

PHIL WEISER
Attorney General

NATALIE HANLON LEH
Chief Deputy Attorney General

JUNE TAYLOR
Chief Operating Officer

ERIC R. OLSON
Solicitor General



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

STATE OF COLORADO
DEPARTMENT OF LAW

September 6, 2019

TO: Colorado Water Conservation Board

FROM: Phil Weiser, Attorney General
Karen Kwon, First Assistant Attorney General
Jen Mele, First Assistant Attorney General

RE: Report of the Attorney General

I enjoyed seeing many of you at Colorado Water Congress' Summer Conference in Steamboat. As you may know, I provided an update on legal issues being handled by the Department of Law on water and related matters. You can see those remarks here: <https://coag.gov/press-releases/8-12-19-2/>. I also asked a question of the audience using the audience polling software that CWC deploys at their conferences. The question was: What should be the top priority for the Attorney General's Office's in water? We provided three specific answers and a fourth of "other." The answer was resoundingly: renegotiating the 2007 Interim Guidelines for Lower Basin Shortages and Coordinated Operations of Lake Powell and Lake Mead. This was really important feedback and reflected our own sense of where we should be focusing. I'll look forward to working with all of you as we undertake this and many other important processes in the near future.

FEDERAL & INTERSTATE MATTERS

1. Rio Grande -Texas v. New Mexico and Colorado, No. 141 Original

Texas has brought this interstate compact dispute before the U.S. Supreme Court alleging that New Mexico was allowing well pumping below Elephant Butte Reservoir to interfere with the Rio Grande Compact. Texas named Colorado as a defendant because it is a signatory to the Compact, but did not bring any claims against Colorado. The United States intervened as a plaintiff making essentially the same allegations against New Mexico as had Texas. The focus of the claims is along the Rio Grande Project area from Elephant Butte Reservoir above Las Cruces to below El Paso, Texas. The case, referred to a special master, is currently in the discovery phase. Trial before the Special Master is tentatively set for late 2020. Colorado

remains involved in each phase of the litigation to assure that any outcome does not negatively affect its interests in the Rio Grande Compact or create adverse jurisprudence for interstate compact litigation generally.

2. Division 3 Rules, 15CW3024

The water judge in Division 3 entered a final decree in March of 2019 approving the “Rules Governing the Withdrawal of Groundwater in Water Division 3 and Establishing Criteria for the Beginning and End of the Irrigation Season in Water Division 3 for All Irrigation Water Rights.” A copy of the Rules as approved by the Court are included here. As a result, all ground water uses subject to the Rules will have to operate under a plan that remedies all injurious stream depletions and sustains the confined aquifer. Well users may do this by decreed plans for augmentation that also comply with the requirements in the Rules or by Groundwater Management Plans approved by the State Engineer. Injurious depletions are determined by the response functions derived from the groundwater model developed for the Rio Grande Decision Support System. Well users may also propose alternate methods to determine their injurious stream depletions if such a method is at least as accurate as the model. Well users can remedy injurious stream depletions to senior surface water users by replacing water or by other agreed upon means. However, plans cannot unreasonably interfere with Colorado’s Rio Grande Compact obligations. The Rules also establish the criteria for the beginning and end of the irrigation season for all irrigation water rights, both ground water and surface water. The irrigation season is presumptively set as April 1 to November 1, with allowances for exceptions as determined by the Division Engineer. The attorneys in the Federal & Interstate Water Unit of the Attorney General’s Office have been working with the Division of Water Resources to clarify how the Rules and the timing for approval of Groundwater Management Plans and Annual Replacement Plans as set forth under the Rules will be implemented.

3. Rio Grande Subdistricts, Water Division 3

As part of the process to implement the recently approved Rio Grande Groundwater Rules, water users within the Rio Grande Water Conservation District are forming subdistricts. These subdistricts operate to raise funds through property assessments to pay for implementing plans for replacing injurious depletions from groundwater wells and for maintaining aquifer sustainability. The attorneys in the Federal & Interstate Water Unit at the Attorney General’s Office have been working with the Division of Water Resources to advise on subdistrict creation and plan development consistent with the Rules. At present, three subdistricts have been formed in Division 3 and are operating under approved ground water management plans pursuant to the Rules. Subdistrict No. 1 is located within the southern portion of the closed basin area of the San Luis Valley. Subdistrict No. 2 is found along the alluvial area of the Rio Grande approximately between Del Norte and Alamosa. Subdistrict No. 3 is in the Conejos basin north to the La Jara area. Other subdistricts have been established

and are currently formulating their ground water management plans. These include subdistrict No. 4 near San Luis Creek, subdistrict No. 5 along lower Saguache Creek, and subdistrict No. 6, which generally covers ground water users in the Alamosa and La Jara creek areas.

4. Arkansas River Compact Administration

The Federal & Interstate Water Unit attorneys continue to work with the Division of Water Resources to address interstate issues pending with Kansas in the Arkansas River basin. Such issues include: (1) the process for conducting the 10-Year review for the Trinidad Project; (2) an agreement to create a new multi-user Colorado subaccount in John Martin Reservoir; and (3) rectifying implementation of the Arkansas River Compact with the Division of Water Resources' statewide approach to historic return flows. While work continues to progress, there are no developments to report at this time.

5. Republican River – Compact Rules

On January 11, 2019, the State Engineer filed Compact Rules with the Division 1 Water Court (the "Rules"). The Rules require all water users to participate in a Compact Compliance Plan—either the Republican River Water Conservation District's Compact Compliance Pipeline or an alternative plan. The Rules set forth operating requirements for the Republican River Water Conservation District's existing plan, as well as for alternative plans and the method of determining the amount of replacement water that will be required as part of any alternative plan.

Approximately 15 parties have filed statements of opposition or support in Water Court. Most recently, the Court approved the State Engineer's proposed case management plan over the objection of two parties. The State Engineer will file its initial disclosures on September 9 and will coordinate with our attorneys to meet with parties to explore the possibility of respective settlements.

6. Colorado River Demand Management Storage Agreement and Investigations

An element of the Upper Basin Drought Contingency Plan is the Demand Management Storage Agreement. This Agreement makes unfilled storage capacity at Lake Powell, the Aspinall Unit, Flaming Gorge Reservoir, and Navajo Reservoir available for use by Colorado and the other Upper Basin States at no charge. This storage capacity is available if the Upper Colorado River Commission ("UCRC") requests its use to store water conserved as part of an Upper Basin demand management program. The Agreement does not establish an Upper Basin demand management program, but does set forth the minimum framework under which the Upper Basin can access the storage prior to 2026.

Demand Management, as currently contemplated, is the temporary, voluntary, compensated reduction in consumptive use of Colorado River uses. Because the concept of Demand Management implicates many issues and questions in the Upper Basin, Colorado (as well as each of the other Upper Division States and Upper Colorado River Commission) has committed to investigating the feasibility of a potential Demand Management program.

At the state level, our attorneys are coordinating with CWCB staff to implement the 2019 Demand Management Feasibility Work. To this end, work groups on specific topics have been established and initial meetings are being scheduled. Each workgroup will consider specific aspects and questions associated with a potential demand management program. The state team is compiling public summaries of each meeting as they occur.

An additional element of the 2019 Work Plan is regional workshops. The first regional workshop was held on August 22, 2019, in Steamboat Springs.

At the workshop, interested parties were able to learn about the process for investigations and provide public input, ask questions, and raise issues to consider going forward. The team will continue to provide updates and status on efforts going forward through announcements on the CWCB webpage, public summaries, basin roundtable meetings, and other forms of communication.

At the regional level, the Upper Colorado River Commission is on a parallel track. It is working to create a framework for the UCRC, through the states, to assess demand management and the various issues such a program would implicate throughout the Basin. The UCRC held its first Upper Basin workshop/listening session on demand management in Salt Lake City, Utah, on June 21. As advisors to the UCRC, our attorneys and CWCB staff presented and helped facilitate the meeting. Initial impressions from this meeting are that there is extensive interest in and concern with what demand management might look like throughout the region. Moreover, there is a significant need to make sure any regional investigations are well coordinated and complimentary to intrastate investigations. Our attorneys are working with the Commissioner for Colorado and her staff in furtherance of these considerations.

7. Navajo Nation v. Dept. of the Interior, et al.- 3:03-CV-00507-GMS

On August 23, 2019, Judge G. Murray Snow in the United States District Court for the District of Arizona rejected Plaintiff's Renewed Motion for Leave to File its Third Amended Complaint, thereby dismissing a lawsuit that has been ongoing for over fifteen years.

The Navajo Nation initially filed suit in 2003 after the Department of the Interior ("DOI") and Lower Colorado River Basin water users had finalized the 2001 Interim Surplus Guidelines, 2003 Quantified Settlement Agreement, and a series of other

agreements around water banking and accounting in the Lower Colorado River Basin. In its complaint, the Navajo Nation asserted that DOI had taken actions that violated the National Environmental Policy Act (“NEPA”) and the Administrative Procedures Act (“APA”), contradicted the federal government’s trust responsibility to the Nation, and ultimately undermined the Navajo Nation’s ability to access water it asserted it was entitled to under a reserved water right that had yet to be confirmed. The case was stayed for ten years as the Navajo attempted to negotiate a reserved water rights settlement within Arizona. The court lifted the stay in 2013 when the negotiations proved unsuccessful.

Upon lifting the stay, the Navajo Nation moved to amend its complaint and added additional claims. Colorado moved to intervene when it became clear that the case may call into question Upper Basin interests in management of the Colorado River System as set forth in the 2007 Interim Guidelines, and related documents. Colorado’s participation and interest has been limited to whether and to what extent the claims would alter or affect the current operations of the Colorado River System in the Upper Colorado River Basin and releases from Lake Powell.

The District of Arizona dismissed Navajo Nation’s case in 2014, holding Navajo failed to establish an injury in fact necessary to confer standing relating to its NEPA and APA claims, and that Navajo failed to identify a waiver of sovereign immunity that would permit it to bring the breach of trust claim. The Navajo Nation appealed to the 9th Circuit Court of Appeal. In 2017, the 9th Circuit upheld dismissal of most of Navajo’s claims, including the NEPA and APA claims relating to the 2007 Interim Guidelines, for lack of standing. but concluded that the Navajo Nation may have standing to bring the breach of trust claim if it could be plead properly. The Navajo Nation filed a Motion for Leave to Amend the Complaint when the case was remanded back to the District Court. The Court entertained two rounds of oral argument and ultimately decided to deny the Motion. (Colorado monitored, but did not participate in these elements of the case.). It is unclear at this time whether the Navajo will appeal this final ruling, The attorneys in the Federal & Interstate Water Unit will continue to monitor during the time for appeal.

8. Colorado River Compact Compliance Study

In 2008, the General Assembly appropriated money and directed CWCB to undertake a study to consider various options for administering and/or avoiding the need for administration of water rights in the Colorado River to comply with the Colorado River Compact. These issues implicate legal interpretations and strategies regarding water rights administration within Colorado and among Colorado and the other six Colorado River Basin States. The Attorney General’s Office continues to contract with Wilson Water Group to provide the technical expertise for this investigation.

9. Paradox Valley Unit EIS

The Paradox Valley Unit is a salinity control project in western Montrose County along the Dolores River. It was constructed pursuant to the Colorado River Basin Salinity Control Act, and extracts brine groundwater in the Paradox Valley, preventing it from entering the Dolores River. Before the PVU, this brine groundwater added more than 205,000 tons of salt to the Dolores River annually. The PVU intercepts brine and injects it into the Leadville geologic formation via a deep injection well. This well is nearing the end of its life. The Bureau of Reclamation is conducting a NEPA process and investigating alternatives for intercepting the brine. Among the alternatives are additional injection wells, evaporation ponds, and a zero liquid discharge experimental option. Colorado is a cooperating agency in this process and is monitoring the project to ensure that Colorado's interests are protected, and to ensure compliance with Colorado water law. Reclamation anticipates releasing a draft EIS by August 30, 2019.

10. Upper Colorado River Basin Fund Memorandum of Agreement

Attorneys in the Federal & Interstate Water Unit at the Attorney General's Office continue to work with CWCB staff to develop a mutually agreeable process with Reclamation to manage project improvements funded pursuant to Colorado's allocation under the Upper Colorado River Basin Fund MOA (MOA). In late August, the parties reached consensus on a Communications Management Plan and template for Project Management Plans that will be used going forward. The purposes of these documents will be to provide a foundational structure for assuring both CWCB and Reclamation maintain a mutual understanding of project status, decisions, and expenditures/funding to thereby promote a transparent and effective management of projects approved pursuant to the MOA within Colorado.

At the regional level, our attorneys continue to coordinate with the Colorado Commissioner and her staff to identify issues and possible paths forward with other Upper Division States, Western Area Power Authority, Colorado River Energy Distribution Association, and Bureau of Reclamation in consideration of renewing or extending the current Basin Fund MOA beyond 2026.

11. Hill v. Warsewa, Appellate Case 19-1025, 10th Cir.

The parties have briefed this case on appeal to the 10th Circuit, after Magistrate Tafoya dismissed the complaint for lack of prudential standing. At its core, the case involves a fishing access dispute, in which Plaintiff fisherman alleges that the state of Colorado, rather than the landowner, holds title to the riverbed of part of the Arkansas River because, so they claim, the Arkansas River was navigable at the time Colorado became a state.

The state moved to dismiss the complaint on several grounds, including prudential standing. Magistrate Tafoya agreed that Plaintiff lacks prudential standing to pursue the case in any forum. She noted that the case is not about whether Colorado has a public trust framework or can turn its back on the public trust, but instead about whether a citizen with no ownership right can bring the case to court as framed. The decision closely follows 10th Circuit case law that our attorneys cited on prudential standing. *See e.g., The Wilderness Soc. v. Kane Cnty, Utah.*, 632 F.3d 1162 (10th Cir. 2011) (determining that a plaintiff lacked prudential standing where it rested its claims on the government's property rights instead of asserting a valid right to relief of its own).

Plaintiff filed his opening appellate brief on April 18. Our attorneys filed a Response Brief on June 21, 2019. Colorado Water Congress and a group of landowners filed amicus briefs in support of the state's position.

12. Save the Colorado v. U.S. Bureau of Reclamation, USDC Colo., No. 1:17-cv-02563-REB

Save the Colorado challenges the Bureau of Reclamation and Army Corps of Engineer's Final Environmental Impact Statement and Record of Decision approving the Windy Gap Firing Project. Our office represents the state of Colorado, who intervened in this case to protect four interests: (1) securing a dependable water supply for the citizens of Colorado, (2) a significant financial interest in the project, (3) an interest in the fish and wildlife mitigation plans developed for the project, and (4) an interest in ensuring that storage, release, transport, and use of water from the project are consistent with state law and are administrable by the Colorado Division of Water Resources.

This case is now fully briefed and awaiting scheduling of oral argument.

13. Platte River Recovery Implementation Program.

This program is designed to address land and water needs for endangered species and their habitats on the Platte River in Nebraska. The signatory parties (United States, Colorado, Nebraska, and Wyoming) have identified goals for habitat improvement and related monetary support to help the whooping crane, interior least tern, piping plover, and pallid sturgeon. Through the recovery program, the signatories obtain Endangered Species Act permitting for past water projects and can allow future water development. Colorado's participation provides coverage for water-related activities on the South Platte River that would otherwise impact downstream flows. The signatories are working on formalizing a thirteen-year extension to the First Increment of the Program. This would bring the term of the First Increment to 2032. While many Program milestones have already been achieved, this extension allows continued implementation of the Nebraska Depletion

Plan and reductions to target flow shortages. Achieving the First Increment milestones will help inform goals for the next increment of the program. The attorneys within the Federal and Interstate Water Unit are advising the Department of Natural Resources and staff at the Colorado Water Conservation Board on the terms and provisions of any program extension.

INTRASTATE MATTERS

14. Application of the Board of Water Works of Pueblo, Colorado, Case No. 16CW3103, District Court, Water Division 2

Applicant filed a claim for a number of appropriative rights of exchange on the Arkansas River and its tributaries. The CWCB filed a statement of opposition to ensure that its instream flow water rights in the Upper Arkansas River Basin located within the claimed exchange reaches would not be injured. One of the primary concerns of the CWCB was to ensure that Applicant would not operate undecreed, out-of-priority “contract” exchanges to the injury of the instream flow rights. Applicant and the CWCB agreed on the inclusion of protective terms and conditions in the decree recognizing that Applicant’s exchanges and exchange-like operations are junior to the instream flow water rights and would be administered according to the priority system, and that the CWCB will be provided notice of Applicant’s exchanges and other operations that would potentially affect an instream flow water right. Applicant and the CWCB entered into a stipulation on August 9, and the CWCB continues to monitor the case.

15. Application of City of Arvada, Case No. 17CW3210, Division 1

Applicant filed for approval of change of water rights, plan for augmentation, including exchanges, and appropriation of return flows. CWCB filed a statement of opposition over concerns regarding Applicant’s claims to sell and lease the subject water rights to parties for use in unknown locations and the potential resulting injury to CWCB’s instream flow water rights. Applicant agreed to include a term which requires these sales and leases, when implemented by means other than the exchanges claimed in the case, to be done in a manner that does not injure CWCB’s instream flow water rights. Applicant also agreed to require parties with whom it contracts to give CWCB written notice of its right to use the subject water rights. CWCB entered into a stipulation with the Applicant and the Court approved the stipulation on August 27. CWCB will continue to monitor the case as Applicant works to reach settlement with the remaining opposers.

16. Application of Robert K. Robbins, Case No. 18CW51, Division 4

Applicant filed for a change of water right to add an alternate point of diversion. CWCB filed a statement of opposition over concerns regarding the addition of the

upstream point of diversion within the reach of CWCB's instream flow water right on Steuben Creek. Through negotiations, CWCB learned that Applicant had been using this point of diversion at the time CWCB appropriated the instream flow right and, therefore, CWCB's instream flow water right was subject to that practice under section 37-92-102(3)(b), C.R.S. (2018). CWCB and Applicant entered into a stipulation to memorialize the subordination of the instream flow right in the decree.

Two new instream flow water rights were decreed this month:

- Douglas Creek ISF, Case No. 18CW3037, Div. 6 from the confluence of East and West Douglas Creeks to the confluence of the White River, a distance of approximately 26.29 miles, in the amount of 2.7 cfs (03/16 - 06/15), and 1.7 cfs (06/16 - 06/30).
- Lost Creek ISF, Case No. 18CW3038, Div. 6 from the confluence with Hahn Creek to the confluence with Long Park Creek, a distance of approximately 3.64 miles, in the amount of 1.3 cfs (10/01 - 03/31), 2.3 cfs (04/01 - 08/15), and 1.8 cfs (08/16 - 09/30).

In August, 2019, the Water Conservation Unit entered into stipulations on behalf of the CWCB in the following cases:

- Pueblo Board of Water Works, Case No. 16CW3103, Div. 2 – Andy Nicewicz
- Arvada, City of, Case No. 17CW3210, Div. 1 – Chris Stork
- Robert K. Robbins, Case No. 18CW51, Div. 4 – Chris Stork

17. Application of Robert K. Robbins, Case No. 18CW51, Division 4

Applicant filed for a change of water right to add an alternate point of diversion. CWCB filed a statement of opposition over concerns regarding the addition of the upstream point of diversion within the reach of CWCB's instream flow water right on Steuben Creek. Through negotiations, CWCB learned that Applicant had been using this point of diversion at the time CWCB appropriated the instream flow right and, therefore, CWCB's instream flow water right was subject to that practice under section 37-92-102(3)(b), C.R.S. (2018). CWCB and Applicant entered into a stipulation to memorialize the subordination of the instream flow right in the decree.

18. Contested Instream Flow Appropriations

- Himes Creek, Div. 7. Dolores Water Conservancy District and Southwestern Water Conservation District filed Notices to Contest this appropriation, Western Resource Advocates filed Notice of Party Status and Trout Unlimited filed Notice of Contested Hearing Participant Status. Bootjack Ranch also raised concerns to the Board and indicated

a desire to see specific terms and conditions on the appropriation regarding the location of their headgate. CWCB staff reached a stipulation with the Districts prior to the July Board meeting, Trout Unlimited and Western Resource Advocates withdrew their participation in the proceedings, and CWCB staff entered into an agreement with Bootjack regarding the location of the headgate and downstream terminus of the instream flow right on August 20, 2019. This office will file an application in water court for the instream flow water right in September 2019.

- Carnero Creek, Div. 3. S&T Farms LLC filed Notice to Contest the appropriation, however CWCB staff and S&T entered into a stipulation on September 5, 2019 and the terms and conditions of the stipulation will be presented to the Board for consideration at the September Board meeting.
- Disappointment Creek, Div. 7. Dolores County filed Notice to Contest, Western Resource Advocates filed Notice of Party Status and Southwestern Water Conservation District filed Notice of Contested Hearing Participant Status. Dolores County withdrew its Notice to Contest and CWCB staff anticipates the other parties will follow suit, however prehearing statements are due September 6, 2019 for any remaining parties.
- Trout Creek, Div. 6. Knott Land and Livestock Company, Inc. filed a Notice to Contest and Twentymile Coal LLC filed Notice of Party Status. Those parties, BLM and CWCB staff filed prehearing statements on September 3, 2019 and the matter is set for hearing at the November board meeting.

19. Two new instream flow water rights were decreed this month:

- Douglas Creek ISF, Case No. 18CW3037, Div. 6 from the confluence of East and West Douglas Creeks to the confluence of the White River, a distance of approximately 26.29 miles, in the amount of 2.7 cfs (03/16 - 06/15), and 1.7 cfs (06/16 - 06/30).
- Lost Creek ISF, Case No. 18CW3038, Div. 6 from the confluence with Hahn Creek to the confluence with Long Park Creek, a distance of approximately 3.64 miles, in the amount of 1.3 cfs (10/01 - 03/31), 2.3 cfs (04/01 - 08/15), and 1.8 cfs (08/16 - 09/30).

20. In August, 2019, the Water Conservation Unit entered into stipulations on behalf of the CWCB in the following cases:

- Pueblo Board of Water Works, Case No. 16CW3103, Div. 2
- Arvada, City of, Case No. 17CW3210, Div. 1

- Robert K. Robbins, Case No. 18CW51, Div. 4