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**STATE OF COLORADO**  
**DEPARTMENT OF LAW**

**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  
Jen Mele, Acting 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

All parties and potential intervenors have submitted comments to the Special Master's draft first report. The parties continue to contemplate settlement options, but there are no new developments to report.

2. Division 3 Ground Water Rules, 15CW3024

Trial of the State Engineer's proposed groundwater rules as filed in Water Division 3 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. Most recently, the Unit successfully argued for adoption of a CMO that requires protesters to the rules to specifically identify their protests so that the State Engineer can identify the scope of the CRCP 26(a)(2) disclosures that he must make. These specific statements were filed on September 15. The Unit is working with the State Engineer to plan expert disclosures, which must be filed by January 5, 2017. The Unit continues to meet with protesters to the rules to explore settlement. Of note, the Unit has successfully negotiated settlement with a significant party, and is close to settlement with several others.

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. Except for preparing for the Arkansas River Compact Administration Meeting set for December, there is nothing new to report at this time.

### 4. Colorado's Compact Compliance Pipeline (CCP) and Bonny Reservoir Disputes

Colorado, Kansas and Nebraska continue to work together to identify how to best implement the long-term plan to resolve their disputes in the Republican River Basin. Specific to Colorado, the Unit is working with the Compact Commissioner and Kansas representatives to identify the 25,000 acres to be removed from irrigation by 2027 under voluntary programs like the Conservation Reserve Enhancement Program and other funding sources.

### 5. Republican River Compact Rules

The Unit has been coordinating closely with the State Engineer to develop rules for 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 frequently in Burlington, CO to discuss the proposed rules. In September, the Committee seemed to understand and grasp the reasoning behind promulgating rules. The Committee is expected to meet again in early November, where they will begin discussing the details of the rules to accomplish the intended goals.

### 6. Hutton v. Wolfe, et. al, 15CW3018

The Unit represents 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. Multiple motions for summary judgment, determinations of questions of law, and to dismiss have been filed.

On August 29, 2016, the Court issued an order granting the Groundwater Commission's motion to dismiss two of the three claims for lack of subject matter jurisdiction. The Court held 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. The Foundation must, therefore, 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.

The Foundation now seeks certification to appeal that ruling as a partial final judgment. However, because several other dispositive motions are fully briefed and awaiting order, all the defendant parties oppose an appeal on this issue alone. The Unit will be taking the lead for all defendants in drafting a response arguing there is "just reason for delay" until all motions are resolved and an appeal of all issues is ready.

7. 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 an order from court granting oral argument.

8. Upper Colorado River Basin System Conservation Pilot Program

Round two of the Upper Basin pilot program for 2016 is coming to a close. 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 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. This has involved negotiating and finalizing amendments to the Facilitation Agreement, coordinating completion and issuance of RFPs for new project proposals, and coordinating project funders and the Upper Colorado River Commission on funding and project selection criteria moving forward.

#### 9. 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 at Lake Powell, including hydropower production and compact compliance. The negotiating representatives have finalized a draft agreement for the Upper Division States and federal leadership to evaluate and consider, with the goal of having it completely finalized by mid-December.

#### 10. Glen Canyon Dam Long-Term Experimental Management Plan – EIS

The Department of the Interior issued the Final Environmental Impact Statement for the Glen Canyon Dam Long-Term Experimental Management Plan on October 14, 2016. The Unit is reviewing the Final EIS and coordinating potential comments that serve the interest of the 7-Basin States, the Upper Colorado River Commission and the state of Colorado before the 30 day deadline expires on November 14. Concurrently, the Unit continues to consult with the Department of the Interior on next steps, including but not limited to the science plan and budgeting of experiments through the Adaptive Management Program as well as the completing the Record of Decision for the LTEMP. The focus of the Unit's efforts continue to be on scope of activities, experiments to be conducted, learning to be gained, and consideration of funding and resources during the process. This has been, and continues to be an extensive, ongoing effort in which the Unit works in conjunction with CWCB staff, Colorado's representative for the Adaptive Management Working Group, and Interior representatives to help ensure the final documents acknowledge Colorado's key interests and concerns.

#### 11. 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 is to finalize a new Minute before the end of current federal administration in mid-January. 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 key terms for hydrology, salinity, the environment, projects and other categories. 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.

## 12. Lake Powell Pipeline

On October 24, 2016 the Utah Division of Water Resources filed a 592 page response to FERC's Request for Clarification and Additional Information filed July 26, 2016. In this letter, UDWR also noted that it intends to provide additional responses to the substantive comments made by BLM and NPS by March 31, 2017. The Unit is working in conjunction with the CWCB to evaluate and monitor this project to protect the state's interests in the Upper Colorado River Basin.

## 13. Animas La Plata Project – 13CW3011, Div. 7

On September 14, the Southwestern Water Conservation District filed a motion for Supplemental Findings of Fact, Conclusions of Law, Judgment and Decree to include a structure related to a conditional water right that the applicant claims was inadvertently omitted. On October 21, 2016 Judge Lyman granted the unopposed motion to grant additional time to respond to the Applicant's Motion. The Applicant and Objectors (including the CWCB) have reached tentative agreement regarding the language to be included in a supplemental decree to include the structure omitted from the November, 2015 decree regarding one of Southwestern's conditional water rights. This motion will likely be filed early in November, and hopefully avoid additional litigation related to the Project.

## 14. Florida v. Georgia, No. 144, Original

Colorado filed an amicus brief in this original action before a Special Master of the United States Supreme Court because of the State's interest in interstate water disputes and their potential to affect future apportionments of Colorado's interstate streams or interpretations of its interstate water compacts. The brief explained the appropriate burden of proof to equitably apportion the Apalachicola-Chattahoochee-Flint River Basin. Contrary to previous precedent on the issue, throughout discovery and in its pretrial brief Florida argued it must only prove its injury, at which point the burden shifts to Georgia to prove that its upstream diversions are justified. Colorado explained in its brief that Florida mistakenly relies on *Colorado v. New Mexico*, 459 U.S. 176 (1982), and that the burden of proof remains at all times on Florida to prove the extent of its injury and that it is entitled to the relief requested.

15. Petition for Writ of Cert, Ark Initiative v. Tidwell, No. 14-5259 (D.C. Cir.)

On behalf of the Department of Natural Resources, the Department of Law filed an amicus brief in support of the Colorado Roadless Rule before the D.C. Circuit Court. Earlier this year, that court upheld the Colorado Rule. Ark Initiative petitioned the United States Supreme Court for certiorari. The Court denied the petition, upholding the Colorado Rule. The State of Colorado had several interests to protect in this case. Colorado invested substantial time, energy, money, and political capital in creating the Colorado Roadless Rule. It petitioned the Forest Service to adopt the Rule and created a state task-force to help identify the best lands for roadless designation while protecting Colorado's economy, future development, state lands, and infrastructure. The Rule also represents a milestone achievement in cooperative federalism.

*ESA Related Matters*

16. New Mexico Dep't of Game and Fish v. U.S. Dep't of the Interior (Tenth Circuit) (Mexican wolf)

The US Department of the Interior and defendant-intervenor environmental groups filed an appeal with the Tenth Circuit challenging a preliminary injunction issued by a district court judge in New Mexico halting further introductions of Mexican wolf pups into New Mexico until US Fish & Wildlife Service 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. The parties have filed their opening briefs. Our amicus brief has been drafted and is due on November 4.

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

The district court approved a proposed settlement agreement between the original parties. New Mexico and Colorado both declined to join the settlement agreement and agreed to voluntarily dismiss their claims upon approval of the settlement agreement. We filed our voluntary dismissal on October 24<sup>th</sup>. Under the terms of the settlement agreement, the US Fish & Wildlife Service will submit a final recovery plan for the Mexican wolf by the end of November 2017.

18. Rocky Mountain Wild v. Walsh (D. Colo.) (Graham's and White River penstemon)

On October 25, 2016, a federal judge in the District of Colorado issued an order vacating a US Fish & Wildlife determination not to list two flowers as threatened or endangered under the ESA. The flowers – Graham's and White River beardtongue, or penstemon – are found exclusively in oil shale and tar sands formations in

northwestern Colorado and northeastern Utah. FWS elected not to list the two flowers based on a 15-year conservation agreement reached in 2014 to protect the two species. The court found that the Conservation Agreement (a) was too speculative and (b) did not go far enough in protecting the flowers to support a decision not to list them under the ESA. The court also ordered the parties to meet and confer by February 2017 to attempt to strengthen the Conservation Agreement enough to satisfy ESA requirements. Colorado did not sign the original Conservation Agreement (and was not a party to the litigation), but will likely participate in the meet-and-confer to monitor the terms of any new agreement.

19. 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 US Fish & Wildlife Service'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 Division 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. Federal defendants filed their answer on October 26. We will file a motion to intervene on behalf of the defendants to support the not-warranted finding.

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

The court has approved a schedule for merits briefing in this case challenging the "threatened" listing issued in 2014 for the Gunnison sage-grouse. Our opening brief is due December 19. The court denied WildEarth Guardians' previously-filed motion to supplement the record with over 900 documents withheld under the attorney-client privilege.

### INTRASTATE MATTERS

21. Application of Upper Eagle Regional Water Authority, Case No 15CW3032 (Water Div. 5):

On September 29, 2016, the CWCB signed a stipulation with Upper Eagle Regional Water Authority in the Authority's Case No. 15CW3032. The application involved a request for new conditional groundwater rights for up to six alluvial wells to be drilled near the confluence of the Eagle River and Lake Creek, and a plan for augmentation to augment out-of-priority lagged well depletions. The Authority intended to use the water to serve its various customers throughout its service area in the Eagle River valley. The CWCB filed a statement of opposition to ensure that

its instream flow water rights on the Eagle River would not be injured by out-of-priority diversions. After negotiations between the CWCB and the Authority concerning the legal and engineering approach to be used for determining the location of stream depletions from the wells, and terms and conditions for administering the plan for augmentation, the Authority agreed to determine, at the time of well construction, which stream would experience the lagged stream depletions. The stipulated decree ensures that a well drilled closer to the Eagle River than to Lake Creek, and operating out-of-priority while the CWCB's instream flow rights are calling for calling, will be augmented by the Authority's upstream Eagle River replacement supplies. The CWCB worked with the Division Engineer's office to ensure that other terms and conditions proposed by the Authority would be administrable and protective of the instream flow rights, and the parties executed a stipulation. As of the date of this report, the Authority's motion for entry of decree was pending before the Division 5 Water Court.

22. Animas-La Plata Water Allocation Sale to La Plata Archuleta Water District

The CWCB entered into an option purchase agreement to sell 2495 acre-feet of supply allocation in the Animas-La Plata Project, Lake Nighthorse on October 1, 2014 to the La Plata Archuleta Water District. The agreement allows the La Plata Archuleta Water District to purchase at least 59.9 acre-feet of supply allocation in the fall of every year for 40 years. The agreement includes provisions for the La Plata Archuleta Water District to pay any additional pro rata amount billed by the US Bureau of Reclamation for the Project, so the annual amount may increase when the US finalizes the costs for the Project. In addition, La Plata Archuleta Water District agreed to pay the annual operations and maintenance costs associated with the Project for the full amount of allocation subject to the option purchase agreement during the life of the agreement. The 2016 option transaction was completed in September 2016, by which the CWCB sold 59.9 acre-feet of supply allocation to La Plata Archuleta Water District and the District paid the \$207,731.40 and renewed its commitment to pay any additional amounts charged by the US and to pay the operations and maintenance costs for the full remaining optioned amount.

23. Case No. 14CW3028, Water Division 6 – Application of M/R White River Ranch

The CWCB reached a stipulation in this matter on October 24, 2016. The application was to change the point of diversion for a portion of a conditional water storage right to a different tributary of the White River. The Stillwater Reservoir First Enlargement water right was originally decreed for more than 10,000 acre-feet as an enlargement of a reservoir to be constructed on the South Fork of the White River. The reservoir was never built and the original owner conveyed the conditional water rights primarily to oil and gas companies. The Applicant in this case acquired 100AF of the conditional enlargement right and applied in this case to



move it to multiple smaller ponds on a tributary downstream, Miller Creek. The CWCB holds decreed instream flow water rights on Miller Creek (1977 appropriation) below the new ponds and on the White River between the upstream location and the confluence with Miller Creek. The Applicant originally claimed that it could divert the water right under its senior priority (1955) at the new location. The Applicant claimed that the full 100 AF was fully consumable. The case required significant negotiations because applicant originally refused to conduct a contemplated draft analysis, and then the analysis provided was very poor and based on inappropriate assumptions. The original application dewatered a portion of the instream flow reach and allowed diversions on Miller Creek based on the enlargement's priority to the detriment of the instream flow on Miller Creek. Ultimately, the applicant abandoned 55.94 AF of the 100 AF to the stream because it decided not to construct several of the original ponds. This reduction in use coupled with terms and conditions which require the applicant to cease all diversions if the instream flow and any other senior Miller Creek water rights are calling were sufficient to satisfy the CWCB that the instream flow would be protected. Our stipulation specifically addresses the fact that the contemplated draft analysis is not appropriate. This case was in front of the water referee and was not set for trial. The CWCB will continue to monitor the case for the final decree based on stipulations with other parties.

#### 24. Chatfield Reallocation Shares Sale to Castle Rock

In 2015, the CWCB entered into a 15 year agreement with Castle Rock to sell 87 acre-feet of shares in the Chatfield Reallocation Project every year. The 2016 installment was completed earlier this month with the wire transfer being completed on October 24, 2016. Castle Rock pays \$609,000 for each installment of 87 acre-feet of shares and agrees to pay all operation and maintenance costs on all remaining shares that are protected by the option for the life of the agreement. Castle Rock has requested to increase the total amount of shares that are subject to this agreement, and the work to amend the purchase agreement will begin now that the 2016 installment is complete.