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Office of the Attorney General

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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

Texas has sued New Mexico, alleging a violation of the Rio Grande Compact. The United States has moved to intervene, and appears to be in support of Texas' allegations. Colorado is a nominal defendant as a compact signatory and wants to make sure its interests in compact interpretation are represented. New Mexico has filed a motion to dismiss the complaints of Texas and the US. The Special Master has set oral argument for New Mexico's motion to dismiss for August 19th, in New Orleans. Two irrigation districts, Elephant Butte Irrigation District and El Paso County Water Improvement District No. 1 are the water users of the Bureau of Reclamation's Rio Grande Project, which receives all compact water delivered by New Mexico. EBID has moved to intervene. The Special Master will hear arguments on that issue on August 20th. EPCWID has also moved to intervene, but the motion is still being briefed before the Supreme Court, which it will likely refer to the Special Master. Although it has not taken a position on either the motion to dismiss or EBID's motion to intervene, Colorado has asked for time to argue both motions, in order to prevent an unnecessarily broad or harmful opinion of Rio Grande Compact interpretation.

The Parties conferenced with the Special Master in mid-June to discuss his staff's outreach and investigation of materials related to the Rio Grande Compact. Although the Special Master does not think it is necessary to go through counsel to obtain "background materials" to which he can take judicial notice, he has acknowledged the Parties' joint concerns and willingness to provide documents upon request.

2. Costilla Creek Compact Commission meeting

The Costilla Creek Compact Commission held its annual meeting in Costilla, New Mexico on May 14, 2015. Present were Colorado's Commissioner, State Engineer Dick Wolfe, New Mexico's Commissioner, State Engineer Tom Blaine, and each Commissioner's Engineer and

Legal Advisors. No serious dispute between the states concerning compact administration exists at this time.

3. Division 3 Groundwater Rules

Following years of extensive modeling and fine-tuning, the State Engineer publically announced the Rio Grande Support Decision System Groundwater Model is sufficiently refined in its current version for purposes of implementing the forthcoming groundwater use rules for Water Division 3. The State Engineer met with the San Luis Valley Groundwater Rules Advisory Committee during on May 12, 2015. The State Engineer announced that this meeting was the last meeting before the rules are adopted.

4. Division 3 Subdistricts – 2013SA135

The Supreme Court appeal examined the water court's rejection of all challenges to Subdistrict No. 1's 2012 annual replacement plan and the State Engineer's approval of the plan in Water Division 3. The Supreme Court upheld the water court's ruling in full and secured the ability to rely on use of a portion of Closed Basin Project production for replacement of injurious stream depletions caused by subdistrict wells.

5. 2J Ranches 15CW3008

This case attacks the forthcoming Div. 3 groundwater rules and how the groundwater model is used for purposes of the rules. Essentially, it is a premature challenge to the rules that should be dismissed. The Unit is working with intervenor water user groups to secure dismissal of this declaratory judgment action.

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

Negotiations between Colorado and Kansas are beginning to focus on regional solutions to preserve groundwater levels in the Ogallala Aquifer. During a meeting in Denver on June 15, Scott Steinbrecher, Dick Wolfe (Colorado's State Engineer), John Stulp (water advisor to Gov. Hickenlooper), and Dan Brown (Commissioner of Agriculture) met with the Kansas Chief Engineer, Commissioner of Agriculture, and several members of the Kansas Water Office to further discuss options for regional conservation plans. The States are exploring options to increase incentives for farmers to voluntarily cease irrigation in Colorado and Kansas. Scott Steinbrecher x 6287.

7. Republican River Compact Measurement Rules

The State and Division Engineers have proposed amendments to the 2008 Republican River Measurement Rules. 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 would have included 300 wells that were excluded from the 2008 Rules. In response to objections from the East Cheyenne Groundwater Management District, the

Engineers agreed to exclude from the amended rule, approximately 90 wells located within the East Cheyenne Groundwater Management District. In exchange, East Cheyenne agreed to adopt and enforce its own rules that are nearly identical to the State's proposed amendments. In accordance with the stipulation between the Engineers and East Cheyenne, East Cheyenne promulgated and adopted its rules in June and hired staff to enforce its rule. The Engineers anticipate an uncontested rulemaking hearing in September, where they will adopt the proposed rules.

8. UCRC System Conservation Pilot Program

The UCRC, Upper Division States, Reclamation and the municipal funding partners (Denver Water, Southern Nevada Water Authority, the Metropolitan Water District of Southern California, and Central Arizona Water Conservation District) met in Denver on June 22 and reached consensus on a number of proposals in Wyoming and Colorado to recommend for selection to the UCRC Commissioners. The UCRC will conference in early July to confirm recommendations. The Unit has drafted a contract for use between the UCRC and water users, which is currently being reviewed by all of the SCPP participants. Once project proposals are formally selected, which is estimated to be in early July, the draft contract will be updated with project details, verification requirements, and funding timelines. Once finalized, it will be shared with the selected SCPP participants and executed with the UCRC. In the meantime, the SCPP participants agreed to issue letters of intent to selected project applicants and to develop a next steps/final negotiations approach. Depending on the success of this round of projects, another round of RFPs will be initiated in November 2015 for implementation in 2016.

9. Mexico Minute 32X Development

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 Minute is set to expire in 2017.

The United States, 7-Basin States and Mexico met with Mexico in San Diego on May 14, 2015 to provide an update on the progress of Minute 319 implementation and kick off discussion of the process for negotiating the next Minute. At that meeting, the parties agreed that the goal should be to have a draft minute finalized by June 2016 and ready for execution by the end of 2016. On June 22, a joint US-Mexico meeting of the Minute 32X Negotiating Group was held in Juarez, Mexico to further review the progress of Minute 319 implementation and to identify a process for negotiating another Minute by summer of 2016. At the meeting, the Negotiating Group reviewed a first draft of the "Framework document" that describes some of the categories of terms that may be considered for inclusion in the successor minute. The two countries have tentatively planned an exchange of documents on July, 31. The next binational meeting is scheduled for August 13th.

The state representatives on the Negotiating Group are working to determine terms for the next minute that are acceptable to the states including issues like: how long this Minute will last; salinity; Mexican storage of water in US facilities; support for projects in Mexico; and environmental provisions. The Unit is involved in this planning process and US/Basin State negotiations and will support the Upper Basin negotiating team in the months to come.

10. Glen Canyon Dam Long Term Experimental Management Plan EIS

The Department of the Interior, through the Bureau of Reclamation (Reclamation) and the National Park Service (NPS), is preparing an environmental impact statement (EIS) for the adoption of a long-term experimental and management plan for the operation of Glen Canyon Dam (Lake Powell). The EIS will fully evaluate dam operations and will provide the basis for decisions that identify management actions and experimental options that will provide a framework for adaptively managing Glen Canyon Dam over the next 15 to 20 years. The 7 Basin States (Basin States) initially submitted a proposed alternative on July 2, 2012, called the Resource Targeted Condition Dependent alternative (RTCD). Over the past year, much time has been spent among the Basin States and DOI to negotiate the various components of a “hybrid alternative,” which generally melds components and aspects of the Basin States’ RTCD alternative and CDAS, DOI’s proposed alternative. The Basin States and DOI have not yet reached consensus on a preferred alternative.

The Upper Colorado River Commission is a cooperating agency in preparation of the EIS. An Administrative Draft EIS was supplied to the cooperating agencies on Monday, June 29. Comments are due 30 days later, July 29, though the Cooperating Agencies have already submitted a joint request to DOI requesting 120 days in which to comment on the more than 900 page document. Over the next 30-120 days our office will work with CWCB staff to review the administrative draft EIS and prepare comments on the same.

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

In this case, 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-La Plata Project (Project). Throughout the last several months, the parties were unable to make any progress towards a stipulated settlement. Southwestern has threatened publicly to dismiss their application to make absolute that portion of the water rights that was stored in Ridges Basin Reservoir (and would eventually be released for use by the ALP Association members). Southwestern has also threatened to transfer title in the water rights to the Bureau of Reclamation, instead of the ALP Association. This is contrary to previous promises to transfer the rights to the Association. In response, several Association members appear ready to ask the Water Court to find that Southwestern cannot utilize the remaining conditional water rights. Those members recently filed a motion asking the Court to determine, as a matter of law, that federal statutes limit the water right currently held by Southwestern to the current, as-built facilities for the Project and cannot legally use the remaining conditional water for irrigation purposes. The motion implicates the tension between federal laws authorizing storage projects

and the state-decreed water rights often associated with such projects. The Engineers and CWCB plan to respond to the motion by July 9, 2015.

In the meantime, Judge John Kuenhold continues to prepare to conduct mediation among the parties on August 14. To further this effort, the Engineers and CWCB are scheduled to meet with Judge Kuenhold on July 2. While the parties have agreed to mediation, they are concurrently focusing on preparing fully for trial. Over the past month, Opposers have issued extensive expert disclosures. Moreover, the parties have scheduled depositions for late June and early July.

12. Amicus Briefing: Ark Initiative v. Tidwell, No. 14-5259 (D.C. Cir.) Ark Initiative v. Tidwell, No. 14-5259 (D.C. Cir.)

On behalf of the Department of Natural Resources, the Department of Law filed an *amicus brief* in this case. Appellant, Ark Initiative, challenges the Forest Service's Colorado Roadless Rule, and in particular, its decision to exclude from its roadless area inventory lands that were, at the time, already designated for ski-area operations or expansions. The case below also involved a specific challenge to the Forest Service's decision to allow Aspen Skiing Company to cut trees on one of the disputed parcels. Thus, Aspen Skiing Company Intervened below and has invited the Colorado Department of Natural Resources to participate in the case as an *amicus*. The State of Colorado has several interests to protect in this case. Colorado invested substantial time, energy, money, and political capital in creating the Colorado Roadless Rule. It petitioned the Forest Service to adopt the Rule and created a state task-force to help identify the best lands for roadless designation while protecting Colorado's economy, future development, state lands, and infrastructure. The Rule also represents a milestone achievement in cooperative federalism. Appellant's reply is due in July. Scott Steinbrecher x 6287.

Endangered Species Act Matters:

13. Colorado Pikeminnow Recovery Plan

CWCB and CPW filed comments on an administrative draft of the revised recovery plan for the Colorado pikeminnow, one of the four endangered fishes in the Upper Colorado River and San Juan River basins. Unresolved issues include the projected timing for downlisting (from endangered to threatened) and de-listing, and the methodology to be used, particularly for downlisting. Competition and predation by non-native fish has been one of the most serious threats to the Colorado pikeminnow, but the recovery program appears to be making some headway in addressing the problem.

14. TransWest Express Transmission Project

BLM issued a Final Environmental Impact Statement for the TransWest Express high voltage transmission line project that would bring wind-generated power from Wyoming to Nevada and California. The route passes through Moffatt and Rio Blanco counties in Colorado, and may require condemnation of a conservation easement owned by Colorado on 15,000 acres of private ranch land in Moffatt County. The easement protects priority habitat for greater sage-grouse as

well as winter range for elk and mule deer and other wildlife. The Governor's Office, DNR, and CPW have worked with USFWS to develop an alternative route, but BLM has not yet accepted it. In addition, project construction may require new depletions from the Platte and Colorado River basins. The US Fish and Wildlife Service requested that BLM initiate consultation on any new consumptive uses from the Platte and Colorado River basins that have not already been consulted on as part of the recovery programs in those basins.

15. In re: Gunnison Sage-Grouse Endangered Species Act Litigation (State of Colorado v. US Fish & Wildlife Service)

The Gunnison sage-grouse litigation is in a holding pattern. August 3 is the cut-off date for new parties or claims. After that date, the court will set a case management plan and briefing schedule. We expect that Utah, San Juan County, UT, and the Colorado Cattlemen's Association will join the litigation between now and August 3rd. Briefing will probably not be completed until spring 2016.

16. People for the Ethical Treatment of Property Owners v. U.S. Fish & Wildlife Service

The Colorado Attorney General joined Utah on an amicus brief to the Tenth Circuit on an Endangered Species Act issue. A group of property owners in Utah challenged the constitutional authority of USFWS to regulate take of purely intrastate species (in this case, the Utah prairie dog). In a high-profile decision, the district court found for the property owners, holding that Congress lacked authority under the Commerce Clause to regulate take of species that reside solely in a single state. The FWS has appealed to the 10th Circuit. Utah, joined by several other states including Colorado, filed an amicus brief urging the Tenth Circuit to affirm the district court's opinion.

17. Greater Sage-grouse

At the end of May BLM issued statewide sage-grouse conservation rules for each of the 11 western states where the Greater sage-grouse is found. BLM needs to have these plans in place in order for FWS to issue a "not warranted" decision for Endangered Species Act protections for the greater sage-grouse on September 30. A number of states, including Colorado, have filed formal protests against the plans, making it less likely that the plans will be finalized in time for the September 30th decision. Population counts of greater sage-grouse and lesser prairie chicken are up this year, with lesser prairie chicken (listed as threatened in spring of 2014) counts increasing by approximately 25%.

18. Upcoming Federal Rulemakings

In July we will be submitting comments on two proposed rulemakings from USFWS. One amends the process for submitting a ESA listing petition, giving states a formal opportunity to be involved earlier in the petition process and to weigh in with data the state wildlife agency has on the petitioned species. The second is a notice of intent to develop a policy regarding incidental take permits under the Migratory Bird Treaty Act. This is in the very early stages, but FWS is feeling pressure from Congress to move forward on this issue because a US House

Representative from South Carolina has proposed legislation that would impair the federal government's ability to enforce the MBTA's prohibition on killing or harming migratory birds. We are working with the Association of Fish and Wildlife Agencies on both sets of comments, and will likely also file separately for Colorado.

WATER RIGHTS MATTERS

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

At the request of the Supreme Court, the Department of Natural Resources filed an amicus brief on January 15, 2015 in this case stating that the plain language of the statute defining "beneficial use" restricts in-channel piscatorial and recreational uses to instream flows and recreational in-channel diversions and does not include aesthetic uses. DNR argued that because a diversion into a private ditch for piscatorial, recreational, or aesthetic use has no inherent duty of water or statutory limits, its duty of water is completely subjective and results in waste and inefficiency. 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. DNR argued that 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. The Supreme Court agreed, holding that the uses claimed were not "beneficial uses," noting that the "General Assembly has taken great care to limit recreational and environmental uses of water in-channel, largely to deal with the potential dangers and excesses inherent in capturing the flow of the stream." The Court also noted the law's "emphasis on reasonableness, efficiency, and avoidance of waste reflects the long-accepted understanding that in order to be beneficial a use must have objective limits, beyond which it becomes unreasonable, inappropriate, inefficient, or wasteful." Here is a link to an article about the decision, including quotes and a link to DNR's brief:

<http://aspenjournalism.org/2015/06/30/colorado-supreme-court-rules-against-private-streams/>

20. CWCB Appropriations on the North Fork Gunnison River

Among the pending 2015 instream flow appropriations, there are four located along the North Fork of the Gunnison River. The North Fork appropriations, which are on Terror (two segments), Hubbard, and Schaefer creeks, were contested by several water users pursuant to the process provided by the CWCB's Rules Concerning the Colorado Instream Flow and Natural Lake Level Program. On May 29, Bowie Resources, LLC withdrew its Notice to Contest the pending instream flow appropriations on Terror and Hubbard creeks. The result of a June 24 in-person meeting between two attorneys from the water conservation unit of the Attorney General's Office, a CWCB staff hydrologist, local water users and their counsel, and local water commissioners was that contesting parties Ragged Mountain Water Users Association, North Fork Water Conservancy District and Overland Ditch and Reservoir Company withdrew opposition to the pending instream flow appropriations on Terror, Hubbard, and Schaefer creeks. A fourth party, the Terror Ditch and Reservoir Company, is the only remaining contesting party to Terror Creek instream flow appropriations, and there are no remaining parties contesting the appropriations on Hubbard and Schaefer creeks.