

**CYNTHIA H. COFFMAN**  
Attorney General  
**MELANIE J. SNYDER**  
Chief Deputy Attorney General  
**LEORA JOSEPH**  
Chief of Staff  
**FREDERICK R. YARGER**  
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**

**Office of the Attorney General**

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**TO:** Colorado Water Conservation Board

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

**RE:** Report of the Attorney General

FEDERAL & INTERSTATE MATTERS

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

A hearing was held on August 28th to discuss scheduling and the pre-trial posture of the case. Most importantly for Colorado, the special master agreed to sign the order provided by Colorado approving the "non-waiver agreement." This agreement among the parties allows Colorado to not file any pleadings at this time; however, it preserves the right to do so later. This addresses Colorado's concern about compulsory counter-claims and potentially expanding the scope of the litigation. It also reduces Colorado's exposure in the litigation. The special master asked the parties to file motions on whether the Supreme Court's opinion on exceptions to the prior special master's report also made legal determinations on several key issues. The special master is providing a list of issues and the parties will submit briefs within two months. The parties start discovery at the end of August. The special master anticipates a trial in the fall of 2020.

2. Arkansas River Compact Administration

The Unit coordinated with the Division of Water Resources and the Arkansas River Compact Administration to provide comments to the draft Environmental Assessment for modification of the Repayment Contract for Trinidad reservoir. The Bureau of Reclamation issued the Final Environmental Assessment and Finding of No Significant Impact decision document on June 28, 2018. The Unit has worked with DWR and ARCA representatives to confirm that the EA and FONSI are sufficient to protect the state's interests going forward. No further action is needed at this time.

Additionally, the Unit continues to provide legal counsel on Compact matters regarding: (1) legal questions associated with implementing or altering Agreement

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

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

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

Representatives from Kansas have reached out to the Division of Water Resources to better understand the issue, but have not made the matter a topic of discussion or matter of priority as of yet. The Groundwater Hearing officer recently granted both the applicant and the State's Motions to Dismiss. The hearing officer also dismissed other objections filed by pro se parties. Because no other objectors remained, the wells will receive the requested permits.

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

In early August, Colorado finalized a settlement with Kansas regarding claims of Colorado's past over-use of water between 2003 and 2013 under the Republican River Compact. Colorado already signed and publicly announced an agreement in which Colorado agrees to repay Nebraska for its over-use. The agreement with Kansas resolves the existing controversies with Colorado and allows all states to work collaboratively through the Compact as part of an overall ongoing compliance effort.

Additionally, Colorado has negotiated a two-year extension to meet the dry-up targets contained in the 2016 Resolution of the Republican River Compact Administration, and has signed an agreement with the USDA to help fund that dry up. That resolution governs future operations of Colorado's Compact Compliance Pipeline and terms for Colorado's compliance with the Compact moving forward. Among the terms of that Resolution, Colorado agreed to remove 25,000 acres from

irrigation in the South Fork Republican River basin. Colorado planned to enroll the majority of the 25,000 acres in the USDA's CREP program, which pays farmers to stop irrigating. However, for the past two years, the USDA was unwilling to renew its CREP agreement with the State. A change of position in recent months has allowed the parties to reached agreement.

#### 5. Republican River Compact Rules

The State Engineer is restarting preparations to file compact rules in the Division One Water Court. The rules would require all water users included in the Compact Accounting to participate in a plan to help the State maintain compliance with the Compact. Most of the water users in the basin would be covered by the Republican River Water Conservancy District's existing plan, which includes operating the Compact Compliance Pipeline. Those users who do not yet participate in the RRWCD's plan would be required to join that plan or create their own. The State Engineer is holding public meetings and soliciting comments on the latest draft of the rules. He hopes to file them this fall.

#### 6. Colorado River Drought Contingency Plans

The seven Colorado River Basin States met in late July to further discuss finalization of drought contingency plans for both the Upper and Lower Colorado River Basins that will help protect critical elevations at Lake Powell and Lake Mead in times of extended drought. As the basin experiences its 19<sup>th</sup> year of drought, the States and Department of the Interior recognize a need to plan for ongoing drought to avoid or mitigate the uncertainties associated with fluctuating water supplies. The Principals directed each of the states to proceed with current drought contingency plans and work through remaining issues. Such plans require intra-state, interstate, regional, interstate and state to federal coordination and agreements that involve a series of negotiations to reach consensus. Following the meeting, members of the Defense of the Colorado River Subunit were tasked with working in a 7-State coordinating committee to identify, and to the extent possible, work through remaining issues before the 7-State Principals and Bureau of Reclamation can consider reaching consensus. In late July, the 7-States and Reclamation assessed the coordinating committee's progress in developing draft documents, and provided insight and direction on how to further complete tasks. The next meeting of the 7-States is set for September 18, 2018. At that time, the Principals will determine whether and to what extent proceeding forward with finalizing documents for the Drought Contingency Plans is possible and advisable.

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

The Unit continues to work in coordination with the CWCB and Upper Colorado River Commission to have an Upper Basin Drought Reservoir Operations Agreement finalized and ready to implement concurrently with a Lower Basin Drought Contingency Plan, and before risking critical elevations at Lake Powell. This Agreement establishes a process by which the Department of the Interior and Commission will work together to utilize the Colorado River Storage Project's primary reservoirs (Glen Canyon Dam, Flaming Gorge, Aspinall Unit, and Navajo Reservoir) to maximize beneficial use of Colorado River water in the Upper Basin during drought emergencies. In fulfilling this purpose, the Agreement focuses on: (1) protecting target operations at Lake Powell, including hydropower production and compact compliance in the face of extended drought consistent with existing laws and regulations for each facility; and (2) preserving the Upper Colorado River Commission's role in when and how to accomplish drought response in a manner that preserves collaborative relationships with federal agencies. Following discussion of the draft Agreement with Lower Colorado River Basin States and Department of the Interior as part of the joint efforts to develop Drought Contingency Plans, the Unit has coordinated with the Upper Colorado River Commission to clarify terms and identify processes that provide further assurance on how the system will be operated. These edits helped the Lower Basin representatives not object at this time to the draft Agreement going forward. The Unit will coordinate with the CWCB and UCRC staff to determine next steps for outreach and approvals on this and other elements of the DCP. (See Drought Contingency Plans, *supra*).

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

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

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

Additionally, the 7-States agreed to consider securing dedicated storage for water created as part of a future demand management program, should such program be finalized and made operational in the future. The Unit is working with the CWCB

staff and Commission representatives to develop authorizations and agreements among the Upper Division States and Secretary of the Interior regarding demand management storage that could be accessed based on certain key conditions. These concepts comprise part of the overall Drought Contingency Plan package and are the topic of much discussion and negotiation among the 7-Basin States, within the Upper Colorado River Basin, and within Colorado.

Concurrently, the Unit is coordinating with CWCB staff to implement an intrastate demand management outreach program that focuses on informing interested stakeholders of current efforts within the Upper Basin and with the Lower Basin to develop drought contingency plans, discussing 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 CWCB staff and Unit are in the process of compiling input from these outreach efforts to inform potential positions or obstacles for the State to consider if pursuing demand management in Colorado and the Upper Basin. The goal is to utilize this and other information to inform the state's position for providing more certainty in water uses on the Colorado River into the future and for promoting ongoing compact compliance consistent with the values and goals of Colorado.

#### 9. Lower Basin Drought Contingency Plan

The Lower Division States, primary water user entities, and Bureau of Reclamation have drafted an agreement on key terms of a draft drought contingency plan for the Lower Colorado River Basin. The plan, as currently drafted, successfully includes California (along with Arizona and Nevada) in conserving additional water to benefit storage at Lake Mead. However, unlike the 2007 Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead, where water simply stays in Lake Mead for the benefit of the system, the plan incentivizes, through a number of complicated and technical provisions, the voluntary conservation of water to be stored for use in later years. Moreover, it cannot be implemented as currently described without Congressional approval that would override current reservoir operations and accounting procedures under the Law of the River. The Unit has been coordinating with the CWCB and Upper Colorado River Commission to evaluate the plan, and to identify potential protections and mechanisms protect the Upper Basin. The completion of the plan depends in part on consensus among the 7-Basin States and the Department of the Interior on both the Upper and Lower Basin Contingency Plans. The 7-States coordinating committee is working to identify any outstanding issues or concerns with the Lower Basin Drought Contingency Plan as part of the package of agreements being vetted in anticipation of the 7-States Principals meeting in the middle of September.

10. Colorado River Companion Agreement

In addition to the Upper and Lower Basin Drought Contingency Plans, the 7-States coordinating committee has been 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 will consider this Agreement along with the rest of the DCPs at the September 18<sup>th</sup> meeting (See Drought Contingency Plans, supra).

11. 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 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 many municipal, industrial, and agricultural water suppliers in the basin and impact numerous Reclamation projects upstream of Lake Powell. Congressional delegations for the 7-Basin States are considering potential solutions. The Unit continues to coordinate with the Department of Natural Resources and the Upper Colorado River Commission to forward, as necessary, additional persuasive measures.

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

Due to an increase in green sunfish and brown trout in the Colorado River between Glen Canyon Dam and Lake Mead and its tributaries, the National Park Service is in the process of conducting an Environmental Assessment relating to non-native species management. The Upper Colorado River Commission is participating as a cooperating agency. The Unit is working with CWCB to staff the cooperating agency meetings and calls and reporting results to the UCRC. NPS provided preliminary draft management alternatives to the cooperating agencies and held webinars going over the alternatives. UCRC has submitted multiple comments for consideration. NPS provided an Administrative DRAFT EA at the end of July. The Unit has

reviewed the draft and helped prepare comments in conjunction with the CWCB to provide to the UCRC on behalf of the Upper Basin.

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

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

14. Hill v. Warsewa, 18-cv-1710, U.S. Dist. Ct. 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.

Defendant landowners have removed this fishing access case from state court to federal court. After removal, Plaintiff filed its First Amended Complaint, which for the first time names the State of Colorado as defendant. The State does not intend to seek remand, but instead filed a motion to dismiss on August 7. The State argues, among other things, that dismissal is required because: (1) the claims are barred by Eleventh Amendment immunity; (2) Plaintiff lacks constitutional and prudential standing to assert title on behalf of the State; and (3) Plaintiff fails to state a claim for which relief can be granted because he does not assert his own title in the disputed lands. Also pending is Defendant landowners' motion to dismiss the First Amended Complaint, which argues that Plaintiff lacks prudential standing to assert title on behalf of the State.

Plaintiff opposes both motions and argues that instead of dismissing the case, the federal court should remand the case to state court.

### INTRASTATE MATTERS

15. Application of City of Aspen, Case No. 15CW3119, Div. 5

City of Aspen applied for water rights and an augmentation plan including exchanges for irrigation of town parks and open space and use in its municipal system. The CWCB holds instream flow water rights on the Roaring Fork River and Castle Creek and filed a statement of opposition in the case to protect those rights. The CWCB raised concerns regarding potential injury, including issues regarding the location of return flow offsets and a fully depletive reach, and timing of replacements. In addition, one of the structures to be augmented under the plan included a claim under § 37-92-102(3)(b). The CWCB and the applicant were able to reach an agreement as to the terms and conditions of the water rights, augmentation plan and the claim under 37-92-102(3)(b) the CWCB felt to be protective of the instream flows rights and a stipulation between CWCB and the applicant was filed on August 1, 2018.

16. Application of Charles L. Mooney, Case No. 16CW3055, Div. 7

Mr. Mooney filed for diligence on a direct flow conditional water right decreed for fish propagation, stock, domestic and irrigation use dating back to 1976. The CWCB filed a statement of opposition primarily due to the claim for direct flow use for fish propagation. The CWCB was also concerned with expansion of use of the irrigation component of the right. The applicant agreed to remove the claimed use of fish propagation, limit the amount of irrigated acreage under the water right and to put the right to beneficial use within two diligence cycles or dismiss the water right. The CWCB stipulated to entry of the decree on August 23, 2018.

17. Application of Colorado Water Conservation Board & Colorado Water Trust, Case No. 14CW3108, Water Division 4

The CWT owns shares in the water rights decreed to the McKinley Ditch, a ditch with four priorities that diverts water from the Little Cimarron River, a tributary of the Cimarron River, a tributary of the Gunnison River. In furtherance of CWT's mission, CWT conveyed to the CWCB a permanent right to use the shares for instream flow use, but the CWT retained the underlying ownership of the shares. The CWCB and the CWT filed Case No. 14CW3108 to change the shares to allow for instream flow use. The goal of the change is to allow the shares to be used for both instream flow use and irrigation uses in the future, which is a new approach for an instream flow right. Two pro se parties who own shares in the McKinley Ditch filed statements of opposition to protect their shares, and one statement of opposition was filed by a neighboring ditch company concerned about injury resulting from the changed right. The CWCB and CWT's stipulation with the last remaining opposer was approved by the Court on August 30, 2018. The co-applicants will submit the final decree for the Court's approval in the next week.