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STATE OF COLORADO
DEPARTMENT OF LAW

Office of the Attorney General

September 7, 2016

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 has issued a draft first report covering New Mexico's motions to dismiss and the motions to intervene by the two local irrigation districts. The Report recommends denying the motion with regard to dismissing Texas, but not allowing the U.S. to assert compact claims. Instead the special master recommended the Court exercise its non-exclusive jurisdiction to hear the reclamation law claims of the U.S. The report also denies the motions to intervene. At the invitation of the special master, Colorado submitted letter comments to the draft. While not taking issue with the legal rulings, the state did suggest that the special master delete over 150 pages of historical analysis from the report, much of it based on independent investigation by the special master. Colorado also identified several areas where it believes the report contains factual errors or confusing statements. The special master is now considering the comments submitted by all the parties before issuing a final report to the Supreme Court.

2. Rio Grande Silvery Minnow

The US Fish and Wildlife Service is in the process of finalizing a Biological Opinion on water use in New Mexico with regard to the silvery minnow, a listed endangered species. The Bureau of Reclamation has made a request to the Rio Grande Compact Commission to provide a statement to the FWS regarding modified reservoir operations as they fall within the purview of the Rio Grande Compact, with the goal of identifying certainty in Reclamation's planned operations. The Compact Commission met on August 31st in El Paso, Texas and approved a motion to submit a letter to Reclamation that highlights: (a) the history of Commission and federal government collaboration on silvery minnow matters; (b) the need to consider

conditions on an annual basis due to varying hydrology; and (c) commits the Engineering Advisors for the Commission to consult with Reclamation to address spring flows as appropriate. A final Biological Opinion is expected in the next few weeks.

3. 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.

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. To this end, the Unit continues to coordinate with Colorado's ARCA representatives and Division Engineers to devise a resolution that would clarify accounting under the 1980 Operating Agreement to which both Colorado and Kansas would agree. To date, Colorado has provided a draft resolution, and Kansas has responded with comments and edits. Colorado is in process of evaluating the edits and determining how best to proceed in anticipation of the ARCA meeting in December.

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

Colorado and Kansas HAVE AGREED to a long term plan to resolve their disputes in the Republican River Basin. Since the Compact was signed in 1943, this is the first time the states have resolved their disputes over Compact compliance without resorting to litigation or arbitration. It would not have been possible but for the commitment and creativity exercised by state representatives and counsel as well as affected water users. Among the many aspects of the agreement, there are three major points. First, the agreement allows Colorado to operate its Compact Compliance Pipeline. The pipeline delivers water from groundwater wells to the Republican River. Under the agreement, the deliveries directly offset depletions from pumping other wells. Second, the agreement requires Colorado to remove from irrigation 25,000 acres in the South Fork basin by 2027. Those lands will be removed from irrigation using voluntary programs like the Conservation Reserve Enhancement Program and additional funding from the Republican River Water Conservation District. Third, and most importantly, the agreement dictates that so long as Colorado complies with the terms of the agreement, it is in compliance with the Compact and Final Settlement Stipulation.

6. 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 committee has met twice in Burlington, CO to discuss the proposed rules. The committee is expected to meet again in October, where they will discuss the first full draft of the proposed rules.

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. 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. The parties filed multiple motions for summary judgment, determinations of questions of law, and to dismiss on April 8, 2016. All motions are fully briefed, and as discussed below, the Court has ruled on two of the three claims.

On August 29, 2016, the Court issued an order granting the Groundwater Commission's motion to dismiss two of the three claims in the case for lack of subject matter jurisdiction. The Court reasoned that the Foundation was seeking declaration about a remedy without first obtaining a decision from the Commission that the NHP water no longer meets the definition of designated groundwater. The Court walked through the *Gallegos* Supreme Court opinion reasoning to find that until the Commission determined that the water did not meet the definition of designated groundwater, the question of the remedy once such a determination is made is not ripe. So the Foundation must get the Commission to determine that NHP no longer meets the definition of designated groundwater and then the Commission determines the remedy. If the remedy is limited by Senate Bill 52, then the Foundation has a ripe controversy for a court to hear. But if the Commission determines that NHP still meets the definition of designated groundwater, then the question of the constitutionality of Senate Bill 52 is moot. The Court followed this exact same reasoning in dismissing the claim that the Groundwater Management Act is unconstitutional. The claim that the State Engineer is not properly administering the Compact remains and the remaining pending motions will direct the future course of this case.

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 Environmental Impact Statement 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 the National Environmental Policy Act 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 an order from court granting oral argument.

9. Upper Colorado River Basin System Conservation Pilot Program

Round two of the Upper Basin pilot program for 2016 is currently being implemented. The Unit has completed 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 work in conjunction with CWCB staff to spearhead talks with the Upper Division 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. The negotiating representatives are close to finalizing a draft agreement for the Upper Division States and federal leadership to evaluate and consider.

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. The EIS is estimated to be made final in the October/November timeframe and a Record of Decision completed in December 2016. The Unit will continue to work in conjunction with CWCB staff, Colorado's representative for the Adaptive Management Working Group, and Interior

representatives to make sure the final documents acknowledge Colorado's key interests and concerns.

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 before the end of 2016. Whether that will be possible depends heavily on the extent to which the two countries can agree on how to address the drought conditions in the basin. 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. New Mexico Dep't of Game and Fish v. U.S. Dep't of the Interior (Tenth Circuit) (Mexican wolf)

In late July and August, the federal government and defendant-intervenor environmental groups in this case filed an appeal with the Tenth Circuit challenging the district of New Mexico judge's injunction halting further introductions of Mexican wolf pups into New Mexico until FWS secured the required state permits. Colorado, Utah and Arizona have agreed to file an amicus brief supporting New Mexico. A number of other states have also expressed interest in joining the brief. Briefing begins next month, and our amicus brief is due on November 4.

14. Center for Biological Diversity v. Sally Jewell (D. Colo.) (Rio Grande cutthroat trout)

On July 29, the Center for Biological Diversity filed suit against the Department of Interior and the US FWS challenging FWS's October 2014 determination that ESA protection for the Rio Grande cutthroat trout was not warranted. Colorado Parks and Wildlife's aquatic section has worked closely with New Mexico Department of Game and Fish, ten Colorado counties, and federal land management agencies on a conservation strategy for the species, and FWS acknowledged in its not warranted decision that the multi-party conservation strategy was key to its decision not to list the trout. We are currently in discussions with our clients and with NMDGF

regarding our likely intervention as defendants in this case. Federal defendants' answer is due on September 27.

15. 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 multiple motions to complete the administrative record. One of the plaintiffs in a parallel consolidated case, the Center for Biological Diversity has until August 31 to file a new motion to supplement the administrative record. Assuming the Center files a motion, the United States has until October 3rd to file a response. On a separate record dispute, the court has not yet ruled on briefing objecting to the U.S.'s revised privilege log and the approximately 950 documents withheld under the attorney-client privilege. Colorado is not participating in the briefing on record disputes. At this point it is unlikely that merits briefs will be due before early 2017.

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

Multiple 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. Motions for summary judgment have been filed in the Utah and Nevada cases, but briefing is not yet complete in any of the cases. In July, the United States filed a motion to sever and transfer certain claims to the district court in the District of Columbia. These claims include challenges to the Northwestern Colorado greater sage-grouse BLM plan. No orders have been issued yet regarding the motions to sever and transfer. At this time, Colorado has not joined any of the lawsuits.

17. 60-day Notice of Intent Letter Announcing a New "Deadline Suit"

On August 23, the Center for Biological Diversity notified US FWS of its intent to sue FWS under the ESA for failing to make required 12-month findings on petitions to list 417 species as threatened or endangered. FWS has sixty days in which to reach agreement with CBD as to action it will take to cure the statutory violations; after the 60-day period, CBD may file suit in federal district court to enforce the provisions of the statute.

The 60-day letter is notable because a settlement agreement signed in 2011 has been preventing CBD from filing "deadline suits" (i.e., suits alleging FWS violated the ESA by failing to meet statutory deadlines in the listing process) concerning more than ten species a year from FY 2012 through FY 2016. By the time the 60-day period of this new notice has run, however, CBD will no longer be limited by the

settlement agreement, and the organization has jumped on the opportunity by threatening to challenge FWS regarding deadlines for over 417 species.

The last set of deadline suits filed by CBD and WildEarth Guardians resulted in the infamous 2011 multi-district litigation settlement agreements (referenced above), which set a series of court-mandated deadlines for listing decision for hundreds of species. These so-called MDL agreements established the listing deadlines for, among others, the lesser prairie chicken, the Gunnison sage-grouse, the greater sage-grouse, the Rio Grande cutthroat trout, and the wolverine. Final listing decisions made pursuant to the settlement agreement for all these species except the greater sage-grouse have been or are currently being challenged in court.

Most of the species listed in the new letter occur in the southeastern US, but two are resident in Colorado: the southern white-tailed ptarmigan and the plains spotted skunk. FWS has already scheduled a 12-month review decision for the ptarmigan for 2018.

WATER RIGHTS MATTERS

18. Decrees issued for CWCB's Instream Flow Water Right on Spottlewood Creek (Case No. 15CW3167) and Natural Lake Level Water Rights on Spottlewood Lakes #1-4 (Case No. 15CW3172), Water Division 1

In mid-August 2016, ~~t~~The Water Court of Water Division 1 issued final decrees for the CWCB's instream flow water right on Spottlewood Creek and for the CWCB's natural lake level water rights for four ponds known as Spottlewood Lakes #1-4. Both the instream flow water right and the four ponds are located on Spottlewood Creek, a small spring-fed stream that flows from Wyoming into Colorado and is located within the Soapstone Prairie Natural Area owned by the City of Fort Collins. The City of Fort Collins and Colorado Parks & Wildlife recommended the instream flow and natural lake level water rights to preserve the unique aquatic insect, fish habitat, and riparian vegetation found in the watershed. The natural lake level water rights will preserve the lake levels of four small ponds located on a wetland-like section of Spottlewood Creek that functions like an oasis for the arid region's wildlife, insects, reptiles, and amphibians.