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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 Special Master issued a preliminary draft of his First Report regarding New Mexico's Motion to Dismiss Texas' Complaint and the United States' Complaint in Intervention and Motions of Elephant Butte Irrigation District and El Paso County Water Improvement District No. 1 for Leave to Intervene. At first glance, the report recommends that New Mexico's Motion to Dismiss Texas' Complaint be denied. New Mexico's Motion to Dismiss the United States' complaint is granted as to all compact claims. The United States has stated viable claims under Reclamation law and the Special Master recommends that the court extend its jurisdiction to hear those claims. Both Motions to Intervene are denied. To arrive at these recommended conclusions, the Special Master provides over 250 pages of background, descriptions and analysis along with an additional 37 attachments. The parties have until August 1st to provide comments before the report is finalized. The Unit is currently reviewing the draft and will prepare comments and identify exceptions if needed. A status conference is scheduled for August 11th to discuss case management.

2. Division 3 - Groundwater Use Rules

The Unit continues to prepare for defending the State Engineer's groundwater rules as filed in Water Division 3. Approximately 30 protests to the rules have been filed. Trial of the proposed rules is set for three months beginning on January 2, 2018. The Unit is coordinating with the Division of Water Resources to conduct settlement discussions and prepare for trial as appropriate.

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.

3. 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. To this end, the Unit coordinated with Colorado's ARCA representatives and Division Engineers to prepare for a meeting with Kansas to the CPW proposal and identify whether and to what extent it could be made possible consistent with the ARCA framework and Arkansas River Compact.

4. 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 a global settlement proposal that would resolve all of the issues described in the in the plan, as well as all of their disputes related to the Republican River Compact. Kansas has responded and proposed that it may be willing to resolve all of the outstanding issues in the basin if Colorado agrees to set goals and a timeline for voluntary dry-up of irrigated acreage in the South Fork basin. Both states are analyzing how much acreage would need to be removed to satisfy Kansas' targets. Colorado hopes to provide a final settlement offer to Kansas in mid-July

5. Republican River Compact Rules

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 has formed a Special Advisory Committee to provide advice and recommendations on the rules. The first meeting will be held on July 19, 2016 in Burlington, Colorado.

6. 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 to dismiss and motions for summary judgement by February 29. Responses to these various motions were filed on April 8, 2016. All motions are fully briefed and pending Court decisions. The resolution of these motions will determine which issues remain and how long trial will last.

7. 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 from irrigation 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. At the end of June, the Engineers and the CWCB entered stipulations, both of which were approved by the Water Court. All other parties to the case also entered stipulations.

8. 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 in this 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. Briefing was completed in mid-June. The parties requested oral argument and are awaiting a court order granting oral argument.

9. Upper Colorado River Basin System Conservation Pilot Program

The Unit is coordinating round two of the Upper Basin pilot program for 2016. This includes drafting and finalizing 25 contracts between the Upper Colorado River Commission and water users, and related funding agreements and verification plans. The Unit is also involved in strategizing next steps for demand management plans – including consideration of extending the pilot program for another year and evaluating lessons learned so that the Upper Division States can consider whether and how to establish a longer term demand management program for drought contingency in the future.

10. Drought 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 prepared to respond, if needed, to extended drought so as to protect key operations from Lake Powell, including hydropower production and compact compliance.

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. The Unit drafted and finalized the state's comments to the public Draft EIS, which was submitted on May 9, 2016. Concurrently, the Unit is coordinating with the 7-States and Department of the Interior to identify improvements that need to be made before it is made final.

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 late-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.

Endangered Species Matters

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

We are still waiting for the court to accept the proposed settlement agreement filed by the States of Arizona and Utah and the United States. Plaintiff-intervenors the States of Colorado and New Mexico 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.

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

Merits briefing in this case continues to be postponed pending the outcome of a motion to complete the administrative record filed by WildEarth Guardians

(plaintiffs in a parallel, consolidated case). On May 13th WildEarth Guardians filed supplemental briefing objecting to the U.S.'s revised privilege log and renewing its objection to approximately 950 documents withheld under the attorney-client privilege.

15. 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. In May, however, the U.S. withdrew its notice of appeal, and the district court's opinion is now final. Through its membership in the Western Association of Fish and Wildlife Agencies, Colorado is a defendant-intervenor in separate challenge to the lesser prairie chicken listing, *Defenders of Wildlife v. Jewell*, which is being heard in the Northern District of Oklahoma. That case is currently stayed.

16. Challenges to BLM's Greater Sage-grouse Land Use Plans

Eight separate challenges have been filed in various federal district courts challenging BLM and the U.S. Forest Service decisions in 2015 to amend multiple land-use plans to enhance conservation measures for the greater sage-grouse. Plaintiffs are: the Wyoming Stock Growers Association; Wyoming Coalition of Local Governments; the State of Idaho; the Attorney General of Nevada along with some Nevada counties and a mining entity, Western Exploration; the State of Utah; a set of environmental groups led by Western Watersheds Project; the American Exploration and Mining Association; and Western Energy Alliance and the North Dakota Petroleum Counsel. Motions for summary judgment have been filed in the Utah and Nevada cases, but briefing is not yet complete in any of the cases.

WATER RIGHTS MATTERS

17. Danis, Thomas & Lucy, Case No. 12CW193, Div. 5

The CWCB entered into a stipulation with the applicant on June 28, 2016 in this case involving new appropriations for ponds, a change in water right and an augmentation plan for the ponds. Even though the case involved relatively small amounts of water, the engineering and accounting were complicated. Staff worked with the applicant's engineer to make sure the dry up was adequate, depletions would be replaced, return flows maintained and to keep diversions and releases from the ponds in check in order to protect the instream flow rights on Capitol Creek, Snowmass Creek and the Roaring Fork River.

18. Breem Ditch Forest Service Issue

In 2010, the CWCB and Skyland Metropolitan District acquired the senior Breem Ditch water right, located on Washington Gulch, tributary to the Slate River. The CWCB and Skyland Metropolitan District changed the water right from irrigation to instream flow and municipal uses, respectively. As part of the decree, the CWCB was required to install a new measurement device and complete some work on the ditch. After trouble accessing the headgate and measurement point location on the objectors' neighboring property, the CWCB and Skyland decided to use the existing ditch easement for the Breem Ditch to reach the headgate location on Washington Gulch, which was accessible, but only by crossing a corner of U.S. Forest Service property at the edge of the Gunnison National Forest. After the Objector complained to the U.S. Forest Service, the Forest Service issued a Cease and Desist Order to the CWCB and Skyland to stop using the Breem Ditch to transport motorized vehicles due to a lack of an easement or special use permit allowing access after the initial construction on the measurement structure was complete. Although Brian Epstein was able to obtain temporary access authorization for small motorized vehicles to conduct inspections and repairs at the new measurement structure for 2015 and 2016 from the Forest Service District Ranger, the Attorney General's Office has completed extensive research to draft a response to the Cease and Desist Order, which is expected to be finalized and transmitted to the Forest Service by the end of July.