



**QUARTERLY ATTORNEY REPORT  
GENERAL DISTRICT  
April 2011**

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**TO:** CRWCD BOARD OF DIRECTORS

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

This report identifies matters for discussion at the River District's April 19-20, 2011 quarterly meeting. A separate Confidential Report addresses confidential matters. The information in this report is current as of April 7, 2011, 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 Basin Proposal, Blue River Decree and Moffat System Issues, including:
  - i. Denver's Blue River System Diligence Applications, Case Nos. 06CW255, 03CW39, and 10CW265, Water Division 5, and
  - ii. Denver's Williams Fork and Fraser (Moffat) Project Diligence Applications in Case Nos. 07CW29, 07CW30 and 07CW31, Water Division 5.
- B. C-BT Project Operations, Windy Gap Firming Project and Upper Colorado Stream Flow Management.
- C. Green Mountain Reservoir Administrative Fill and Climax C.A. 1710 Priority Issues.
- D. Colorado River Wild and Scenic Stakeholders Group Proposal for Alternative Management Plan.
- E. Colorado River Compact, Interstate, and International Issues.
- F. Colorado River District Conditional Water Rights/Project Development.

## II. GENERAL AND GOVERNANCE MATTERS

### A. Proposed Changes of River District Bylaws.

1. Change from Roberts Rule of Order to the Modern Rules of Order.

In January, we discussed with the Board whether it wished to consider amending its bylaws to reflect that meetings would be conducted pursuant to the Modern Rules of Order, 3<sup>rd</sup> edition. The Board requested that copies of the Modern Rules of Order be distributed to the Board prior to making any change to the bylaws and requested that counsel bring this matter back for consideration at the April Quarterly. Copies of the Modern Rules of Order have been distributed to Board members.

The River District's bylaws currently provide that meetings of the River District Board are governed by Roberts Rules of Order. As we noted in January, the basic principles of Roberts Rules are sound; however, the rules themselves are complex and somewhat archaic, particularly for small entities such as the River District. Our (limited) experience is that every rule has several exceptions, and every exception has its own exception. Roberts Rules also have been criticized as rewarding parliamentary maneuvers over fair discourse. The River District's bylaws already recognize this to some extent by providing that the Board President may modify meeting procedures to ensure fair and efficient conduct at meetings. Despite this existing recognition of flexibility, we recommend that the Board revise the River District bylaws to provide that River District meetings be governed by the more user-friendly Modern Rules of Order (3<sup>rd</sup> Edition) (the Modern Rules book is less than 60 pages, as opposed to more than 700 pages for Roberts Rules).

*We recommend that the Board adopt a motion approving a revision to Art. III, Section 8 of the River District's bylaws to read as follows:*

*Regular and special Board meetings shall be conducted generally in conformance with the Modern Rules of Order, 3<sup>rd</sup> Edition. Meeting procedures may be modified by the President as necessary to ensure the fair and efficient conduct of Board meetings.*

## III. RIVER DISTRICT WATER MATTERS

### A. Colorado River Basin.

1. Colorado River Basin Proposal, Blue River Decree and Moffat System Issues, including:
  - a. Denver's Blue River System Diligence Applications, Case Nos. 06CW255, 03CW39, and 10CW265, Water Division 5, and
  - b. Denver's Williams Fork and Fraser (Moffat) Project Diligence Applications in Case Nos. 07CW29, 07CW30 and 07CW31, Water Division 5.

i. Update on Denver Negotiations/Mediation.

We continue to meet frequently with Denver and the State of Colorado regarding potential mechanisms to implement the proposed Denver Mediation Agreement. We are making progress but have not reached consensus resolutions on the implementation mechanisms.

We also have continued negotiations with Denver on how to “tier” the mediation agreement in a manner that ensures all parties receive their respective benefits from the agreement. As discussed further in the Confidential Report, we are hopeful that a resolution is close at hand on tiering.

ii. Update on Litigation.

Denver’s diligence case for its Blue River System water rights remains on “administrative hold” by the federal court. Denver’s other diligence cases remain in a semi-active status before the Colorado Division 5 Water Court. Status conferences were held on March 22<sup>nd</sup> in Denver’s diligence cases, as well as the River District’s application for the Wolford Mountain Reservoir Second Enlargement in Case No. 03CW302 (a River District Enterprise matter). In all of the cases, the parties once again requested additional time to finalize and implement the settlement agreement. The Water Referee set the next status conferences for August 4, 2011. We anticipate filing a joint status report in the cases with Denver prior to the August 4<sup>th</sup> conferences.

iii. Update on Permitting and Division of Wildlife Mitigation Plan.

Consistent with state statute, both Denver Water and Northern’s Municipal Subdistrict are required to submit plans outlining their proposals to mitigate impacts to the state’s fish and wildlife resources caused by the construction of the Moffat Collection System and Windy Gap Firing Projects respectively. The mitigation plans are submitted to the Colorado Wildlife Commission and the Colorado Water Conservation Board, and once accepted become the official state position with respect to the mitigation required for a project.

On January 24<sup>th</sup> and 25<sup>th</sup>, the Colorado Division of Wildlife held a workshop to gain stakeholder input on the mitigation associated with the projects. Eric Kuhn and Jason Turner attended the meetings.

In early February, Denver and the Municipal Subdistrict submitted draft mitigation plans for comment from various stakeholders. Numerous entities including the River District, Grand County, Trout Unlimited and local landowners submitted comments on the draft mitigation plans. The primary points made in the River District’s comments were: (1) the timing of the mitigation plans is premature because no final environmental impact statements have been released – thus the impacts from the projects have yet to be identified, making a determination by the State on appropriate mitigation premature, and (2) a clarification that the “enhancement” packages negotiated in the context of the global settlement with Denver (and pending negotiations with the Municipal Subdistrict) are not a substitute for the statutorily-required mitigation for the projects.

Denver and the Municipal Subdistrict anticipated submitting their final mitigation plans to the Wildlife Commission on March 10<sup>th</sup>. However, based in part on the comments received, both entities elected to take additional time to formulate their respective mitigation plans. We understand that the parties intend to submit final wildlife mitigation plans on April 7<sup>th</sup>. Once submitted, the mitigation plans will start a formal 60-day review period by the Wildlife Commission before submission to the CWCB. We anticipate filing comments on the final mitigation plans that are similar to the comments we filed on the draft plans.

*The Board may wish to discuss the negotiation items in executive session.*

2. C-BT Project Operations, Windy Gap Firming Project, and Upper Colorado Stream Flow Management.

We reported in January that negotiations with the Municipal Subdistrict on the Windy Gap Firming Project had slowed since mid-November of 2010. Since January, the negotiations with the Municipal Subdistrict have picked-up substantially. A negotiation session with the River District, the Municipal Subdistrict, Grand County, and the Middle Park Water Conservancy District was held in Granby on April 6<sup>th</sup>. The Subdistrict submitted a proposal on a number of outstanding issues including water supply for Middle Park and Grand County, as well as issues related to Shoshone. Three additional negotiation sessions are scheduled in April.

The status of the WGFP Wildlife Mitigation Plan is described in the paragraph above regarding Denver's proposed Wildlife Mitigation Plan.

*The Board may wish to discuss the WGFP issues in executive session.*

3. Green Mountain Reservoir Administrative Fill and Climax C.A. 1710 Priority Issues.

River District counsel and staff continues to dedicate substantial time and energy on the mediated effort to resolve the Green Mountain Reservoir administrative problem. The negotiations continue to plod along, with some progress but with substantial frustration. There are multiple disputes and long-held positions at stake in the negotiations, but the primary contested issues that are currently bogging-down the process are (1) whether the United States can exercise its storage and direct flow power rights at Green Mountain Reservoir simultaneously (without exercise of the power right counting toward the administrative fill of the Green Mountain Reservoir storage right), (2) whether water stored or diverted by Denver and Colorado Springs during the Green Mountain Reservoir fill-season "counts-toward" the fill of Green Mountain Reservoir, and if not, (3) whether other water rights are impaired by any resulting extension of the Green Mountain Reservoir storage right for a longer period of time than it would be on the river if the Cities' storage did count toward the administrative fill of Green Mountain Reservoir.

There are three different potential solutions that, with some tweaking, could work to resolve the issues (at least from the River District's point of view). The group is meeting quite frequently

and seems to be narrowing-in on a consensus resolution. However, we continue to believe that it is premature to dedicate substantial Board time toward detailed discussion of any one of the three possible solutions.

*The Board may wish to discuss these issues in executive session.*

4. Upper Colorado River Wild and Scenic Stakeholders Group Proposal for Alternative Management Plan.

*Action requested, as described on page 8, below.*

In January, we reported on two roadblocks to completion of the Upper Colorado River Wild and Scenic Stakeholders Group Proposal for Alternative Management Plan. Thankfully, those two issues were resolved in a manner consistent with the Board's direction. In particular, the more controversial issue concerning the plan's use of Resource Guides was resolved by agreement that the provisional Resource Guides will not serve as a trigger of any action or affirmative obligation on the part of any stakeholder. Instead, the Resource Guides will merely be used for informational purposes and to guide the discussions of the Stakeholder Group. As a *quid pro quo*, the group agreed that the provisional Resource Guides would not be substantially qualified (*i.e.*, rendered meaningless) by "implementation criteria."

We are pleased to report that the Stakeholder Group made enough progress to submit the alternative management plan to the BLM on February 28<sup>th</sup> for publication in BLM's upcoming draft Environmental Impact Statement for its Resource Management Plan (expected to be released to the public this spring). The members of the Stakeholder Group set an internal deadline of April 30, 2011, to obtain the formal endorsement of the Stakeholders' respective governing Boards. The purpose of the deadline is to obtain the endorsements prior to the BLM's publication of its draft EIS. A few stakeholders (notably Colorado Springs Utilities and Aurora Water) have lengthy city council approval processes and may not meet the deadline. However, those entities have pledged to at least initiate the approval process by April 30<sup>th</sup>.

We recommend that the River District formally endorse the proposed Wild and Scenic Alternative Management Plan, subject to the qualifications noted below. A full copy of the (lengthy) plan is included as Attachment A to this memo. An outline summary of how the plan operates follows:

- a. Purpose: Develop a plan by stakeholders as an alternative to a top-down federal Wild and Scenic management for the Upper Colorado River. The stated purpose of the SG Plan is to "balance permanent protection of the ORVs, certainty for the stakeholders, water project yield, and flexibility for water users." (See Plan at Pgs. 3 and 8).
- b. Protection of the Wild and Scenic Outstandingly Remarkable Values ("ORVs") for Fishing and Recreational Boating:

- i. Long-term Protection Measures include appropriation of CWCB instream flow, delivery of water to downstream demands, delivery to downstream senior water rights, and deliveries to the Upper Colorado River Endangered Fish Species in the Grand Valley. (Pgs. 25-26).
  - ii. Cooperative Measures of Stakeholders. (Pgs. 27-30).
  - iii. Stakeholder Group “internal elevation/review” process. (Pgs. 30 and 38-41).
  - iv. Termination of the SG Plan, subsequent action by BLM. (Pgs. 30 and 38-41).
- c. Provisional ORV Indicators: The conditions that characterize the ORVs and gage whether the ORVs are being protected. (Pgs. 14-15).
- d. Provisional Resource Guides: Resource guides are flow-based guides for recreational boating and fish habitat, as well as standards for water quality. During the provisional period, the Resource Guides will be used only as a source of information to inform SG discussions under the Plan. The Resource Guides are not intended to be used as a test for Plan success, nor for use by permitting agencies or entities as the criterion for evaluating a project’s effects on the ORVs. During the provisional period, the SG will gather additional data, learn and refine what is needed for the protection of the ORVs, and develop a long-term Monitoring Plan to guide the protection of the ORVs. (Pgs. 15-23).
- e. Elevation/Referral/Termination Process: Any stakeholder can elevate issues to the full SG to address unresolved concerns related to implementation of the Plan or the status of the ORVs. The SG Plan provides governing mechanisms to address a Significant Risk of Impairment to an ORV, a missed Milestone or Material Change in Circumstances. For example, certain disputes may trigger a mediation procedure or referral of the dispute to a policy level group for guidance. If cooperative attempts fail and concerns remain about ORVs, the Plan can be terminated on a vote of 5 out of 6 Interest Groups. (Pgs. 38-41).
- f. Significant Risk of Impairment of an ORV: is a determination made by affirmative vote of at least five Interest Groups that one or more of the ORVs is faced with an imminent risk of material diminishment due to circumstances under the control of the Plan. This may be cause for invoking the dispute resolution and potential Plan termination procedures. (Pgs. 7 and 40).
- g. Governance Committee (pgs. 32-42): The primary group implementing and making decisions regarding the SG Plan; comprised of 6 Interest Groups each with three representatives:

- i. West Slope Water Conservancy/Conservation Districts and Landowners/Water Users.
- ii. Local Government.
- iii. Trans-Mountain Diverters.
- iv. Conservation/Environmental/Fishing.
- v. Recreational Floatboating.
- vi. State Interests (*e.g.*, CWCB, CDOW, and State or Division Engineer)

(Ex-Officio non-voting members are BLM and USFS).

- h. **Poison Pill:** If the outcome of negotiations or final permitting related to Denver's Moffat Project and the Windy Gap Firing Project precludes continued support of the Plan by any stakeholder, that stakeholder shall provide written notification of such position to the SG and the SG will withdraw the Plan from consideration by BLM and USFS as a locally supported Wild and Scenic management plan alternative. The effect of such withdrawal will be that the BLM and USFS will be left to determine the appropriate Wild and Scenic determinations and protective measures for Segments 4, 5, 6 and 7, if any, without taking into account the SG Plan alternative. (Pgs. 21-22).
- i. **Funding:** The SG Plan contemplates an endowment fund of at least \$1.5M. The SG anticipates seeking grants, federal, state and local funding. Initial annual funding by each Interest Group (each Interest Group is made up of at least three Stakeholders) is \$10,000. (Pgs. 44-49).
- j. **Suitability Determination and Agency Coordination:** The SG Plan is contingent upon the neutral deferral of a suitability determination under the Wild and Scenic Rivers Act by BLM/USFS. The SG Plan will not become effective or will terminate if either agency enters formal findings that Segments 4, 5, 6 or 7 of the Upper Colorado River are suitable or not suitable. (Pg. 9).
- k. **New Projects:** Proposed new water projects may seek to opt-in to the SG Plan but are not required to do so. All new projects will go through normal regulatory approvals, regardless of whether they opt-in to the SG Plan. Certain limitations apply to Stakeholders' ability to challenge new projects. (Pgs. 42-44).

As noted above, one of the primary long-term protection measures set forth in the Plan is the Stakeholders' support for a CWCB instream flow appropriation. Currently, the ISF appropriation is contemplated only for Segments 4, 5, and 6 (Kremmling to Dotsero). The Stakeholder Group has not reached consensus on the appropriate flow rate for the ISF. A memo from Mike Eytel that details the Stakeholders' views on the ISF is included with your material as Attachment B to this memo.

The goal is to achieve a consensus Stakeholder Group recommendation to the CWCB on the ISF before the end of April. The Plan provides a mechanism to address a missed-milestone on the ISF, so it may not be absolutely necessary for the Stakeholders to achieve consensus on the ISF prior to formal endorsement of the Plan.

*We recommend that the Board formally endorse the February 2011 Upper Colorado River Wild and Scenic Stakeholders Group Proposal for Alternative Management Plan. The Board may wish to discuss associated issues in executive session.*

5. Update on Other Wild & Scenic River Stakeholder Group Processes (prepared with substantial input from Chris Treese).
  - a. Lower Colorado River.

The River District's involvement with the lower Colorado, Gunnison and Dolores Rivers' Wild and Scenic Rivers evaluations (Grand Junction Field Office) is complete. The draft Resource Management Plan (RMP) is in Washington, D.C. for final approval. A draft EIS on the RMP is expected in late spring 2011. That will be the first official opportunity to see if all the stakeholder recommendations (for no suitability) were accepted. Whispers from federal sources suggest that the recommendations will be approved.

- b. Gunnison/Uncompahgre Rivers.

Final stakeholder recommendations on stream and river segments were delivered to the BLM's Uncompahgre Field Office last month. With the withdrawal of environmental advocates at the conclusion of the stakeholder process, the final recommendations predictably included uniform recommendations for findings of no suitability on all segments under evaluation.

- c. Dominguez-Escalante National Conservation Area.

Consistent with the legislation establishing the Dominguez-Escalante (D-E) National Conservation Area (NCA), a separate RMP is being developed for the new NCA. Streams and rivers in both the Grand Junction and Uncompahgre field offices' eligibility evaluations are included in the NCA's suitability evaluations and will be included in the final RMP. Importantly, three segments of the mainstem of the Gunnison River will be included in the D-E's RMP. Stakeholders (also without environmental interests) are developing alternative management plans that do not include findings of suitability for any of the eligible segments. This stakeholder group's efforts will conclude this month.

6. River District Conditional Water Rights/Project Development.

The River District owns, or has a significant interest in, the following seven projects with numerous associated conditional water rights, all of which are due for findings of reasonable diligence in May of 2011: Basalt Project, West Divide Project, Elkhead Reservoir, Flattops Project,

Redcliff Project, Rangely Project, and Wolcott Reservoir. Failure to file timely diligence applications will result in cancellation /abandonment of these water rights.

*These issues are discussed in the Confidential Report. We recommend that the Board discuss the projects in executive session.*

#### 7. Aspinall Unit EIS Update.

In December 2010, Reclamation released to Cooperating Agencies (including the River District) its long-anticipated Preliminary Final Environmental Impact Statement (PFEIS) on Re-Operation of the Aspinall Unit regarding Endangered Species Flow Recommendations at Whitewater. The primary change from Reclamation's December 2009 Draft EIS is the incorporation of the Black Canyon National Park federal reserved water right into the PFEIS. We participated in a meeting between Reclamation and the Cooperating Agencies in early February held to discuss initial comments on the PFEIS. The State of Colorado, Western Area Power Administration (WAPA), and the Colorado River Energy Distributors Association (CREDA) expressed deep reservations about the way Reclamation incorporated the Black Canyon right into the EIS. The primary concerns raised were that the EIS effectively subordinates the operation of the Aspinall Unit to the Black Canyon right and that possible (but unknown) impacts on Aspinall Unit storage and power generation were unacceptable.

Although the discussion of the Black Canyon right in the PFEIS could definitely benefit from clarification and simplification, we believe that the State and power interests misread the intent of the language – which we read as adequately preserving the discretion of the Secretary of the Interior to balance the competing storage/power interests with the need to address the Black Canyon reserved right. In an example of “no good deed goes unpunished”, we offered to draft proposed compromise language to see if all of the stakeholders could reach consensus comments on the Black Canyon portion of the PFEIS. Substantial work and compromise by all parties produced a document upon which the parties almost reached complete consensus – save three issues reserved for further discussion by the State of Colorado. We submitted comments on the PFEIS that recommend approval of the consensus document without regard to the issues reserved by the State. However, we have informed all of the parties that we remain willing to work with the State on the reserved issues. Please let Peter or Jason know if you would like a copy of the River District's comments on the PFEIS.

One of the States' reserved issues is very important to the success of the Endangered Fish Species Recovery Program. Ironically, the specific issue is not related to the Black Canyon reserved right. Instead, the issue relates to whether Reclamation should assume that, during dry-periods, it will make periodic releases of Aspinall Unit storage in order to maintain the viability of the Redlands Fish Ladder. The State apparently objects to the use of storage for this purpose. The fish ladder is an important component of the Recovery Program, and we believe that it is well worth the use of some storage water if necessary to keep the ladder operational. We view the use of Aspinall Storage toward this purpose as similar to Colorado River reservoir releases for the benefit of the 15-Mile Reach in the Grand Valley. Both actions provide an essential benefit to water users by helping to

ensure the success of the Recovery Program. We will continue to work with the State and other stakeholders on this important issue.

### **III. COLORADO RIVER COMPACT, INTERSTATE, AND INTERNATIONAL MATTERS**

River District staff and counsel continue to work with the Colorado Water Conservation Board, the Southwestern Water Conservation District, The Nature Conservancy, and the Front Range Water Council toward developing the conceptual Colorado Compact Curtailment Plan/Water Bank. The CWCB awarded the group a \$180,000 grant (subject to matching of \$120,000) at its January Board meeting. The group currently is reviewing work qualification statements from possible consultants to conduct preliminary technical work on the water bank.

Recent interstate activity has focused on negotiations with Mexico on possible shortages in deliveries to Mexico if/when the Lower Basin States have shortages imposed under the 2007 Interim Guidelines and Shortage Criteria. The Mexican shortage issue is a bit tricky because it can easily get tied up in interstate controversies regarding the Lower Basin's tributary use.

We also continue to work with the Upper Colorado River Commission staff and other Upper Basin States' advisors toward a recommended curtailment policy.

*The Board may wish to discuss some of these issues in executive session.*

Attachments:

- A. Upper Colorado River Wild & Scenic Stakeholder Group Management Plan, February 2011
- B. Memorandum dated April 7, 2011 from Mike Eytel regarding UPCO Wild & Scenic Instream Flow Proposal