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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 US 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 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 forest lands; require the evaluation of potential impacts from groundwater withdrawals on forest resources; and provide for measurement and reporting for some larger groundwater withdrawals. The Unit coordinated with DNR agencies to prepare comments that express and protect the State's interests and authorities in regulation and use of groundwater resources. The Governor provided a cover letter to the comments which were submitted on October 3, 2014.

2. **United States Forest Service – San Juan Land and Resource Management Plan.**

In November 2013, the US Forest Service issued a Final Environmental Impact Statement and Record of Decision for the San Juan National Forest Revised Plan. Over the past year, the State has employed administrative mechanisms (appeal, consistency review, and discretionary review of appeal) to ensure the Revised Plan is consistent with state law. The Forest Service has denied each of these efforts. The Department of Agriculture acknowledges the critical role that the State plays in water issues in National Forests, the need to balance interests regarding water on National Forest lands, and the opportunity to collaborate with the State consistent with an operative Memorandum of Understanding between the Forest Service and the Colorado Department of Natural Resources. However, the Forest Service has not incorporated such acknowledgements into the Revised Plan. On October 29, 2014, the Department of Natural

Resources submitted a letter to the Secretary of Agriculture that: (1) notes the State's ongoing commitment to collaborate regarding federal obligations to manage forest lands and Colorado's sovereign authority to administer water; and (2) advises that if such collaboration is not included as a mandatory component of the Revised Plan, the State will explore options, including judicial review, to protect and enforce its rights and authorities regarding the waters of the State.

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 US 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 Fish and Wildlife Services' proposed changes 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. The Unit coordinated with clients at Colorado Parks and Wildlife, Division of Water Resources, Colorado Water Conservation Board, and the Executive Director's Office at the Department of Natural Resources to provide one set of comments that identify and inform the State of Colorado's collective interests with each of these proposals by October 9, 2014.

4. Environmental Protection Agency and Army Corps of Engineers – Proposed "Definition of 'Waters of the United States' Under the Clean Water Act" (79 Fed. Reg. 22,188, April 21, 2014).

The Environmental Protection Agency and Army Corps of Engineers proposed a rule to define 'waters of the United States' under the Clean Water Act to clarify the scope of water protected under the Clean Water Act. These agencies assert that the need for this proposed rule arises in light of the U.S. Supreme Court cases in *U.S. v. Riverside Bayview*, *Rapanos v. United States*, and *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*. The goal of the rule is to enhance protection for the nation's public health and aquatic resources, and increase CWA program predictability and consistency by increasing clarity as to the scope of "waters of the United States" protected under the Act. The agencies have and will continue to receive a number of comments on the proposed rule, many of which express grave concern with the perceived expansion of federal jurisdiction. Attorney General Suthers submitted a comment letter on October 21, 2014 that, among other things, proposed the rule be stayed until a more robust outreach program with interested and affected stakeholders could be completed. In addition, the Unit has coordinated with the Department of Natural Resources to prepare comments to the rule that identify the State's concerns from a water quantity and administration perspective. These comments are currently being incorporated into a single letter from the Governor's Office that includes also comments and considerations from the Department of Public Health and Environment. The comment period for this letter has been extended to November 14, 2014.

5. Designation of Critical Habitat for the Western Distinct Population Segment of the Yellow-billed Cuckoo (29 Fed. Reg. 48548, August 15, 2014)

On October 14, 2014, the Unit submitted comments for the Department of Natural Resources the Unit on the proposed designation of critical habitat for the western Yellow-billed Cuckoo. The comments assert designation of habitat in Colorado and within the reservoir pool at Elephant Butte Reservoir is inappropriate and unnecessary. They further clarify the rationale and bases for not designating critical habitat for the Yellow-billed Cuckoo within specific units being considered within the Rio Grande, Gunnison and Yampa Basins. These comments incorporated interests and concerns from Colorado Parks and Wildlife, the Colorado Water Conservation Board, the Division of Water Resources and the Executive Director's Office of the Department of Natural Resources.

6. Rio Grande: WildEarth Guardians

This summer WildEarth Guardians filed suit against 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 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 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.

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

The U.S. Supreme Court appointed A. Gregory Grimsal of New Orleans, Louisiana on November 3, 2014 as the Special Master for this case. In making this appointment, the Court made no mention of New Mexico's Motion to Dismiss Texas' Complaint and the United States' Complaint in Intervention that was pending before the Court. The parties are currently working to determine whether the Court intended to deny the Motion by implication with the appointment of a Special Master or to have the Special Master recommend a decision concerning the Motion. Regardless, the Unit continues to prepare legal strategies to protect Colorado's interests in the Rio Grande Compact as this case develops.

8. Groundwater Rules

The Unit and Division of Water Resources continue to work with the Rio Grande Support System to refine the modeling that is intended to identify final stream depletions in the San Luis Valley. This modeling is necessary to inform the State Engineer's groundwater rulemaking for

the region. Such modeling is complicated by the variable geology, hydrogeology and topography throughout the Valley. If there is sufficient progress on this front in the upcoming weeks, the Unit and Division of Water Resources expect to issue final rules for consideration later this year.

9. Water Division 3 Subdistricts

The Colorado Supreme Court heard oral argument on the 2012 Annual Replacement Plan for Subdistrict #1 case on September 30. Preston Hartman represented the State Engineer's Office and worked with David Robbins, counsel for the Rio Grande Water Conservation District to develop arguments for the Appellees. The most important issue is whether the Rio Grande Water Conservation District may rely on production from the Closed Basin Project to replace stream depletions from well pumping in its Annual Replacement Plans.

10. 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. The Unit is also coordinating with the Division Engineer to explore options for a possible rulemaking that addresses administration of post-1985 well uses similar to the Rule 14 mechanism created for pre-1985 well uses. A public meeting to discuss this effort is tentatively scheduled for mid-November in Pueblo. Finally, the Unit is preparing for discussions with Kansas on evaluation of the H-I Model (for compact compliance), and proposed modifications to the model to correct potential errors. The annual ARCA compact meetings are set for December 16 and 17, 2014 in Lamar.

11. Trinidad Project

As part of its decennial review process, the US Bureau of Reclamation is reviewing the Trinidad Project to, among other things; ensure the project has had no effect on downstream (non-project) water users, including Kansas. To date, a double mass balance has been used, but there is movement towards Colorado creating a model as part of the overall Arkansas Decision Support System. The Unit is working directly with DWR to ensure the State's interests are considered and protected during this process.

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

On October 11, 2014, the US Supreme Court heard oral argument on the parties' exceptions to the Report of the Special Master. The Report recommends Nebraska pay Kansas \$5.5 million dollars for violating the Compact in 2006, and further recommends the parties modify the Compact accounting to prevent Nebraska from being charged under the Republican River Compact for consuming water imported from Platte River basin. Colorado and Nebraska took exception to the damages award, which seeks in part to disgorge a small portion of the profits Nebraska gained by violating the Compact. Kansas sought even greater disgorgement and is seeking to block the accounting changes. Although no claims were brought and no evidence was presented against Colorado during the trial before the Special Master, the final decisions

concerning the litigation will impact Colorado's current and future compliance with the Compact. For that reason, Colorado was actively involved in the trial before the Special Master.

Before the US Supreme Court, Colorado briefed its exceptions to the Report of the Special Master and responded to Kansas' exceptions and arguments in favor of its exceptions. In addition, Colorado worked closely with Nebraska to develop a common strategy for oral argument. All parties are awaiting the US Supreme Court's final decision.

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

At a recent meeting of the Republican River Compact Administration, the states agreed to operate Colorado's Compact Compliance Pipeline during 2015. Colorado and Kansas also agreed to a list of discussion topics related to the South Fork Republican. If the two states can devise a plan to resolve those topics by November 1, 2015, then approval of the CCP will automatically renew for 2016. Meetings are scheduled for this November and early December to employ good faith efforts toward finalizing the plan by this time next year.

14. 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.

15. Colorado River – Contingency Planning

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) exploring the feasibility of implementing a demand management program 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 as appropriate with various agencies at the Department of the Interior and interested stakeholders to assure a final plan avoids critical concerns and can be integrated with efforts in the Lower Basin to encourage a synergistic benefit for both basins.

16. 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 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 Spring of 2015).

17. Southwestern Water Conservation District, 13CW3011, Water Div. 7

Southwestern Water Conservation District applied to the Division 7 - Water Court for a decree confirming that a portion of its water rights have been made absolute and a finding of reasonable diligence on the remaining water rights. This application involves rights to be used to operate the Animas La-Plata Project. It, therefore, has the potential to implicate 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). Some of the Project participants do not think the District should succeed in establishing reasonable diligence on the conditional rights identified in the 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 its ability to administer rights consistently throughout the state. Trial has been set for 14 days beginning on November 2, 2015.

On October 23, 2014, the District sent a letter to the parties indicating the District's intent to file a Motion for Partial Summary Judgment that seeks to make absolute the water claimed to be absolute in the application for all purposes except irrigation. This motion has not yet been filed. On October 27, 2014, the Judge denied the District's Motion to Narrow Issues in the Discovery Phase. On October 30, 2014, the San Juan Water Commission and La Plata Conservancy District of New Mexico filed a Motion for a Determination of a Question of Law (Can and Will/Speculation) asking the court to determine the legal requirements for the District to demonstrate reasonable diligence with respect to the conditional water rights identified in the application. The Unit will coordinate with clients from the CWCB and Division of Resources to prepare a Response. Finally, the judge has not yet ruled on the District's motion for a protective order to limit the scope of discovery.

## WATER RIGHTS MATTERS

### 18. Application of the CWCB to Make Conditional Water Rights (Case No. 05CW225) Absolute

The CWCB filed an application to make 3989 AF of water in Bear Creek Lake absolute. In Case has been placed to beneficial use for recreational and piscatorial purposes. The two rights were decreed conditional in 2008 for municipal, domestic, industrial and irrigation uses in Case No. 05CW225 in Water Division 1. Piscatorial and recreational uses were already decreed absolute. Section 37-92-301(4)(e), C.R.S. (2014), states that “[a] decreed conditional water storage right shall be made absolute for all decreed purposes to the extent of the volume of the appropriation that has been captured, possessed, and controlled at the decreed storage structure.” Since the applicant has decreed storage rights that are absolute for piscatorial and recreational purposes, the applicant has captured, possessed, and controlled 3989 AF of water at the decreed storage structure. The conditional water right in the amount of 3989 AF became eligible to be decreed absolute effective August 7, 2014, the effective date of section 37-92-301(4)(e).

Even without the promulgation of section 37-92-301(4)(e), the CWCB still would have met the requirements for obtaining a diligence decree for the conditional uses under the previous statutes because the water rights at issue are part of an integrated system, along with Chatfield and Cherry Creek reservoirs. Under section 37-92-301(4)(b), “[w]hen a project or integrated system is comprised of several features, work on feature of the project or system shall be considered in finding that reasonable diligence has been shown for all features of the project or system.” Further, section 37-92-301(4)(d), added in 2014, states that “[i]n the case of a project or integrated system that contains more than one water storage feature, an applicant need not demonstrate that all existing or absolute decreed water rights that are part of the project or integrated system have been utilized in order to make a conditional water storage right absolute, in whole or in part.”

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

The CWCB 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 stored a total of 162.10 AF of water in Terrace Reservoir pursuant to Substitute Water Supply Plans ("SWSPs"). When the irrigation season ended on November 1, releases from Terrace began, and those releases have successfully lengthened the season during which water flows through the instream flow reaches on the Alamosa River. The CWCB and ARK remain in settlement discussions with opposers to the Gabino Gallegos application, and hope to reach a resolution in the next few months. In the meantime, the proposed decrees will be updated when the Water Commissioner's final storage and releases are complete, so that much of our claimed exchange and instream flow water right can be made absolute in the final decree.