



**ATTORNEY REPORT
JOINT QUARTERLY MEETING
GENERAL and ENTERPRISE
April 2018**

TO: CRWCD BOARD OF DIRECTORS

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

Dear Directors:

This report identifies matters for discussion at the April 17-18, 2018, 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 5, 2018, 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)(b) and (e).

- A. Colorado River District Conditional Water Rights. (An Enterprise and General District Matter).
- B. Colorado River Cooperative Agreement Implementation Matters.
- C. Northern Water's Proposed Northern Integrated Supply Project.
- D. Joint Application of Northern Water's Municipal Subdistrict and the Colorado River District regarding the Windy Gap Firming Project and the Windy Gap Connectivity Channel, Case No. 17CW3176, Water Division 5.
- E. Remand of Grand Valley Water Users Association v. Busk-Ivanhoe, Inc., Case No. 09CW142, Water Division 2.
- F. Diligence Application of Colorado Springs, Case No. 15CW3019, Water Division 5.

- G. CWCB Application for Dolores River Instream Flow, Case No. 15CW3111, Water Division 4.
- H. Instream Flows and Protection of Pre-existing Uses, such as Stock-watering.
- I. Water Administration Matters.
- J. Eagle River Memorandum of Agreement and Eagle Park Reservoir Company Update. (Enterprise Matters).
- K. Colorado River Compact, Interstate and International Negotiation Matters.

II. GENERAL MATTERS.

A. **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. Strategic Initiatives: 1B and 1C.

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.

The United States Supreme Court granted *certiorari* on the question of which court has original jurisdiction to review challenges to the WOTUS Rule. Pending that decision in February of 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 Justice Scalia’s plurality opinion in the Supreme Court’s 2006 *Rapanos* decision,¹ which arguably would remove so-called “isolated

¹ As summarized in the current administration’s proposed rule, Justice Scalia’s plurality opinion (not a majority opinion) in the *Rapanos* case interpreted the term “waters of the United States as covering relatively

waters” (water without a surface connection to traditionally navigable waters) from federal jurisdiction under the Clean Water Act.

In June of 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 WOTUS as it existed prior to the 2015 Rule.

On January 22, 2018, the Supreme Court ruled that original jurisdiction was proper in the federal district court and not the court of appeals. On February 6, 2018, the Army Corps and EPA published in the Federal Register a “final rule” adding an applicability date of February 6, 2020. The purpose for the final rule is to maintain the status quo—implementing the pre-2015 interpretation of WOTUS while they consider and review the comments they have received on the “first step” initiated in June of 2017.

We will continue to monitor this issue and update the Board as appropriate.

B. *Hill v. Warsewa*, Civil Case No. 18-cv-00277, Federal District Court, District of Colorado.

Update only. Strategic Initiatives: 1B and 1C.

A recent lawsuit filed in federal district court seeks to clarify the law governing public access to streams and rivers in Colorado. Hill, an angler, filed a declaratory judgment action seeking access to a stretch of the Arkansas River that flows through property owned by Warsewa. Hill claims that the bed of the river is public property based on the legal doctrine of “navigability-for-title” which effectively holds that if a waterway was used for interstate commerce purposes at the time of statehood, the state owns the stream bed and the public has access. Hill points to historical accounts of the Arkansas River being used for commerce that predate statehood, primarily for moving logs and railroad ties, but also accounts of fur trappers navigating the Arkansas River by canoe.

The issue of stream access in Colorado rears its head from time-to-time and is always controversial. The seminal case is *People v. Emmert* from 1979 in which the Colorado Supreme Court upheld a criminal trespass conviction against rafters who floated through private property on the Colorado River in Grand County. However, in the *Emmert* case both parties agreed that the Colorado was non-navigable in the subject stretch of the river. In 1983, the Colorado attorney general’s office offered a legal opinion to attempt to clarify the ruling in *Emmert*. The attorney general opined that floaters committed *criminal trespass* only if they touched the river bottom but could be sued for *civil trespass* for the act of floating through private property—regardless of whether they made contact with the stream bed. It is important to note that the 1983 Attorney General Opinion has never been tested by a Colorado court—although many people rely on it.

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.”

Historically, the River District has monitored river access issues but has not become directly involved because the fundamental issues at stake involve real property (*i.e.*, land access issues), and do not involve the right to use water. At this time, we do not foresee a need to change the River District’s historical position of “monitor” (to borrow a concept from your External Affairs Department).

We will provide the Board with updates on this case.

C. Texas v. New Mexico, United States Supreme Court, March 5, 2018, 138 S.Ct. 954 (2018).

Update only. Strategic Initiatives IC.

The United States Supreme Court has original jurisdiction to hear lawsuits between the States, including litigation over interstate compacts. We keep an eye on certain interstate compact-related litigation to determine if it might impact Colorado and the River District’s interests in the 1922 Colorado River Compact and the 1948 Upper Colorado River Basin Compact. The subject case involves a lawsuit initiated by Texas against New Mexico regarding the Rio Grande Compact.

The States of Colorado, Texas, and New Mexico are the parties to the 1939 Rio Grande Compact. Texas sued New Mexico, alleging that New Mexico is depleting water below Elephant Butte Reservoir in ways not authorized by the compact. Colorado intervened in the lawsuit, primarily to monitor the case and protect its interests in the litigation. The United States also intervened as a party in the litigation (even though it is not a party to the Rio Grande Compact), alleging claims similar to those alleged by Texas. Colorado argued that the United States’ participation in the litigation should be limited to only those claims that arise directly from the United States’ treaty obligations to Mexico.

On March 5th, the Supreme Court issued a ruling on this question, allowing the United States to address limited compact-related claims, in addition to treaty-specific claims. The Supreme Court set parameters that limit the scope of the United States’ participation in compact-related litigation to only claims that involve “distinctly federal interests.” In the Rio Grande Compact case, the Court determined that the United States could participate because (1) the compact was inextricably intertwined with the federal Rio Grande Project and related water allocation contracts, (2) at least one party (New Mexico) had admitted that the United States plays an “integral role” in the compact’s operation, (3) a breach of the compact by one or more of the state parties could jeopardize the United States’ treaty obligations to Mexico, and (4) the claims asserted by the United States were brought in existing compact-litigation and did not raise new claims or substantially broaden the scope of the litigation.

Although the scope of the ruling is relatively narrow, one can anticipate that the United States might assert a right to participate in any interstate litigation concerning the Colorado River Compact, since there could be similar distinct federal interests at issue in potential Colorado River compact litigation.

III. RIVER DISTRICT WATER MATTERS.

A. **Colorado River District Conditional Water Rights (An Enterprise and General District Matter).**

We anticipate Board direction or action pending discussion of this matter in executive session. Strategic Initiatives: 2A, 3A, 4A, 8B, 8C.

The River District owns, or has a significant interest in, the following projects and associated conditional water rights, all of which are due for findings of reasonable diligence in 2018: Battlement Mesa Project, Red Cliff Project, and the Wolcott Project.

In addition, the River District has diligence findings due on Elkhead Reservoir (an Enterprise matter), the Flattops Project, Fraser Valley Project, Great Northern Project, and Savery Pothook Project in 2019. Failure to file timely diligence applications will result in cancellation of these water rights.

These issues are discussed in the Confidential Report. We request that the Board discuss this matter in executive session.

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

Update only. We may request Board action depending on pending developments or following discussion in executive session. Strategic Initiatives: 5A, 5C, 8A, 9A.

We continue to work with other West Slope interests and Denver Water in implementation of several items related to the CRCA. The Division 5 Water Judge entered the parties' proposed consent decree in Denver's Roberts Tunnel Diligence application (Case No. 06CW255) on January 18th. The time for filing any appeals has expired, thus Denver has informed the CRCA parties that benefits due to them upon entry of the decree in Case No. 06CW255 are available for disbursement by Denver. This is an important positive development and triggers the first significant conveyance of monetary benefits to the West Slope under the CRCA.

In January, we discussed the status of ongoing negotiations between Denver Water and numerous Front Range water users related to the "1940 Consolidated Ditches Agreement." Denver has provided us with a draft proposal to address the concerns we discussed with the Board. We will be discussing Denver's proposal with other West Slope entities. We hope to have more information on this matter in time for the River District's Board meeting.

Another matter of significance is that Denver Water's General Counsel, Patti Wells, has announced her retirement, effective in August. It has been a pleasure to work with Patti over the years. She is a formidable but fair opponent, a terrific ally to have on your side, and has been a dedicated public servant throughout her career.

The Board may wish to discuss the 1940 Agreement issues and other CRCA Implementation matters in executive session.

C. Northern Water’s Proposed Northern Integrated Supply Project.

We may request Board action following potential discussion in executive session and presentation by Northern Water staff. Strategic Initiatives: 5C, 8C, 9A.

Eric Wilkinson and Northern Water’s incoming General Manager, Brad Wind, plan to attend the River District’s Board meeting to introduce Mr. Wind to the Board, as well as to present developments related to Northern Water’s Proposed Northern Integrated Supply Project (“NISP”). NISP is characterized as an East Slope project, utilizing Poudre and South Platte River supplies to supply two new reservoirs. Northern would use its Grey Mountain water rights on the Poudre River for storage in the proposed Glade Reservoir and its South Platte Water Conservation Project water rights for storage in the proposed Galeton Reservoir.

While we have applauded Northern for proposing a project that relies on East Slope water there historically has been uncertainty regarding the possible use of C-BT Project facilities and C-BT Project water as part of the NISP. Therefore, pursuant to Board direction, the River District has historically withheld support of NISP and, has submitted comments expressing its concerns in the project’s NEPA process. Northern has indicated that the project configuration has been modified significantly so that it is no longer proposed to be connected to C-BT Project facilities. In addition, we believe that Northern has clarified certain concerns we have regarding the project’s proposed operations.

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

D. Joint Application of Northern Water’s Municipal Subdistrict and the Colorado River District regarding the Windy Gap Firming Project and Windy Gap Connectivity Channel, Case No. 17CW3176, Water Division 5.

Update only. Strategic Initiatives: 4A, 5A, 5C, 8A, 8E, 9A.

Consistent with the Board’s previous direction, the River District filed a joint application with Northern Water’s Municipal Subdistrict to incorporate the Windy Gap Firming Project IGA into the Windy Gap water rights. Additionally, the application seeks a determination regarding the operation of the proposed Colorado River Connectivity Channel. Statements of opposition were filed by ten parties, some falling into the “statement of opposition in support” category, some characterized more as a “monitor” filing, and at least one party—The Schmuck Children’s Trust—that may present some degree of opposition to the application. The Trust’s opposition is primarily with the connectivity channel as the Trust is the landowner immediately downstream of Windy Gap Reservoir, and the connectivity channel could potentially impact the flow of the river as it runs through the Trust’s property.

We previously reported that the Windy Gap Firming Project also is the subject of a different legal proceeding filed in the Federal District Court for Colorado. In that case (Civil Action No. 17-cv-2563, USDC, Colorado), a group of environmental organizations (Save the Colorado, Save

the Poudre, WildEarth Guardians, Living Rivers, and Waterkeeper Alliance) sued the U.S. Bureau of Reclamation and Army Corps of Engineers challenging the sufficiency of Reclamation's NEPA analysis of the WGFP, and the Corps' analysis of the need for the WGFP. The project proponent, the Municipal Subdistrict of the Northern Colorado Water Conservancy District has intervened in the lawsuit. You previously authorized us to file an *amicus curiae* brief (friend of the court brief) in support of the Municipal Subdistrict and the federal agencies. We are working with the Subdistrict on the timing of this filing.

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

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

We anticipate that we will request Board action following a discussion in executive session. Strategic Initiatives: 3A, 3D, 4A, 5A, 5C.

Division 2 Water Judge Schwartz held a status conference in this case on February 13th. The parties explained their collective belief that a conceptual settlement had been reached in the case but that the parties required additional time to fine-tune the language of the proposed agreement, stipulation, and consent decree, as well as to prepare exhibits to the proposed decree, and to address the public approval process for the parties that are governmental entities. Judge Schwartz granted the requested extension and set a status conference for May 18th.

We have been meeting with Aurora and the West Slope parties on a weekly basis to finalize the proposed settlement documents and bring them to our respective governing boards in effectively complete form. There have been some substantive changes in the language, if not the general concepts, of the settlement that differ from what we previously reviewed with the Board. However, it is our hope that we will be in a position to discuss a final version of the settlement agreement and proposed decree (subject to minor clerical corrections) with you at the April Board Meeting.

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

F. Application for Finding of Reasonable Diligence of Colorado Springs Utilities, Case No. 15CW3019, Water Division 5.

Update only. Strategic Initiatives: 3A, 3D, 4A, 5A, 5C.

We continue to make reasonable progress on settlement of this case in line with the general direction previously provided by the Board. We met with Colorado Springs in February and have another settlement meeting scheduled for April 12th.

We will report on any developments at the Board meeting, the following week.

This case is discussed in the Confidential Report. The Board may wish to discuss it and any update in executive session.

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

Update only. Strategic Initiatives: 2A, 4A.

The Board previously provided direction that the River District should oppose the motion for summary judgment filed by the Colorado Water Conservation Board in the Dolores River Instream Flow case. The briefing in the case was completed on March 5, 2018. In our response and sur-reply briefs, we argued (together with the Southwestern Conservation District) that the CWCB has broad quasi-legislative authority to adopt terms and conditions in its appropriation of an instream flow in order to balance the needs of mankind with the reasonable preservation of the natural environment. We argued that this discretion includes the ability to consider a *de minimis* depletion allowance to accommodate future development, as proposed by the Conservation Districts at the CWCB’s hearing on the instream flow appropriation.

Board members may recall that the CWCB was advised by its staff and counsel that it does not have the authority to adopt the Conservation Districts’ proposal. We argued that the CWCB misinterpreted or failed to apply its statutory authority, resulting in an abuse of discretion, and that the Division 4 Water Court should remand the issue back to the CWCB for further consideration based on the legal conclusion that the CWCB has the statutory discretion to consider the Conservation Districts’ proposal.

In our response brief, we requested that the court grant oral argument on the parties’ legal arguments. On April 4th, Judge Patrick denied the request for oral argument. We therefore anticipate that Judge Patrick will issue a ruling on the CWCB’s motion for summary judgment prior to the River District’s April Board meeting.

The Board may wish to discuss any new developments on this matter in executive session.

H. Update on Instream Flows – Recognition of Pre-existing Uses, including Stockwatering.

Update only. Strategic Initiatives: 1B, 2A, 2B, 6D, 9A.

In January, the River District adopted a position statement, consistent with C.R.S. § 39-92-102(3)(b), that instream flow rights are subject to the “present uses of water whether or not previously confirmed by court order or decree.” We have worked with Chris Treese to set a meeting with CWCB staff and counsel and the Routt County Stockmen’s Association on this issue for April 13th in Steamboat Springs.

We will report on the outcome at the Board meeting. *Depending on any remaining issues, it is possible that the Board may wish to discuss the matter in executive session.*

I. Water Administration Matters.

Update only. Strategic Initiatives: 1B, 2A, 2B, 6D, 9A.

Similar to the instream flow and pre-existing uses issue discussed above, we have been working with a number of River District constituents or their water attorneys on various water administration matters. We have scheduled a meeting for April 13th in Steamboat Springs (separate from the instream flow meeting) with the State Engineer and Division 6 Engineer to discuss water administration matters. The goal of the meeting (and any necessary future meetings) will be to understand existing concerns of water users and water administrators, and to foster a productive partnership on water administration.

We will report on the outcome at the April Board meeting. *The Board may wish to discuss any sensitive negotiation matters or specific legal issues regarding this topic in executive session.*

J. Eagle River Memorandum of Agreement and Eagle Park Reservoir Company Update. (Enterprise Matters).

We may seek Board action following potential discussion in executive session. Strategic Initiatives: 5C, 7A, 7B, 7C, 7D, 8A, 9A, 12A.

The River District is a party to the Eagle River MOU, which, among other items, contemplates development of water projects in the Eagle River basin by the West Slope parties and the Homestake Partners in three phases. The first phase yield was effectively developed with the construction/remediation of the Eagle Park Reservoir. The MOU contemplates that the remaining Phase II and Phase III yields would be developed jointly by all of the MOU parties, or subject to certain conditions, separately by one or more of the MOU parties.

On February 13th, the Eagle River Water and Sanitation District and the Upper Eagle Regional Water Authority provided written notice pursuant to the MOU that they wish to proceed with an enlargement of Eagle Park Reservoir (from its existing approximate 3,300 acre feet capacity to a volume between 6,500 and 7,950 acre feet) as a Phase II MOU Project. The Eagle River entities' February 13th letter is included as Attachment A to this report.

The notice provided by the Eagle entities triggers a 90-day period within which the other MOU partners must indicate their desire to participate in the project. Thus, as an MOU party, the River District should consider whether it wishes to participate in the proposed enlargement of Eagle Park Reservoir and, if so, the extent to which it wishes to participate, and any associated conditions. A confidential ERMOU negotiations update memo from John Currier is included in your Board material. Counsel's Confidential Report also includes a discussion of Eagle River MOU and related Eagle Park Reservoir Company matters. (John Currier's memo and counsel's confidential discussion will be redacted from Director Chandler-Henry's Board material).

The Board may wish to discuss this matter in executive session.

K. Colorado River District Conditional Rights of Exchange for Moser Ditch Consumptive Use, Case No. 17CW3100, Water Division 5. (An Enterprise Matter).

Update only. Strategic Initiatives: 3A, 7A, 7B, 8B.

We are pleased to report that the Division 5 Water Judge entered a decree finding that the River District had been reasonably diligent in perfecting its conditional exchange of the Moser Consumptive Use water and that 73 acre feet of Moser Exchange to Wolford Mountain Reservoir was made absolute at a rate 4.5 cfs leaving 32.5 cfs of the Wolford exchange remaining as conditional. Additionally, the 0.45 cfs right to deliver the Moser Consumptive Use Right through the CWCB instream flow reaches on Boulder Creek, through Green Mountain Reservoir, and the Blue River without storage in Green Mountain remains conditional.

An application for a finding of reasonable diligence for the remaining conditional portions of the Moser Ditch Consumptive Use exchange rights is due in January of 2024. 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 of the right. We have instructed River District staff to calendar periodic reminders of the application deadline.

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

Update only. Strategic Initiatives: 4A, 4B, 4C, 4D, 6A, 6C, 6D, 8B, 8D, 8E.

Pursuant to the Board’s direction at its March 29th special joint telephonic meeting, the River District filed a protest with the Utah State Engineer (Division of Water Rights) to protest the application of Water Horse Resources, LLC (*i.e.*, Aaron Million’s latest company) for a Utah water right on the Green River in the amount of 55,000 acre feet for proposed use on Colorado’s Front Range. A copy of the protest is included as Attachment B to this report. We will work with River District staff to keep the Board updated on Mr. Million’s latest pump and pipeline project.

Eric Kuhn continues work on assisting the River District, the State of Colorado, and the Upper Colorado River Commission on matters related to the upcoming renegotiation of the 2007 Interim Guidelines for Lakes Powell and Mead. Eric or Andy Mueller may have updates to report to the Board.

With respect to other compact-related matters, we have been working with the Southwestern Conservation District and others on concepts related to “demand management boundaries” in order to address West Slope concerns about unfettered following of West Slope agricultural land.

In January, the Board directed staff and counsel to file for intervention in the Federal Energy Regulatory Commission’s environmental review for the Lake Powell Pipeline Project proposed by the State of Utah’s Water Resources Board. We have not yet filed that motion because

the applicable timelines have been extended (to a date that has not yet been established) pending FERC's resolution of an issue regarding the jurisdictional scope of its environmental review.

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

Attachments:

- A. Eagle River Entities' Phase 2 Eagle River MOU Project Notice, dated February 13, 2018
- B. Utah Division of Water Rights, CRWCD's Protest of Water Right 41-3747 (Application A81080), dated March 5, 2018



ATTACHMENT A
QUARTERLY ATTORNEY REPORT
JOINT - APRIL 2018

February 13, 2018

Ms. Alex Davis (aldavis@auroragov.org)
Ms. Kathy Kitzman (kkitzman@auroragov.org)
Aurora Water Resources
.15151 E. Alameda Parkway
Aurora, CO 80012

Mr. Doug Lovell (dlovell@vailresorts.com)
Ms. Annie Kao (AKao@vailresorts.com)
Vail Associates, Inc.
390 Interlocken Crescent
Broomfield, CO 80021

Mr. Kevin Lusk (klusk@csu.org)
Mr. Pat Wells (mpwells@csu.org)
Utilities Department – Mail Code 1321
City of Colorado Springs
P.O. Box 1103
Colorado Springs, CO 80947

Mr. Andrew Mueller (amueller@crwcd.org)
Mr. John Currier (jcurrier@crwcd.org)
Colorado River Water Conservation District
P.O. Box 1120
Glenwood Springs, CO 81602

Mr. Bryce Romig (bromig@fmi.com)
Climax Molybdenum Co.
Climax Mine
Hwy. 91
Climax, CO 80429

Re: Phase 2 Eagle River MOU Project Notice

Dear Eagle River MOU Partners:

Reference is made to the Memorandum of Understanding dated April 21, 1998, among the Cities of Aurora and Colorado Springs ("Cities"), the Colorado River Water Conservation District, Climax Molybdenum Company ("Climax"), and the Vail Consortium consisting of the Eagle River Water & Sanitation District ("District"), Upper Eagle Regional Water Authority ("Authority") and Vail Associates, Inc. (the "Eagle River MOU"). Pursuant to Section III.D.4. of the Eagle River MOU, notice is hereby given that the District and the Authority desire to proceed with the permitting and construction of a Phase 2 project that would increase the capacity of Eagle Park Reservoir from its current size of approximately 3,300 acre feet to a total volume of 6,500 to 7,950 acre feet. It would also potentially increase this East Fork Pumping System from its existing 6 cfs up to 20 cfs. This increased storage volume and pumping capacity from the East Fork of the Eagle River would provide an additional firm annual yield of approximately 1,500 to 1,700 acre feet.

Clean Water. Quality Life.™

846 Forest Road Vail, Colorado 81657 Tel (970) 476-7480 Fax (970) 476-4089 crwcd.org

Tom Williamsen with Helton & Williamsen prepared the following chart which sets forth the Eagle Park Reservoir firm annual yield with varying reservoir capacities and East Fork Pump capacities:

Storage Capacity (ac-ft)	Firm Annual Yield (ac-ft)			
	Pump Capacity (cfs)			
	6 cfs ²	10 cfs	15 cfs	20 cfs
3,300 ¹	2,089 ³	2,106	---	---
4,500	2,625	2,700	---	---
6,500	3,008	3,297	3,427	3,485
8,000	3,210	3,515	3,710	3,799

¹existing reservoir capacity

²existing pump capacity

³existing firm annual yield without the 500 acre feet of Aurora Homestake Reservoir delivery water

As indicated, the foregoing amounts are firm annual yield amounts and the Cities are entitled to a maximum of 20,000 acre feet of average year yield under the Eagle River MOU. To the extent the Cities desire to participate in this Phase 2 project, the Cities' portion would have to be converted to average year yield.

If Climax desires to participate in this Phase 2 project to obtain all or a portion of its 3,000 acre feet of Eagle River MOU storage, the reservoir enlargement could include the saddle dam detailed by RJH Consultants, Inc. This would increase the reservoir capacity to 11,200 acre feet.

Please let the District and the Authority know in writing by May 14, 2018, if you desire to participate in this Phase 2 project and the extent of your desired participation. Once the District and Authority receive your response, they will then determine and send you notice of your pro rata share of the permitting and construction costs.

Lastly, the Cities have indicated they are considering one or more subsequent project phases as defined under the Eagle River MOU. So long as the subsequent project phases are consistent with the Eagle River MOU, the District and Authority are open to coordinating with the Cities on obtaining Eagle County permits for the Phase 2 project and any subsequent phase project if that can be done without delaying the permitting of the Phase 2 project.

Very truly yours,

EAGLE RIVER WATER & SANITATION DISTRICT
UPPER EAGLE REGIONAL WATER AUTHORITY


Linn Brooks, General Manager

cc: Board of Directors, Eagle River Water & Sanitation District
Board of Directors, Upper Eagle Regional Water Authority
James P. Collins, District and Authority general counsel
Thomas Williamsen, District and Authority water resource engineer
Scott Fifer, District and Authority hydrologist

PROTEST

PROTEST FEE PAID

\$15.00 18-01638

Fee Rec'd BY: ONLINE

April 5, 2018

Protestant: Colorado River District Colorado River Water Conservation District
c/o John Currier, Chief Engineer
P.O. Box 1120
Glenwood Springs, CO 81602

RECEIVED
APR 05 2018
WATER RIGHTS
ONLINE

RE: Protest of Water Right Application 41-3747

The Colorado River District's Protest of Water Right 41-3747 (Application A81080) is being submitted electronically via email to waterrights@utah.gov

John Currier, Chief Engineer

ATTACHMENT B
QUARTERLY ATTORNEY REPORT
JOINT - APRIL 2018

SCANNED



April 5, 2018

Submitted via email: waterrights@utah.gov

To: Mr. Kent Jones, Utah State Engineer, Utah Department of Natural Resources,
Division of Water Rights

Protestant: Colorado River Water Conservation District
P.O. Box 1120
Glenwood Springs, CO 81602-1120

Re: Protest of Water Right 41-3747, Water Horse Resources, LLC (Application
A81080)

The Colorado River Water Conservation District (“Colorado River District”) hereby respectfully submits this protest to the application of Water Horse Resources, LLC (A81080, 41-3747). The Colorado River District is a political subdivision of the State of Colorado, formed by the Colorado Legislature (*See* C.R.S. § 37-46-101, *et seq.*) in 1937 for the purpose of safeguarding for the State of Colorado the beneficial consumptive use within Colorado of that portion of the waters of the Colorado River apportioned to the state by interstate compact, and for promoting the welfare of the inhabitants of the Colorado River District. Geographically, the Colorado River District encompasses an area of approximately 29,000 square miles, including all of twelve and parts of three western Colorado counties. Included in that area are the headwaters and tributaries of the Colorado River mainstem and its principal tributaries, the Gunnison, the White and the Yampa Rivers (as well as the portion of the Green River as it curves into and out of Colorado).

The applicant, Water Horse Resources, LLC, is managed, owned, and/or controlled in whole or in part by Mr. Aaron Million. Mr. Million has previously attempted to secure personal profit by moving water from one state in the Upper Colorado River Basin to the Colorado Front Range. Mr. Million’s Wyco Power and Water, Inc. proposed the Flaming Gorge Regional Watershed Supply Project which would have pumped water more than 500 hundred miles from Flaming Gorge Reservoir or a point upstream on the Green River in Wyoming to Colorado’s Front Range. The application of Water Horse Resources for a State of Utah water right has similar problems as the Wyco Power and Water, Inc. proposal, and should be rejected for essentially the same reasons as Mr. Million’s previous proposals.

The Colorado River District provides the following initial objections to the application.

1. The application is speculative. A fundamental precept of water use in Colorado (and, we believe, in Utah as well) is a strict prohibition on speculative claims of water. No specific beneficial use or need has been identified for the project other than a general reference to future water demands in Colorado. The Water Horse Resources application would not

survive any objection based on speculation in the Colorado water court process. Thus, no Utah water right should be awarded for the project unless and until Water Horse Resources has obtained a Colorado water right, adjudicated in a Colorado water court that establishes specific beneficial uses, and a firm contractual commitment by end-users for the full amount of water claimed.

2. The application requests a large volume of water to move from the Green River for consumptive uses on Colorado's Front Range. The application states that the claimed water would be diverted pursuant to a State of Utah water right permit but accounted as part of Colorado's allocation under the Upper Colorado River Compact, which raises numerous legal and practical water accounting issues. Importantly, the application claims that the proposed Utah water right would establish a priority that would be enforceable as against other water users within the State of Colorado. No legal mechanism or agreement currently exists to establish a priority in one state that would be enforceable within the other state. In addition, no agreement exists to guide the complicated water accounting necessary to track the project's diversion in Utah for use within Colorado. Thus, the application could adversely impact water users in both Colorado and Utah. No water right should be awarded unless and until the Upper Colorado River Commission has formally adopted procedures on how such a right would be administered and accounted.
3. The proposed application would adversely impact the ability of the Colorado River District, the State of Colorado, and other public entities charged with the development and conservation of Colorado's compact entitlement to plan for the coordinated development of Colorado's remaining compact entitlement in a responsibly conservative manner. The application would therefore be detrimental to the public welfare. We concur with the argument made by the Utah Board of Water Resources and Division of Water Resources in their April 3, 2018 protest in this matter that the application should be denied because it lacks support from any of the three governmental entities within Colorado (the Colorado Water Conservation Board, the Colorado River District, and the Southwestern Water Conservation District) that have statutory duties regarding the conservation and development of the State's Colorado River compact allocation.
4. The large volume of water claimed would adversely impact existing users of Colorado's entitlement to the waters of the Colorado River, and could usurp the remainder of the state's compact allocation. The State of Colorado and its sister states within the Upper Basin, including Utah, are actively studying and conducting projects to reduce existing consumptive uses of water within the Upper Basin in order to avoid the potential chaos and hardship that would be triggered by administration under the 1922 Colorado River Compact or by water levels at Lake Powell dropping to critically low levels. The proposed water right would exacerbate the supply problems currently faced in the Colorado River Basin, and would increase the need and cost of any Upper Basin demand management program. The proposed water right thus would be counter-productive to the actions of the Upper Division States by requiring that additional existing beneficial uses of water within the Upper Basin be eliminated, simply so that a water supply would be available for Water

- Horse Resources speculative application. No water right should be awarded unless the applicant can prove that the claimed use will not adversely impact existing water uses in the Upper Basin, and that the application would not be detrimental to the public welfare.
5. The application does not provide any supporting information to demonstrate the economic feasibility of the project, or that the applicant has the economic ability to complete the proposed project works. No water right should be awarded unless and until the applicant can demonstrate that the proposed project is economically feasible, and can and will be developed within the applicant's financial ability, for non-speculative beneficial uses.
 6. No environmental analysis has been completed or even initiated for the proposed project. Such an enormous project almost certainly would face formidable hurdles in obtaining the national, state, and local permits required for construction and operation of the diversion structure, pumping plants, pipeline, power-plants, and any associated storage or forebay reservoir structures. No water right should be granted unless and until the applicant can demonstrate that it has or will be able to acquire the necessary permits and governmental authorizations.
 7. The Colorado River District and its constituents support, and benefit from, the Upper Colorado River Endangered Fish Species Recovery Program. Reservoir releases from Flaming Gorge Reservoir and associated flows in the Green River below the reservoir play an important part in the success of the Recovery Program. If granted, the application could adversely impact flows in the Green River to the detriment of the Recovery Program, and the associated detriment of virtually every Upper Colorado River Basin water user. No water right should be granted unless and until the applicant has demonstrated that the proposed project will not adversely impact the Upper Colorado River Recovery Program.
 8. The Colorado Water Plan establishes a seven-principle "Conceptual Framework" for the development of any new supply from the Colorado River basin for transmountain use on Colorado's Front Range. The Colorado Water Plan's framework includes principles that would require (1) the project proponent and end-users accept the hydrologic risk of water availability, (2) conjunctive use with other non-Colorado River Basin supplies, (3) the establishment of hydrologic, river, and storage triggers as conditions for when a new transmountain diversion project, such as Water Horse Resources' proposal, would be able to divert; (4) the establishment of a collaborative program that protects against involuntary curtailment for existing uses and some reasonable increment of future development in the Colorado River System but would not cover a new transmountain application such as the subject application, (5) the accommodation of water needs on Colorado's West Slope as part of the project, (6) conservation and reuse commitments, and (7) environmental resiliency and recreational uses. The Colorado Water Plan's Conceptual Framework can be found at the following link:
<http://cwcbweblink.state.co.us/WebLink/ElectronicFile.aspx?docid=199506&searchid=80d50cb3-95bf-405c-bfa5-587c633c7136&dbid=0> . The applicant has not demonstrated,

that it can operate its project in compliance with the Colorado Water Plan's Conceptual Framework.

9. For the reasons specified above, the application does not satisfy the requirements to obtain a water right within the State of Colorado, and also would fail to meet the requirements set forth at Utah Code 73-1-1(3), 73-1-3, 73-3-8, and the corresponding provisions of Utah's export statute.
10. The application is vague and lacks sufficient detail to form the basis of a recognized water right, particularly given the large volume of water claimed and the complex legal and accounting problems raised by the application. The application should be denied on this basis alone. However, if it is not summarily rejected, the Colorado River District reserves the right to raise additional objections to the application as more information may be provided by the applicant or others.
11. The Colorado River District does not specifically request a hearing in this matter. However, if a hearing is held, we request the opportunity to present objections and information at the hearing.

Respectfully submitted this 5th day of April, 2018.



John M. Currier, Chief Engineer
Colorado River Water Conservation District