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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 Bureau of Reclamation promulgated a Draft Environmental Impact Statement for the Rio Grande Operating Agreement. The Unit is coordinating with the Colorado Division of Water Resources as Colorado's cooperating agent to prepare comments regarding the Draft EIS for public record.

3. Division 3 - Groundwater Use Rules

The Unit is defending 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 court recently entered a modified Case Management Order proposed by the Unit that forces protesting parties to identify their objections more specifically than has been required in previous litigation of rules adopted by the State Engineer. This novel procedure will narrow the scope of trial and reduce the number and breadth of expert reports that the State Engineer must produce. This matter is set for trial beginning January 2, 2018 and ending March 2, 2018. The Unit is concurrently coordinating with the State Engineer to determine the possibility of settlement to any and all protests that have been filed.

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 seeks 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. The parties to this case recently entered a stipulation. The Unit is involved 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 second phase of evaluation and then the parties met to discuss that evaluation. Kansas responded to Colorado's evaluation on April 30. Colorado is reviewing that response and will reply by May 31.

7. Republican River Compact Rules (Tentative)

The Unit represents the State Engineer in this matter. The State Engineer is considering rulemaking regarding water diversion, use, and administration of water within the Republican River Compact Administration Groundwater Model Domain. The proposed rulemaking would likely require all water users within the model domain to offset impacts in excess of Colorado's apportionment under the Republican River Compact as determined under the Final Settlement Stipulation.

The State Engineer will be forming a Special Advisory Committee to provide advice and recommendations on the rules. A public meeting will be held May 16 in Burlington, Colorado, to discuss the need for rules and regulations, the rulemaking process, and the formation of a Special Advisory Committee to assist the State Engineer.

8. Yuma County Water Authority, 14CW3135, Water Div. 1

The Unit represents the State Engineer and Division Engineer for Water Division 1, as well as the CWCB in this case. The applicant has applied to change to augmentation several irrigation rights that historically diverted from the Republican River. In addition, applicant proposes to use the changed water rights to help the State comply with its obligations under the Republican River Compact. The Engineers and the CWCB have met multiple times with applicant's engineers and counsel to negotiate decreed terms and conditions that will allow the Division Engineer to account for delivery of the water for compact compliance purposes and prevent other water users from diverting the changed water rights when they are no longer being diverted for augmentation purposes. The Engineers and CWCB are currently reviewing those proposed terms and conditions and will provide their comments by May 15, 2016.

9. 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. In addition, the Foundation 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. All indispensable parties (i.e., well owners in the designated Basin who would incur significant expense if they are forced to administer in priority with surface water rights) have been served by publication and the case is at issue. The court 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.

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. As part of the case management process, the Court has asked parties to file concurrently all motions motions to dismiss and motions for summary judgement by February 29. Responses to these various motions were filed on April 8, 2016. The resolution of these motions will determine which issues remain and how long trial will last.

10. Audubon Society of Greater Denver v. United States Army Corps of Engineers, et. al, 14CV02749, D. Colo.

The Unit represents the Colorado Department of Natural Resources as an Intervenor in this matter, which involves review of the EIS prepared by the Army Corps of Engineers for the Chatfield Reallocation Project. Audubon raises several challenges in its opening brief: (1) that the Corps violated the Clean Water Act by failing to select the least damaging alternative for the project; (2) that the Corps violated NEPA because it failed to evaluate reasonable alternatives; and (3) that the Corps violated NEPA because it failed to foster informed decision making and public participation. The Department of Natural Resources disagrees and intervened in support of the Corps. The Department worked closely with the Corps as it developed the Project and EIS over nearly a decade. The Army Corps of Engineers' Answer Brief is due May 25. The Intervenor's brief in support of the Army Corps is due June 6. Audubon then has 15 days to file a reply brief.

11. Upper Colorado River Basin System Conservation Pilot Program

The Upper Colorado River Commission has considered the recommendations and approved approximately 25 projects for round 2 of the System Conservation Pilot Program. These projects include proposals from Utah, New Mexico, Wyoming and Colorado, and involve municipalities, agriculture, storage, and system efficiency activities. The Unit is currently coordinating the contracting and funding agreements for these projects, and is also involved in coordinating parties and evaluating lessons learned.

12. 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 most recent meeting to develop a conceptual process was held on May 2, 2016. Additional collaboration will continue following briefing and discussion by the Upper Colorado River Commission in early June.

13. 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 comments by individuals or entities were submitted since the deadline of February 29th. No state has provided a formal comment to date. The Unit continues to coordinate with the CWCB to identify questions and concerns to the UDWR and prepare formal comments during the upcoming NEPA process if needed.

14. 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 minimizing the effects to hydropower generation. This 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 Unit is coordinating with Colorado's AMWG representative and the CWCB to prepare formal comments to the public Draft

Environmental Impact Statement by May 9, 2016, and to participate in ongoing consultations with the Department of the Interior 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, during this process.

15. 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. The Unit continues to provide counsel to the Upper Basin representatives on legal matters as they arise.

16. 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 2015, 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, 2016.

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. The Engineers are discussing with the water users whether and to rescind that protocol.

Endangered Species Matters

17. State of Arizona v. Sally Jewell (D. Ariz.) (Mexican wolf).

On April 29, the States of Arizona and Utah and the United States filed a joint motion to enter a settlement agreement as an order of the court. Plaintiff-intervenors the States of Colorado and New Mexico have declined to join the settlement agreement, and will seek to voluntarily dismiss their claims in the case after the settlement is finalized. The science team for the recovery plan continues to focus on recovery options in Mexico.

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

This case challenges the USFWS's November 2014 decision to list the Gunnison sage-grouse as "threatened" under the ESA. Merits briefing in this case has been postponed pending the outcome of a motion to complete the administrative record filed by WildEarth Guardians (plaintiffs in a parallel, consolidated case). On April 15, FWS filed a revised privilege log pursuant to an order from Magistrate Judge Kathleen Tafoya. WildEarth Guardians have until May 13th to file any supplemental briefing regarding the revised privilege log.

19. Permian Basin Petroleum Association v. Department of the Interior (W.D. Texas) (lesser prairie chicken).

On April 29, the federal government filed a notice of appeal with the district court indicating its intent to appeal both the district court's opinion vacating the listing of the lesser prairie chicken and its order denying the U.S.'s motion to amend the judgment to the Fifth Circuit. Colorado is not a party to this case, but through its membership in the Western Association of Fish and Wildlife Agencies, is a defendant-intervenor in another challenge to the listing, *Defenders of Wildlife v. Jewell*, which is being heard in the Northern District of Oklahoma. That case is currently stayed.

WATER RIGHTS MATTERS

20. 2016 Instream Flow Appropriations on Yellow Creek (Upper and Lower), Water Division 6

In January 2015, the CWCB declared its intent to appropriate instream flow water rights on two reaches of Yellow Creek in Water Division 6. Exxon Mobil Corporation filed a Notice to Contest the CWCB's appropriations, and a number of organizations and resource extraction companies filed notices of party status. During the CWCB's July 2015 meeting, at the request of CWCB Staff, the Board canceled its intent to appropriate 2015 ISF water rights on Yellow Creek for a number of reasons. The CWCB Staff worked with the recommending agencies on

revised recommendations for 2016 ISF appropriations on Yellow Creek (Upper and Lower). The Board declared its intent to appropriate ISFs on two reaches of Yellow Creek at its 2016 Board meeting, based on the Staff's revised recommendations.

Between January and March 2016, CWCB Staff and attorneys corresponded and met with two private parties, Exxon Mobil Corporation and Mountain Water LLC, (a water supplier to the large sodium bicarbonate producer Natural Soda LLC in Rio Blanco County), to resolve any opposition to the revised 2016 appropriations on Yellow Creek. On March 31, 2016 (the deadline for parties to file a Notice to Contest the Board's appropriations), CWCB Staff signed stipulations with Exxon Mobil and Mountain Water LLC, resolving their opposition to the Board's 2016 appropriations. In the stipulation with Exxon Mobil, Staff agreed to recommend to the Board that a term and condition be including in the Board's final appropriation, and water court decree, concerning the unique hydrology of the Yellow Creek stream system and administration of the claimed ISFs. In the stipulation with Mountain Water LLC the CWCB recognized Mountain Water's uses of water in the Yellow Creek basin and its decreed augmentation plan (including exchange rights) as pre-existing to the CWCB's ISF appropriations. After signing the stipulation, Mountain Water provided a letter to the Board in support of the ISF appropriations on Yellow Creek.

21. 2016 Instream Flow Appropriation on Piceance Creek, Water Division 6

In January 2016, the CWCB declared its intent to appropriate an instream flow water right on a reach of Piceance Creek in Water Division 6. In connection with negotiations with Exxon Mobil Corporation and Mountain Water LLC to resolve their opposition to the Board's 2016 ISF appropriations on Yellow Creek, the CWCB Staff simultaneously negotiated stipulations that resolved those entities' opposition to the CWCB's ISF appropriation on Piceance Creek. On March 31, 2016, both Mountain Water LLC and Exxon Mobil signed stipulations with CWCB Staff that resolved their opposition to the 2016 appropriations on Piceance Creek, on terms that mirror those in each parties' respective stipulations regarding the Yellow Creek ISFs (see the item above).