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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 continue to await 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. In the meantime, the Unit continues to prepare for trial and the Parties are also looking into to potential next steps.

2. Rio Grande Operating Agreement Environmental Impact Statement

The Rio Grande Project serves irrigation districts in New Mexico and Texas, and is at the center of the *Texas v. New Mexico and Colorado* litigation in the U.S. Supreme Court. The Unit coordinated with the Colorado Division of Water Resources as Colorado's cooperating agent to prepare comments on the administrative draft Environmental Impact Statement to the Bureau of Reclamation by February 11. When the public draft EIS is complete, the Unit will review the document and prepare formal comments in coordination with DWR for public record

3. Division 3 - Groundwater Use Rules

The Unit is preparing to defend the State Engineer's groundwater rules as filed in Water Division 3. 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. All protests were due by December 31, 2015. About 30 protests have been filed, about half of which protests are

actually pleadings in support of the rules. 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. The Unit is now working with the other parties' attorneys to draft a proposed modified Case Management Order, which will likely be approved by the court in late March. On February 22, the court set this matter for trial beginning January 2, 2018 and ending March 2, 2018.

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.

4. Arkansas River Basin Generally

There continues to be a number of daily administrative matters that the Unit is involved in on the Arkansas River Basin to promote ongoing compact compliance. This includes, but is not limited to, working with the Division of Water Resources to address compact considerations that may be associated with Colorado Parks and Wildlife's efforts to obtain a permanent pool at John Martin Reservoir and consideration and incorporation of results from the recently completed pond study in the administration for compact compliance.

5. 05CW107-B - City of Lamar Exchange Case

The City of Lamar is seeking to exchange water from below John Martin Reservoir to Pueblo Reservoir, which is above John Martin. The Arkansas River Compact restricts the transfer/use of District 67 water rights (those below JMR) to above JMR without approval from the Arkansas River Compact Administration. Lamar asserts that they are not transferring District 67 water rights, because their sewage return flows are not District 67 water rights. If approved, Lamar's application could implicate compact concerns for Kansas that would potentially require state to state and ARCA negotiations. The Unit is involved in the case to the extent necessary to help the state avoid unnecessary compact implications.

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

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 provided to Kansas the first phase of evaluation and then the parties met to discuss that evaluation. Kansas responded to Colorado's evaluation on February 26. Colorado is reviewing that response and will reply by March 31.

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

The Hutton Foundation seeks injunctive and declaratory relief against the Division of Water Resources and Parks and Wildlife 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 motion to 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). Publication to join these parties is now complete and the case is at issue. The court also granted the motions to intervene filed by the Groundwater Commission and several Groundwater Management Districts. The State Land Board, the Republican River Water Conservation District, and many other well owners have filed answers to the complaint. On February 29, 2016, the parties filed various Rule 12 and 56 motions (motions to dismiss and for summary judgement). The resolution of these motions will determine which issues remain and how long trial will last.

The Unit will continue to represent the Division of Water Resources and the Republican River Compact Commissioner's interests in this case. It also has a separate attorney representing the Groundwater Commission.

8. Upper Colorado River Basin System Conservation Pilot Program

The Unit has facilitated completion of contracts and implementation of eight pilot projects for the Upper Basin System Conservation Pilot Program in 2015. The Unit is now coordinating round two of the pilot program for 2016 by participating in formulation of recommendations for project approvals, and coordinating contracting,

meetings with interested parties and evaluating lessons learned. At this point approximately 10 additional projects are being considered for implementation in Colorado.

9. Extended Reservoir Operations

The Unit continues to spearhead talks with the Upper Basin States, Bureau of Reclamation, Western Area Power Authority, Fish and Wildlife Service and National Park Service on how to utilize storage from the Colorado River Storage Project's primary reservoirs (Flaming Gorge, Aspinall Unit, and Navajo Reservoir) to maintain minimum power pool at Lake Powell. The purpose of this exercise is to be ready and prepared to respond, if needed, to extended drought so as to protect key operations from Lake Powell, including hydropower production and compact compliance. The next meeting is scheduled for March 3rd.

10. Lake Powell Pipeline

The integrated licensing process for the Lake Powell Pipeline continues to progress. The Utah Department of Water Resources submitted an Application for Original License – Preliminary Licensing Proposal in December. Over 70 individual or entity comments have been submitted since the commenting due date of February 29th. No state has provided a formal comment at this time. The Unit continues to coordinate with the CWCB to identify questions and concerns to the UDW and prepare formal comments during the upcoming NEPA process if needed.

11. Glen Canyon Dam Long-Term Experimental Management Plan - EIS

The Unit continues to work on consulting with the Department of the Interior on its plan to re-operate Glen Canyon Dam via adaptive management measures to protect and improve downstream resources (in the Grand Canyon) without compromising the compact operations and with the least amount of effects to hydropower generation. This has been, and continues to be an extensive, ongoing effort that involves coordinating with seven Colorado River Basin states to present a united front in protecting key rights to Colorado River water under the Law of the River. A public Draft EIS was promulgated in early January. The parties are in the process of preparing formal comments and participating in consultations to arrive at a document that is either mutually agreeable to all parties and/or to identify key concerns with the EIS. The Unit will work to protect the state's interests, through the CWCB, throughout this process.

12. 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 by summer 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. Potential differences in opinion in scope and/or content, in addition to budgeting difficulties in both Mexico and within the United States are challenges that the Parties continue to work to overcome. The Unit continues to provide counsel to the Upper Basin representatives on legal matters as they arise.

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

In this case, Southwestern 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). In November, all parties, except the Federal Government confirmed their agreement to a stipulated settlement. In early February, the Federal Government confirmed its agreement as well. The Water Court entered the stipulated decree on February 24.

Entry of the decree triggers the settlement agreement provisions regarding conveyance of deeds between the parties. As such, counsel for the Animas La Plata Operation, Replacement and Maintenance Association (Association) has requested that Southwestern transfer title to portion of its rights now described as the “ALP Project” water rights and to record the deed. Southwestern’s counsel has responded and is taking steps to complete transfer and recordation, as described in the agreement.

The decree contains several terms and conditions governing use and administration of Project water rights, which supersede many of the operations described in the State and Division Engineer’s protocol governing administration of those water rights and the Engineers are discussing with the water users whether and to rescind that protocol.

Endangered Species Matters

14. Final Rules for ESA

In February, the Fish and Wildlife Service issued final rules on critical habitat designation and adverse modification of critical habitat. These rules were proposed originally in May 2014. Public comments were taken through October 2014. Final rules were published in the Federal Register on February 11, 2016.

Notwithstanding the many comments received, the Service did not make any significant changes to the proposed rules. The Department of Natural Resource’s

strongest objection was to an aspect of the new definition of “adverse modification” of habitat. The proposed definition specified that precluding or delaying development or re-establishment of key physical and biological features could be considered adverse modification. DNR objected that the definition (a) was not authorized by the ESA and (b) continuation of current uses could be found to adversely modify areas simply by precluding or delaying the future development of habitat features. The Service responded by stating emphatically that current uses are not exempt from analysis during Section 7 consultation and could be part of a determination that a proposed project would adversely modify critical habitat.

DNR also requested that the Service reinstate the regulatory provision requiring that unoccupied areas be designated as critical habitat only when the current range is found to be inadequate for recovery of the species. The Service rejected this request, stating that the requirement unnecessarily limited its use of “an important conservation tool.”

Whether and to what extent application of these rules will be challenged remains to be seen. The Endangered Species Specialist for the Natural Resources Section at the Department of Law will continue to monitor and strategize with the Department of Natural Resources going forward.

15. State of Colorado v. U.S. Fish & Wildlife Service (D. Colo.) (Gunnison sage-grouse)

The Gunnison sage-grouse litigation is on hold while the environmental groups and Fish and Wildlife Service resolve some disputes over the administrative record. A hearing on a motion to complete the administrative record with 900 documents that were withheld under the attorney-client privilege is set for March 16.

16. Rio Grande Chub and Sucker

Colorado Parks and Wildlife is expecting a positive 90-day finding on the Rio Grande chub and sucker in mid-March and is working on a conservation agreement with New Mexico Department of Game and Fish for these two species.

17. Greater Sage Grouse

Western Watersheds Project filed a lawsuit challenging the Greater sage-grouse conservation plans that the Bureau of Land Management adopted to help keep the species from being listed as threatened or endangered. There are now five sets of plaintiffs challenging the BLM plans (Idaho, Nevada, Utah, the Wyoming Stockgrowers, and Western Watersheds Project).

WATER RIGHTS MATTERS

18. Concerning The Application For Water Rights Of Colorado Water Conservation Board

In Case No. 15CW3111, the CWCB's instream flow application on the Dolores River, Western Resource Advocates, the Conservation Colorado Education Fund, and San Juan Citizens Alliance filed a joint statement of opposition in support of the application. Both the Southwestern Water Conservation District and the Colorado River Water Conservation District filed statements of opposition, arguing that the application is inconsistent with the CWCB's statutory direction to correlate the activities of mankind with some reasonable preservation of the natural environment, that the flows exceed the minimum amount to preserve the natural environment to a reasonable degree, that the application does not promote maximum utilization and that it impairs compact development, among other things. The Dolores Water Conservancy District filed a statement of opposition to ensure that the Dolores ISF decree comports with the terms of the Stipulation entered into by the CWCB and the District on August 31, 2015.

19. Case No. 11CW152, Division 5: Application of Denver Water, Grand County, and CWCB:

On March 1, 2016, Judge Boyd issued a decree in this case that implements a unique partnership between Denver Water, Grand County, and the CWCB. This decree is related to the Colorado River Cooperative Agreement signed between Denver Water and seventeen west slope entities in September 2010, and is based on a Water Delivery and Stream Flow Improvement Agreement reached between the CWCB, Denver Water, and Grand County in late 2011. The decree describes claims and operation of junior priority rights for Denver's Moffat Tunnel Collection System and the Williams Fork Reservoir that Denver Water may use to substitute for diversions it would otherwise be entitled to make at those structures under its existing absolute water rights. In other words, upon request by Grand County in conjunction with the CWCB, Denver will bypass at its diversion structures up to 2,375 acre-feet of water for various uses in Grand County that Denver otherwise would be entitled to divert for east slope uses. The decree requires the Division Engineer to shepherd the water downstream to preserve and improve the natural environment to a reasonable degree at the location and in the quantity for instream flow segments in Grand County listed in the decree. The decree also provides a process to allow the CWCB to use such water for new and increased instream flow rights in the future. The CWCB, Grand County, and Denver Water worked cooperatively to craft this unique arrangement and to agree on decree language that would satisfy nineteen opposers from the east and west slopes (and DWR).