



**QUARTERLY ATTORNEY REPORT
GENERAL DISTRICT
October 2011**

TO: CRWCD BOARD OF DIRECTORS

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Dear Directors:

This report identifies matters for discussion at the River District's October 18-19, 2011 quarterly meeting. A separate Confidential Report addresses confidential matters. The information in this report is current as of October 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. Proposed Colorado River Cooperative Agreement - Implementation Issues.
- 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. 10825 Proposed Agreements and Implementation Issues.
- E. River District Conditional Water Rights - Project Development.
- F. Colorado River Compact, Interstate, and International Issues.
- G. Application of Busk-Ivanhoe, Inc. Case No. 09CW142, Water Division 2.

II. GENERAL AND GOVERNANCE MATTERS

A. Potential Request for Legal Assistance by Yellow Jacket Water Conservancy District.

As reported at the July Quarterly Meeting, the Division 6 Water Judge entered a ruling abandoning a number of the Yellow Jacket Water Conservancy District's conditional water rights. The order granted summary judgment in favor of the objectors in Yellow Jacket's diligence

application. The court found that Yellow Jacket lacked the requisite quorum to authorize the diligence application because the terms of appointment for certain Yellow Jacket Board members had expired. Thus, the applications were void as a matter of law, and the water rights were cancelled for failure to file a timely diligence application.

Yellow Jacket's legal counsel has contacted us to inquire if the River District would provide Yellow Jacket with some financial assistance to appeal the ruling. A notice of appeal must be filed no later than October 24th. If Yellow Jacket succeeds on appeal, the case would be remanded to the water court, and Yellow Jacket would be given the opportunity to reach settlement with the objectors to the case or take the matter to trial to demonstrate reasonable diligence on its conditional water rights.

We have not received a specific monetary request at this point but likely will have received a proposal by the October meeting. Although no funds were specifically identified in the 2011 Budget for legal assistance to others, the Board has approved a specific line item in the past. There are sufficient funds available in the legal budget to provide Yellow Jacket with some financial assistance should the Board choose to do so.

At this point, we do not have a recommendation on whether the River District should provide monetary assistance to the Yellow Jacket District. However, if we receive a proposal from the Yellow Jacket District, the Board may wish to consider whether to contribute a specific dollar amount to the district to assist in its appeal.

III. RIVER DISTRICT WATER MATTERS

A. Proposed Colorado River Cooperative Agreement - Implementation Issues.

No action is requested.

We have been meeting frequently with Denver, the State of Colorado, and the West Slope parties to the proposed Colorado River Cooperative Agreement ("CRCA") on implementation of the agreement. The majority of implementation work over the past six months has been spent on a proposed agreement between Grand County, Denver, and the Colorado Water Conservation Board, and an associated junior water rights application to implement the 1,000 acre-feet of bypasses from Denver's Moffat Collection System.

We also have worked on the terms of a proposed consent decree in Denver's pending Roberts Tunnel Diligence Application. The parties intend for the proposed consent decree to implement the provisions of the CRCA related to resolution of the Blue River Decree metropolitan area, reuse, and place of storage issues. In addition, the proposed consent decree in the diligence case will implement the provisions of the agreement that confirm the ability of Denver to provide water for municipal purposes to water users in Summit County. Pursuant to the provisions of the CRCA, the diligence decree will not be entered by the federal court until the United States has approved the Shoshone Outage Protocol.

The parties to the proposed CRCA still have an informal goal of executing the agreement by the end of the year. However, there has been little progress on issues related to Shoshone – primarily because the group has dedicated its effort toward the other issues to date. We are hopeful that a Shoshone meeting set for October 11th will start to move the group forward on resolution of the Shoshone issues.

Denver has drafted new proposed revisions to the West Slope Charge part of the CRCA in order to more clearly integrate the WISE Project into the CRCA. We are in the process of reviewing the proposed changes.

Issues related to implementation of the CRCA are discussed further in the Confidential Report. The Board may wish to discuss those issues in executive session.

B. C-BT Project Operations, Windy Gap Firing Project, and Upper Colorado Stream Flow Management.

Negotiations with the Municipal Subdistrict on the Windy Gap Firing Project continue to move forward. We have made progress in reducing the number of substantive issues, subject to Board review. We therefore have been working with counsel for the Municipal Subdistrict and our West Slope partners to revise and draft the proposed WGFP agreement for consideration by the River District and the other governing boards. However, there are a few lingering substantive issues that could prove difficult to resolve.

The remaining issues related to the WGFP negotiations are discussed further in the Confidential Report. We recommend that the Board discuss the issues in executive session.

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

Detailed update. No action requested.

Recent negotiations with the State and the other parties involved in the Green Mountain Reservoir negotiations have been productive. The parties have managed to narrow the dispute to a few remaining issues. A *very general* summary of the Green Mountain Reservoir (“GMR”) quagmire is set forth below, followed by a *very general* summary of the proposed compromise solution.

1. Summary of the Basic GMR Dispute and Shared-Goals Toward Compromise Resolution.

Among other things, the Blue River Decree adjudicated the respective priorities of the C-BT Project’s GMR storage and direct flow power rights (August 1, 1935), Denver’s Blue River Project (1946), and Colorado Springs’ Upper Blue/Hoosier Pass System (1948). GMR was decreed for 154,645 acre feet, and its power right was decreed for 1,700 c.f.s. The C-BT’s senior priority meant that the Denver and Colorado Springs projects would not be feasible, so a compromise was struck to allow Denver and Colorado Springs (“the Cities”) to divert out of priority against the power right

by paying a power-interference charge to Reclamation, provided they keep replacement storage on hand to be released if necessary to ensure that GMR receives its full storage entitlement. For example (in gross oversimplification), if Denver stores 15,000 acre feet out-of-priority and GMR ends the year 10,000 acre feet short of a physical fill, then Denver must “substitute” the 10,000 acre foot shortfall by releasing 10,000 acre feet of water from its replacement supplies at Wolford Mountain Reservoir or Williams Fork Reservoir. Denver then gets to keep the 15,000 acre feet of water originally stored out-of-priority in Dillon Reservoir. Unfortunately, this basic compromise has spawned decades of litigation.

There are two primary issues related to the current dispute. The first issue is, within any water year, when is the 1935 priority of the GMR storage right satisfied? The River District (and other entities, including the State Engineer and many other West Slope parties) have argued that the 1935 priority is satisfied when GMR’s decreed capacity of 154,645 acre feet has been stored in the combination of GMR and the Cities’ facilities. The Cities disagree and argue that the 1935 priority is not satisfied until the actual physical storage in GMR reaches 154,645 acre feet (thus reducing, or eliminating the amount of replacement water the Cities have to pay-back to GMR). In 2004, the State Engineer adopted an Interim Policy on the dispute, which has worked to hold off full-on litigation between the parties but probably would not survive the stress of a few dry years without challenge. (The Interim Policy has been revised several times since 2004).

The second issue is closely related to the “end of fill” question and involves the administration of Reclamation’s 1,700 c.f.s. direct flow power right. The Cities maintain that they are entitled to all of the water made available by Reclamation’s reduction of the power right, despite the existence of intervening water rights. The River District has argued that the Cities’ payment of power interference cannot be used in a way that would allow Denver’s 1946 priority to leap-frog more senior West Slope priorities.

Many other side-issues or subsets of the primary issues are interwoven within the two primary disputes discussed above. For example, an important “sub-issue” is whether water that Reclamation dedicates to power generation or toward the historical bypass of 60 c.f.s. counts against the fill of the 1935 storage right. Another significant sub-issue concerns the respective priority of GMR and the Climax Mine’s Civil Action No. 1710 water rights (which have an appropriation date 10-days junior to Green Mountain Reservoir but which were adjudicated years in advance to the 1955 Blue River Decree). Normally, the postponement doctrine would apply so that the latter adjudication of GMR would mean that it would be administered as junior to the Climax rights. However, in Case No. 88CW382, the Division 5 Water Court confirmed that GMR should be administered with an August 1, 1935 – effectively senior to the Climax rights. Climax has therefore been a party to the negotiations in order to ensure that the priority issue is resolved.

During the last year or so, the non-State parties have maintained following “shared-goals” in the negotiations in their attempt to reach a compromise solution to the dispute:

- a. Fill GMR.
- b. Generate power at GMR. (Fill the reservoir, but try to prevent spilling water by providing for the co-equal administration of Reclamation's storage and power rights at GMR without counting power water against the fill of the reservoir).
- c. Make as much water as possible available for upstream use without impairment of the fill of GMR. (For example, allow upstream use by the Cities by allowing the Cities to store against the power right without paper filling the storage right).
- d. Provide a clear mechanism for the reduction of the Cities' Owed-to-GMR accounts, for payment by the Cities of any amounts remaining in the Owed-to-GMR accounts, and to equitably allocate any remaining "power hole fill-deficit" at GMR between the Cities and the reservoir's storage account.
- e. Ensure that the Cities do not "hide behind" or otherwise benefit from the GMR priorities at the expense of GMR itself, the expense of the "Intervening Rights" (i.e., water rights junior to GMR but senior to the Cities), or at the expenses of West Slope beneficiaries of Senate Document 80 that are junior to the Cities.
- f. Provide certainty that the 60 cfs bypass at GMR will not be administered as counting toward the fill of the reservoir's storage right.
- g. Address the relative priority of GMR, the rights of the Cities, and the Climax C.A. 1710 water rights in a manner agreed by the parties, while maintaining the co-equal August 1, 1935 priority of the C-BT's transmountain component and GMR's 100,000 acre foot power/compensatory pool.

2. Non-State Parties' Proposed Resolution.

The currently proposed solution of the non-State parties would address the GMR administration problem somewhat differently than the River District's interpretation. However, we believe that the proposal, as an offer of compromise and settlement, addresses the "shared-goals" and would protect the West Slope's interests, if it is implemented without significant modification. The proposal is twenty-pages long. In a very simplified summary, the primary points are set forth below. (The proposal consists of compromise by all of the parties. No agreement has been reached on any of the points until there is resolution on all of them. That said, the text in italics below notes the four issues that still need to be resolved with the State).

- a. The GMR storage and power rights can be operated on a co-equal basis. Reclamation will allocate available water supply to storage or power according to an annual “fill schedule” which can be revised as necessary, depending on runoff conditions.
- b. GMR’s 1935 storage priority will be satisfied at the earlier of:
 - i. The date that the following volumes equal 154,645 acre feet: start of fill content in GMR, storage at GMR during the fill season, the depletions of Senate Document 80 beneficiaries that are junior to the Cities, and water depleted by the Cities during the fill of GMR when a downstream call senior to the Cities is on the river (e.g., Shoshone’s 1941 junior right for 158 c.f.s.) (this calculation is similar to what is sometimes referred to as the reservoir’s “physical fill”);

or
 - ii. The date when GMR’s storage right is curtailed by a senior right for at least seven consecutive days after a total of 154,645 acre feet has been accounted toward the fill of GMR pursuant to the above calculation, plus the addition of all amounts depleted by the Cities during the fill of GMR (this calculation is similar to what is sometimes referred to as the reservoir’s “legal fill” or “paper fill”).
- c. Unless a call senior to the Cities is placed during the fill, the Cities will divert pursuant to the GMR power interference agreement. The GMR power right will maintain its 1935 priority, but it will be exercised against all rights junior to the date that is one day senior to the rights of the Cities. The Intervening Rights are protected because they will divert in preference to the GMR power right, and thus their depletions will not count against the GMR 1935 storage right.
- d. If a call is placed by a right senior to the Cities before the “paper fill” of GMR, then Reclamation will declare that no power water is available. Any diversions by the Cities under this circumstance will count against the GMR storage right as “Water Stored by Statute” under Colorado’s upstream storage statute. *The proposal contemplates that the volume of Water Stored by Statute will be repaid to GMR by an undecreed 1946 priority exchange between GMR and Dillon Reservoir. However, the State is not comfortable with this proposal.*
- e. The GMR 60 c.f.s. bypass is not counted toward the fill of the GMR storage rights regardless of when the GMR start of fill is declared (any date between April 1 and May 15). *The State proposes that if the GMR Start of Fill is*

declared prior to May 1, the 60 c.f.s. would count against the GMR storage right.

- f. Senate Document 80 beneficiaries that are upstream of Dillon Reservoir with priorities between 1946 and 1984 would be entitled to continue to divert regardless of a call by Denver, provided that the depletions of such rights are counted toward the fill of the GMR storage rights. *The State is concerned that this concept it could be interpreted as a selective subordination.*
- g. With respect to the Climax C.A. 1710 rights, the parties would recognize Climax's rights as senior in priority to GMR and, thus, also senior to any right of the Cities to intercept water otherwise due to the GMR power right. In return, Climax would provide 600 acre feet of water for GMR purposes in the rare years (like 2002) when GMR does not achieve a "legal/paper fill." *The State is continuing to review the proposal on the Climax rights.*
- h. The proposal provides a detailed formula to calculate the Cities Owed-to-GMR accounts, including an adjustment to those amounts that more equitably allocates the risk when Reclamation generates too much power instead of placing available water into storage.
- i. The proposal contains a mutual "no waiver, no precedent" clause. It also specifies that it will not operate as a subordination of the 1935 priority decreed for GMR or the transmountain component of the C-BT water rights.

The parties continue to work closely with the State to resolve the four-remaining issues. A meeting is set for October 10th with the State, so there should be additional information to report at the Board meeting.

The Board may wish to discuss the GMR and Climax issues in executive session.

D. 10825 Proposed Agreements and Implementation Issues.

Dan Birch has provided the Board with a status memo on the 10825 process. The good news is that Reclamation has issued the 10825 Environmental Assessment and an associated Finding of No Significant Impact. The not-so-good news is that a substantial amount of negotiation and work remains on how to mitigate the impacts to the GMR 100,000 acre foot pool and the Cities' substitution accounts that will be caused by implementation of the Granby 5412 component of the 10825 solution.

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

E. Upper Colorado River Wild and Scenic Stakeholders Group Proposal for Alternative Management Plan and Proposed CWCB Instream Flow.

No action requested.

With the support of the River District and the other Wild & Scenic Stakeholders, the Colorado Water Conservation Board adopted a motion at its September 2011 meeting noticing its intent to appropriate three separate instream flows on the mainstem of the Colorado River, from Kremmling to a point just upstream of the confluence of the Eagle and Colorado Rivers. The CWCB adopted the Stakeholder Group's recommended terms and conditions (previously approved by the River District), subject to very slight modification, and directed its staff to file applications for the instream flows by end of 2011. No instream flow was proposed by the Stakeholder Group or appropriated by the CWCB for the W&S eligible segment from Dotsero to No Name. We will continue to monitor the progress of the instream flow applications.

On a related matter, the BLM's Kremmling and Colorado River Valley Field Offices recently released their draft Resource Management Plans, which contain the BLM's recommendations for the four mainstem Colorado River segments from Kremmling to No Name that were deemed "eligible" for Wild & Scenic designation. (Portions of the river segments are on Forest Service land, and the Forest Service's recommendations on those segments are included in the BLM's RMPs).

Both of the draft RMPs contain a "split" preferred alternative on the Wild & Scenic determination; one that finds the four Wild & Scenic segments on the Colorado River "suitable" for designation under the Wild & Scenic Rivers Act (Alternative B1 in each RMP), and one that affirmatively defers making a determination on "suitability" and adopts the Stakeholder Group's proposed management plan (Alternative B2 in each RMP). This is good news but does mean it is still possible that the BLM could find the segments suitable. One reason (perhaps a significant reason) for the two options under the preferred alternative is that the Stakeholder Group was not able to submit its alternative plan to the BLM in sufficient time for BLM to fully review the plan prior to the publication of the RMPs. We are very optimistic that the BLM will formally adopt the Stakeholder Group plan when the RMPs are finalized (target date is late 2012).

The BLM's preferred alternative includes a recommendation of "suitability" for portions of Deep Creek. We do not object to that suitability determination because the River District abandoned its water rights on Deep Creek in 2003 and earlier this year.

F. River District's May 2011 Diligence Filings in Case Nos. 11CW93 (West Divide Project), 11CW94 (Red Cliff Project), 11CW95 (Wolcott Project), 11CW96 (Basalt Project), Water Division No. 5, and Case No. 11CW8 (Flattops Project), Water Division No. 6.

No action requested.

Consistent with the Board's direction in April, we filed applications for findings of reasonable diligence and, where appropriate, to make conditional water rights absolute in part for the River

District's West Divide Project, Red Cliff Project, and Basalt Project water rights in Water Division No. 5, and the Flattops Project in Water Division 6. The deadline for filing statements of opposition expired at the end of July.

The West Divide Project was the only application that garnered any statements of opposition. Statements of Opposition were filed by Pitkin County, Crystal Valley Environmental Protection Association, Crystal River Caucus, American Rivers, Trout Unlimited, and Paul G. Durret. It is our understanding that Garfield County intends to intervene in the case with a Statement of Opposition in "friendly" support of the River District/West Divide Application. The first status conference before the Water Referee has been scheduled for October 13th. We have scheduled a meeting with Pitkin County for October 10th to discuss the county's concerns with the application. We may have additional information to provide at the meeting.

For the other diligence applications, we are in the process of responding to the Division Engineer's summary of consultation letters, where provided, and drafting proposed rulings for consideration by the referee.

The Board may wish to discuss the West Divide application in executive session.

G. Colorado River District Project Development.

An Application for a finding of reasonable diligence is due in December of 2011 for the River District's Battlement Mesa Project water rights (Owens Creek Reservoir, Colorado Canal, Harrison Canal, Buzzard Creek Dam and Reservoir, and Brush Creek Canal) in Water Division 5. These water rights were conveyed to the River District in 2009 upon the dissolution of the Battlement Mesa Water Conservancy District. The Ute Water Conservancy District owns 22.5% of the Owens Creek Reservoir and Buzzard Creek Dam and Reservoir rights.

Additionally, applications for findings of reasonable diligence are due in May of 2012 for the River District's Juniper and Cross Mountain, Great Northern Project and Savery-Pothook Project water rights, all located in Division 6.

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

H. Application of Busk-Ivanhoe, Inc., Case No. 09CW142, Water Division No. 2.

Consistent with the Board's past direction, River District staff and Special Counsel David Hallford have met with representatives of the City of Aurora regarding the change of its 50% interest in the Busk-Ivanhoe System. David has prepared a confidential memorandum regarding the case which is included with your packet.

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

I. Update on Aspinall Unit EIS.

In late August, Reclamation released its “Final-Preliminary-Final EIS” for the Re-operation of the Aspinall Unit. The August version adopted most, but not all, of the consensus comments submitted by the stakeholder group (consisting of the River District, the State of Colorado, Western Resource Advocates, Colorado River Energy Distributors Association, Western Area Power Administration, and others) on the December 2010 Preliminary Final EIS. Reclamation held a stakeholder meeting in September to discuss the changes. The State of Colorado and the power interests still had concerns with the August version of the EIS and submitted comments that tend to veer a bit from the stakeholders’ consensus comments.

We submitted a response requesting that Reclamation finalize the EIS as soon as practicable, and that, if any changes are made that they be consistent with the stakeholders’ previous consensus comments. We expect that Reclamation will issue a final EIS within a month or two, and a final Record of Decision in early 2012.

IV. COLORADO RIVER COMPACT, INTERSTATE, AND INTERNATIONAL MATTERS

Eric Kuhn has prepared an update memo on Reclamation’s Basin Study that is included in your Board material.

A meeting is set for October 7th of the Upper Colorado River Commission’s technical committee.

The Board may wish to discuss any new sensitive negotiation items in executive session.