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TO: Colorado Water Conservation Board

FROM: John W. Suthers, Attorney General

Karen Kwon, First Assistant Attorney General
Susan Schneider, First Assistant Attorney General

RE: Report of the Attorney General

FEDERAL & INTERSTATE MATTERS

1. United States Forest Service - Proposed Directive on Groundwater Resource Management, Forest Service Manual 2560 (79 FR 25815, May 6, 2014).

In May 2014, the Forest Service proposed to amend its internal Agency directives for Watershed and Air Management to establish direction for management of groundwater resources on National Forest System (NFS) lands as an integral component of watershed management. According to the Federal Register Notice, the proposed amendment would provide direction on the consideration of groundwater resources in agency activities, approvals, and authorizations; encourage source water protection and water conservation; establish procedures for reviewing new proposals for groundwater withdrawals on NFS lands; require the evaluation of potential impacts from groundwater withdrawals on NFS resources; and provide for measurement and reporting for some larger groundwater withdrawals. The deadline for comments has been extended to September 3rd. The Unit is evaluating the proposed directive and coordinating with DNR agencies as well as the Association of Western Governors to provide comments that express and protect the State's interests and authorities in regulation and use of groundwater resources.

2. United States Forest Service – Proposed Directive for Ski Area Water Rights on National Forest System Lands (70 Fed. Reg. 35513, June 23, 2014).

In June, the Forest Service proposed to amend its internal directives for ski area concessions by adding two clauses to the Special Uses Handbook to address water rights necessary for and that primarily support operation of ski areas on National Forest System (NFS) lands. According to the Forest Service, the purposes of the proposed changes are to ensure that sufficient water is available for operation of ski areas on NFS lands and to provide greater consistency and accountability in authorization of water uses and ownership of water rights

for ski areas. Comments on the proposed change were due August 22, 2014. The Unit coordinated with DNR to develop and finalize comments that highlight the importance of respecting the state's framework for administering water rights and the need to coordinate with water users and the state through a formal rule making process consistent with the current Memorandum of Understanding between DNR and the Forest Service to avoid protracted litigation that has occurred and would likely be perpetuated as a result of these efforts.

3. United States Fish and Wildlife Service and National Oceanic and Atmospheric Administration – Proposed Changes to the Definitions and Regulations for Designating Critical Habitat (79 Fed. Reg. 36284, June 26, 2014)

In June, the Fish and Wildlife Service and National Oceanic and Atmospheric Administration published two notices of proposed rulemaking and a draft policy, each regarding issues surrounding the interpretation and application of statutory and regulatory language concerning designation and protection of critical habitat under the Endangered Species Act of 1973, as amended (ESA). 16 U.S.C.A. §§ 1531-1544 (2014). The Services' proposed changes specifically address (1) the process of designating critical habitat; (2) the interpretation of what constitutes an adverse modification of critical habitat, and; (3) the process of excluding lands from critical habitat designation (NODP 1). The deadline for public comment on these proposals is October 9, 2014. The Unit is evaluating the proposed changes and coordinating with DNR agencies as well as regional associations to provide comments that express and protect the State's interests and authorities in definition and application of critical habitat designations under the ESA.

4. Rio Grande: WildEarth Guardians

On July 24, WildEarth Guardians sued the U.S. Bureau of Reclamation and the Army Corps of Engineers under the citizen suit provision of the Endangered Species Act. The Complaint alleges that the federal defendants' actions and failure to act have destroyed or adversely modified the critical habitat of the Silvery Minnow and Southwest Willow Flycatcher in northern New Mexico, and that the federal defendants have failed to perform their procedural duties under the ESA to avoid harming Minnow and the Flycatcher. WildEarth Guardians also issued notices of intent to sue the State of New Mexico and the Middle Rio Grande Conservancy District on August 20, 2014 for alleged violations of the ESA related to administration distribution and regulation of water in the Rio Grande Basin in New Mexico. Although WildEarth Guardians provided notice in January of intent to sue Mike King (Executive Director of the Department of Natural Resources) and Dick Wolfe (State Engineer), neither person nor the state are currently been named as party to the suit. The Unit continues to coordinate legal strategies to protect the State's interest in the Rio Grande in general and in the event a party tries to involve Colorado directly as the case develops.

5. Texas v. New Mexico and Colorado, No. 141 Original.

As of August 4, 2014, New Mexico's Motion to Dismiss Texas' Complaint and the United States' Complaint in Intervention has been fully briefed and is pending before the U.S. Supreme Court. As a very general summary, New Mexico asserts the case should be dismissed because neither Texas nor the United States can point to a specific compact provision that New Mexico has violated. Moreover, to the extent any party actually means to assert New Mexico is either interfering with contract allocations from the Rio Grande Project or violating the Rio Grande Project Act, the U.S. Supreme Court is not the appropriate venue and the compact is not the appropriate document from which to allege legal claims. Texas and the United States filed responsive pleadings identifying the alleged Compact violations that they think are ripe for adjudication before the Supreme Court.

Neither Texas nor the United States assert claims against Colorado. However, litigating the terms of the Compact and identifying the rights of the parties thereunder implicate Colorado interests in the Rio Grande specifically and in application of compact law in general. Throughout this case, Colorado has tried to work with all parties to resolve the issues and/or at least narrow the scope of issues to be litigated. During the briefing period for the Motion to Dismiss, the Unit coordinated with Colorado's Compact Commissioner, Dick Wolfe, members of his staff, and attorneys representing water users in the San Luis Valley to determine whether Colorado should weigh in on any of the issues. Based on these discussions, Colorado decided not to weigh in on whether to dismiss the case at this time. Instead, the Unit will preserve any argument that we may have regarding positions taken by the parties if and when it is deemed necessary through progression of the case.

6. Groundwater Rules.

On July 1, 2014, the State Engineer, Dick Wolfe, and his staff met again with the San Luis Valley Groundwater Rules Advisory Committee. In addition, the Rio Grande Decision Support System (RGDSS) Peer Review team continues to work on modeling to identify final stream depletion and sustainability numbers that are necessary to inform the State Engineer's groundwater rule making for the San Luis Valley. The hope is to present final rules for consideration this Fall.

7. Arkansas River – Compact matters:

The Unit continues to work in direct coordination with the Division of Water Resources to enforce rules to assure ongoing compliance with the Arkansas River compact. Along these same lines, the Unit is advising DWR on positions and/or strategies concerning potential rulemaking for management of groundwater wells that post-date 1985. In addition, the Unit is coordinating with Kansas to prepare a resolution for approval by the Arkansas River Compact Administration that would modify the John Martin Reservoir Operating Plan to address ambiguities in language that authorize the Amity Canal's "storage" account.

8. Republican River - *Kansas v. Nebraska & Colorado*, Orig. No. 126

The Court has scheduled oral argument for October 14, 2014. Kansas and Nebraska will have 25 minutes to argue. The United States will likely have 10 minutes to argue, assuming the Court grants its unopposed motion asking for the same. Colorado has elected to abstain from oral argument and instead help prepare Nebraska for its argument. That decision was made in consultation with John Suthers, Dan Domenico, the State Engineer, counsel for the Republican River Water Conservation District, and counsel for the State of Nebraska. Nebraska and Colorado have scheduled several moot court sessions in September and October in Washington, D.C. and Denver.

9. Colorado's Compact Compliance Pipeline (CCP) and Bonny Reservoir Disputes.

Colorado's State Engineer and commissioner to the Republican River Compact Administration, Dick Wolfe, met with commissioners from Nebraska and Kansas to discuss Nebraska and Colorado's proposals for compact compliance. Several cabinet members from the Kansas Governor's office also attended the meeting. During the meeting, the States discussed Kansas' remaining issues regarding Nebraska's augmentation plans, and developed a plan and schedule for resolving those issues in the future. The States did not discuss Colorado's proposals in-depth. Colorado has asked to meet separately with the Kansas Chief Engineer and Secretary of Agriculture to discuss Colorado's proposals. Governor Hickenlooper's water policy advisor, John Stulp, has offered to assist Colorado in negotiations with Kansas, and we plan to involve him as necessary. Colorado remains optimistic that it can obtain another temporary approval of its Compact Compliance Pipeline for 2015.

10. Effort to De-Designate the Northern Highplains Groundwater Basin

In April, the Hale Ditch corresponded with the State Engineer, asserting that the Division of was obligated to ensure that water be made available for diversion by the Hale Ditch under recent case law and its interpretation of how compact administration should be applied. The Unit represented the State Engineer in responding to the Hale Ditch letter. Although we rejected Hale Ditch's compact assertions, we coordinated with counsel for Hale Ditch and representatives for the Bureau of Reclamation to help increase (but not guarantee) the potential for surface water availability for Hale Ditch under existing operations. In July, counsel for Hale Ditch provided notice that it would seek de-designation of the Northern Highplains Groundwater Basin as the next effort to secure more surface water availability. No formal action has been taken yet. To ensure that no compact interests are implicated, the Unit has been and will continue to be involved in this matter if it develops.

11. Colorado River - Aspinall Unit

Since the Bureau of Reclamation announced its decision to operate the Unit under a moderate wet year hydrology for FY 2014, the CWCB, DWR and the Unit have participated in status updates and discussions with counsel and leadership to express our significant

concerns with Reclamation's justifications for storing and releasing water based off of forecast projections that could significantly affect hydropower production and recreation, risk ignoring compliance with state water administration, and potentially risk impacts to annual storage and flooding at Delta and Grand Junction. Actual hydrology and operational limitations reduced the magnitude of the releases from that originally contemplated.

However, to avoid, to the extent possible, confusion and disagreement over future operations, the Unit participated in meetings with the CWCB and Reclamation to discuss the meaning of the terms of the ROD and to clarify the basis of decision for operating the Unit in WY2014. Follow up meeting are anticipated during the winter months. In preparation of these follow up meetings, the Unit continues to work on a comprehensive understanding of administration needs in Water Division 4, and advise CWCB and the State Engineer on consistency of Aspinall operations with state water rights administration.

12. Contingency Planning

The 7-Colorado River Basin States met with Mike Connor (Deputy Secretary of the Interior), Anne Castle (Assistant Secretary for Water and Science), Lowell Pimley (Acting Commissioner, Bureau of Reclamation), and their staff to discuss progress on planning for drought contingencies on the Colorado River. The Upper and Lower Basins detailed their respective efforts for preparing for drought contingencies by identifying mechanisms, programs and methods that they are working towards to protect critical elevations at Lake Mead and Lake Powell. The participants agreed to work towards finalizing plans, if possible, by the end of the calendar year, and to continue to coordinate on messaging the potential challenge and proposed solutions. Following the meeting, the Upper Colorado River Commission is evaluating the Lower Basin efforts thus far and determining whether and to what extent Upper Basin interests may be implicated.

Contingency planning in the Upper Basin continues to focus on preparing for the low probability but high risk associated with reservoir storage going below minimum power pool at Lake Powell. Both technical and legal committees have been established to develop plans for: (1) expanding weather modification operations; (2) extending operation at reservoirs authorized by the Colorado River Storage Project Act; and (3) being prepared to implement a demand management pilot project to evaluate methods for conserving water for the benefit of the system. Each of these options has technical and legal obstacles to overcome, but are considered worth the effort to assure ongoing compliance with the Colorado River Compact and to better assure a stabilization of the Colorado River System. As part of plan development, these committees have met and will continue to meet with advisors from non-governmental organizations, power interests, and the various agencies at the Department of the Interior and interested stakeholders.

13. Long-Term Experimental Management Plan EIS

The Department of the Interior continues to work to finalize a draft Environmental Impact Statement for re-operating Glen Canyon Dam based on science and experience gained in operating the system since the last EIS was finalized in 1995. The Colorado River Basin

States continue to be actively involved in proposing alternatives to be considered and modeled, evaluating modeling designs and results, and critiquing analysis approaches and results. A primary reason for active state involvement in this process is to assure, to the extent possible, that Interior selects a preferred alternative that helps resources downstream of the dam in a fashion that protects the States' respective interests in the water resource. As part of this effort, the Unit coordinates with the CWCB and our contractors to attend meetings, develop strategy documents, and communicate concerns and options with DOI representatives. The Unit will continue these efforts and prepare to develop comments to the Draft EIS for client consideration when it is issued (estimated currently to be January 2015).

14. Colorado River Basin Study

The Bureau of Reclamation's Upper Colorado and Lower Colorado Regions, in collaboration with representatives of the seven Colorado River Basin States completed the "Colorado River Basin Water Supply and Demand Study" in December 2012. The Study defines current and future imbalances in water supply and demand in the Colorado River Basin and the adjacent areas of the Basin States that receive Colorado River water for approximately the next 50 years, and developed and analyzed adaptation and mitigation strategies to resolve those imbalances. The Study characterized current and future water supply and demand imbalances in the Basin and assessed the risks to Basin-wide resources. Resources include water allocations and deliveries consistent with the apportionments under the Law of the River, hydroelectric power generation; recreation; fish, wildlife, and their habitats (including candidate, threatened, and endangered species); water quality including salinity; flow- and water-dependent ecological systems; and flood control. The Study confirmed what most experts know: there are likely to be significant shortfalls between projected water supplies and demands within the Colorado River Basin as a whole in the coming decades. The study also shows prudent planning and targeted investments in additional water supplies and conservation efforts could sustain the Colorado River system into the future. Following the call to action of the Study, all that rely on the Colorado are taking initial, voluntary steps – *working together* in workgroups– to identify positive solutions that could be implemented to meet potential challenges ahead. Current workgroups include the: Municipal and Industrial Conservation and Water Reuse Workgroup; Agricultural Conservation, Productivity and Water Transfers Workgroup; and Environmental and Recreational Flows Workgroup. Representatives from the CWCB are part of the Basin Study coordination team, and they, along with Unit members participate in the workgroups as appropriate. On August 14, Shanti Rosset presented the Upper Basin States' perspective on the Environmental and Recreational Flows Workgroup at the Urban Water Institute Conference in San Diego.

15. Southwestern Water Conservation District, 13CW3011, Water Div. 3

Southwestern Water Conservation District (District) has applied to the Water Court for a decree confirming that a portion of its water rights have been made absolute and a finding reasonable diligence on the remaining water rights. This application involves rights to be used to operate the Animas La-Plata Project (Project). As such, it is no simple diligence and / or water rights proceeding. Rather, it involves claims and opinions from two entities from

New Mexico, three separate Indian Tribes, and the CWCB (as Project participants) as well as the State Engineer (as administrator of water rights). Because some of the Project participants do not agree that Southwestern should obtain a finding of reasonable diligence on the remaining water right, they have opposed the diligence application. The CWCB intervened in the case when the New Mexico objectors suggested the potential for compact compliance matters to be at issue, and because the CWCB is also a project participant whose interests could be implicated by the outcome of the case. The Division of Water Resources has participated in the case from the beginning to protect, among other things, its ability to administer rights consistently throughout the state. Trial has been set for 14 days beginning on November 2, 2015. Attorneys met in May and again in July to discuss issues in the case and attempt to resolve some issues prior to trial. Shanti Rosset represents CWCB and Scott Steinbrecher represents the Division of Water Resources for the Unit.

WATER RIGHTS MATTERS

16. Instream Flow Water Right Applications of the CWCB and the Alamosa Riverkeeper in Case Nos. 13CW3013 and 13CW3014

The CWCB has applied together with the Alamosa Riverkeeper (“ARK”) to change irrigation water rights historically diverted through the Gabino Gallegos Ditch and the Valdez Ditch in Case Nos. 13CW3013 and 13CW3014, respectively, for instream flow purposes in the Alamosa River. The instream flow water rights may be left in the river, or stored by exchange in the upstream Terrace Reservoir and released later in the season for instream flow purposes. Since June, the CWCB has been storing water in Terrace Reservoir pursuant to Substitute Water Supply Plans (“SWSPs”). The Division Engineer filed a Summary of Consultation in each of these cases on August 25, recommending that the applications be granted if they contain terms and conditions similar to those in the SWSPs, and directing the CWCB and ARK to negotiate a term representing historical ditch loss with party of opposers who use water rights on the Gabino Gallegos Ditch. The CWCB and ARK are currently in settlement discussions with the Gabino Gallegos opposers, and hope to reach a resolution in the next few months.

17. Statement of Opposition Filed to Application of Edgemont Ranch Metropolitan District in Case No. 14CW3013-7

On August 19, the CWCB filed a Statement of Opposition to the Edgemont Ranch Metropolitan District’s water rights application in Division 7. This is an application to change water rights to municipal uses, which could cause injury to the CWCB’s instream flow water rights on the Florida River in La Plata County. The CWCB will ensure by its opposition that there is no expansion of use or inadequate maintenance of return flows detrimental to the instream flow water rights.

18. Statement of Opposition Filed to Application of White Horse Springs Water and Sanitation District in Case No. 14CW3080-5

On August 19, the CWCBC filed a Statement of Opposition to the White Horse Springs Water and Sanitation District's water rights application in Division 5. This application seeks a plan for augmentation by exchange to facilitate diversions from a water collection system and the use of storage tanks, as well as diversions from eight wells that are alternate points of diversion for the collection system, using replacement water from the Colorado River Water Conservation District stored in Woford Mountain Reservoir and Green Mountain Reservoir. This could cause injury to the CWCBC's instream flow water rights on the Roaring Fork River in Pitkin, Eagle, and Garfield Counties. The CWCBC will ensure by its opposition that the plan for augmentation adequately replaces water in time, place, and amount to protect the instream flow water rights.