



**ATTORNEY REPORT
JOINT QUARTERLY MEETING
GENERAL and ENTERPRISE
July 2017**

TO: CRWCD BOARD OF DIRECTORS

FROM: PETER C. FLEMING, GENERAL COUNSEL *PCF*
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Dear Directors:

This report identifies matters for discussion at the July 18-19, 2017, joint quarterly meeting of the River District and its Enterprise. A separate Confidential Report addresses confidential matters. The information in this report is current as of July 7, 2017, and will be supplemented as necessary before or at the Board meeting.

I. EXECUTIVE SESSION.

The following is a list of matters that qualify for discussion in executive session pursuant to C.R.S. §§ 24-6-402(3.5), (4)(a), (b) and (e).

- A. Executive Committee Report on General Manager Transition Process.
- B. Colorado River Cooperative Agreement Implementation Matters.
- C. Windy Gap Firing Project and Windy Gap Connectivity Channel.
- D. Remand of Grand Valley Water Users Association v. Busk-Ivanhoe, Inc., Case No. 09CW142, Water Division 2.
- E. CWCB Application for Dolores River Instream Flow, Case No. 15CW3111, Water Division 4.
- F. Analysis of River District Property in Moffat and Eagle Counties.
- G. Delta Urban Renewal Authority Proposal.

H. Colorado River Compact, Interstate and International Negotiation Matters.

II. GENERAL MATTERS.

A. Executive Committee Report on General Manager Transition and Hiring Process.

We recommend that the Board adopt a motion to clarify the delegated authority of the Executive Committee regarding the General Manager hiring process.

It is expected that, by the time of the July Board meeting, the Executive Committee (acting as the River District's search committee) will have interviewed most, if not all, of the candidates selected for interviews for the General Manager position. We anticipate that the committee will provide an update and summary on the process at the July meeting. As previously noted, most of the interested applicants have asked that the River District maintain as confidential their interest in the General Manager position, so we continue to be cautious about inadvertent disclosure of the identity of the applicants. The Executive Committee expects to identify candidates recommended (non-binding) for second interviews, to be conducted by the full Board (then acting as a search committee of the whole).

The authority delegated to the Executive Committee is set to expire on September 14, 2017. *For procedural reasons, we recommend that the Board adopt a motion clarifying that the Board retains authority to act as a search committee when it is convened, notwithstanding the limited scope of authority delegated to the Executive Committee.*

B. Analysis of River District Properties in Eagle and Moffat Counties.

No action requested.

In April, the Board briefly discussed a draft report from Western Lands Group regarding River District properties located in Eagle and Moffat Counties. A memo from Chris Treese regarding the report is included with your Board material. *The Board may wish to discuss the River District's future use and potential sale or other disposition of the property in executive session.*

C. Update on Environmental Protection Agency and U.S. Army Corps of Engineers Rule Defining "Waters of the United States" Under the Clean Water Act.

Update only.

We previously reported that numerous lawsuits have been filed challenging the 2015 Waters of the United States ("WOTUS") Rule promulgated by the EPA and Army Corps of Engineers. There has been a significant amount of litigation just on the issue of which court should hear the challenges to the rule. Under the Clean Water Act, jurisdiction to challenge the rule may lie either in a federal district court or a federal court of appeals, depending on the effect of the rule.

The District Courts for the Southern District of Georgia and the Northern District of West Virginia ruled that the federal court of appeals should have original jurisdiction and therefore dismissed the respective lawsuits pending before them. In contrast, the district court for the District of North Dakota ruled that jurisdiction was proper before it and then granted the preliminary injunction requested by the states that are plaintiffs in that lawsuit. The EPA and Corps subsequently stated they interpret that injunction to apply only within the states that are a party to the North Dakota litigation. Thus, the WOTUS rule was not effective in Colorado, North Dakota, Alaska, Arizona, Arkansas, Idaho, Missouri, Montana, Nebraska, Nevada, South Dakota, Wyoming, and New Mexico. Shortly after these rulings, the Sixth Circuit Court of Appeals issued an order prohibiting implementation of the 2015 WOTUS Rule nationwide.

On January 13, 2017, the United States Supreme Court granted *certiorari* on the question of which court has original jurisdiction to review challenges to the WOTUS Rule. On February 28, 2017, the President of the United States issued an Executive Order directing the Army Corps and EPA to issue a proposed rule “rescinding or revising the 2015 rule as appropriate and consistent with law.” The Executive Order also directs the agencies to consider interpreting the term “navigable waters” in a manner consistent with late Justice Scalia’s plurality opinion in the Supreme Court’s 2006 *Rapanos* decision¹, which arguably would remove so-called “isolated waters” (water without a surface connection to traditionally navigable waters) from federal jurisdiction under the Clean Water Act.

On June 27, 2017, the Army Corps and EPA published a proposed rule for publication in the Federal Register. The proposed rule purports to initiate the “first step in a two-step process” of reviewing and revising the definition of WOTUS. The first step was to rescind the 2015 WOTUS Rule and recodify the definition of waters of the United States as it existed prior to the 2015 Rule. We anticipate that the second-step will be to propose a definition that is consistent with the plurality opinion in *Rapanos*. We also expect that the 2017 proposed rule will be met with just as much litigation as the 2015 Rule. Hopefully, the Supreme Court will at least clarify whether that litigation will originate at the district court level or the court of appeals.

D. Environmental Protection Agency’s Water Transfer Rule Litigation Update.

Update only.

The EPA’s water transfer rule is yet another rule that has been the source of constant litigation since its issuance in 2008. At the heart of this litigation is whether a permit is required under the Clean Water Act’s National Pollutant Discharge Elimination System (NPDES) for water transfers that move water from one water body to another without the intervening addition of pollutant (*e.g.*, a transbasin or transmountain diversion). The rule was issued in an attempt to clarify the agency’s position that an NPDES permit *is not* required when water is transferred from one water body to another distinct water body without any intervening industrial, municipal, or commercial use.

¹ As summarized in the current administration’s proposed rule, the *Rapanos* plurality opinion interpreted the term “waters of the united states as covering relatively permanent, standing, or continuously flowing bodies of water that are connected to traditional navigable waters as well as wetlands with a continuous surface connection to such water bodies.” Proposed Rule @ p.7

In a recent decision, the Second Circuit Court of Appeals overturned the lower district court's decision in *Catskill Mountains Chapter of Trout Unlimited v. United States Environmental Protection Agency*, and found that the EPA's Water Transfer Rule was a reasonable interpretation of the Clean Water Act which is entitled to deference from the court. We anticipate that the Second Circuit's opinion will be appealed to the United States Supreme Court. We will provide the Board with updates as warranted.

E. Delta Urban Renewal Authority.

Update only.

The Delta Urban Renewal Authority ("DURA") recently contacted the River District to request that the River District agree to the dedication of all tax increment revenue in the DURA project's boundaries. We informed the attorney for the DURA that, based on the Board's prior direction regarding a similar request from the Montrose Urban Renewal Authority ("MURA") that the River District was unlikely to agree to dedicate the TIF revenue to the Authority.

We interpret Colorado law to require that urban renewal authorities must obtain the consent of local taxing districts for the inclusion of agriculture land within the boundaries of a proposed project. It is our understanding that agriculturally-assessed lands are located within the DURA's proposed project boundaries. Thus, based on the Board's direction and the successful negotiation of an agreement with the MURA, we informed the DURA that the Board likely would consent to the inclusion of the agriculturally-assessed land if the DURA returned all of the TIF revenue to the River District (with the exception of a 3% administrative fee). We also discussed that the River District has not looked favorably on tax increment financing in the past, and that the small proportionate share of the TIF revenue attributable to the River District's mill levy likely would not be critical to the project. The DURA's informal response was that the DURA needs every dollar of the project's TIF revenue and that they wanted the opportunity to make a presentation to the Board. We let them know they were welcome to make such a presentation but we have not heard anything additional from the Authority since mid-May.

This matter is discussed further in the Confidential Report. The Board may wish to discuss it in executive session.

F. General Counsel Goals and Objectives.

No action requested.

Consistent with past custom, a list of General Counsel's Goals and Objectives for 2017, is set forth below as a mid-year status check, with update notes where appropriate.

1. Continue Implementation of the Colorado River Cooperative Agreement (CRCA).
 - a. Work toward successful adjudication of the Green Mountain Reservoir Administrative Protocol. (This continues to be stalled at the federal court.

However, Judge Krieger's March 22nd Order regarding the federal court's jurisdiction of Blue River Decree matters raises issues about how the many co-petitioners will complete adjudication of the protocol. Peter provided an update memo to the Board regarding Judge Krieger's order on June 23rd. Please let us know if you have any questions about that memo).

- b. Provide leadership on the West Slope investigation contemplated by the CRCA to fully explore all methods to preserve the Shoshone Call Flows. (This matter is ongoing).
- c. Convene and implement the West Slope Fund Management Committees to manage the investments and disbursement criteria for income to the West Slope Fund. (2017 should be the first year in which relatively significant revenue begins to accrue to the West Slope Fund. We recently executed a West Slope Charge Agreement with the WISE Authority, which will be the first long-term agreement that will, eventually, provide a significant source of revenue to the West Slope Fund. We are tardy in convening the management committee and will schedule a meeting of the management committee for later this summer or fall).

2. Work to ensure a satisfactory implementation of actions contemplated by the Windy Gap Firing Project IGA. The two primary implementation items are a proposed amendment of the Windy Gap water rights to incorporate the terms of the IGA, and implementation of the Windy Gap Connectivity Channel in a manner that protects overall West Slope interests and is consistent with applicable law. (We continue to dedicate significant effort to these ongoing items. We are confident that a consensus application will be filed with the water court within the next several months to adjudicate these important components of the WGFP IGA).

3. Assist staff on development of a strategic water rights development plan. (Ongoing. We anticipated providing a comprehensive refresher of the evolving law on diligence at your April quarterly meeting but due to the one-day meeting in April and a lack of pending diligence determinations, we decided to postpone that report. The River District's next major diligence filing deadlines are in 2018. We believe a report on the evolving law of diligence standards will be more relevant to the Board at that time but we are happy to provide a detailed summary sooner if the Board wishes. In the meantime, we have alerted River District staff to the upcoming diligence filing deadlines and will work with staff in furthering development of a strategic water rights development plan).

4. Advise staff and Board on legal matters related to Wolford Dam Embankment issues. (Ongoing).

5. Work with River District technical and external affairs staff to increase overall River District presence and outreach in Water Divisions 4 and 6. (Ongoing).

6. Advise the River District Board, and work closely with River District staff and other entities on matters related the System Conservation Pilot Programs, Colorado River Basin

Study “Next Steps”, the conceptual Colorado River Water Bank, and implementation of the State Water Plan. (Ongoing).

- a. Expand knowledge, participation, and advice to the Board on interstate compact matters and other matters related to interstate Colorado River negotiations.
 - b. Related to these items, advise the River District on the potential scope and extent of State Engineer rules and regulations related to the 1922 and 1948 Colorado River Compacts.
 - c. Protect the West Slope’s interests by helping the River District proceed with caution on matters related to demand management as it impacts West Slope agriculture.
7. Assist River District technical staff and advise the Board on negotiations related to implementation of the Eagle River MOU. (Ongoing).
8. Assist the Board with River District personnel succession planning as requested by the Board. (Ongoing).

The above list should not necessarily be interpreted as a “priority” list for legal staff. There are numerous ongoing tasks and activities that command legal staff’s time on an ongoing basis. Often, those items (such as the day-to-day litigation of water court cases, assisting staff on legislative matters, etc.) require substantial attention from legal staff. In addition, it should be anticipated that the goals and objectives may change throughout the year as priorities shift due to unforeseen circumstances or actions by others. Finally, it is possible that in some cases, General Counsel’s goals and objectives should be discussed with the Board in executive session if necessary to protect the confidentiality of attorney-client communications and matters subject to negotiation.

III. RIVER DISTRICT WATER MATTERS.

A. Colorado River Cooperative Agreement – Implementation Issues.

Update only.

1. Denver’s Roberts Tunnel Diligence Application, Consolidated Cases 49-CV-2782, U.S. District Court (Blue River Decree), and Case No. 06CW255, Water Division 5.

A number of CRCA benefits will accrue to the West Slope upon “Resolution of Blue River Decree Issues”, which the CRCA defines to mean “the entry of final judgments and decrees no longer subject to appeal which make absolute 654 cfs in 06CW255, Water Division 5, and in 49-CV-2782, U.S. District Court [and in Denver’s Dillon Refill diligence application in Case No. 03CW39, Water Division 5].” Thus, the CRCA provides that decrees must be entered in both the

Colorado Division 5 Water Court and the federal court for Denver's Roberts Tunnel diligence case. In April, Denver filed a stipulated motion with the Colorado Division 5 Water Court for entry of the consent decree in Case No. 06CW255. The Division 5 Water Court has not yet acted on that motion. As discussed at your April Board meeting, the March 22nd Order issued by federal district court Judge Krieger creates a problem with obtaining a final decree for Denver's Robert's Tunnel diligence from the federal court. We will work cooperatively with Denver and the other CRCA parties to clarify how to resolve the confusion about "resolution of Blue River Decree issues" created by Judge Krieger's order.

With respect to Judge Krieger's order (as discussed above in the General Counsel's goals and objectives section of this memo), we provided a report to the Board on June 23rd with an update on our outlook regarding the order, and how it may impact other CRCA-related items, such as the adjudication of the Green Mountain Reservoir Administrative Protocol. Please let us know if you would like further discussion on Judge Krieger's order. We will continue to update the Board on any new developments.

2. Incorporation of the Learning By Doing Group.

As part of the Colorado River Cooperative Agreement ("CRCA") and the Windy Gap Firing Project Intergovernmental Agreement ("Windy Gap IGA"), the River District, Grand County, Denver Water, Northern Water, and the Middle Park Water Conservancy District are parties to the Learning By Doing agreements ("LBD Agreements"²). The LBD Agreements commit the parties to serve on the Learning By Doing management committee, which has the goal of maintaining, and where reasonably possible, restoring or enhancing, the aquatic environment in Grand County. Trout Unlimited and Colorado Parks and Wildlife are also members of the management committee.

Pursuant to the CRCA and Windy Gap IGA, the obligations under the LBD Agreements become effective upon the acceptance of permits by Denver and Northern for their respective projects. Despite the fact that all the permits are not in place, the management committee has been meeting bi-monthly to identify stream enhancement opportunities and monitoring objectives. Earlier this year it began its first project -- a channel restoration project on the Fraser River.

The LBD Agreements contemplate that the parties may wish to form a non-profit corporation to carry out the functions of LBD. The limitations of carrying out the functions of LBD without a corporate structure became apparent during the contracting for the Fraser River restoration project. Because the LBD management committee is not a legally recognized entity, the restoration project required one of the member entities to hold the contract with the contractor and another to enter into a contract and accept the grant funds that are being used to partially pay for the project.

The management committee believes it would be advantageous to set up a non-profit corporation to carry out the administrative functions of LBD (*e.g.*, entering into contracts, opening

² There are two nearly identical LBD Agreements, one between the West Slope entities and Denver Water and one between the West Slope entities and Northern Water.

a bank account, etc.). The corporate entity would still be operated pursuant to the LBD Agreements and lead by the management committee. The management committee is in the very early stages of defining the corporate structure, articles of incorporation, and bylaws. The River District would be a member of the corporation, so we will provide those documents for the River District's review and approval when they are complete.

Please let us know if you have any concerns with the concept of incorporating LBD.

3. Other CRCA Implementation items.

A confidential negotiations update memo from Dan Birch is included with Board material on a separate CRCA-related implementation item.

The Board may wish to discuss these matters in executive session.

B. Windy Gap Firing Project and Windy Gap Connectivity Channel.

Update only.

We continue to work with Northern Water's Municipal Subdistrict, Grand County, and the Middle Park Water Conservancy District on a draft application and form of consent decree to incorporate the Windy Gap Firing Project IGA into the Windy Gap water rights, and to adjudicate operation of the proposed Windy Gap Connectivity Channel. We believe that very substantial progress has been made on both tasks over the past few months.

We currently contemplate that the River District will be a co-applicant with the Municipal Subdistrict on a single unified application that will address both the WGFP IGA and the connectivity channel (the River District's role in the application would be limited to the determination that the WGFP IGA meets the compensatory mitigation requirements of the Water Conservancy Act). There is one remaining substantive issue that the parties have been working on that requires additional negotiation and drafting. Despite that lingering issue, the parties held a productive meeting last week with the pertinent State DNR Agencies (State Engineer, CWCB, and Parks and Wildlife).

These matters are discussed in the Confidential Report. We request that the Board discuss them in executive session.

C. Remand of Grand Valley Water Users Assoc., et al. v. Busk-Ivanhoe, Inc., Case No. 09CW142, Water Division 2.

Update only.

We continue to negotiate with Busk-Ivanhoe, Inc. ("City of Aurora") regarding the Supreme Court's remand and disposition of the Busk-Ivanhoe change case. The Division 2 Water Court has again extended the deadline for the parties to reach a settlement. Pursuant to the Court's most recent order, the parties must file a motion by October 2nd advising the court of progress toward settlement, and either presenting the settlement for the court's consideration or seeking a

further extension to complete the settlement. In the event that the parties determine they cannot reach an agreement, the West Slope Opposers and the State and Division Engineers would have until October 23rd to submit a proposed amended decree to the court consistent with the Supreme Court’s Opinion. The City of Aurora will have until November 13th to file any objections to the amended decree.

This matter is discussed in the Confidential Report. We request that the Board discuss this matter in executive session.

D. CWCB Application for Dolores River Instream Flow, Case No. 15CW3111, Water Division 4.

Update only.

The River District is an objector in the CWCB’s pending application for a Dolores River instream flow right. Pursuant to the Board’s prior direction, we worked closely with our co-objector, the Southwestern Water Conservation District, to develop a settlement proposal, which we submitted to the CWCB. Unfortunately, CWCB staff and counsel have advised us that the proposal is not acceptable, so the CWCB proposes to file a stipulated motion to re-refer the case from the Water Referee to the Water Court. This will put the case on the litigation track.

This matter is discussed in the Confidential Report. We request that the Board discuss this matter in executive session.

E. Application for Finding of Reasonable Diligence for Conditional Homestake Exchange (River District, City of Aurora, Colorado Springs Utilities, and Eagle Entities), Case No. 16CW3131, Water Division 5. (An Enterprise Matter).

Update only.

We are pleased to report that the Division 5 Water Judge has entered a decree finding that the River District, the Homestake Partners, and the Eagle River entities have been diligent in maintaining the remaining conditional Homestake Exchanges originally decreed in Case No. 98CW20, Water Division 5. An application for a finding of reasonable diligence for the remaining conditional portion of the Homestake Exchanges is due in June of 2023. Failure to file a timely diligence application or failure to continue work with reasonable diligence in the completion of the appropriation of the subject water rights, will result in cancellation of the rights. We have instructed River District staff to calendar periodic reminders of the diligence application deadline.

F. Diligence Decree for the Wolford Mountain Reservoir Power Right, Case No. 16CW3082, Water Division 5. (An Enterprise Matter).

Update only.

We are pleased to report that the Division 5 Water Judge has entered a decree finding that the River District has been diligent in maintaining the 600 c.f.s. conditional water right for the

Gunsight Pass Reservoir Power Plant (a/k/a Wolford Mountain Reservoir Power Plant). An application for a finding of reasonable diligence for the conditional power right is due in April of 2023. Failure to file a timely diligence application or failure to continue work with reasonable diligence in the completion of the appropriation of the subject water right, will result in cancellation of the right. We have instructed River District staff to calendar periodic reminders of the diligence application deadline.

III. COLORADO RIVER COMPACT, INTERSTATE, AND INTERNATIONAL NEGOTIATION MATTERS.

Eric Kuhn’s confidential negotiations memo (included with your Board material) contains a discussion on likely future interstate negotiations related to the 2007 Interim Guidelines. In addition, there have been some developments within the State related to the Water Bank Work Group that the Board may wish to discuss.

The Board may wish to discuss sensitive negotiation items related to these and other compact and interstate matters in executive session.