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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.

The Federal and Interstate Water Unit is awaiting the Special Master's decision on New Mexico's Motion to Dismiss and the Supreme Court's decision on how to handle Elephant Butte Irrigation District's Motion to Intervene. In the meantime, the Unit continues to coordinate with the Division of Water Resources and other client agencies to determine the State's legal strategy, and to outline Colorado's overall approach to the litigation, assuming it moves forward.

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 Federal and Interstate Water Unit and State Engineer's Office are currently working with irrigators who rely on groundwater to resolve their concerns about how groundwater will be managed in a sustainable manner, as required by the applicable statutes. These statutes also instruct the State Engineer to curtail groundwater use the minimum necessary to achieve sustainability. The Unit and State Engineer's Office also continues 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.

3. WildEarth Guardians

On February 24, 2015, WildEarth Guardians filed suit in the Federal District Court of New Mexico against the Army Corps of Engineers for its recent approval of a project to replace approximately 40 miles of existing levees in the San Acacia Reach of the Rio Grande in New Mexico. In its complaint, WildEarth Guardians claims that the Corps failed to fully assess impacts of or analyze alternatives to the levee project in violation of NEPA and failed to demonstrate how the project would ensure the recovery of endangered species in compliance with the ESA.

This case does not involve Colorado directly. Nonetheless, the Federal and Interstate Water Unit will monitor the proceedings as they relate to the other lawsuit filed by WildEarth Guardians concerning federal management of Rio Grande facilities in New Mexico and how they could indirectly implicate Colorado's compact interests in the resource and the authorities of Colorado agencies to manage the resource within Colorado borders. As a reminder, WildEarth Guardians provided notice in January 2014 of intent to sue Mike King (Executive Director of the Department of Natural Resources) and Dick Wolfe (State Engineer). At this stage, neither person nor the state are currently been named as party to either of these lawsuits. 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.

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. The Unit has participated in two separate public meetings and now is involved in surveying water users in the basin. No decision has yet been made as to whether the Division of Water Resources will actually pursue a rulemaking.

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

The U.S. Supreme Court issued its opinion on February 24, 2015. The Court adopted the recommendations of the Special Master that Nebraska pay Kansas \$3.7 million for its actual damages, plus an additional \$1.8 million representing a small portion of what Nebraska gained by using more than its allocation in the mid-2000s. In doing so, the Court overruled Nebraska and Colorado's exceptions arguing against disgorgement of any kind, as well as Kansas' exception arguing for disgorgement of even more money. In awarding disgorgement, the Court found that Nebraska "recklessly gambled" with Kansas' rights when it consciously disregarded a substantial probability that its actions would deprive Kansas of the water to which it was entitled under the Compact. The Court found that because Nebraska is upstream from Kansas, it can physically drain all the water it wants from the Republican River. Moreover, the higher value of

water on Nebraska's farmland than on Kansas' means that Nebraska can take water that under the Compact should go to Kansas, pay Kansas actual damages, and still come out ahead. The Court held that under such circumstances, a disgorgement of \$1.8 million reminds Nebraska of its legal obligations.

The Court also adopted the recommendation of the Special Master that the accounting procedures and computer model used to calculate Nebraska's use of water should be conformed to the States' underlying agreement that Nebraska will not be charged for consuming water imported in the Republican River basin from other river basins. Nebraska and Colorado argued in favor of the changes; Kansas argued against them. The Court agreed with Nebraska and Colorado when it found that the current procedures mistakenly charged Nebraska for consuming such imported water, which itself violates the Compact by extending its reach beyond the Republican River basin, and that none of the States bargained for that result. The decision preserves the integrity of the Republican River Compact by ensuring the Compact's provisions govern the division of the Republican River Basin's (and only that Basin's) water supply.

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

Colorado and Kansas continue to negotiate approval of Colorado's Compact Compliance Pipeline. Colorado is conducting a preliminary analysis of options to increase streamflow in the South Fork Republican River. Kansas has indicated that if the states can agree on options to increase streamflow, Kansas might agree to Colorado's proposal for modeling Bonny Reservoir on the South Fork as well as Colorado's use of the unallocated supply on the South Fork. The states are scheduled to meet in Manhattan, Kansas on March 30-31, 2015 to discuss Colorado's preliminary results.

7. 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 proposed amendments include 300 wells that were excluded from the 2008 Rules. The Groundwater Management Districts, where the 300 wells are located, opposed the amendments for various reasons, as did four other Districts. The Engineers have reached stipulated settlements with those four Groundwater Management Districts. The Engineers have reached settlement in concept with one other District, which settlement will be confirmed by stipulations. A hearing on the State's proposed amendments is scheduled for March 31-April 1, 2015.

8. Hutton Trust Foundation v. Wolfe, et. al. 15CW3018

The Hutton Trust Foundation recently filed a lawsuit in Division 1 Water court against the State Engineer, Division Engineer for Division 1, Division of Water Resources, Colorado Parks and Wildlife and the Department of Natural Resources. According to the Complaint, the Foundation seeks declaratory judgment and injunctive relief related to curtailment of surface water diversions for interstate compact compliance without curtailing the ground water diversions that are causing the compact compliance problem, and to the administration and management of

Bonny Reservoir in a manner that causes injury to the Foundation's water rights. To support these claims, the Foundation also challenges the constitutionality of Senate Bill 052 (2010) on grounds that it "revised the Ground Water Management Act in a way that deprives the Foundation of valuable water rights and protections." Moreover, the Foundation alleges the Ground Water Management Act itself is unconstitutional if designated ground water that causes depletions subject to an interstate compact cannot be administered under that compact so that surface water rights bear the burden of compact compliance. The Unit is coordinating with the Agencies to respond appropriately to this Complaint.

9. 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.

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.

System Conservation Pilot Program: The Unit continues to coordinate with CWCB and Upper Colorado River Commission staff to finalize documents and agreements for the Commission to approve to facilitate the system conservation pilot program in the Upper Basin. The Unit is currently finalizing a facilitation agreement among the funding parties and Upper Colorado River Commission, developing selection criteria for approving projects in Colorado, preparing template agreements for project implementation, and coordinating development of infrastructure for the program to be implanted successfully for both 2015 and 2016.

10. Mexico Treaty Minutes

In November 2012, the United States and Mexico entered into a Minute to the 1944 Water Treaty. The Minute includes voluntary mechanisms for Mexico sharing in shortages and surpluses on the Colorado River, storing water in United States facilities, providing flows to sustain environmental resources, and other related topics. Since its execution, the parties have successfully implemented the environmental pulse flow and established work groups to explore opportunities for system efficiency projects that can benefit both countries. The term of the Minute will end in 2017. The United States, 7-Basin States and Mexico are preparing for a

workshop in May to discuss the lessons learned in implementing Minute 319 and exploring opportunities for developing a new Minute. The Unit is coordinating with the CWCB and Upper Colorado River Commission to ensure that Colorado and the Upper Basin's interests are represented in these discussions.

11. 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 joint Opposition Briefing to be filed by March 19, 2017.

12. Southwestern Water Conservation District, 13CW3011, Water Division 7

Southwestern Water Conservation District 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, SEO, and the Unit are involved in additional negotiations with Southwestern to reach further settlement of the outstanding issues.

WATER RIGHTS MATTERS

13. Opposition of the CWCB to the Application of Elk Wallow Ranch LLC in Case No. 14CW3168-5.

Elk Wallow Ranch applied for plan for augmentation and an appropriative right of exchange to augment storage rights for a pond and a reservoir on its property. The replacement water will be provided by releases from Ruedi Reservoir, which is downstream of the depletions. The CWCB filed a statement of opposition to protect its instream flow water rights on the Roaring Fork River.

14. Opposition of the CWCB to the Application of Morrison Creek Metropolitan Water & Sanitation District in Case No. 14CW3047-6.

Morrison Creek Metropolitan Water & Sanitation District applied for a plan for augmentation and an appropriative right of exchange in Case No. 09CW72, so that it may replace depletions from wells that will be used for water service within its service boundaries upstream of Stagecoach Reservoir and the Yampa River. The CWCB opposed that case because it has senior instream flow water rights tributary to the Yampa River that could be impacted. Upon

consultation with the CWCB and the State and Division Engineers, who are also opposers to the Case No. 09CW72 application, Morrison Creek Metropolitan Water & Sanitation District realized that it should adjudicate conditional water rights for a well field for which depletions will be replaced by the plan for augmentation, and so it filed this case. The CWCB has entered a statement of opposition to protect its instream flow water rights on Little Morrison Creek, Morrison Creek, and Silver Creek.