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TO: Colorado Water Conservation Board

FROM: Cynthia H. Coffman, Attorney General
Karen Kwon, First Assistant Attorney General
Susan Schneider, First Assistant Attorney General

RE: Report of the Attorney General

FEDERAL & INTERSTATE MATTERS

1. Rio Grande - Texas v. New Mexico and Colorado, No. 141 Original.

Special Master Grimsal held a status conference on January 6, 2015 in which he:

(1) identified his staff, outlined the rates for working on this matter, and asked the parties to reach agreement on how to split payment for his costs and fees, noting that his first invoice will likely be submitted in May; (2) clarified he is in the process of preparing a draft decision on New Mexico's Motion to Dismiss (which when complete, he will distribute among the parties for comment and then finalize as an interim report to the Supreme Court, to which the parties could then make formal exceptions if appropriate); (3) notified the parties opposition briefs regarding EBID's motion to intervene are due to the Supreme Court by January 29 (should the Court decide to refer that matter to the Special Master, he will then take up the decision making); (4) clarified that venue for this action will be at either the 5th Circuit or the Eastern District of Louisiana, both of which are in New Orleans; and (5) indicated case management deadlines will not be set until after the decision regarding the Motion to Dismiss is finalized and sent to the Supreme Court. The Unit is coordinating with the Division of Water Resources and other client agencies to determine the State's legal strategy regarding EBID's Motion to Intervene and to outline Colorado's overall approach to the litigation, assuming it moves forward. Chad Wallace X6281; Preston Hartman X6260; Karen Kwon X6269.

2. Groundwater Rules

Work with the Rio Grande Support Decision System continues in efforts to refine the modeling intended to identify final stream depletions caused by groundwater withdrawals in the San Luis Valley. This modeling is essential for informing the State Engineer's groundwater rulemaking for the region. Such modeling is complicated by the variable geology, hydrogeology and topography throughout the Valley. Over the past month, the

Technical Advisory Committee reached a major milestone when it decided at its last meeting that the current version of the groundwater model is sufficiently accurate for purposes of implementing the Rules. The State Engineer has scheduled a meeting with the San Luis Valley Groundwater Rules Advisory Committee on January 23, 2015, which may be the last meeting before he adopts the Rules.

Concurrently, the Unit and State Engineer's Office continue to work closely with counsel for municipalities in the San Luis Valley to ensure they have a working understanding of how the groundwater rules and other tools would operate. Unlike other water users, municipalities are less able to participate in groundwater subdistricts to avoid application of groundwater rules because they cannot subject their water supplies to control by others. Their only option, therefore, is to file an application for a plan for augmentation that will comply with the groundwater rules. To avoid surprises once the rules are promulgated, the Unit and State Engineer's Office are making efforts to explain how the groundwater rules would be enforced and how the municipalities can use the RGDSS Groundwater Model when they assemble their plans for augmentation. Preston Hartman X6260.

3. 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. Preston Hartman X6260.

4. Arkansas River – Compact matters

The Unit continues to coordinate 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 second public meeting to further discuss options is set for January 22, 2015 in La Junta. No decision has yet been made as to whether the Division of Water Resources will actually pursue a rulemaking.

5. Arkansas River Compact Administration (ARCA) Meeting

At the annual ARCA, held in mid-December, the states discussed Kansas' concerns with transit loss calculations, amendments to the John Martin Reservoir principles, and operations at Trinidad Reservoir. Regarding the transit loss calculations, Kansas accepted Colorado's calculations following a series of technical discussions with Colorado's Division Engineer, Steve Witte, and an agreement to work together to improve the accuracy of gage data to avoid such a large discrepancy in the future.

Regarding amendments to John Martin Reservoir operating principles, Kansas proposed for the first time at the ARCA meeting alternative language for amending the JMR principles. The proposal proffered by Colorado previously is simply a housekeeping issue to address some ambiguities in the operating principles so that they conform to the way the Division Engineer accounts for water. The Unit is working with the Division of Water Resources and counsel for water users in the region to identify an appropriate approach for resolving the competing proposals for amendments.

Regarding the Trinidad facility, the states approved a “split” amendment regarding operations at the Trinidad facility. Reclamation has yet to approve, however, asserting that the entire repayment contract must be amended before the operating principles at the Trinidad facility can be amended. The parties are still negotiating to see if Reclamation can ultimately find an amendment to the contract that avoids having to amend the contract any time an amendment to the operating principles is adopted in the future. The also parties continue to work on whether and how to allow use of project water outside the project area. Dan Steuer X6262.

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

The Court has not yet issued its opinion on the exceptions to the Special Master Report following oral argument in October 2014. Scott Steinbrecher X6287.

7. Colorado’s Compact Compliance Pipeline (CCP) and Bonny Reservoir Disputes.

Colorado and Kansas continue to negotiate temporary approval of Colorado’s Compact Compliance Pipeline. On October 22, 2014, Kansas agreed to allow Colorado to operate the pipeline again in 2015 (as did Nebraska). In exchange, Colorado agreed to work with Kansas to address Kansas’ concerns regarding the South Fork Republican River. In accordance with that agreement, Colorado provided Kansas a list of options to increase flows in the South Fork Republican River at the Colorado-Kansas state line. Colorado also provided proposed modeling for Bonny Reservoir, and a statement describing each state’s right to use the unallocated supply in the South Fork. Kansas is reviewing the list options to increase streamflow but has not yet identified options for Colorado to investigate further. Kansas has indicated that if the states can agree on options to increase streamflow, Kansas might agree to Colorado’s modeling proposal as well as its use of the unallocated supply. The parties are scheduled to meet again later in January. Scott Steinbrecher X6287.

8. 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.

9. Republican River Compact Measurement Rules

The State and Division Engineers have proposed amendments to the Republican River Measurement Rules that they adopted in 2008. The original rules require water users to install flow meters (or an approved substitute) on all wells within the Republican River drainage basin. The original rules failed to include approximately 300 wells that are outside the Republican River drainage basin, but included in the Republican River Groundwater Model. Because those wells are included in the model, their depletions count against Colorado's Compact Compliance. The proposed amendments would include those 300 wells and clarify some of the approved alternative methods of measurement. The Groundwater Management Districts where the 300 wells are located opposed the amendments for various reasons. The Engineers have met with several Districts and they have reached settlement in concept, which will be confirmed by stipulations. The Engineers are scheduled to meet again with the East Cheyenne Groundwater Management District to discuss potential settlement options. If we cannot resolve their concerns, then we expect East Cheyenne to present its case opposing the rules during the rulemaking. A hearing will likely be scheduled for March 2015. Scott Steinbrecher X6287.

10. 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. Technical and legal personnel from the CWCB and Unit have coordinated meetings with representatives from the other Upper Division States, Commission, Department of the Interior, Western Area Power Administration and interested stakeholders as appropriate help the Commission develop plans for: (1) expanding weather modification operations; (2) extending operation at the initial units 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. Karen Kwon x. 6269; Shanti Rosset x 6259.

11. Extended Reservoir Operations

The Unit continues to coordinate with the CWCB, Upper Colorado River Commission, Bureau of Reclamation and interested stakeholders to identify the ranges and mechanisms available for operating the CRSP reservoirs to preserve power pool elevations at Lake Powell (as part of the drought contingency plan). Modeling of operations at the Flaming Gorge, Aspinall and Navajo Units continues as does discussions regarding the legal framework

necessary to authorize operations in a manner that respects the rights and authorities of the Department of the Interior and Upper Division States.

12. System Conservation Pilot Program

The Unit has coordinated with CWCB and Upper Colorado River Commission staff to prepare draft documents and agreements for the Commission to consider when deciding whether and how to assist in implementing a system conservation pilot program in the Upper Basin. At the direction of the Commission, the Unit is leading negotiations with the funding parties for the pilot program to finalize an agreement on the goals, purpose and roles of the Commission and funding entities. If successful, the Commission will subsequently issue Requests for Proposals in the Upper Basin to solicit interest in project participation.

The pilot program, which is funded by Denver Water, the Southern Nevada Water Authority, the Central Arizona Water Conservation District, the Metropolitan Water District of Southern California, and the Bureau of Reclamation, is intended to explore and learn about whether demand management (voluntary, compensated reduction of consumptive use for a temporary period) could be a viable method to protect critical water levels at Colorado River storage facilities (i.e., Lake Powell and Lake Mead). Specific pilot projects in the Upper Basin could potentially involve compensating water users (municipal, industrial and agricultural) for affirmative efforts taken to temporarily reduce consumptive use of Colorado River water to learn whether a combination of such efforts could positively impact the Colorado River system and storage at Lake Powell.

While not formally part of the Upper Division States' drought contingency planning effort, the UCRC recognizes that the Pilot Program may help provide critically important information related to the feasibility of demand management for the Upper Division States to consider. Recognizing that there are a number of legal, technical and policy matters to consider in implementing the Pilot Program in the Upper Basin, the Unit is coordinating the effort to research the legal issues and advise the Commissioners on the opportunities and risks associated with this process. Karen Kwon X6269; Shanti Rosset X6259.

13. Resolutions

On December 10, 2014, the Upper Colorado River Commission formally passed two Resolutions regarding contingency planning and the system conservation pilot program in the Upper Basin. These resolutions outline the Commission's basis for supporting each of these processes and directs staff to continue supporting these efforts so as to gain the appropriate information to assist the Commission in a final decision for approving and implementing either process or both if and when it is deemed necessary. Karen Kwon X6269; Shanti Rosset X6259.

14. Navajo Nation v. Department of the Interior, et. al. – 9th Circuit

The Navajo Nation filed its Opening Brief on its Appeal to the 9th Circuit of the District Court's dismissal without prejudice of claims regarding operation and allocation of the Colorado River in the Lower Basin. Colorado intervened as a Defendant at the trial court level to protect its interests in reservoir operations between Lake Powell and Lake Mead pursuant to the 2007 Interim Guidelines. Defendant Intervenors, of which there are many, are coordinating on whether and to what extent they can provide a joint Opposition Brief that is in line with the Federal Defendants by the January 29, 2015 filing deadline. The Unit is coordinating with the CWCB to strategize next steps. Karen Kwon X6269; Shanti Rosset X6259.

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

Southwestern has applied to the Water Court for a decree confirming that a portion of its water rights have been made absolute and that the remaining water rights should be continued as conditional. The water rights are associated with the Animas-LaPlata Project (Project). Both the Division of Water Resources and the Colorado Water Conservation Board have stipulated with Southwestern to make a portion of the ALP water rights absolute. The stipulation allows Southwestern to obtain a decree making absolute the water rights in the amounts and for the purposes claimed in the application, except that no rights will be made absolute for irrigation purposes. Southwestern has dropped its request for absolute irrigation rights at the behest of other parties. The stipulation does not address Southwestern's claims for diligence on its remaining conditional water rights. Representatives from the CWCB and the Unit are scheduled to attend a meeting of the ALP Association in mid-January to discuss remaining issues and whether the Association (comprised of New Mexico and tribal water users in addition to the CWCB) can reach consensus on next steps. Shanti Rosset X6259 (CWCB), Scott Steinbrecher X6287 (SEO).

WATER RIGHTS MATTERS

16. Resolution of Opposition of the CWCB to the Application of W/J Metropolitan District in Case No. 13CW3108.

W/J Metropolitan District applied to add two appropriative rights of exchange to an existing plan for augmentation, by which it would substitute 13.5 acre-feet of water contracted from Ruedi Reservoir to augment existing diversions from the Roaring Fork River in Pitkin County. The CWCB filed a statement of opposition to protect its instream flow water rights on the Roaring Fork River. In December 2014, W/J Metropolitan District and the CWCB entered a stipulation to resolve the opposition, pursuant to which the decree entered by W/J in this case will identify the CWCB's potentially impacted water rights and will agree not to operate the claimed exchanges through the instream flow reaches when the CWCBs water rights are not met and are being administered. Kate Ryan, x6304

17. Resolution of Opposition of the CWCB to the Application of James R. Donnelley in Case No. 12CW186.

Donnelley applied for an absolute water right for irrigation and piscatorial uses for an existing pond-well system adjacent to Snowmass Creek in Pitkin County. Donnelley also applied for rights of augmentation and exchange, seeking to replace depletions from the pond-well system with releases under a Basalt Water Conservancy District contract. The CWCB filed a statement of opposition to protect its instream flow water rights on Snowmass Creek and the Roaring Fork River. It was unclear whether Donnelley would claim that any of its uses should subject the CWCB's instream flow water rights to administrative priority pursuant to C.R.S. 37-92-102(3)(b). In December 2014, Donnelley and the CWCB entered a stipulation to resolve the opposition, pursuant to which the decree entered by Donnelley will identify the CWCB's potentially impacted water rights, will confirm that there is no C.R.S. 37-92-102(3)(b) claim, and will agree not to operate the claimed exchanges through the instream flow reaches when the CWCBs water rights are not met and are being administered. Kate Ryan, x6304

18. 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 successfully lengthened the season during which water flows through the instream flow reaches on the Alamosa River. The CWCB and ARK reached settlement with opposers to the Gabino Gallegos application, pursuant to which the decree entered in that case will contain a 20% ditch loss figure, and the ARK will pay \$15,000 to account for future ditch maintenance costs. There are no other opposers to these applications except for the Colorado Water Trust, which entered the cases to support the CWCB and ARK. The proposed decrees will be updated when the Water Commissioner's storage and release accounting for 2014 is final, so that our claimed exchanges can be made absolute in the final decrees. Kate Ryan, x6304

19. DNR Amicus Brief in St. Jude's Co. v. Roaring Fork Club, LLC, Case No. 2013SA132

At the request of the Supreme Court DNR filed an amicus brief on January 15 in this case stating that the plain language of the Water Rights Determination Act defining "beneficial use" restricts piscatorial and recreational uses and does not include aesthetic uses. DNR also noted that neither the General Assembly nor the Supreme Court has recognized diversions into ditches for private aesthetic and piscatorial uses as a beneficial use, and so they have no statutory or customary limitations. Without established limits, such uses can result in complete depletions of stream reaches for unlimited distances to the detriment of the stream reach and its public aesthetic and piscatorial benefits, maximum utilization, and compact development. Susan Schneider X6311