



**ATTORNEY REPORT
JOINT QUARTERLY MEETING
GENERAL and ENTERPRISE
April 2019**

TO: CRWCD BOARD OF DIRECTORS

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Dear Directors:

This report identifies matters for discussion at the April 16-17, 2019, 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 4, 2019, 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 Cooperative Agreement Implementation Matters.
- B. Colorado River District Conditional Water Rights. (General and Enterprise Matters).
- C. Application of City of Glenwood Springs for Recreational In-Channel Diversion Water Right, Case No. 13CW3109, Water Division 5.
- D. C.R.S 37-92-102(3)(b) – Instream Flow Rights and Pre-Existing Uses.
- E. Colorado River Compact, Intra-State, Interstate, and International Negotiation Matters, including Demand Management.
- F. Wolford Mountain Reservoir Conveyance of Interest to Denver Water. (An Enterprise Matter).
- G. Fair Campaign Practices Act and Discussion of Possible Election Matters.

II. GENERAL MATTERS.

A. Waters of the United States Proposed Rule.

Update only. Strategic Initiatives: 9A (support wise use of Colorado’s waters) and 10A (protect against regulatory concerns).

On February 14, 2019, the Army Corps of Engineers and the Environmental Protection Agency published the agencies’ proposed new rule defining the Waters of the United States (aka “WOTUS”) in the Federal Register. The stated goal of the rule is to increase Clean Water Act (“CWA”) “program predictability and consistency by increasing clarity as to the scope of “waters of the United States.”” The CWA’s primary areas of regulatory focus are point-source discharge permit requirements under Section 402 (the National Pollution Discharge Elimination System (NPDES)), and “dredge and fill” permit requirements under Section 404. Federal jurisdiction to impose those permit requirements extends only to jurisdictional WOTUS. By all accounts, the proposed rule asserts jurisdiction over a narrower scope of waters than does the previous/existing rule.

The proposed rule identifies six categories of jurisdictional waters (1) Traditional Navigable Waters and Territorial Seas, (2) Tributaries, (3) Ditches, (4) Lakes and Ponds, (5) Impoundments, and (6) Wetlands. Our discussion of the rule focuses on ditches, as that has been a past area of Board concern.

The proposed rule defines ditches as “an artificial channel used to convey water,” and identifies three categories of ditches that are considered jurisdictional: (1) ditches which are traditionally navigable waters used in interstate or foreign commerce, (2) ditches constructed in a tributary, and (3) ditches constructed in an adjacent wetland. All other ditches are not considered WOTUS and are excluded from the rule.¹

The first category of jurisdictional ditches is relatively straightforward, any ditch that transport goods and services in interstate or foreign commerce is jurisdictional. An example would be the Erie Canal.

The second category – ditches constructed in a tributary – is not quite as clear. The rule defines a tributary as a “river, stream, or similar naturally occurring surface water channel that contributes perennial or intermittent flow to a navigable water...in a typical year either directly or indirectly through other jurisdictional waters such as other tributaries.” We note that the proposed rule’s treatment of tributaries is much narrower than the previous/existing rule, which asserts jurisdiction over ephemeral streams (surface water flowing only in direct response to precipitation) and waters that have a “significant nexus” to otherwise jurisdictional waters. The proposed rule defines “perennial” as “surface water flowing continuously year-round during a typical year”, and “intermittent” as “surface water flowing continuously during certain times of a typical year and more than in direct response to precipitation.” Although the proposed rule does not provide a clear

¹ It is important to note that ditches not covered by one of these categories could still be regulated under Section 402 of the CWA if they are a point source discharge into jurisdictional WOTUS. Also, recall that irrigation return flows and agricultural discharges are excluded from the definition of a point source. 33 U.S.C. 1362(14).

example, we assume that the channelization and/or straightening of an intermittent oxbow would qualify as a jurisdictional ditch under the second category.

The third category of jurisdictional ditches are those built in adjacent wetlands. Adjacent wetlands are defined in the proposed rule as “wetlands that abut or have a direct hydrologic surface connection to a [jurisdictional] water...” A ditch built through a wetland adjacent to another jurisdictional water would make the ditch a jurisdictional WOTUS for purposes of the rule.

It also is important to note that the proposed rule does not affect the statutory exemption provided for the construction and maintenance of *irrigation* ditches, including diversion structures, weirs, headgates, and other related facilities that connect an irrigation ditch to a jurisdictional water. However, the construction or maintenance of a diversion structures for *municipal* (or other non-irrigation) ditches likely would not be exempted. Additionally, artificial lakes and ponds constructed in uplands (including water storage reservoirs, farm and stock watering ponds) are not jurisdictional pursuant to the proposed rule.

It is our intent to work with staff through the River District’s relationships with the Colorado Water Congress, the National Water Resources Association, and Western States Coalition of Arid States to coordinate any comments to the proposed rule. Comments are due on April 15th. We do not believe it is necessary to file River District-specific comments, but may file very brief comments if staff determines it is worthwhile to suggest clarifying language regarding the proposed rule’s second category of ditches.

B. *Hill v. Warsewa, Federal District Court, Colorado (Riverbed Access).*

Update only. Strategic Initiative: 1.B (outreach and advocacy).

Last year we reported on a lawsuit filed in federal district court that sought 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 claimed 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 streambed and that, without express state-imposed restrictions, the public has access across the streambed. In May of 2018, Hill filed a motion to dismiss his complaint without prejudice (meaning that the lawsuit could be re-filed anytime in the future).

Hill then re-filed the lawsuit in state court. The case was then removed back to the federal district court again, and the State of Colorado joined the federal court proceeding. In January of 2019, the Federal District Court dismissed the complaint holding that Hill, as a private individual, had no standing to assert the State of Colorado’s interest in the streambed. The District Court’s decision has been appealed by Hill to the 10th Circuit Court of Appeals.

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. We will update the Board on the resolution of this case.

C. Fair Campaign Practices Act and Discussion of Possible Election Matters.

Update only. Strategic Initiative: 1 (outreach and advocacy) and 12 (financial sustainability).

The confidential report contains a brief summary of the requirements of the Fair Campaign Practices Act as it would relate to possible election/ballot issues or questions.

We recommend that the Board discuss this subject in executive session.

III. RIVER DISTRICT WATER MATTERS.

A. Colorado River Cooperative Agreement – Implementation Issues.

Update only. Strategic Initiatives: 5A (Shoshone permanency), 5C (transmountain diversions), and 9A (wise and efficient water use).

We continue to work with other West Slope interests and Denver Water in implementation of several items related to the CRCA.

1. 1940 Consolidated Ditches Agreement.

Our negotiations with Denver continue related to its effort to terminate the 1940 Consolidated Ditches Agreement. However, Denver believes that the momentum to reach a comprehensive deal with Consolidated Ditches, a number of Front Range entities, and the West Slope CRCA Signatories is waning – due to too many demands requested of Denver by the other entities (West Slope included). A meeting is set for April 11th at Denver Water to determine if and how to regain momentum and try to reach agreement in a short time-frame. Thus, it is possible we will have more to report at the April Quarterly River District meeting.

2. Update on Denver's Moffat System Project.

Significant CRCA benefits accrue to the West Slope when Denver accepts final permits for its Moffat System Project (*i.e.*, Gross Reservoir Enlargement), and also when the project is substantially completed. We therefore will continue to monitor, the lawsuit, filed last December by Save the Colorado, against the U.S. Fish and Wildlife Service and the Army Corps of Engineers for an alleged violation of the Endangered Species Act (ESA) concerning the Moffat System Project's potential impacts to the green lineage cutthroat trout. Denver has intervened in the case in February.

In addition, at a recent hearing, the Boulder County Commissioners confirmed that Boulder County will assert 1041 County Permitting authority over the Moffat System Project. Denver has historically argued that Boulder County's permitting authority is preempted by the Federal Energy Regulatory Commission (FERC) permit process for the Gross Reservoir enlargement. On a somewhat related side-note, Larimer County recently denied a 1041 permit for the City of Thornton's Northern Project which would divert water from the Poudre River.

3. We continue to work on other CRCA implementation items, including evaluation of efforts to best preserve the Shoshone Call Flows, and West Slope Fund items.

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

B. Colorado River District Conditional Water Rights.

Update only. Strategic Initiatives: 4 (Colorado River supplies) and 8 (Colorado Water Plan).

1. River District Conditional Water Rights for the Fraser Valley Project.

An application for finding of reasonable diligence is due in December 2019 for the following River District conditional water rights: Fraser Feeder Canal (150 c.f.s.), Fraser Pumping Plant and Pipeline (35 c.f.s.), and Ranch Creek Reservoir (20,000 A.F.). In 2013, the River District entered into a memorandum of understanding with Grand County and the Middle Park Water Conservancy District for the joint development of these conditional water rights for the benefit of the Fraser River basin.

2. River District Conditional Water Rights for Elkhead Reservoir Enlargement (*an Enterprise Matter*).

In 2013, the River District demonstrated reasonable diligence and made absolute 11,957 A.F. of the Elkhead Reservoir Enlargement water right as well as 1,000 A.F. of the reservoir refill right. An application for finding of reasonable diligence is due on the remaining conditional portion of the enlargement water right (1,043 A.F.) and all of the hydropower right (200 c.f.s.) in September of 2019.

3. River District Conditional Water Rights for the West Divide Project.

An application for reasonable diligence is due in April of 2020 for the remaining conditional components of the West Divide Project: Avalanche Canal and Siphon (30 c.f.s.), Dry Hollow Feeder Canal (250 c.f.s.), Dry Hollow Reservoir (45,000 A.F.), Four Mile Canal and Siphon (50 c.f.s. Four Mile Creek Diversion and 50 c.f.s. Three Mile Creek Diversion), Horsethief Canal Headgates 1-5 (750 c.f.s. in the aggregate), Kendig Reservoir (15,450 A.F.), Kendig Reservoir First Enlargement (2,610 A.F.), West Divide Canal (300 c.f.s.), and West Mamm Creek Reservoir (6,500 A.F.).

Failure to file timely diligence applications for the above rights will result in cancellation of the conditional water rights.

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

C. Application of the City of Glenwood Springs for Recreational In-Channel Diversion, Case No. 13CW3109, Water Division 5.

Update only. Strategic Initiative: 7.A (consumptive and non-consumptive water needs).

The Colorado Water Conservation Board approved amended findings of fact supportive of the Glenwood Springs RICD at its March 2019 meeting. Consistent with the Board's previous direction, the River District will remain in the case until Glenwood Springs has reached stipulations with the remaining parties.

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

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

Update only. Strategic Initiative: 5.C (transmountain diversions).

We continue to meet regularly with representatives of Colorado Springs Utilities to resolve West Slope concerns with the diligence application for the conditional components of its Upper Blue/Hoosier Pass transmountain diversion project. Our next meeting is scheduled for April 24th. We will report back to the Board with any updates at a later meeting.

E. Application of Water Horse Resources for Utah Water Right.

Update only. Strategic Initiatives: 5B (IBCC Conceptual Framework), 5C (transmountain diversions), and 8E (Colorado Water Plan – Conceptual Framework).

Consistent with the Utah State Engineer's request for additional information, Water Horse Resources provided approximately 250 pages of supplemental information related to its application for a Utah water right and pipeline project from the Green River. On March 15th we filed a joint-response with the Upper Yampa Water Conservancy District to the supplemental information supplied by Water Horse Resources.

Our response focused on the following points: (a) the speculative nature of the application, (b) the legal requirements that Water Horse Resources will face to use a portion of Colorado's allocation of its compact entitlement within Colorado, and (c) the physical and economic infeasibility of the proposed project. Please contact Peter or Jason if you would like a copy of our response or any other filings.

The Utah State Engineer has not committed to any schedule for issuing an order on whether the application will be approved or denied. We will continue to update to the Board on this matter.

F. C.R.S. § 39-92-102(3)(b)—Instream Flow and Protection of Pre-existing Uses.

Update only. Strategic Initiative: 2.A (basin outreach), 6.D (agricultural water use).

As previously reported, we have been negotiating with the State Engineer's Office and CWCB staff regarding the state's treatment of un-decreed uses that pre-exist an instream flow right. The issue arose in Water Division 6, where the State curtailed long-standing stock-watering diversions when the CWCB's instream flow rights were not satisfied. The ranchers' irrigation rights are clearly senior in priority to the instream flow rights. The ranchers asserted that the stock-watering diversions are an implied component of, and an ancillary use associated with, their decreed irrigation rights. The state disagreed and argued that the ranchers' stock-water diversions are not included within the scope of the irrigation decrees, and that the stock-water diversions are therefore junior to the instream flow rights.

Our position has been that regardless of whether the irrigation decrees impliedly include stock-watering, the historical stock-water diversions are protected against a call from the instream flow rights because the instream flow statute expressly makes instream flow rights subject to "present uses...of water...whether or not previously confirmed by court order or decree." C.R.S. § 39-92-102(3)(b). The state acknowledges that instream flow rights are subject to pre-existing uses but argues that pre-existing uses must first be expressly recognized in a water court decree in order to take advantage of the benefits of Section 102(3)(b).

Until recently, we were making reasonably good progress on negotiating a state engineer policy that would provide a uniform mechanism for the state to recognize pre-existing stock water uses without the need for such rights to be adjudicated in water court. However, we were recently informed that the state has reverted to its previous position – *i.e.*, that pre-existing uses must be decreed (presumably with a senior appropriation date, but a junior administration/filing date) in order to be free from curtailment by a decreed instream flow water right. In March, the River District Board directed staff to propose legislation that would confirm protection of pre-existing uses without the necessity of a water court decree (in effect, legislatively mandating the procedures we had spent months negotiating with the state). Unfortunately, we understand that the CWCB rejected our proposal at its March meeting.

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

G. Colorado River Compact, Intra-State, Interstate, and International Negotiation Matters, including Demand Management.

Updates only. Strategic Initiatives: 4 (Colorado River Water Supplies), 6 (Agricultural Water Use), and 8 (Colorado Water Plan – compact risk and conceptual framework).

1. Lake Powell Pipeline.

The proponents of the Lake Powell Pipeline (the Utah Board of Water Resources and the Washington County (Utah) Water Conservancy District) recently filed their joint-reply to the pleadings filed by intervenors, including the River District, in the Federal Energy Regulatory Commission licensing environmental review process for the project. The reply includes an argument that compact water availability, drought contingency planning, and demand management are not appropriate topics for consideration in the FERC environmental review process.

We will continue to monitor the proceeding, update the Board, and participate further as necessary if so directed.

2. Drought Contingency Planning and Demand Management.

There have been a number of developments related to contingency planning and demand management since the River District's January Board meeting. As previously reported at a special Board meeting, all seven states signed onto the Drought Contingency Plan (DCP) agreements – notwithstanding the objection/hold-out of the basin's largest single water user, the Imperial Irrigation District. IID's opposition caused some temporary concern about the prospects for passing DCP legislation in Congress. However, more recently, the DCP legislation that will direct the Secretary of the Interior to implement the DCP "without delay" was introduced (co-sponsored by all 14 Senators from the Basin States).

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

H. Woldford Mountain Reservoir - Conveyance of Interest to Denver Water (an Enterprise Matter).

Update only. Strategic Initiatives: 12 (Financial Sustainability) and 13 (Asset Management).

River District technical and legal staff have been holding preliminary discussions with Denver Water regarding the upcoming termination of Denver Water's lease of 15,000 acre feet at Woldford Mountain Reservoir. Following the lease termination, the River District will be required to convey to Denver a 40% ownership interest in the reservoir.

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

I. Green Mountain Reservoir Operations and Administrative Protocol.

Update only. Strategic Initiatives: 5.C (transmountain diversions) and 7 (River District constituents' water needs).

Green Mountain Reservoir has historically been (and likely will continue to be) a central focus of River District efforts to protect existing and future West Slope water uses in the mainstem Colorado River basin. Recently, we have been working with River District technical staff on three issues related to Green Mountain Reservoir. First, we have renewed efforts with Denver Water and other parties to the Green Mountain Reservoir Administrative Protocol Agreement to address the fallout from Judge Kreiger's order which dismissed Denver's diligence case and remanded it and future Blue River Decree diligence filings to the State Water Court. (A question remains as to whether Judge Krieger's order also intended to remand all other Blue River Decree matters, including the GMR Administrative Protocol, to the Colorado Water Court). We hope to achieve consensus among the parties to the Protocol Agreement, including the State and the United States, on a path forward to obtain adjudication of all four component of the Protocol. We do not anticipate

an update or request for direction/action until July but wanted to update the Board that these efforts have been renewed.

We also are working with Denver Water, Colorado Springs, and the Grand Valley Water Users Association, and Orchard Mesa Irrigation District on a joint letter to Reclamation to express concern about the manner in which Reclamation accounted for inflow and bypasses from Green Mountain Reservoir during the 2018 fill season. Green Mountain Reservoir, a component of the C-BT Project has two primary pools – the 52,000 acre foot Replacement Pool, which is used to replace diversions by the C-BT Project’s transmountain collection system, and the 100,000 acre foot Power Pool, which is used for West Slope compensatory purposes and includes the 66,000 acre foot Historic Users Pool (HUP) and the Contract Pool. Senate Document 80 (the operating bible for GMR) makes clear that the 52,000 acre foot Replacement Pool must fill prior to the 100,000 acre foot compensatory power pool. However, Senate Document 80 also makes clear that the 100,000 acre foot pool has a co-equal priority with the project’s transmountain collection system.

Our concern about last year’s fill accounting is focused on the period of time when the C-BT Project was the “swing right” (meaning it was partially in-priority and partially out-of-priority). At that time, the 52,000 acre foot Replacement Pool had already filled, and reservoir bypasses or releases were necessary to satisfy the downstream senior call from Shoshone. We maintain that, in such conditions, Reclamation should pro-rate releases from GMR’s two pools in proportion to the respective out-of-priority depletions made by the C-BT Project’s transmountain collection system and depletions made by West Slope HUP beneficiaries and contractors. Instead, Reclamation treated all water released or bypassed from GMR to satisfy the downstream call as coming entirely from the 100,000 acre-foot pool’s storable inflow. This manner of accounting reduced the volume of storable inflow to the 100,000 acre-foot pool. The end result is that water diverted or stored for transmountain diversion through the Adams Tunnel was replaced from the 100,000 acre-foot pool instead of from the 52,000 acre-foot C-BT replacement pool as set forth in Senate Document 80 and the relevant decrees.

Luckily, the 100,000 acre foot pool filled last year anyway, so the Cities were not injured by an increased substitution requirement and the West Slope benefitted from a full compensatory power pool. However, the Cities and the West Slope parties want to ensure that Reclamation properly accounts for depletions and inflow in future years in order to avoid risk or injury to their respective interests under the Blue River Decree. We expect that we will join the Cities and the other West Slope parties in sending a letter expressing the above concern relatively soon.

In addition, we are working with River District technical staff, representatives of the Middle Park Water Conservancy District, and the Division 5 Engineer to renew efforts to address the long-standing (decades) problem of the GMR HUP’s so-called “Slot Group.” The GMR HUP was established by Reclamation’s 1984 Green Mountain Reservoir Operating Policy, which effectively split the GMR 100,000 acre foot pool into (1) the 66,000 acre foot HUP to protect existing domestic and irrigation uses “perfected by use” prior to October 16, 1977, and (2) the remainder of the pool’s capacity, to be dedicated to West Slope purposes by contract for industrial uses and junior domestic and irrigation priorities. The 66,000 acre foot size of the HUP was set based on the volume of water released from GMR during the 1977 drought year.

The “Slot Group” refers to the group of water uses that were perfected between October 16, 1977 and the January 1984 effective date of Reclamation’s GMR Operating Policy. The basic concept is that the Slot Group did not have notice that the HUP would be set based on the volume released in 1977 until after the Slot Group rights were perfected, and therefore, the rights in question should receive some form of benefit from GMR other than contracting for GMR water on an equal basis with post-1984 rights.

A number of years ago, the Slot Group problem was essentially deemed unsolvable because the volume of Slot Group depletions could be quite substantial. No entity, including Reclamation, was willing to consent that additional GMR water should be released free of charge for the benefit of the Slot Group. More recently, we have held a number of discussions with the Division 5 Engineer, who believes that the volume of Slot Group depletions could be smaller and more manageable. River District staff is working with the Division 5 Engineer’s office to refine the depletion numbers. The trick will then be to develop a creative means to secure replacement water to cover the out of priority diversions of the Slot Group. We will continue to update the Board on these developments.