



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

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**TO:** CRWCD BOARD OF DIRECTORS

**FROM:** PETER C. FLEMING, GENERAL COUNSEL  
JASON V. TURNER, SENIOR COUNSEL

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Dear Directors:

This report identifies matters for discussion at the April 18, 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 April 6, 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(4)(a), (b) and (e).

- A. Federal Court's March 22, 2017, Order in Denver's Blue River Decree Diligence Application Case.
- B. Colorado River Cooperative Agreement Implementation Matters.
- C. Diligence Application of Colorado Springs Utilities, Case No. 15CW3019, Water Division 5.
- D. Windy Gap Firing Project and Windy Gap Connectivity Channel.
- E. Remand of Grand Valley Water Users Association v. Busk-Ivanhoe, Inc. Case No. 09CW142, Water Division 2.
- F. Colorado River District Conditional Rights of Exchange for Moser Ditch Consumptive Use. (An Enterprise Matter).

- G. Analysis of River District Property in Moffat and Eagle Counties.
- H. Option to Purchase Inundation Easement.
- I. Elkhead Reservoir Stem Bolt Installation. (An Enterprise Matter).
- J. Colorado River Compact, Interstate and International Negotiation Matters.

## II. GENERAL MATTERS.

### A. Urban Renewal Authorities – Special District Board Seats.

*We request direction as set forth below.*

Colorado law requires that the 13-member board of commissioners of any urban renewal authority include a representative from a special taxing district that imposes a mill-levy on property within an urban renewal area managed by the authority. For the purpose of the applicable statute, the River District qualifies as a special taxing district for all urban renewal authorities located within its boundaries. Other local taxing districts (*e.g.*, fire-protection or library districts), would similarly qualify for the “special-district” seat on an urban renewal authority’s board if they impose a mill levy within the authority’s boundaries. (School districts must also be included as a separate seat on the board of an urban renewal authority).

Recently, the River District received letters from the Delta Urban Renewal Authority and the Meeker Urban Renewal Authority inquiring as to whether the River District would like to be considered for a seat on the board of those Authorities. River District staff and counsel believe that, in almost all circumstances, it is appropriate for the River District to defer the “special district seat” to a local special district, such as a fire-protection district. Those districts typically impose a much larger mill levy than the River District. Thus, the impacts of tax-increment-financing would be more significant on such districts than on the River District. In addition, those types of smaller districts likely have more direct, local connections to the area covered by an urban renewal authority.

*We request direction that the River District’s General Manager decline the opportunity to have a representative of the River District serve on the board of any one or more urban renewal authorities located within the River District’s boundaries. It is possible that an unusual circumstance could arise where it would be more appropriate for a representative of the River District to serve on such an urban renewal authority board. Staff and counsel would notify and advise the River District Board if that situation arises.*

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

*No action requested.*

Pursuant to the Board’s direction, River District staff contracted for an analysis of River District real properties located in Moffat and Eagle Counties. *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. Elkhead Reservoir Stem Bolt Installation. (An Enterprise Matter).**

*No action requested.*

River District technical staff previously reported that the anchor bolts for the outlet works stem guides at Elkhead Reservoir were installed incorrectly, and that the anchor bolts are failing. The failing bolts prohibit the gates for the fish screen from operating properly. Consistent with previous Board direction we have contracted to have the anchor bolts replaced – which work currently is underway.

*This matter is discussed in the Confidential Report. We recommend that the Board discuss it in executive session.*

**III. RIVER DISTRICT WATER MATTERS.**

**A. Federal Court's March 22, 2017 Order in Denver's Blue River Decree Diligence Application Case.**

Denver recently filed a motion with the federal district court for approval of a stipulated consent decree its Blue River/Roberts Tunnel diligence application. The River District's opposition to the application was resolved by the CRCA, subject to the conditions set forth in the CRCA. Pursuant to a 1977 order by then Federal Court Judge Arraj, Denver filed its diligence application in both the federal court and the Division 5 Water Court. The application was assigned Case No. 06CW255 in the Division 5 Water Court.

The case was filed in 2006 but stayed (*i.e.*, put on hold) pending satisfaction of conditions set forth in the CRCA (including final execution of the Shoshone Outage Protocol Agreement). Those conditions were completed recently, so Denver filed a motion asking the federal court to approve the stipulated consent decree. On March 22<sup>nd</sup>, Judge Krieger of the federal district court issued an order granting Denver's motion only to the extent that the parties agree that Denver has exercised reasonable diligence, has put the claimed amount to beneficial use, and that the parties are bound by their stipulation. However, the court expressly declined to make the specific findings of fact and rulings of law contemplated by the stipulated consent decree. The court then vacated Judge Arraj's 1977 Order and terminated the court's continuing jurisdiction to adjudicate Blue River diligence cases in the future.

The court arguably went further in limiting its jurisdiction by then stating:

Indeed, to the extent that the [Blue River Decree] reserves exclusive federal jurisdiction to hear and resolve suits that arose among exclusively state and local entities concerning the decree's terms, this Court vacates such provision....The only future proceedings that this Court anticipates in this action would be those in which the United States asserts a claim such that this Court would exercise subject-matter jurisdiction over it pursuant to 28 U.S.C. § 1345....[t]he Clerk of the Court

shall administratively close this case, subject only to a motion by the United States to reopen it.

The statute referenced by the court, above, provides the federal courts with original jurisdiction for suits filed by the United States. Thus, the court appears to intend to limit its jurisdiction regarding Blue River Decree disputes to a much greater extent than simply pushing future diligence cases to the Division 5 Water Court. The court's order raises many issues regarding pending and future Blue River Decree-related cases. One such issue is whether the court even has the authority to dispose of jurisdiction provided by the Blue River Decree that was subsequently adopted into federal statute.

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

#### **B. Colorado River Cooperative Agreement – Implementation Issues.**

*Update only.*

As discussed above, the Federal Court's March 22<sup>nd</sup> order raises many issues. Among the issues related to the CRCA is how Denver and the other CRCA parties should proceed in the Division 5 Water Court to secure the necessary judicially-binding CRCA provisions contemplated by the stipulated consent decree for Denver's Roberts Tunnel diligence case. Those provisions provide benefits to both Denver and West Slope entities, so the West Slope has an interest in ensuring a judicially binding determination that the decree terms are legal and effective.

We continue to work with other West Slope interests on implementation of other CRCA items. The adjudication of the Green Mountain Reservoir Administrative Protocol is another CRCA-related item that could be impacted by Judge Krieger's March 22<sup>nd</sup> Order. As a component of the Colorado-Big Thompson Project, the water rights for Green Mountain Reservoir are an integral part of the Blue River Decree. Thus, upon completing the negotiations for the GMR Administrative Protocol, the River District and most of the other parties to the Blue River Decree filed an application and petition to adjudicate the Protocol in both the federal court and the Division 5 Water Court. Judge Krieger's order could be interpreted to mean that she also intends to terminate jurisdiction of the federal court to adjudicate cases such as the GMR Administrative Protocol.

*These and other CRCA implementation items are discussed in more detail in the Confidential Report. The Board may wish to discuss these issues in executive session.*

#### **C. Diligence Application of Colorado Springs Utilities, Case No. 15CW3019, Water Division 5.**

*Update only.*

The River District and other West Slope entities are objectors in Colorado Springs' diligence application for the conditional components of its Upper Blue/Hoosier Pass transmountain

diversion system. Settlement negotiations in the case have been lagging, however, a settlement meeting is scheduled for April 10<sup>th</sup>, so we likely will have more to report at the Board meeting.

As with Denver’s Blue River System water rights, the water rights for Colorado Springs’ Upper Blue System were incorporated into the federal Blue River Decree. Unlike Denver, Colorado Springs historically did not file simultaneous diligence applications in the federal district court and the state water court as contemplated by Judge Arraj’s 1977 Order. In the pending diligence case, the objectors have raised an issue regarding the impact, if any, on Colorado Springs’ conditional rights with respect to the requirements of the 1977 Order. Thus, Judge Krieger’s recent order discussed vacating Judge Arraj’s order likely will be a primary topic of discussion at the upcoming settlement meeting.

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

**D. Windy Gap Firing Project and Windy Gap Connectivity Channel.**

*Update only.*

We are working on several items related to the Windy Gap Firing Project, including potential adjudication of the proposed Windy Gap Connectivity Channel and amendment of the Windy Gap water rights to incorporate the terms of the Windy Gap Firing Project IGA.

Last fall, staff of the Colorado Water Conservation Board (“CWCB”), Department of Natural Resources (“DNR”), and Parks and Wildlife (“CPW”) proposed appropriating non-instream flow water rights for the Windy Gap Connectivity Channel. Northern Water’s Municipal Subdistrict would be a co-applicant because it owns the lands on which the connectivity channel would be located. The claimed beneficial uses include “piscatorial, wildlife, and environmental uses and to promote the conservation of the waters of the state.” The River District supports the connectivity channel project but expressed concerns with the then-proposed method of adjudication. We are now in the process of working with Northern’s Municipal Subdistrict and other stakeholders on a possible alternative.

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

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

*Update only.*

Consistent with the Board’s direction in January, we have been in discussions with Busk-Ivanhoe, Inc. (“City of Aurora”) regarding the remand and disposition of the Busk-Ivanhoe case. Since January, the Division 2 Water Court has revised its deadlines to accommodate these discussions. Pursuant to the Court’s most recent order, the parties must file a motion by April 28<sup>th</sup> advising the Court of their 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 have until May 19, 2017, to submit an amended decree consistent with the Supreme Court’s Opinion. The City of Aurora will have until June 2, 2017, 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.*

**F. Colorado River District Conditional Rights of Exchange for Moser Ditch Consumptive Use. (An Enterprise Matter).**

*We may request action following Board discussion.*

In 2005, the River District contracted with the Colorado Water Trust to purchase the consumptive use portion of the Moser water rights for use in its water marketing program. The River District was a co-applicant to the Water Trust’s change of water rights application to quantify the consumptive use associated with the Moser rights.

A decree was entered in April of 2011 quantifying the consumptive use at 73 acre feet. The 73 acre feet of consumptive use was conveyed to the River District in June of 2011. The River District is authorized by the change decree and by an excess capacity contract with the Bureau of Reclamation to store this water on an annual basis in Green Mountain Reservoir for subsequent release as part of the River District’s water marketing program. In addition, the River District may exchange the water into Wolford Mountain Reservoir. An application for reasonable diligence is due at the end of April for the conditional appropriative right of exchange.

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

**G. Proposed Instream Flow on Elkhead Creek, Upstream of Elkhead Reservoir. (An Enterprise Matter).**

*We request approval of a stipulation and agreement concerning the CWCB’s proposed Elkhead Creek instream flow.*

In 2015, CWCB staff proposed an instream flow on Elkhead Creek (“Elkhead Creek ISF”) from the confluence of the North Fork of Elkhead Creek to the inlet of Elkhead Reservoir. We expressed concerns with the location of the proposed downstream terminus of the instream flow and requested that the CWCB move the terminus upstream in order to prevent any interference with a potential future enlargement of Elkhead Reservoir or any inundation caused by temporary flood events.

The CWCB staff has worked with the River District and our partners in the reservoir (the City of Craig and Tri-State Generation and Transmission Association) to move the location of the downstream terminus of the Elkhead Creek ISF back upstream in order to avoid the inundation issue for a potential future enlargement of the reservoir. We also have negotiated language to

address potential issues that could arise due to temporary inundation of the proposed Elkhead Creek ISF caused by temporary flood surcharge.

A copy of the proposed stipulation and agreement is included as Attachment A to this memo. CWCB staff plans to present the stipulation and agreement to the CWCB Board at its May 2017 meeting. In the unlikely event that the CWCB Board does not accept this proposal, staff has agreed to schedule a contested hearing for this instream flow appropriation. We feel confident, based on the assurances of the CWCB staff, that this proposal will be acceptable.

*We recommend that the Board authorize counsel to execute a stipulation and agreement with CWCB consistent with the stipulation and agreement included as Attachment A.*

#### **H. Option to Purchase Inundation Easement.**

In 1997, the River District acquired an option to purchase an inundation easement associated with its conditional Iron Mountain Reservoir storage water rights in Eagle County. Iron Mountain Reservoir is part of the River District's Red Cliff Project.

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

#### **III. Colorado River Compact, Interstate, and International Negotiation Matters.**

*The Board may wish to discuss sensitive negotiation items related to compact and interstate negotiations in executive session.*

Attachments:

- A. Proposed Stipulation and Agreement between CWCB, CRWCD, City of Craig and Tri-State Generation & Transmission Association in the matter of Elkhead Creek (Lower) Proposed Instream Flow Appropriation, Water Division 6

**BEFORE THE COLORADO WATER CONSERVATION BOARD**  
**STATE OF COLORADO**

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**STIPULATION AND AGREEMENT BETWEEN THE COLORADO WATER CONSERVATION BOARD, THE COLORADO RIVER WATER CONSERVATION DISTRICT, ACTING BY AND THROUGH ITS COLORADO RIVER WATER PROJECTS ENTERPRISE, THE CITY OF CRAIG, AND TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.**

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**IN THE MATTER OF PROPOSED INSTREAM FLOW APPROPRIATION IN WATER DIVISION 6: ELKHEAD CREEK (LOWER)**

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The Colorado River Water Conservation District, acting by and through its Colorado River Water Projects Enterprise (“River District”), the City of Craig (“Craig”), Tri-State Generation and Transmission Association, Inc. (“Tri-State”) and the Colorado Water Conservation Board (“CWCB”), by and through their respective counsel, hereby stipulate and agree as follows:

1. The staff of the CWCB has recommended a proposed instream flow water right appropriation for Elkhead Creek with an upper terminus located at the confluence of the North Fork of Elkhead Creek and the lower terminus at the USGS Gage #09246200, also known as the Long Gulch gage (“Lower Elkhead Creek ISF”), Water Division 6.
2. The River District, Craig, and Tri-State hold water rights and storage interests in Elkhead Creek Reservoir located downstream of the lower terminus of the proposed Lower Elkhead Creek ISF.
3. The CWCB agrees to include the following terms and conditions in its final notice of intent to appropriate, the application filed with the water court to adjudicate the Lower Elkhead Creek ISF, and any decree entered by the water court for the Lower Elkhead Creek ISF.
  - a. The CWCB is hereby exercising its discretion under section 37-92-102(4)(a), C.R.S. (2016) to “adopt conditions attached to an appropriation” and to “enter into stipulations for decrees or other forms of contractual agreements, including enforcement agreements, that it determines will preserve the natural environment to a reasonable degree.”
  - b. Pursuant to that authority, the CWCB has determined that the natural environment will be preserved to a reasonable degree by ensuring that the lower terminus of the Lower Elkhead Creek ISF is located at the location of the Long Gulch gage existing as of the date of this Agreement. This location is above the ordinary high water

mark of the existing Elkhead Creek Reservoir as well as the ordinary high water mark of a contemplated expansion of Elkhead Creek Reservoir, and will therefore not impair the ability of the River District, Craig, and/or Tri-State to expand the Elkhead Creek Reservoir or to use it for flood control purposes.

- c. Pursuant to the CWCB's *Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, Rule 7.*, the CWCB "**may** file a Statement of Opposition to inundations if it determines that the ISF right or the natural environment will be adversely affected by the inundation. (Emphasis added). Pursuant to that authority, the CWCB has determined, and this Court finds, that the proposed Lower Elkhead Creek ISF water right will not be injured and that the natural environment will be preserved to a reasonable degree notwithstanding any potential inundation that may occur due to flood-surge from Elkhead Creek Reservoir or a contemplated expansion. Such potential inundation does not constitute injury because the natural environment will only be inundated temporarily during the flood event.
4. In consideration of the mutual promises contained herein the River District, Craig, and Tri-State agree not to oppose any water court proceeding to adjudicate the Lower Elkhead Creek ISF. Provided, however, the River District, Craig, and Tri-State reserve the right to file a statement of opposition in any water court adjudication to ensure that the CWCB remains in compliance with the terms and conditions agreed upon by the parties.
5. This stipulation shall be binding upon and inure to the benefit of the parties, their successors and assigns.
6. The parties shall each bear their own attorneys' fees and costs associated with this matter.
7. CWCB shall provide counsel of the River District, Craig, and Tri-State copies of its application to confirm a water right for the Lower Elkhead Creek ISF and any proposed rulings or decrees that are submitted by the CWCB to the water referee or water court, as applicable. CWCB shall also provide said counsel with any Report of the Division Engineer issued in such case.
8. This stipulation and agreement may be executed in counterparts, each of which shall be deemed to be an original, but all of which, taken together, shall constitute one and the same agreement.

Stipulated and agreed to this \_\_\_\_\_ day of \_\_\_\_\_, 2017.

Colorado River Water Conservation District,  
acting by and through its Colorado River  
Water Projects Enterprise

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COLORADO WATER CONSERVATION BOARD

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