Natural Resources Section
November 2018 Monthly Report

Court Appearances, Speaking Engagements, Publications and Conference Appearances:

- Dan Miller and Jason King will be representing the Hazardous Materials and Waste Management Division of CDPHE in the OAC, November 5-8, on a license denial case. The Division denied a "qualified instructor" license for the inspection of methamphetamine-affected properties.
- Karen Kwon - Northern Water Conservation District Water Users meeting – November 14.
- Amy Ostdiek or Lain Leoniak – Arkansas River water users/ basin roundtable meeting. November 14.
- Robyn Wille and Deputy Director of APCD, Chris Colclasure, have prepared an article for publication in the Colorado Lawyer. The article focuses on Colorado's status under and efforts to attain the ozone National Ambient Air Quality Standard.
- The article **was published** in the October 2018 issue.
- Robyn Wille, x6261
- On Wednesday Nov. 14, 2018, David Kreutzer will speak at a joint EPA / NR&E environmental enforcement attorneys meeting on how the three NR&E environmental units handle requests for client testimony in 3rd party suits, and the use of clients as expert witnesses.

Air Quality Unit

<u>Rulemaking: Reasonably Available Control Technology (RACT) requirements for Major Sources and Oil and Gas</u> -

- The Air Pollution Control Division is working on various rulemaking proposals to codify emission control requirements Colorado's State Implementation Plan for Colorado's Ozone Nonattainment Area to meet federal requirements.
- The Air Quality Control Commission **adopted** rules for stationary combustion equipment at major sources of volatile organic compounds ("VOCs") and/or oxides of nitrogen ("NO_x") in July 2018.
- In general, industry is pleased with the stationary combustion equipment rules.
- The Division has proposed rules for breweries (Coors and Anheuser Busch are the only breweries that will be subject), and the Commission will consider adoption of those rules at its meeting in November 2018. Both Coors and

Anheuser Busch have expressed full support for the proposed rules to the Commission.
- Robyn Wille, x6261

Colowyo Mine air permit modification and lawsuit

- Colowyo Coal Company, a Tri-State Generation and Transmission Association subsidiary, applied to modify its air permit for this mine as part of an expansion project.
- CDPHE approved the permit modification after determining the proposed expansion would not cause or contribute to an exceedance of National Ambient Air Quality Standards.
- The Division reviewed and responded to public comments, including comments from the Sierra Club and Center for Biological Diversity.
- The Sierra Club and Center for Biological Diversity filed a complaint for judicial review in Moffat County District Court, claiming the modification unlawfully authorizes an expansion that will cause or contribute to an exceedance of the ambient standard for Oxides of Nitrogen, and that the modification was unlawfully approved as a minor source permit even though potential emissions exceed the major source threshold.
- On August 27, 2018, the court approved the intervention of Colowyo Coal and Tri-State.
- CDPHE answered the Complaint on 9/4. The parties submitted a joint proposed case management order, and are scheduled to call the court to get dates for the case management conference on November 8.
- We have identified the record, and Plaintiffs must file their designation of the administrative record by November 1.
- Jessica Lowrey, x6167; Robyn Wille, x6261

Xcel Energy Approval of 2016 Electric Resource Plan

- Xcel Energy is completing its 2016 Electric Resource Plan (ERP) which involves a stipulated settlement of issues involving, among other things, the potential closure of two electric generating units at Xcel's Comanche power station in Pueblo, Colorado.
- The Air Pollution Control Division intervened to testify on potential air quality impacts.
- The CEO intervened as a stipulating party and was part of the initial negotiations to develop the ERP.
- The PUC conducted a hearing on the stipulation on February 7-9, 2018 and issued a decision on March 22 allowing Xcel to present its plan to close the Comanche units during phase 2 of the ERP process.
- Xcel filed its 120 Day Report on the ERP on June 6, 2018. The 120 Day Report, pursuant to the PUC regulations, lays out the utility's preferred ERP and the portfolio of resources that will be used to carry out the ERP. In its 120 Day Report, Xcel is maintaining its recommendation for the ERP that

includes the closure of the two Comanche units.
- On August 27, 2018, the PUC approved the ERP with the portfolio that includes closure of Comanche units I and II, and will utilize renewable energy over coal as the largest generation source for the company.
- Requests for reconsideration of the PUC's approval were denied on October 29, 2018. The requestors, if seeking further review, will have 30 days to seek judicial review.
- Clay Clarke, x6250

Colorado Energy Office Matters

Public Service Company application for special rates for EVRAZ Steel Mill in Pueblo, CO

- On August 16, 2018, Public Service filed an application for approval of special rates under § 40-3-104.3(1)(a), C.R.S. EVRAZ is the largest electric customer of Public Service, and it had threatened to leave the state if it could not secure lower electric rates.
- The application also included a proposal for a 240 MW solar facility to provide renewable energy to EVRAZ.
- On September 7, 2018, CEO filed testimony supporting the application from CEO's Deputy Director and from the Director of Business Funding and Incentives for the Colorado Office of Economic Development and International Trade.
- CEO's testimony provided evidence that the application met the statutory requirements that the EVRAZ will likely leave the state if it does not receive a favorable rate, that the proposed rate will not harm the rest of the ratepayers, and that the application is in the public interest.
- After a one day hearing, the Commission granted Public Service's application on October 4, 2018.

Water Quality & Radiation

Colorado Springs MS4 Litigation – CDPHE's Water Quality Control Division is a co-plaintiff with EPA and DOJ on an enforcement case against the City of Colorado Springs for violations of the City's MS4 (municipal stormwater) permit. Under the federal Clean Water Act, Colorado must be a party to this case. Lower Arkansas Valley Water Conservation District and Pueblo County have intervened on the side of CDPHE and EPA.

A trial covering three exemplar sites was held before Judge Matsch in federal district court from September 5th through September 17th. This trial addressed: 1) the City's failure to require permanent, post-construction stormwater controls at new developments, focused on a large residential development called Indigo Ranch; 2) the City's approval of incorrectly designed and sized drainage basins, focused on

a site called Morningstar at Bear Creek; and 3) the City's failure to supervise and enforce the use of stormwater controls at construction sites, focused on a large residential development called Star Ranch. We are awaiting a decision from Judge Matsch on these claims.

The parties are also engaged in settlement discussions. Plaintiffs have shared a high-level conceptual settlement framework that with Colorado Springs, and have had follow up discussions with the Springs regarding their response to the framework and additional information needed on the status of their MS4 program to evaluate potential settlement options. Carrie Noteboom, x6285

Peabody Sage Creek Mining LLC Permit Appeal and Civil Penalty - Peabody Permit Appeal: In 2015, WQCD issued a proposed renewal permit to Peabody Sage Creek Mining LLC covering discharges from coal mining operations in Routt County. Peabody submitted a Notice of Appeal, Request for Adjudicatory Hearing, and Request for Stay. WQCD granted Peabody's request for hearing and granted in part and denied in part Peabody's request for stays. The matter was referred to the Office of Administrative Courts. The hearing occurred on July 31st- August 2nd on three out of the five issues: flow, selenium effluent limits, and points of compliance for selenium. WQCD and Peabody agreed to stay the hearing on the issues of storm-water and TDS limits, pending the finalization and performance of an amended settlement agreement. On September 7th, the ALJ, Matthew Norwood, issued an initial decision modifying the permit issued by WQCD by adopting Peabody's pro-posed permit #2 in its entirety. On November 1, WQCD filed exceptions to appeal the initial decision. Peabody also filed an exception for the one point of compliance location. Both parties filed responses to the exceptions on December 8th. Pursuant to the APA, CDPHE now will review the record on the initial decision and the exceptions and issue a final agency decision.

In regard to the settled issues of stormwater and TDS limits, the Division published a draft modified permit through public notice and then issued the modified permit with the terms for the settlement agreement. Peabody did not provide comments during the public comment period. The modified permit was to become effective on November 30, 2017. Peabody contacted the Division at noon on that date in an effort to address last minute concerns regarding language in the permit. The Division was not able to respond to Peabody's concerns by the end of that date, so Peabody filed an appeal and a request for a hearing on the modified permit. The Division denied the request for hearing. The Division and Peabody recently entered into another settlement agreement, where the Division agreed to make Peabody's requested changes as modified permit #3, and in exchange Peabody agreed to dismiss TDS and stormwater issues, and waive its rights to appeal modified permit #2 and #3. The TDS and stormwater issues have been dismissed. Elaine Wizzard, x6308

Aspen Canyon Guest Ranch Drinking Water Compliance – Aspen Canyon Ranch is a "cannabis-friendly" guest ranch and events venue in Grand County with its own public water system. Among other violations, its owner has failed to maintain or monitor disinfection levels in the system since October 2017 and has ignored numerous notices of violation from CDPHE. On March 5, CDPHE filed a complaint and motion for a preliminary injunction shutting down the facility until it is in compliance with the State's drinking water laws. On March 26, a preliminary injunction was issued requiring that the facility be closed until it achieves compliance. The Division thereafter received payment of the associated penalty, and entered into a compliance order on consent with the owner, whereby he agreed to hire a certified operator and to comply with relevant drinking water laws. In July, the owner did hire a certified operator to manage the drinking water system, and just when the Division was planning to file a motion to dismiss the complaint and lift the PI, we learned that the certified operator had resigned for non-payment for his services. The owner has told the division that the ranch is no longer in business and that there is a planned foreclosure sale on the property in November. The Division is not convinced of his claim because the Aspen Canyon Ranch website and Facebook page appear to still be active in seeking new reservations. We are discussing next steps. Annette Quill #6264

Denver Water Lead and Copper Rule Optimal Corrosion Control Treatment Study - In 2012, Denver Water exceeded the action level for lead, triggering a requirement for a new study and determination as to what would be the Optimal Corrosion Control Treatment ("OCCT") for Denver Water, meaning corrosion control treatment that minimizes the lead and copper concentrations at consumers' taps while ensuring that the treatment does not cause the water system to violate any provision of Regulation 11. On March 20, 2018, the Water Quality Control Division of CDPHE issued a final letter to Denver Water designating orthophosphate to be the OCCT under the Lead and Copper Rule. The Division is currently defending its decision in two separate appeals, one before the Water Quality Control Commission and one before the Denver District Court. Plaintiffs in the Commission appeal are: Greenway Foundation, Metro Wastewater Reclamation District, City of Aurora, Barr Lake and Milton Reservoir Watershed Association, South Adams County Water and Sanitation District, South Metro WISE Authority, and Denver Water. Plaintiffs in the district court appeal are: Greenway Foundation, Metro Wastewater, the City of Aurora, and Denver Water (with a motion to intervene pending from the City and County of Denver). On July 23, 2018, all of the parties to both appeals signed an MOU establishing stakeholder groups to: (1) review and evaluate whether other alternatives might be approved as optimal corrosion control treatment; and (2) identify, monitor, and mitigate impacts of the current optimal corrosion control treatment on wastewater entities and watersheds. In order to allow the stakeholder process to potentially address the plaintiffs concerns, all parties to both appeals agreed to stay the appeals until November 1, 2018. The

parties are currently drafting joint motions to extend the stays until January 15, 2019. Jessica Lowrey, x6167; David Banas, x6284

Galambs Mobil Home Park - Galambs MHP is east of Denver and has chronic problems with its wastewater treatment system. In 2014, CDPHE obtained a district court judgement for penalties in an amount in excess of $500,000 for violations of numerous regulations and orders. In lieu of a hearing on CDPHE's motion for an injunction, the park's current owner John Baranway and CDPHE negotiated a compliance schedule that included specific dates for the completion of certain tasks, and stipulated penalties for failure to meet those deadlines. Baranway has failed to pay the penalty and has failed to meet most of the compliance deadlines. Stipulated penalties now exceed $1.5 million. After years of fruitless negotiations and unfulfilled promises by Baranway, CDPHE filed a motion to set a date for payment of the existing penalty judgement and for the imposition of stipulated penalties. Prior to the motion being filed, Baranway's attorney asked that CDPHE hold off on filing the motion pending receipt of additional information on Baranway obtaining a loan to bring the facility into compliance. During this time, Baranway's attorney filed a withdrawal as counsel, claiming that there were no outstanding issues in the case. We opposed the withdrawal. Baranway has engaged new counsel who reached out to discuss the case. We agreed to a short continuance of the motion for payment of penalties to allow the new attorney to get up to speed on the matter. Jerry Goad, x 6296

Union Pacific Railroad, Moffat Tunnel West Portal Permit Appeal – Union Pacific Railroad Company conducts railroad operations and maintenance activities in the Moffat Tunnel, which is a railroad tunnel located in the Continental Divide of Colorado. The West Portal of the tunnel daylights in Grand County. Union Pacific discharges wastewater from the West Portal into the Fraser River. Union Pacific's West Portal Permit includes effluent monitoring and sampling terms requiring Union Pacific to sample Total Suspended Solids ("TSS") once every month. The Permit also includes terms for an influent turbidity threshold of 175 NTU for 15 minutes that triggers additional effluent monitoring and sampling requirements for TSS. Union Pacific is appealing the influent turbidity threshold and additional sampling requirements for TSS.

Union Pacific's past track maintenance activities have been associated with discharges of visually obvious sediment-laden water into the Fraser River. The Division was concerned that with the monthly sampling requirement for TSS, Union Pacific can avoid sampling during times of track maintenance in the tunnel. The Division included the disputed permit terms to trigger additional sampling for TSS when Union Pacific is performing track maintenance within the tunnel. Based on data provided by Union Pacific, the influent turbidity should exceed the threshold only during times of track maintenance. The turbidity and TSS monitoring terms work together so that if the influent turbidity exceeds the

threshold of 175 NTU for 15 minutes, Union Pacific would be required to take a grab sample for TSS and monitor the TSS for every 2 hours the turbidity exceeded the turbidity threshold. The additional TSS sampling would confirm whether Union Pacific was routing the wastewater through its new wastewater treatment facility and whether the facility was effectively treating the sediment.

Union Pacific requested a hearing on the disputed permit terms, alleging that the influent turbidity threshold of 175 NTU for 15 minutes and the related TSS sampling should be removed from the permit because they are arbitrary, burdensome, and ineffective. Union Pacific also requested a stay of the permit terms pending the outcome of the hearing. The Division granted the hearing, but denied the request for a stay since Union Pacific did not demonstrate the necessary criteria to support a stay. Elaine Wizzard, x6308

Hazardous and Solid Waste/CERCLA Litigation Unit

Closed Pecos Landfill in Adams County – Solid Waste Enforcement/Litigation - Litigation with Adams County is on the horizon. A roadside ditch within the footprint of the closed Pecos landfill is full of leachate that has expressed to the surface over the past year. The leachate is within Adams County right-of-way. The cause of the expression is unknown. The former landfill owner, Pecos Investments, LLC, and the former landfill operator, Mr. Phil Spano, are subject to a 2001 CDPHE order to maintain the landfill cap in that area. But Mr. Spano passed away last fall (2017) and the LLC purportedly has no assets but for a $300,000 letter of credit serving as a financial assurance mechanism. CDPHE estimates the response could cost as much as $2 million. CDPHE and the AGO are trying to extract as much from the financial assurance and Mr. Spano's estate as possible, but it will likely soon need to file a lawsuit against Adams County, as the current owner, to perform additional work. CDPHE met with Adams County in August 2018 seeking a cooperative approach, but Adams County rejected any voluntarily involvement with this issue. Lukas Staks, x6251

Fairplay Landfill – Solid Waste Administrative Enforcement - Groundwater sampling in late June 2018 of 12 residential drinking water wells near the closed Fairplay Landfill showed two wells with 1,4-dioxane above drinking water standards, and six with trace levels of 1,4-dioxane. Park County, the former landfill operator, performed the sampling and informed each well owner of his or her individual sampling results. We await the results of follow-up sampling conducted in mid-October. Park County and BLM (property owner) generally agree that BLM will investigate the closed landfill source area and Park County will continue delineating the extent of groundwater contamination.

With the statute of limitations for legal action pending, CDPHE will likely enter into a compliance order on consent with Park County and will likely issue a unilateral order to BLM by the end of October. BLM has resisted entry into a state-law consent order by claiming it is required to respond pursuant to a lengthy CERCLA process is lucky enough to control. BLM and CDPHE have nevertheless been negotiating a compliance order consent, and it may be possible to transition from a unilateral order to a consent order in the future. Three neighboring property owners and the neighboring HOA have lawyered up and the AGO is in frequent communication with their sophisticated environmental counsel. Lukas Staks, x6251

EPA Compliance with State Law Requirements at CERCLA Removal Sites - MWMD is in dispute resolution with EPA regarding whether EPA will comply with Colorado's Institutional Controls Statute at CERCLA or Superfund Removal Action, smaller cleanups that EPA does at smaller sites not warranting a National Priorities List slot. EPA usually cannot removal all contaminants in Removal Actions, and so per its own guidance should impose an institutional control to prevent human contact with the left-behind waste. The left-behind waste also triggers Colorado's ICs Statute. EPA finds our ICs Statute difficult to comply with and so does not want to list it as an Applicable or Relevant & Appropriate (ARAR) State law. HMWMD and this office contend Colorado's IC Statute should be an ARAR at all Removal Action where waste is left in place, as required by Superfund and the ICs Statute. EPA refuses to note the ICs Statutte as an ARAR at Removal Actions. This dispute has brewed for over a decade.

HMWMD Division Director Jennifer Opila will meet EPA R 8's Betsy Smidinger, Deputy Director, Office of Compliance. If the dispute is not resolved at the next meeting Monday the 5th, the next and final dispute level is CDPHE's Director of Environmental Programs Martha Rudolph and EPA R 8 Administrator Doug Benevento. David Kreutzer, x 6270

Blue Tee – Natural Resource Damages - DOJ hopes to file the Complaint and the Consent Decree on October 29, 2018. The State will receive almost $450,000 for claims we did not know about just six months ago. Near the end of a nationwide settlement of other environmental liabilities, US DOJ discovered that Blue Tee was liable at two Superfund sites in Colorado, leading to this windfall.

Chemical Sales Superfund Site - The Chemical Sales Superfund Site is being addressed under CERCLA, aka Superfund, by the State as lead agency, and EPA. The last five-year review, in 2017, made a protectiveness determination but recommended evaluating 1, 4 dioxane. Per and Polyfluoroalkyl substances (PFAS) are not currently being reviewed as part of the CERCLA Superfund Process for Chemical Sales. PFAS are also not a listed hazardous substance under CERCLA. The State does not have a statewide water quality standard for PFAS. The only standard the State has is a site specific groundwater standard for PFAs which

covers only the Fountain, Security and Widefield Aquifer area near Colorado Springs. The site-specific groundwater standard is 70 ppt, which is the same as the EPA health advisory for PFAS. The EPA health advisory is not an enforceable standard. There is no federal cleanup standard for PFAS. Under the current regulatory framework, there is no basis to require a responsible party to respond to an alleged source of a PFAS release.

While PFAS is not a hazardous substance, they could be pollutants or contaminants under CERCLA, which provides authorization to respond to a release of PFAS only when they present an imminent and substantial endangerment to public health or welfare. Similarly, the State Solid Waste Act provides HMWMD with authority to address contamination when there is an imminent and substantial endangerment to public health or welfare. Neither the federal or state authorities provide enforcement authority; therefore, requiring either an EPA fund-led action or use of the solid waste management fund to respond to PFAS contamination. The only other action EPA/CDPHE can take is to investigate the existence and extent of the release under CERCLA 104(b). EPA and the State are conducting sampling under this authority, as described below.

In July 2018, South Adams County Water and Sanitation District (SACWSD) discovered concentrations of PFAS in its water supply. SACWSD is not located within the boundaries impacted by the State site-specific standard described above. SACWSD turned off the contaminated wells in order to protect its water supply. Additionally, the State and EPA performed limited sampling to help identify potential source areas through a limited Preliminary Assessment/Site Investigation process. As part of the State's sampling activities, the Chemical Sales groundwater monitoring wells are being sampled to test for PFAS. To date, the Chemical Sales Superfund Site has not been identified as a known source. However, on September 28, 2018, SACWSD filed a notice of claim against the State and CDPHE pursuit to the Colorado Governmental Immunity Act, section 24-10-109, C.R.S. with our Office alleging millions of dollars in injuries as a result of the PFAS contamination. The notice of claim is required to be filed within 182 days of discovery of the injury. However, the State, as the agency overseeing the Superfund response actions, is not a responsible party. Further, most relevant claims would lie in tort, resulting in immunity for the State. Jennifer Robbins, x6257

Parks Wildlife and Trust Lands Unit

STATE TRUST LANDS

Town of Monument v. Town of Monument, Colorado Court of Appeals, case no. 17CA1663, on appeal from El Paso County District Court, Case No. 2017 CV 30105 - Oral argument heard August 30th. The Town of Monument is attempting to use eminent domain to remove restrictive covenants from property it owns without

compensating any of the beneficiaries of the covenants for the loss of the benefit of the restrictions on property use. The Land Board holds some of the restrictive covenants for the benefit of adjoining school trust lands. The district court ruled in the Board's favor that restrictive covenants are a property right entitled to compensation in an eminent domain action. The town appealed. The Land Board's last parcel of affected land is under contract and may close before a decision is issued.

Update: The Court of Appeals issued its opinion October 4th. The Town of Monument is attempting to use eminent domain to remove restrictive covenants from property it owns without compensating any of the beneficiaries of the covenants for the loss of the benefit of the restrictions on property use. The Land Board holds one remaining parcel of adjoining school trust lands. The district court ruled in the Board's favor, the town appealed, and the Court of Appeals reversed. The Land Board will petition for certiorari. Ed Hamrick, x6267

Mark Phillips v. State Land Board, Denver County District Court, Case No. 2014cv506u - Mark Phillips filed an administrative appeal of the Land Board's denial of an access permit to a landlocked parcel in Boulder County. The Land Board filed counter- and cross-claims against Mr. Phillips and the record owners of the landlocked parcel seeking to quiet title to the portion of the landlocked parcel overlapping the Land Board's property. The trial court entered a default judgment against Mr. Phillips and the record owners and quieted title in favor of the Land Board. In October 2016, the Court of Appeals affirmed the judgment against the record owners but it reversed as to Mr. Phillips and remanded the case for further proceedings. Since then, this case has languished on the district court's docket without any action. Before default judgment was entered by the trial court, the parties had fully briefed Mr. Phillips' combined motion to dismiss and motion for partial summary judgment.

Update: Plaintiff's filed a new Motion to Dismiss, and it is now fully briefed. The court requested a status conference. Cory Haller, x6304

Cactus Hill Ranch Company et al. v. Water Supply and Storage Company, et al., Weld County District Court, Case No. 2018cv030402 - Cactus Hill Ranch Company filed a declaratory judgment action against the Water Supply and Storage Company seeking a determination that it was entitled to a crossing of or to modify WSSC's irrigation ditch to convey stormwater from one portion of a parcel owned by Cactus Hill that is bisected by the ditch to another portion of that parcel. WSSC filed a motion to dismiss arguing that Cactus Hill lacked standing, because the Land Board retained ownership of the land under the irrigation ditch. The Court denied the motion to dismiss, and on July 27, 2018, Cactus Hill amended its complaint to name the Land Board as a defendant and to add a claim to quiet title as to the ownership of the land under the irrigation ditch.

Update: Plaintiffs submitted Requests for Production and Interrogatories to the Land Board. Cory Haller, x6304

PARKS AND WILDLIFE

In the Matter of the Estate of Lester Dan Lacy, III, El Paso County District Court Case No. 2018PR30665 & Oklahoma County (OK) District Court Case No. PB-2018-731
Oklahoma State University Foundation v. Russell Lawson and Sherry Lawson, Payne County (OK) District Court Case No. CJ-18-185 - These cases arise out of the administration of the estate of Lester Dan Lacy, III. Mr. Lacy, a longtime resident of Colorado Springs and a prominent member of the Colorado business community, attempted to bequeath half of his estate (valued at approximately $18 million) to Colorado Parks & Wildlife and the other half to the Oklahoma Tourism and Recreation Department for the construction of state parks bearing his name in those states.

Update: Mediation for the Oklahoma is set for December 17, 2018. Cory Haller, x6304

Colorado Division of Parks and Wildlife v. 5 Star Feedlot, Inc., Colorado Court of Appeals; Case No. 18 CA 1131 - This is a fish kill case entitling CPW to statutory damages. On June 5, 2015, a containment pond owned by 5 Star Feedlot, Inc., discharged more than 500,000 gallons of manure-containing effluent into the South Fork of the Republican River, resulting in more than 14,711 fish being killed in the river and nearby Hale Ponds. CPW filed a lawsuit seeking approximately $625,000 in damages. On April 10, 2018, the Court issued a judgment awarding CPW $625,755.

Update: The Court of Appeals issued an updated Briefing Schedule following an update to the record. The deadlines for briefs: 12/10/18 – 5 Star's Opening Brief; 1/14/19 – CPW Answer Brief; 2/4/19 – 5 Star Reply brief. Jake Matter, x6289 and Andy Nicewicz, x6259

ENDANGERED SPECIES ACT

State of Colorado v. U.S. Fish and Wildlife Service (D. Colo.) - On September 27, Judge Arguello issued an opinion rejecting all of Colorado's challenges and upholding the FWS's decision to list the Gunnison sage-grouse and to designate critical habitat for the species. CPW is unlikely to file an appeal. The deadline falls in late November. Lisa Reynolds, x6252

Resource Conservation Unit

Oil and Gas

COGCC v. Martinez - On January 29th the Colorado Supreme Court granted the COGCC's petition for certiorari. The issue to be heard by the Court is "Whether the court of appeals erred in determining that the Colorado Oil and Gas Commission misinterpreted section 34-60-102(1)(a)(I), C.R.S. as requiring a balance between oil and gas development and public health, safety, and welfare." The American Petroleum Institute is an intervenor-petitioner in the case. Opening briefs were filed April 2nd. The COGCC's Reply Brief was filed June 15th. Oral argument was held on 1:30 on October 16, 2018. Mimi Larsen x6254/Kyle Davenport x6292/Jake Matter x6289

Weld Air and Water, et al. v. COGCC, 2017CV31315 (Denver Dist Ct) -This is an APA judicial review case arising out of the COGCC's approval of a permit to construct and operate a large oil and gas location in Weld County. The Sierra Club, NAACP Colorado State Conference, and Wall of Women are also plaintiffs. The Commission was served April 13, 2017 with the original complaint. An amended complaint was served on April 25, 2017. The location at issue will have 24 wells and associated facilities. The athletic fields and playground of a middle school, Bella Romero Academy, are less than 500 feet from the development. Plaintiffs allege the Commission's approval process was conclusory and inadequate, and that the Commission failed to protect public health, safety, welfare and the environment in approving the facility. Environmental justice issues are also raised in the complaint. Oral argument on the merits was held on December 22nd. On June 20th, the Court entered its order in favor of the COGCC, dismissing Plaintiffs' Complaint. After the Order was issued, Plaintiffs filed a Notice of Appeal, and on June 29th, a Motion for Injunctive Relief pursuant to C.A.R. 8. On July 12th, the Court of Appeals denied Appellants' Motion for Injunctive Relief. Appellants' opening brief was due October 5th. Mimi Larsen x6254

Neighbors Affected by Triple Creek v. COGCC, et al, 2018CA116 (Colo. Ct. of Appeals) - This is an APA judicial review case arising out of the COGCC's approval of a large oil and gas location in Greeley. Extraction Oil & Gas, Inc. (the operator of the approved location), and the Colorado Oil and Gas Association (COGA) are defendant-intervenors. In 2017, the district court issued two orders, which resolved all of Plaintiff's claims. The Court found the Plaintiff had standing and that the COGCC followed its rules in not requiring an alternative site analysis and in approving the access road to the location. The Court also found that the COGCC failed to properly consider public comments or support its reasoning in regard to best management practices in the permit and stated it would remand to the COGCC on these issues. Plaintiff, the COGCC, and COGA all appealed. COGCC appealed the district court's holdings that the Plaintiff had standing, that the

COGCC failed to properly consider or respond to public comments, and the COGCC must support its decisions in writing, rather than rely on the record as a whole. The Court of Appeals raised an issue sua sponte of whether the district court's orders were final, because the district court remanded the public comment issue back to the COGCC and the COGCC issued a supplemental response to public comments in response to the remand. The Court of Appeals ordered all parties to show cause why the Court had jurisdiction. All parties argued the district court's orders were final, and the Court of Appeals has jurisdiction. In its response to the Court of Appeals' show cause order, Extraction argued that Plaintiff's appeal is moot as the construction of the location is complete. The Court of Appeals did not dismiss the appeals, but required that the mootness and jurisdictional issues to be briefed. Neighbors submitted their Opening Brief on July 20, 2018. The COGCC filed its Opening-Answer Brief on September 14, 2018. Kyle Davenport x6292

500 Series Rulemaking - The COGCC is conducting a rulemaking to update certain of its procedural rules related to adjudicatory hearings and to incorporate changes to the pooling statute made by SB 18-230. Several local governments, including Adams, Boulder and Broomfield counties, are parties to the rulemaking. The local governments are advocating for significant changes to the COGCC's rules, including increasing the percentage mineral ownership interest that must be satisfied before a statutory pooling application can be considered the Commission. The rulemaking commenced with party testimony during the Commission's October 3rd hearing, and was continued for deliberation and ruling during the Commission's October 30 hearing. Mimi Larsen x6254

School Setback Rulemaking - At its July Commission hearing, Commissioners voted in favor of directing COGCC staff to undertake a rulemaking that considers LOGIC's proposed rule for a 1,000 foot setback for oil and gas operations from the property line of a school. The first of three scheduled stakeholder meetings occurred on August 24th. The rulemaking is scheduled for the December 17 and 18 Commission hearing. Mimi Larsen x6254

Payments of Proceeds cases - Oil and gas operators seek judicial review of COGCC's dismissal of royalty underpayment dispute cases between operators and royalty owners. COGCC dismissed the underlying administrative matters for lack of jurisdiction under § 34-60-118.5, CRS. Responsive pleadings were filed on October 26, 2018. COGCC answered 3 of the 4 complaints, and moved to dismiss the 4th. Parties have moved the courts to consolidate the four cases, but there is no ruling on that motion. Prehearing procedures are ongoing and no dates has been set for trial. This is a technical case, so is unlikely to receive a great deal of press, however, it is a hot topic for industry and has high potential for appellate proceedings. Mimi Larsen, x6254

Division of Reclamation, Mining and Safety

Ball and Kim, Estate of Ball and Kim v. US (USFS) and Division of Reclamation, Mining and Safety, 18-CV-01461, Federal District Court - Sarah Ball and Peter Kim are deceased and their parents are pursuing a civil action against the U.S. Forest Service and DRMS, Inactive Mine Program. This case arises out of a vehicular accident in Boulder County where a driver steered his jeep into an abandoned mine shaft, ejecting passengers Ball and Kim, resulting in their deaths. The parents of Ball and Kim filed suit against both the USFS and DRMS alleging a duty to safeguard the mine. Because no such statutory duty exists, DRMS filed a motion to dismiss. Conversations with opposing counsel indicates that the Ball and Kim families will drop the claims against the DRMS, however, that has not yet occurred. Jeff Fugate x6286

Pride of the West, LLC and Todd Hennis v. Colorado Mined Land Reclamation Board and the Colorado Division of Reclamation, Mining and Safety, 2017cv30268 (Denver Dist. Ct) 2018CA109 (Court of Appeals) - On January 19, 2017, Pride filed a complaint for judicial review pursuant to the Colorado Administrative Procedure Act seeking court reversal of a Mining Board Order revoking a permit and forfeiting the associated $515,000 financial warranty. The permit at issue is known as the Pride of the West Mill, a permit for a gold and silver mine and mill located near the town of Silverton in San Juan County, Colorado. This site is also one of the 48 sites included in the Bonita Peaks Mining District Superfund area. In an administrative enforcement hearing the Mining Board found Permittee Colorado Goldfields in violation of a July 2016 Order for failure to comply and reclaim Cell 1A, a tailings impoundment pond that had lost containment through holes in the HDPE liner, resulting in the estimated release of 40,000 gallons of poor-quality, metals-laden storm water. Revocation of the permit and forfeiture of the associated bond allowed the Mining Division to commence and conduct the necessary reclamation work on-site to address the loss of containment of Cell 1A to avoid additional hydrologic impacts prior to spring snowmelt and runoff. The primary claim raised by Pride related to the issue of notice and whether Pride was provided sufficient notice of the adjudicatory hearing that led to permit revocation and bond forfeiture. Pride asserted that, because it purchased rights to the permit and financial warranty through a foreclosure sale, it was entitled to direct notice of the hearing and should have been made a party to the underlying enforcement action. The Mining Board and Division disagreed, and have maintained its position that an entity cannot simply purchase rights to a permit and warranty. Rights can only be acquired through compliance with the administrative transfer process, which Pride failed to do.

In November 2017, the district court issued an order in favor of the Mining Board and Division, finding that rights to a permit and financial warranty cannot be purchased, and that Pride was not entitled to direct notice of the administrative

enforcement hearing. UPDATE: Pride has appealed the district court order and this matter is pending before the Colorado Court of Appeals. Pride's opening brief is due November 6. Jeff Fugate x6286

Water Conservation/Water Resources

In October 2018 the Water Conservation Unit on behalf of the Colorado Water Conservation Board filed a statement of opposition in the following two water court cases:

- B Lazy M Ranch Owners Association, Case No. 18CW33044, Water Division 2 – Phil Lopez, x6312
- Young Life and Upper Arkansas Water Conservancy District, Case No. 18CW3048, Water Division 2 – Andy Nicewicz, x6429 and Ema Schultz, x6307

In October 2018 the water court entered a final decree for an instream flow water right in the following case:

- Piceance Creek ISF, Case No. 16CW3038, Water Division 6 – Andy Nicewicz and Phil Lopez, x6312
- Willow Creek ISF, Case No. 16CW3044, Water Division 6 – Phil Lopez, x6312
- Fourmile Creek ISF, Case No. 16CW3040, Water Division 6 – Phil Lopez, x6312
- McKinley Ditch ISF acquisition and change of water right (co-applicants with Colorado Water Trust), Case No. 14CW3108, Water Division 4 – Jeff Candrian, x6288

In October 2018 the Water Conservation Unit on behalf of the Colorado Water Conservation Board filed a water court application for the following instream flow water rights:

- Miners Creek ISF, Case No. 18CW3014, Water Division 3 – Pat Kowaleski, x6297
- Coyote Wash ISF, Case No. 18CW3041, Water Division 4 – Marc Sarmiento, x6429
- Dutchman Creek ISF, Case No. 18CW3043, Water Division 4 – Marc Sarmiento, x6429

People v. Two Rivers Water & Farming Company, et al., Case No. 15CW3051, District Court, Water Division 2 – This matter involves the ongoing efforts of the State Engineer to have the Cucharas Reservoir #5 Dam on the Cucharas River

northeast of Walsenburg, in Huerfano County, breached in order protect lives and property downstream. In response to the defendants' failure to comply with a Consent Decree approved by the water court for the breaching of the dam, the State Engineer and the District Attorney for Huerfano County, initiated contempt of court proceedings against the defendant corporations and their officers and directors last April. In August, the State Engineer exercised his emergency powers by taking control of the dam to raze it to a safe level before the next spring runoff season. The Spring Fire that began near Fort Garland in late June burned 49,000 acres (12%) of the drainage basin above the dam, which increases the risk of debris clogging the reservoir's outlets so as to cause water to be impounded behind this unsafe dam. The office is now assisting the State Engineer in his efforts to work with the owner of the property underlying the dam and contractors to start work to raze the dam in November with a goal of completing the work before the end of March, 2019. The State Engineer plans to seek recovery of all reasonable expenses from the defendants as allowed by statute. Meanwhile, in the contempt proceeding, the State filed an unopposed motion for partial summary judgment finding that: (1) the Consent Decree is an existing lawful order of the water court; (2) the defendants failed to comply with the Consent Decree; and (3) the defendants must pay the Consent Decree's stipulated penalty of $100,000 to Huerfano County. In October, the water court entered the State' proposed order granting all of this relief. Philip Lopez, x6312; Paul Benington, x6309.

People v. Two Rivers, et. al., Case No. 17CV30034, Huerfano County District Court - This case concerned an action by the State Engineer to enforce his 2014 order to Two Rivers and it subsidiaries that restricts the water storage level in the Cucharas Reservoir to zero and requires that all operable outlet gates be maintained in the full open position ("Zero Storage Order"). The State Engineer issued the Zero Storage Order due to the structural deficiencies in the dam. In September, 2017, the State Engineer became aware that the outlet gates had become clogged with debris and that water was building up behind the Dam. Pursuant to section 37-87-1114(2), the State Engineer asked the Attorney General's Office to bring an action in Huerfano County District Court to enforce the Zero Storage Order. Pursuant to 37-87-114(1), the State Engineer requested the District Attorney for the 3rd Judicial District to also seek penalties of no less than $500/day for Two Rivers violation of the Zero Storage Order. The District Attorney appointed First AAG Paul Benington and AAG Philip Lopez as Special Deputy District Attorneys to seek the penalties. The People obtained a preliminary injunction finding Two Rivers had violated the Zero Storage Order and ordering Two Rivers to immediately unclog the reservoir's outlets. Two Rivers complied.

The People then filed a motion for summary judgment based on the undisputed fact that water was stored in the reservoir for 171 days in violation of the Zero Storage Order. The motion also requested a mandatory permanent injunction requiring Two Rivers to comply with the Zero Storage Order until the dam is razed. The

Court granted the motion, awarding penalties in the amount of $85,500. The Court also issued a mandatory permanent injunction requiring Two Rivers to continue to comply with the Zero Storage Order until the dam is razed. Phil Lopez, x6312; Paul Benington, x6309.

Proposed Cache La Poudre River Plan for Augmentation for the Colorado Water Conservation Board's Instream Flow Use – In October, the State Engineer requested a legal opinion from the Water Resources Unit regarding a concept proposed by certain Cache La Poudre River water users, including Fort Collins, Greeley and Thornton, for the use of the municipalities' changed irrigation water rights stored upstream to maintain certain minimum flows in the river as the water is released for deliver to the municipalities' uses. The proposed plan seeks to protect such flows from any diversions by others, including water users with appropriative rights of exchange on the river. The State Engineer is concerned that the proposal is not in accordance with law and will cause injury to the exchange rights on the river. The CWCB disagrees. The Director of the Department of Natural Resources and his staff are facilitating discussions between the two agencies and their respective counsel as to a path forward as to this proposed concept and the means for resolving any continuing disagreement between the agencies. The next meeting is scheduled for November 21, 2018. Paul Benington, x6309; Phil Lopez, x6312.

The State and Division Engineers successfully negotiated a settlement agreement in the following case:

Application for Water Rights of Silver Ponds Property Owners Association, Inc., the Northgate Company, and Great Divide Water Company, Consolidated Cases No. 95CW68, 94CW69, and 94CW75, Water Division 2.

Other recent developments involving the State and Division Engineers or the Colorado Ground Water Commission:

Application of Center of Colorado Water Conservancy District and Upper South Platte Water Conservancy District (together the Headwaters Authority of the South Platte, "HASP"), Case No. 06CW270, District Court, Water Division 1 - Based on a dispute over whether the Division Engineer was precluded from requiring HASP to install necessary measuring devices on Deer Creek for the administration of HASP's water rights, the Engineers filed a petition under the retained jurisdiction provision of the decree in Case No. 06CW270 in May, 2018. The petition requested clarification from the water court that under the relevant decrees, and pursuant to their statutory authority, the Engineers are not precluded from requiring HASP to install necessary measuring devices. HASP filed a response to the petition and a motion for summary judgment requesting that the petition be denied. In July, HASP and other Deer Creek water users, also filed a complaint (Case No.

18CW3102) against the Engineers and a motion for preliminary injunction to block the Division Engineer's administrative order requiring HASP and other water users to measure their water rights if streamflow levels in Deer Creek dropped to a certain level. After the water court heard HASP's evidence at the preliminary injunction hearing, the water court denied the request for a preliminary injunction because HASP failed to make a prima facie showing to support any injunction. Based on the separation of powers doctrine, the water court agreed with the Engineers that they had independent statutory authority to require HASP to install necessary measuring devices, effectively ending the dispute. Subsequently, HASP and the Engineers executed a stipulation in Case No. 06CW270 confirming that the Engineers could lawfully order HASP to install necessary measuring devices. The Court vacated the scheduled hearing for the Engineer's original petition. The Engineers are close to reaching a similar settlement with HASP and others in Case No. 18CW3102. Jeff Candrian, x6288; Paul Benington, x6309.

Multiple La Garita Creek Cases in Water Division 3 - Several applicants have filed to adjudicate appropriations out of La Garita Creek in Saguache County. These applications are in response to the current litigation between the Mike and Jim Kruse Partnership ("Kruse") and the State Engineer and Division 3 Engineer in Case No. 17CW3003 regarding the decreed source for the Rocky Hill Ditch. In 17CW3003, Kruse has taken the position that La Garita Creek is a decreed source for the Rocky Hill Seepage and Overflow Ditch, while the Engineers have taken the position that the source of water is limited to waste, seepage and overflow water from irrigation under the Rio Grande Canal with water imported into the Closed Basin from the Rio Grande. A number of the applicants in these newly-filed cases are also owners of the Rocky Hill Ditch and have filed applications to adjudicate appropriations of La Garita Creek water from the Rocky Hill Ditch in the event the Division 3 Water Court rules that the decreed source of the Rocky Hill ditch does not include La Garita Creek water. The Engineers have recently filed unopposed motions to intervene in all of these cases:

17CW2 – Wagon Tracks West, LLC (Motion to intervene filed)
17CW10 – Hale (Motion to intervene filed)
17CW3028 – Warner (Motion to intervene granted)
17CW3030 – Kruse (Motion to intervene filed)
17CW3033 – Toews (Motion to intervene filed)
18CW1 – Arrow Cattle (Motion to intervene filed)

The Division 3 Referee has been staying these cases pending the outcome of the 17CW3003 case, which is set for a 3-day trial beginning March 19, 2019. Phil Lopez, x6312; Marc Sarmiento, x6429

Application of the Cherokee Metropolitan District in the Upper Black Squirrel Creek Designated Groundwater Basin, Consolidated Cases No. 08GW71, 08GW78, 09GW15, Ground Water Commission's Hearing Officer – This matter involves Cherokee's pending application for approval of a replacement plan to make new

appropriations from the alluvial aquifer within the basin. Objections were filed by the Upper Black Squirrel Groundwater Management District, along with four other water users in the basin. The Commission's staff is automatically a party under the Commission's rules. In 2009, this matter was stayed due to a related ruling by the water court for Water Division 2 in Case No. 98CW80, which was then appealed to the Colorado Supreme Court in Case No. 13SA330. At issue before the water court and the Supreme Court was the meaning and effect of a previous 1999 Stipulation between Cherokee, the District, and the State Engineer as to whether Cherokee was required to use its wastewater as recharge for the basin or if that wastewater can be claimed as replacement credit under Cherokee's replacement plan. In 2015, the Supreme Court affirmed the water court's determination that the 1999 Stipulation does not address whether Cherokee may claim wastewater return credits for its replacement plan. *See Upper Black Squirrel Creek Ground Water Mgmt. Dist. v. Cherokee Metro. Dist.*, 2015 CO 47, ¶ 1, 351 P.3d 408, 410. The Supreme Court held that it was for the Ground Water Commission to decide whether the recharged wastewater could be credited toward replacement under a replacement plan. In January, 2018, Cherokee filed a Motion for Determination of Question of Law to clarify its use of the wastewater in its replacement plan. The Commission's staff filed a response in opposition to Cherokee's motion arguing that the recharged wastewater could not be used as a source of replacement water in a replacement plan to be approved by the Commission because Cherokee relinquishes dominion over the wastewater such that it becomes designated ground water subject to appropriation in accordance with the statutory scheme and the Commission's rules. The District also filed a motion opposing the motion. In a ruling on October 29, 2018, the Hearing Officer disagreed with the District and the Commission's staff and granted Cherokee's motion. The Hearing Officer concluded that Cherokee can seek replacement credit in the replacement plan for wastewater recharged under the 1999 Stipulation, subject to meeting any and all requirements as set forth under the law, the 1965 Ground Water Management Act, and the Commission's rules. Additional legal briefing is expected, but this matter will now likely be set for a hearing. Paul Benington, x6309.

State Engineer and Division Engineer for Water Division 3 v. Chris Burns and Gina Burns, Case No. 18CW3007, District Court, Water Division 3 – As previously reported, the State and Division Engineer for Water Division 3 filed this enforcement action in April of 2018. The case involves a complaint for injunctive relief, penalties and costs due to violations of the State Engineer's Rules Governing the Measurement of Ground Water Diversions Located in Water Division 3. After filing the complaint and after negotiations with the Defendants, a Consent Decree was filed requiring payments of $250.00 in penalties and $300.00 in attorney fees within 14 days of the Court's acceptance of the Consent Decree. The Court adopted the Consent Decree as an order of the Court on June 21, 2018. Defendants, however, did not timely pay the agreed upon amounts. Due to this non-payment, the Engineers filed a Motion for Issuance of Contempt of Court Citation on August 2,

2018. Following this motion, the Court issued the Contempt of Court Citation and the matter was set for an October 22, 2018 hearing. In the interim, the Engineers and Defendants entered into a Stipulation and Plea Agreement in which Defendants must pay a $2,000.00 punitive fine to the Court within 30 days of the Court's order approving the agreement. The Court entered an order approving the agreement on October 18, 2018, and vacated the hearing. Defendants now have until November 17, 2018, to submit the required payment to the Court. Timely payment will then end this matter. Chris Stork x6311; Pat Kowaleski, x6297

Application for Water Rights of Glen and Pat Burgener, Case No. 16CW3100, Water Division 2 – As previously reported, the State and Division Engineer for Water Division 2 filed a protest to the Ruling of the Referee in this matter in January of 2018 due to a number of concerns regarding the claimed absolute storage water right, the change of water right, and the proposed augmentation plan. The Engineers and Applicants held an in-person settlement meeting followed by extensive communications as to the Engineers' concerns. Eventually, Applicants agreed to drop their claim for the water storage right and agreed to other changes in the decree eliminating any appropriation of return flows from the changed water rights. On October 23, 2018, the water court approved the proposed decree to which the Applicants and the Engineers stipulated, ending this matter. Chris Stork, x6311; Jeff Candrian, x6288

Federal and Interstate Water

Rio Grande -Texas v. New Mexico and Colorado, No. 141 Original - This suit focuses on claims regarding actions of Texas, the United States, New Mexico and the Republic of Mexico, and their alleged impacts on the Rio Grande Project water deliveries. The Project delivers water to southern New Mexico, west Texas and Mexico. The Parties have started discovery, with the first requests for production issued and depositions scheduled. This case will use extensive electronic discovery methods, with hundreds of gigabytes of documents being produced. The Special Master expects the Parties to start the trial in the fall of 2020.

Colorado is participating as a signatory to the Rio Grande Compact, which is at issue in the case. However, but has no claims asserted against it and is not asserting any claims at this time. Colorado reached an agreement with the other Parties 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. Chad Wallace x 6281, Karen Kwon x 6269

Special Improvement District No. 1, 07CW52, Division 3 – This subdistrict of the Rio Grande Water Conservation District promulgated the second amended plan for

water management, which the State Engineer approved. The changes deal primarily with contracting with people outside the District boundaries and quantification of recharge to the unconfined aquifer within the District. S & T Farms filed an objection to this amendment, based largely on the burden of proof regarding recharge. A one day trial will be held in April 10, 2019. Chad Wallace x 6281

Arkansas River Compact Administration – The Unit is coordinating with clients from the Division of Water Resources in anticipation of a Special Engineering Committee meeting with Kansas on October 8. Two issues will be considered during the meeting. The first is identifying a mechanism to provide a perpetual approval of the Highland Canal as a source of water for the Permanent Pool in John Martin Reservoir. John Martin Reservoir has been operated on temporary one-year Permanent Pool approvals for the past 2 years. One of those years was a wet year and the other a dry year. As such, there has been ample demonstration to Kansas that the agreement is beneficial to water users in both states under variable conditions. Following a teleconference meeting on October 8, it is not yet clear whether Kansas will provide a perpetual approval at the December meeting of the Arkansas River Compact Administration. If not, there will likely be an additional annual, temporary approval to occur for another year.

The second issue is exploring mechanisms that will secure approval of a new Multi-Purpose Colorado account in John Martin Reservoir. Currently, the John Martin Reservoir Operating Plan has specific accounts for which many water users do not have access even though the reservoir almost always has excess capacity. This leads to the inefficient use of water resources. Given that storage capacity exists in John Martin Reservoir, Colorado is seeking Kansas approval of a new account that could be utilized by those Colorado water users that do not currently have an account. This is likely to be a long negotiating process. To begin this effort, the Special Engineering Committee will meet on November 6. Prior to that, the Division of Water Resources will provide a presentation on water exchanges at the request of Kansas. The Unit will participate to provide an understanding on the law as it relates to exchanges in Colorado. Dan Steuer x 6262

Republican River Compact Negotiations - Colorado is currently negotiating with Kansas and Nebraska to extend the deadline by which it must remove from irrigation 25,000 acres of land in the South Fork Republican River basin under the 2016 Resolution of the Republican River Compact Administration. Since 2016, Colorado has been unable to enroll land in the Conservation Reserve Enhancement Program because the Farm Services Agency refused to approve amendments to its contract with Colorado under the CREP Program. Those amendments have now been approved, but there is no funding for CREP because the House and Senate are unable to agree on the substance of a farm bill. The States are exploring whether the extension can be reasonably tied to approval of a farm bill. Scott Steinbrecher x 6287

Republican River Compact Rules - The State Engineer is preparing to file rules for administering water consistent with the Republican River Compact (compact rules) in the Division One Water Court. The rules would require all water users who are included in Colorado's Compact Accounting to participate in a plan to help the State maintain compact compliance. Most of the water users in the basin would be covered by the Republican River Water Conservation District's existing plan, which includes operating the Compact Compliance Pipeline. Those users who do not yet participate in the District's plan would be required to join that plan or create their own. The State Engineer revised the rules and statement of basis and purpose. He subsequently solicited comment on the draft rules document. The Unit is currently assessing the comments and will coordinate with the Division of Water Resources on edits to draft rules before they are filed with the Water Court in Division 1. Dan Steuer x 6262; Scott Steinbrecher x 6287

Colorado River Drought Contingency Plans – The Colorado River Basin is experiencing its 19th year of drought. In light of this ongoing condition, the Colorado River Basin States and Department of the Interior recognize a need to plan for drought contingencies that would help avoid or mitigate the uncertainties associated with fluctuating water supplies. Such plans require intra-state, interstate, regional, interstate and state to federal coordination and agreements that involve a series of negotiations to reach consensus. The Unit has been working with the Colorado Compact Commissioner, Colorado Water Conservation Board, and Upper Colorado River Commission to explore and evaluate the options and terms of any drought contingency plan. In mid-September, the States' Principals and Commissioner of Reclamation met to confirm the status of the draft plans and directed staff to proceed with performing public outreach and initiating processes for necessary approvals.

The Unit has coordinated with the state representatives to finalize the draft planning documents. It has also participated in a special meeting of the Colorado Water Conservation Board to walk through the terms of the documents, and been part of the public outreach efforts to help explain the purpose and need of the documents. These efforts include a 2 hour public webinar in which the documents were discussed and posted to the CWCB's website, basin roundtable meetings in the Colorado River and Southwest Colorado basins, and the Grand Valley Water Users' Association Seminar. Additional outreach will be performed as meetings and seminars are scheduled.

In addition to the Drought Contingency Planning documents, the 7-States' Principals and Department of the Interior agree that federal legislation essentially "blessing" the documents is appropriate. Once the terms of the Drought Contingency Planning documents are deemed ready for approval, they will be combined into a package for the Congressional delegations to consider. No vehicle

for federal legislation has yet been identified and the timing for federal authorization is yet to be determined. Karen Kwon x 6269.

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 Operation 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 for the Department of the Interior and Commission to 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. The Upper Basin members have confirmed that the Lower Basin and Reclamation accept the edits to the draft Agreement. As such, this draft document has been prepared for final review and made available for public distribution and consideration. The Unit is coordinating with state representatives on preparing responses to the public's frequently asked questions and addressing concerns as they arise. (See Drought Contingency Plan, supra). Karen Kwon x 6269

Upper Basin Drought Contingency Plan - Exploring Demand Management Feasibility - Demand management is a second 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 has been working with Colorado's Compact Commissioner as well as staff from the CWCB and Upper Colorado River Commission to draft the authorizations and agreements to further these directives. The Upper Basin members have confirmed that the Lower Basin and Reclamation do not object to the terms as drafted at this time. As such, this draft document has been prepared for final review and made available for public distribution and consideration.

Concurrently, the Unit has been 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 identifying concepts, issues and concerns that stakeholders may have with the demand management concept. Initial outreach began in March, has progressed through the Summer, and will through the Fall and Winter. The goal is to utilize this and other information to inform any state position on the feasibility and terms of a demand management program in a manner that will provide more certainty in water uses on the Colorado River into the future and promote ongoing compact compliance consistent with the values and goals of Colorado. At the September meeting of the Colorado Water Conservation Board, the directors heard testimony from stakeholders interested in and concerned by the concept of demand management. Additionally, there has been a number of Basin Roundtable meetings and seminars in which stakeholders are expressing opinions and concerns on demand management and its potential impacts to their respective communities. The CWCB conducted a Special Board Meeting on October 4 to consider the elements of the Drought Contingency Plans and determine related next steps for water policy considerations in Colorado. At that meeting, the Board directed staff to prepare a draft policy statement regarding the role of demand management going forward. The Unit is in the process of helping prepare that statement in anticipation of the November Board meeting. Karen Kwon x 6269; Amy Ostdiek x 6305; Lain Leoniak x 6313

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 draft plan 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 Principals recently confirmed at the September meeting, that there are no major outstanding issues to negotiate between the Upper and Lower Basin regarding this plan so long as the Upper Basin's elements of the Drought Contingency Plan can be approved and finalized. A few additional terms are currently being finalized within the Lower Basin, but the substance of the draft Agreement was completed in Final Draft Review format and made available for public distribution by October 9. (See Drought Contingency Plans, *supra).* Karen Kwon x 6269; Amy Ostdiek x 6305; Lain Leoniak x 6313

Colorado River Companion Agreement - In addition to the Upper and Lower Basin Drought Contingency Plans, the 7-States coordinating committee was tasked with mapping out the terms of an additional agreement that would set forth the relationship between the Upper and Lower Basin and Secretary in implementing and enforcing each other's Drought Contingency Plans. This 7-State Principals considered this Agreement along with the rest of the DCPs at the September meeting and confirmed that it was ready for public distribution by October 9. (See Drought Contingency Plans, supra). Karen Kwon x 6269

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 submitted a letter the first week in July 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 over 2,000 municipal, industrial, and agricultural water suppliers in the basin and impacts 2,500 Reclamation projects upstream of Lake Powell. This is a matter of concern as the Colorado River Basin enters its

nineteenth year of drought conditions, which have drawn down reservoir levels and created significant water management challenges for the years to come.

On September 21, 2018, the President signed H.R. 5895 into law. The bill provides full funding for the Recovery Implementation Programs. The Bureau of Reclamation has identified funding for the Glen Canyon Dam Adaptive Management Program for FY 19. The Upper Basin States through Upper Colorado River Commission and the Recovery Implementation Program Management Committees, continue to work for re-authorization of the RIPs through 2023, and for a long-term funding solution for GCDAMP. Lain Leoniak x 6313.

Long-Term Experimental Management Plan at Glen Canyon Dam – The Long-Term Experimental and Management Plan for the operation of Glen Canyon Dam ("LTEMP") analyzes potential impacts of various operating protocols for Glen Canyon Dam and the stretch of the Colorado River that flows through the Grand Canyon. Among these potential operational protocols are flow-related experiments, including a High Flow Experiment, which increases the amount of water released from Lake Powell for a short time period for the purposes of distributing sediment downstream and improving sandbars for recreational purposes. The Unit continues too coordinate with CWCB staff and Colorado's Adaptive Management representative to monitor implementation of the LTEMP with the ultimate goal of coordinating with other parties and decision makers to ensure the state's interests are protected and that management activities comply with the 2016 Record of Decision. The Adaptive Management Work Group and Technical Work Group, both Federal Advisory Committees on which Colorado is represented, analyze management options and assess potential effects on resources within the Canyon, including cultural resources, power production, endangered species, non-native fish, and other resources.

The Assistant Secretary for Water and Science within the Department of the Interior, with consultation from stakeholders including representatives from the seven Colorado River Basin States, has decided to implement a Fall High Flow Experiment to take place November 5-8. During this 60-hour flow event, 38,700 cfs will be released from Glen Canyon Dam. The annual releases, however, will be unchanged; other monthly releases will be reduced to accommodate the increased release in November. The impact of the high-flow event on other resources, including the endangered humpback chub will be closely monitored. Amy Ostdiek x 6305.

Lake Powell Pipeline - The Utah Board of Water Resources filed an application with the Federal Energy Regulatory Commission in May 2016 to construct a pipeline from Lake Powell to Southwest Utah to develop an additional 100,000 AF of Utah's allotment under the Colorado River Compact and the Upper Colorado River Compact. There are potential impacts to the operation of the Project in relation to

the named sources of water for the Project, the Law of the Colorado River, and Glen Canyon Dam operations as a result of the pipeline project. In January 2018, the Colorado Water Conservation Board approved filing a Motion to Intervene. However, also in January, FERC suspended the proceedings to decide a jurisdictional issue. On September 20, 2018, FERC issued an order denying Utah's Petition for Declaratory Order on Jurisdiction, limiting the scope of its review to the hydropower components of the project only. The Order granted Utah the option to amend the application. Also, it remains unclear if FERC will continue to serve as the lead agency for purposes of coordinating the EIS process. The deadline to file a Motion to Intervene is now November 19, 2018. The Unit will continue to coordinate with the CWCB to protect the State's interests concerning this project. Lain Leoniak x 6313

Wildearth Guardians v. Jewell, 16CV1724, U.S. Dist. Ct., D.C. - Wildearth - Guardians has challenged BLM's decision to lease lands for oil and gas development in Colorado, Utah, and Wyoming. In particular, Wildearth Guardians challenges the decision under NEPA for BLM's alleged failure to consider the potential cumulative impacts on the climate if all of those leases are developed. The parties fully-briefed issues for summary judgment and were awaiting a decision from the United States District Court for the District of Columbia. However, the Court has now requested additional briefing from the parties. The issue is whether, after the leasing stage, BLM may institute a blanket ban on drilling across the leases at issue in the case, based on policy considerations. Plaintiffs must file their brief by November 5. Defendants will file theirs November 19. The Court has invited all of the Defendants, including DOJ and the States to file one joint brief. The States are meeting to discuss their strategy and then will coordinate with DOJ. Scott Steinbrecher x 6287

Audubon Society of Greater Denver v. United States Army Corps of Engineers, et. al, Appellate Case 18-1004, 10th Cir. - 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 Court held oral argument was held September 24. Only Appellee and Appellant (no intervenors) argued. The parties currently are awaiting the Court's decision. Scott Steinbrecher x 6287

Hill v. Warsewa, 18-cv-300069, Fremont County District Court, Colorado – In this fishing access dispute, Plaintiff fisherman 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.

Currently pending before the Court are two motions to dismiss for lack of jurisdiction, Plaintiff's motion to remand for lack of jurisdiction, and Plaintiff's motion to certify to the Colorado Supreme Court the question of "the nature of the State's title in navigable waterways." Scott Steinbrecher x 6287