decree included a right to fill and refill continuously under the 1989 storage right and the CWCB argued only a single fill was adjudicated. The parties reached an agreement as to terms and conditions to protect the CWCB's instream flow water rights. Stipulations have been filed in both cases however only the stipulation in Case No. 14CW3179 has been approved at this time.

19. Southeastern Colorado Water Conservancy District, Case No. 16CW3076 & 16CW3079, Div. 2

The CWCB entered stipulations in both cases on May 11, 2018. Case No. 16CW3076 is an application for a change of water rights to allow storage of several conditional direct flow water rights that are a part of the Fryingpan-Arkansas Project. Case No. 16CW3079 is a diligence application for those east slope conditional water rights. The CWCB had concerns in both cases about expansion of the west slope component of the Fry-Ark Project, as well as expansion issues related to the conditional rights on the east slope because the rights had not been developed and are fairly large rights. The CWCB was also interested in making sure these decrees are consistent with previous Fry-Ark Project decrees. Parties agreed to language making clear no expansion of the water rights would result from the applications and that was consistent with prior decrees. The cases are set for a consolidated trial and there are still active parties in the cases.

20. Winding River Ranch, LLC, Case No. 15CW3145, Div. 1

The CWCB entered into a stipulation on June 29, 2018. Applicant filed an application for a change of water rights and a plan for augmentation to maintain water levels for two ponds that are a part of a private fishing club. The CWCB stipulated to terms and conditions that reflect appropriate diversion limits, set forth the applicant's augmentation requirements, and prevent against injury to its South Fork of the South Platte River instream flow water right from the applicant's flow through operations.

21. Town of Buena Vista, Case Nos. 17CW3022 and 16CW3101, Div. 2

The CWCB entered into stipulations on June 7, 2018. The cases include applications for a water storage right and plan for augmentation for a municipal use pond. Applicant claimed that the CWCB's Cottonwood Creek instream flow water right was subordinate to the subject rights under § 37-92-102(3)(b). The parties agreed to terms and conditions outlining the subordination to portions, but not all, of the subject water rights and to terms and conditions under the augmentation plan to prevent injury to the Cottonwood Creek instream flow right.