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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

The parties are awaiting the Special Master's Ruling on New Mexico's Motion to Dismiss Texas and the United States' complaints and Elephant Butte Irrigation District's (EBID) Motion to Intervene in the litigation. New Mexico's motion was based on the premise that the Rio Grande Compact contains no express provisions covering the allegations made by either Texas or the U.S. The Compact has a water delivery requirement into Elephant Butte Reservoir, but is silent on New Mexico's obligations, if any, after that point. Once water is delivered to Elephant Butte Reservoir, the U.S. allocates water to EBID and El Paso County Water Improvement District No. 1 (El Paso County) within the Bureau of Reclamation's Rio Grande Project. The alleged injuries all stem from actions or omissions revolving around Rio Grande Project water below the reservoir. Both irrigation districts have moved to intervene based on their Project interests. EBID's motion was heard in August, while El Paso County's motion is waiting referral to the Special Master from the Court. The Special Master gave no indication of when the parties may expect rulings.

On November 1, 2015 the Special Master submitted his second invoice for services. Although Colorado is only responsible for 5% of the Special Master's bill, the first two invoices exceed estimates for Special Master expenses based on experience in previous interstate water litigation. The Unit will continue to monitor the Special Master's bills and report to the Board accordingly.

2. Division 3 - Groundwater Use Rules

On September 23, 2015, State Engineer Dick Wolfe filed Rules Governing the Withdrawal of Groundwater in Water Division No. 3 (the Rio Grande Basin) and Establishing Criteria for the Beginning and End of the Irrigation Season in Water Division No. 3 for All Irrigation Water Rights in the water court for Water Division No. 3. This is a big step in a process that began in the 1970s, when the State Engineer first attempted to adopt groundwater use rules for the San Luis Valley. The rules require well users to replace stream depletions caused by their wells that

injure senior surface water rights. They also require well users to achieve and maintain sustainable water supplies in most of the aquifers of the San Luis Valley, an approach to groundwater management that is very rare worldwide and unprecedented in the arid West. Per court decisions and legislative directives regarding groundwater use in the San Luis Valley, the State Engineer and interested stakeholders have been working over the past decade to study the area's complex hydrogeology and develop a regional groundwater model that determines the impact of well pumping on streams. In May, 2015 the State Engineer announced that the model created is sufficiently refined for purposes of implementing new groundwater use rules in the San Luis Valley (for Water Division 3).

Protests to the proposed rules can be made through the end of December, 2015. Protests follow the procedure for water court cases and the rules will be measured against special standards for rules adopted by the State Engineer, not the Colorado Administrative Procedures Act. If a challenge materializes, the Unit expects a lengthy trial in 2016.

The Unit also continues to participate with representatives from the Division of Water Resources in working groups aimed at informing water users about administration under the groundwater rules. As part of the groundwater administration framework, subdistricts of the Rio Grande Water Conservation District will have the opportunity to develop Annual Replacement Plans approved by the State Engineer to help ensure the subdistricts have the water supplies and financial ability to meet their well users' obligations to owners of senior surface water rights. This is a novel approach to groundwater management that will require the cooperation of all groundwater users in the San Luis Valley. The RGWCD is currently progressing on establishing subdistricts, and the Water Division 3 office recently added a specialized position to coordinate the office's work (with the advice of the Unit) with the other subdistricts that may soon form.
Preston Hartman x6260

3. Hutton v. Wolfe, et. al, 15CW3018

The Hutton Foundation seeks injunctive and declaratory relief against the Division of Water Resources, Parks and Wildlife and the Department of Natural Resources for administration of surface water (and lack of administration of groundwater) in the Republican River basin. The Foundation also claims that the inability to de-designate the Northern High Plains Designated Basin is unconstitutional and that the Groundwater Management Act, to the extent it is used to circumvent prevention of injury to surface water users, is also unconstitutional. The Court has granted the Unit's motions to dismiss DNR and to have the Foundation join all indispensable parties (all well owners in the designated Basin who would incur significant expense if they are forced to administer in priority with surface water rights). The Court subsequently denied the Foundation's motion to reconsider but granted the Foundation's request to allow service by publication. Publication is taking place now and the case is expected to be at issue by December 16. The Unit will continue to represent DWR and the Republican River Compact Commissioner's interests in this case.

4. Republican River - Colorado's Compact Compliance Pipeline & Bonny Reservoir Disputes

Colorado and Kansas have agreed to a plan to allow Colorado to operate its Compact Compliance Pipeline in 2016. The pipeline delivers water from groundwater wells to the Republican River to offset depletions from pumping other wells. Running the pipeline is crucial to Colorado's compliance with the Republican River Compact. As part of the agreement for operation in 2016, the States negotiated a long-term plan to evaluate streamflow in the Republican River and water use in the Republican River Basin. Colorado has also agreed to evaluate the benefits of further reducing groundwater pumping and surface water diversions in the basin.

5. Republican River Compact Measurement Rules

The State and Division Engineers adopted 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 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. An uncontested rulemaking on the state's amendments was held on September 10, in Burlington, Colorado. On September 16, the hearing officer adopted the amendments, and they were submitted to this office for a rule opinion.

6. Upper Colorado River Basin System Conservation Pilot Program

The Unit continues to facilitate completion of contracts for the Upper Basin System Conservation Pilot Program for 2015. In June, representatives from the funding agencies (Denver Water, Southern Nevada Water Authority, the Metropolitan Water District of Southern California, Central Arizona Water Conservation District, and Bureau of Reclamation) and UCRC met to review applications to participate in the pilot program for 2015, and to make recommendations to the UCRC Commissioners for selection and approval. In early July, the Commissioners collectively approved the recommendations, which included projects in both Wyoming and Colorado, and both the Wyoming and Colorado Commissioners noted no objections. Following this approval, the UCRC staff issued Letters of Intent to ten applicants expressing interest in entering into agreements for program participation. Since that time, the Unit has coordinated contracting documents among the Funding Partners and water users for the ten projects. Contracts, Funding Agreements, and Verification Plans have been negotiated and fully executed for three Colorado projects (Carpenter Ranch, TU Wells, and Grand Valley Ranch) and five Wyoming projects (Cottonwood Ranches, Willow Island, Barnes, Piney Creeks Ranch, and P/T Livestock Ranch). Two additional Colorado projects (Pueblo Board of Waterworks and Water Bank Working Group) are in the process of finalizing document provisions to be applicable to the unique characteristics of each project. Wilson Water Group and the Bureau of Reclamation are assisting in implementation and verification of project

activities. Administrative costs associated with this program are funded via a grant from Reclamation, which was received in mid-September.

The UCRC and Upper Division States coordinated the release of a second round of RFPs for 2016. Applications are currently being compiled and summarized. The Funders, Upper Division State and UCRC representatives are scheduled to evaluate and develop recommendations for the applications in early December. The contracting processes will then be initiated accordingly.

7. Mexico Minute 32X Development

The United States, 7-Basin States and Mexico continue to identify and discuss elements to be included in an updated agreement to Minute 319 of the 1944 Water Treaty. The goal remains to finalize a new Minute in 2016 to have a draft minute finalized by summer 2016 and ready for execution by the end of 2016. The Minute Negotiating Group representatives from the U.S., Basin States and Mexico continue to flesh out the framework for negotiations, and have identified work groups to staff and inform the negotiations on, among other things, salinity, environment, bi-national projects, and basin hydrology.

Concurrently, the Basin 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 (among other things). 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.

8. Southwestern Water Conservation District (SWCD), 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-LaPlata Project (Project) and involve a number of issues implicating tribal, interstate, federal, state and local interests. Over the last several months, the case has proceeded simultaneously on two different tracks: settlement and litigation. A potential breakthrough in positions has recently occurred based on tireless discussions among the Applicant and Opposers. As a result, the Parties are in the process of drafting settlement stipulations and stipulated decrees for their respective Boards and Councils to approve. Given the most recent progress on settlement, the Court agreed at the parties request to delay trial until November 9. If settlement can be reached before then, the parties will move to vacate the trial.

ENDANGERED SPECIES ACT MATTERS

9. State of Arizona v. Sally Jewell (D. Ariz.)

In September, the Department of Natural Resources (DNR) and the Division of Parks and Wildlife (CPW) moved to intervene, as did the State of New Mexico, in the above litigation. Arizona's complaint, filed in June of this year in federal court in the District of Arizona, requests a declaration from the court that the Endangered Species Act (ESA) requires the Secretary of the Interior (through the U.S. Fish & Wildlife Service (FWS)), to prepare a legally compliant recovery plan for the endangered Mexican wolf (*Canis lupus baileyi*) and an order mandating that the agency do so by a date certain. The four corner states – Arizona, New Mexico, Colorado, and Utah – all have a stake in the recovery planning. The Court recently granted current motions to intervene. Utah may move intervene in November. The Department of Justice has begun inquiries to schedule settlement talks with all four states.

10. State of Colorado v. U.S. Fish & Wildlife Service (D. Colo.)

This case, filed in February, challenges the November 2014 decision by FWS to list the Gunnison sage-grouse (*Centrocercus minimus*) as “threatened” under the ESA, triggering the various protections that statute accords to threatened and endangered species. Intervenor include Gunnison County, the Gunnison County Stockgrowers' Association, the State of Utah, and San Juan County, Utah. In September, the Fish & Wildlife Service (FWS) its extensive administrative record. The case has bounced around between judges, and we are currently before Judge Arguello (who is the fourth judge to whom the case has been assigned). The plaintiffs have until November 6th to review the record and inform FWS of any deficiencies. Opening briefs are due in February 2016.

11. Permian Basin Petroleum Association v. Department of the Interior (W.D. Texas)

The court in this case recently vacated a federal rule listing the lesser prairie chicken (*Tympanuchus pallidicinctus*) as threatened under the ESA. In April 2014, FWS listed the lesser prairie chicken and simultaneously issued a “4(d)” rule governing management of the species and its habitat throughout its range. The range includes parts of Texas, New Mexico, Oklahoma, Kansas, and Colorado. Shortly after the listing was announced, multiple lawsuits were filed challenging both the listing and the 4(d) rule. The lawsuits ended up grouped in three venues: two in the district court for D.C., two in the northern district of Oklahoma, and one in the western district of Texas. Colorado did not directly participate in any of the lawsuits, but did participate as a member of the Western Association of Fish and Wildlife Agencies, which intervened in one of the Oklahoma cases to defend the 4(d) rule against a challenge from environmental groups. The Western District of Texas was the first to issue an opinion in September in the case filed by the Permian Basin Petroleum Association and a number of New Mexico counties. The court found that FWS had violated its own guidelines for assessing the benefits of known but future conservation efforts and vacated the listing rule. FWS has indicated it expects to appeal the decision to the 5th Circuit if necessary, but has first filed a motion asking the court to change its remedy from vacatur to remand so they could address the procedural

failings in the listing. A hearing on the motion is set for early November. The cases in D.C. and Oklahoma – which challenge the listing on other grounds – are still proceeding.

12. People for the Ethical Treatment of Property Owners v. U.S.FWS (10th Cir.)

On September 28, a panel of the Tenth Circuit will hear oral argument in this closely-watched case on appeal from the US District Court in Utah, which challenges Congress' constitutional authority to regulate the "take" of wildlife on non-federal lands, if the species of wildlife resides entirely in a single state. Plaintiffs, a group of property owners, challenged a 4(d) rule regulating take of Utah prairie dogs on the basis that neither the Commerce Clause nor the Necessary and Proper Clause authorizes the federal government to regulate purely intrastate species. The district court agreed with the plaintiffs, holding that FWS lacked authority to enforce prohibitions against killing or harming federally-threatened Utah prairie dogs on non-federal land. FWS appealed the decision. On appeal, Colorado, with seven other western states, joined an amicus brief filed by Utah supporting the district court's opinion and urging the court to recognize the states' sovereign authority under the Tenth Amendment to manage wildlife within their borders.

13. Greater Sage-Grouse "Not Warranted" Determination

On September 22nd, the Secretary of Interior and the Director of FWS announced FWS's determination that ESA protection for the greater sage-grouse (*Centrocercus urophasianus*) is not warranted. This announcement came 5 years after FWS's finding that ESA protection for the greater sage-grouse was warranted but precluded by higher priorities. During that time, the 11 western states that host populations of greater sage-grouse engaged in collaborative landscape-scale conservation efforts, working with local governments, ranchers, conservation groups, industry, and federal land management agencies to keep the species off the ESA lists and under the jurisdiction and management of the state wildlife agencies. Part of the basis for the "not warranted" decision was a new set of land management policies adopted by BLM and the US Forest Service to provide more stringent protections for the birds and their habitat on federal lands. The plans, which were formally adopted within a day of the announcement of the not warranted decision, have been controversial. Hundreds of individuals and organizations filed protests challenging the plans– including the State of Colorado, along with other affected states– but notwithstanding the formal protests, the essential components of the plans have remained largely unchanged. As of September 25, the State of Idaho and two Nevada counties, along with some mining companies, have filed suit challenging the BLM plan for the Great Basin Region. Entities in Wyoming have submitted a challenge to the Rocky Mountain Region plans but no State has done so. Colorado Parks and Wildlife is currently working with BLM on how the Rocky Mountain Region plans can be implemented consistent with state strategies and considerations.

WATER RIGHTS MATTERS

14. Instream Flow Change of Water Rights on the Alamosa River (Case Nos. 13CW3013 and 13CW3014), Water Division 3.

On November 5, 2015, the Division 3 Water Court entered final decrees granting changes of water rights and appropriative rights of exchange to the CWCB and co-applicant, the Alamosa Riverkeeper. Case Nos. 13CW3013 and 13CW3014 adjudicated changes of irrigation water rights that have 1888 adjudication dates from the Valdez and Gabino Gallegos ditches for instream flow and appropriative rights of exchange. These rights will be operated in most years by storing water upstream at Terrace Reservoir and releasing to the Alamosa River when the local irrigation season ends, thereby extending the season of annual flows in the Alamosa River. The CWCB and Alamosa Riverkeeper addressed the concerns voiced by a group of Gabino Gallegos ditch water users who entered Case No. 13CW3013 as opposers in the course of adjudicating these applications. The Colorado Water Trust also entered both cases, but as a “friendly opposer” to provide helpful support. During the two-year adjudication, the exchange, which was originally claimed as a conditional water right, was operated under a SWSP. Accordingly, all water rights sought in the applications have been decreed absolute, and no future diligence is required.

The Alamosa River instream flows appear to have been an operational success with community support. The CWCB is currently releasing water stored during the 2015 irrigation season, marking a second season of instream flow operations on the Alamosa River. Reflecting community impact, a bait and tackle shop opened in Capulin this year. That shop sponsored a “biggest fish” contest this summer—and the winner caught a 22.5 inch German Brown Trout.