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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

The Special Master filed his First Report with the U.S. Supreme Court. In it, the Special Master recommends denying New Mexico's motion to dismiss and the motions to intervene by two local water districts. The Report is nearly 300 pages long and includes an extensive factual and historical analysis based on the special master's independent investigations. As a result, the Report makes findings about many issues that the parties had not raised. The Unit is in the process of drafting potential exceptions to the First Report for the Justices to consider. All of the parties have jointly requested an extension for filing exceptions until June 9.

2. Division 3 Ground Water Rules, 15CW3024

The Unit continues to prepare for trial in January 2018 of the State Engineer's proposed groundwater rules as filed in Water Division 3. Concurrently, the Unit, in coordination with the Division of Water Resources, continues to conduct settlement discussions with more than 20 parties. Finally, the Unit continues to participate with representatives from the Division of Water Resources in working groups aimed at informing water users about administration under the new groundwater rules

3. Arkansas River Compact Administration

After months of discussions and negotiations, the State Engineers for Colorado and Kansas signed a tentative agreement on March 9 to allow, as a one-year program, the Lower Arkansas Water Management Association's Highland Canal water right to be used to fill the permanent pool at John Martin Reservoir for 2017. To finalize this great first step in assisting Colorado Parks and Wildlife's efforts to secure

water for the permanent pool at John Martin Reservoir, the Arkansas River Compact Administration conducted a special meeting to approve the program subject to certain conditions as spelled out in the agreement. This temporary program will be revisited at the 2017 annual meeting and the Special Engineering Committee meetings as needed.

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

Colorado and Kansas have nearly resolved the additional issues contained in their August 24, 2016 resolution. Those include the future of water in Bonny Reservoir and water short year accounting. The States have reached conceptual agreement on water short accounting for all past and future years. The States will adopt the accounting changes at their next meeting in Manhattan, KS on May 25. Those accounting changes will apply every year from 2007 forward.

5. Republican River Compact Rules

The Unit represents the State Engineer in this matter. The State Engineer has been 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 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 met with interested parties to seek stakeholder input. Several parties and their attorneys have provided comments on draft provisions of the rules. As a result of these comments and meetings, the State Engineer has decided to propose legislation that would grant jurisdiction to the Division 1 Water Court to promulgate the rules that would apply to designated basin wells. The legislation would also likely designate the Water Division 1 Water Judge as the Designated Basin Judge who would hear challenges to orders issued under the rules pertaining to designated basin wells. Counsel for several water users in the Basin have expressed interest in helping to draft that legislation. The State Engineer will not submit the rules to Water Court until the legislative process has run its course. The Unit will continue to work with the State Engineer and participate in any additional meeting as appropriate

6. 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. The parties previously briefed several issues related to Audubon's challenge of the Army Corps' decision under NEPA. The Department of Natural

Resources supports the Corps. The Judge has not yet issued a decision in the case, but recently denied Audubon's motion for status conference and site visit with the judge. Audubon filed the motion because it was worried that construction might begin before the Judge issues his ruling. Colorado DNR and the Intervenors opposed the site visit but not a telephonic status conference with the Judge to determine the status of his review. Federal Defendants opposed both.

7. Upper Colorado River Basin System Conservation Pilot Program

The Unit continues to coordinate funding and contracting agreements to implement Round 3 of the System Conservation Pilot Program in the Upper Colorado River Basin. On February 24, 2017, the Commission approved projects in Utah, New Mexico, Wyoming and Colorado for inclusion in Round 3. The Unit, therefore, is now in the process of negotiating funding and participation agreements with the Funding entities and water user participants, respectively. Because the Commission does not have full staff to coordinate the program, the Unit has also served to help ensure a path forward in the Upper Basin. This involves coordination meetings, accounting, contract development, discussions with water users, Commission briefings and outreach.

8. Drought Reservoir Operations

The Unit continues to await next steps on drought contingency planning throughout the basin before finalizing or revising the Draft MOA for drought operations on Colorado River Storage Project's primary reservoirs (Glen Canyon Dam, Flaming Gorge, Aspinall Unit, and Navajo Reservoir). The purpose of this MOA is to identify a process that will help the Upper Basin and Bureau of Reclamation prepare for declining reservoir storage and help maintain minimum power pool at Lake Powell. The purpose of this exercise is twofold: (1) to protect key operations at Lake Powell, including hydropower production and compact compliance in the face of extended drought consistent with existing laws and regulations for each facility; and (2) to preserve the Upper Colorado River Commissions' role in when and how to accomplish drought response in a manner that preserves collaborative relationships with federal agencies. Although the negotiating representatives have prepared a draft agreement, the state and federal decision makers have yet to decide if it will be executed or requires modification. Whether and when this agreement may be edited or executed will be linked to introducing and working with new leadership within the Department of the Interior and consensus among the Basin States and others on the Lower Basin Drought Contingency Plan.

9. Lower Basin Drought Contingency Plan

The Lower Basin has identified key terms of a draft drought contingency plan. The plan successfully includes California (along with Arizona and Nevada) in conserving

additional water to benefit storage at Lake Mead. However, unlike the 2007 Lower Basin shortage guidelines, where water simply stays in Lake Mead for the benefit of the system, this plan incentivizes, through a number of complicated and technical provisions, the voluntary conservation of water to be stored for use in later years. Moreover, it cannot be implemented as currently described without Congressional approval that would override current reservoir operations and accounting procedures under the Law of the River. The Unit is coordinating with the Colorado Water Conservation Board and Upper Colorado River Commission to evaluate the harm, and legal and policy implications of the plan, if any to the Upper Basin, and identify potential protections and mechanisms to ensure the plan is not implemented at the expense of interests in the Upper Basin. The success of the plan also depends in part on efforts and approval of new leadership in the Department of the Interior. The 7-States principals continue to work with Reclamation and its solicitors to coordinate with and brief the Department as negotiations progress.

10. Mexico Minute 32X Development

Minute 319, which addresses voluntary measures between the countries for sharing in shortages, providing flexibility in available water supplies, and benefits for the environment, will expire on December 31, 2017. The Basin States, U.S. and Mexico utilized extensive resources and personnel to try to finalize a new Minute with negotiating parties who had familiarity and understanding of the key issues. The Unit is coordinating with the Colorado Water Conservation Board, Upper Colorado River Commission, Lower Basin States, and Department of the Interior to reinstate discussions to finalize a new Minute before the end of the year. Meetings are set to occur throughout May to update domestic agreements and finalize the draft Minute 32X for consideration and potential execution in late summer or fall.

11. Agua Caliente Band of Cahuilla Indians et. al. v. Coachella Valley Water District, et. al., No. 15-55896 (9th Cir. 2017)

The 9th Circuit Court of Appeals recently decided an issue of first impression regarding groundwater and the reserved water rights doctrine. Ruling in favor of the Tribe, the Court held that the Winters Doctrine (applying reserved water rights to Indian tribes) does not distinguish between surface and groundwater. The District anticipates filing a petition for certiorari with the U.S. Supreme Court, which is due in early July. The western states are being asked to consider whether to author or join an amicus brief in support of the petition, which would be due by August 5. The Unit will consult with DNR, CWCB and the Division of Water Resources and coordinate with the Solicitor General and the Western Attorneys General Legal Action Committee to determine the implications for the state, and consider whether and to what extent Colorado should participate as an amicus.

ESA RELATED MATTERS

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

In February 2015, Colorado filed suit against the U.S. Fish & Wildlife Service challenging its decision to list the Gunnison sage-grouse as threatened. On February 28, the court approved a joint motion to stay the briefing pending mediation /settlement discussions. The parties conducted a full day mediation with a federal magistrate judge on April 25. No settlement was reached. The parties have tentatively agreed to meet for another half day of mediation in late May. If we continue to be unable to reach an agreement to settle the litigation, briefing will resume in early July. Lisa Reynolds x6252.

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

On July 29, 2016 the Center for Biological Diversity filed suit against the Department of Interior and the U.S. FWS challenging FWS's October 2014 determination that ESA protection for the Rio Grande cutthroat trout was not warranted. Federal defendants filed their answer on October 26. Colorado has been granted leave to intervene on behalf of the FWS. The court granted New Mexico Department of Game and Fish's motion to intervene as a defendant. Briefing on Plaintiffs' challenges to the administrative record has been extended until June 8th. Merits briefing will not begin until after record disputes have been resolved.

14. 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 FWS secured the required state permits. (Colorado filed a brief on behalf of 18 amici states). *Update:* On April 25, the Tenth Circuit issued an order vacating the preliminary injunction and remanding the case to the district court. The court based its decision on New Mexico's failure to demonstrate that it would suffer irreparable harm if the injunction did not issue; it did not make any findings on the likelihood of success on the merits of the case. New Mexico has confirmed it will continue to litigate the case before the district court. L

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INTRASTATE MATTERS

15. Upper Colorado River Endangered Fish Recovery Program

This program provides a “reasonable and prudent alternative” to avoid jeopardy for four endangered fish species in the Upper Colorado River Basin, via a series of programmatic biological opinions (PBOs) that authorize new and continuing water depletions from this part of the Colorado River and its tributaries. Last fall, the Center for Biological Diversity threatened to challenge the ability of the fish recovery program to authorize water depletions for new oil and gas projects in northwest Colorado. The Fish and Wildlife Service recently informed BLM that the Service will re-open “consultation,” i.e., re-analyze the projected impact of the oil and gas-related water depletions to determine whether they will jeopardize the continued existence of the four endangered fish species and if so, whether the recovery program sufficiently mitigates the impacts as to ensure the four species’ continued existence. Despite this effort, the Center for Biological Diversity filed a formal protest on April 10 with BLM regarding a planned oil and gas lease sale in and near the Pieceance Basin. In their protest, CBD argued that BLM failed to consider the impact of the new oil and gas leases on the four endangered fish in the Upper Colorado River Basin and that BLM could not legitimately rely on the Recovery Program, as it has done in the past, to provide “take coverage,” i.e., authorize under the ESA, the new oil and gas development. The Unit will continue to monitor this activity to evaluate and advise whether ongoing or future water uses protected under the program may be put in jeopardy.

16. Application for water rights by the Colorado Water Conservation Board on Fourth of July Creek in Gunnison and Hinsdale Counties, Case No. 16CW3066, Division 4

On March 13, 2017, the Water Court for Water Division 4 issued a decree for the Fourth of July Creek instream flow water right, for 1.1 cfs (April 1 – July 31) and 0.6 cfs (August 1 – March 31) to preserve the natural environment to a reasonable degree in the reach of Fourth of July Creek between the Fourth of July Creek headwaters to the Carris Thompson Ditch headgate, a distance of approximately 6 miles. No statements of opposition were filed and the Division Engineer filed a supportive Summary of Consultation.

17. Application for water rights by the Colorado Water Conservation Board on Little Cimarron River in Gunnison County, 16CW3064, Division 4

On March 27, 2017, the Water Court for Water Division 4 issued a decree for the Little Cimarron River instream flow right, in the amounts of 11 cfs (April 15- September 30), 7 cfs (October 1- October 31), and 4.6 cfs (November 1- April 14) to preserve the natural environment to a reasonable degree in the reach of Fourth of July Creek between the confluence with Firebox Creek to the confluence with Van Boxel Creek, a distance of approximately 7.55 miles. No statements of opposition were filed, and the Division Engineer filed a supportive Summary of Consultation.

18. Application for water rights by the Colorado Water Conservation Board on East Fork Turkey Creek in El Paso and Teller Counties, 16CW3075, Division 2

On April 6, 2017, the Water Court for Water Division 2 issued a decree for the East Fork Turkey Creek instream flow right in the amounts of 1.35 cfs (May 1 – August 31), 0.5 cfs (September 1 – November 30), 0.3 cfs (December 1 – March 31), and 0.6 cfs (April 1 – April 30) to preserve the natural environment to a reasonable degree. The reach of this instream flow right is approximately 3.43 miles, and extends from the headwaters of the East Fork Turkey Creek to the confluence with West Fork Turkey Creek. No statements of opposition were filed and the Division Engineer filed a supportive Summary of Consultation.

19. Concerning Water Rights of Four Star Oil & Gas Co., Chevron MidContinent LP, XTO Energy Inc., and BP America Production Co., Case No. 10CW7, Water Division 7

On March 31, 2017 the Colorado Water Conservation Board (CWCB) entered into a stipulation with the applicants in this case. The application was filed following the Supreme Court's decision in *Vance v. Wolfe*, 205 P.3d 1165 (Colo. 2009), holding that water diverted during the coal bed methane ("CBM") extraction process is beneficially used and requires a water right or augmentation plan if the water affects a surface stream, and also held that the CBM wells must be administered by the State Engineer. This case was stayed pending the establishment of the Rules and Regulations for the Determination of Nontributary Nature of Ground Water

Produced Through Wells in Conjunction with the Mining of Minerals, 2 CCR 402-17 (“Rules”). The Rules created the tributary boundaries of the Fruitland Formation, which dictates what CBM wells require water rights and augmentation plans. This application seeks an augmentation plan to replace out-of-priority depletions from all CBM wells that deplete the Pine River (Los Pinos River). The proposed augmentation plan assumes that the entire Fruitland Formation is completely dewatered by the pumping which is a conservative estimate of the potential impact on the river. The CWCB holds decreed instream flow water rights on the Pine River. The CWCB accepted the depletion engineering model and is satisfied that the model operates appropriately, and obtained terms and conditions in the decree to reflect that the instream flow rights are entitled to replacements by this augmentation plan in the event that the instream flow is not satisfied. The case is not currently set for trial and several opposers remain parties in the case. The CWCB will continue to monitor the case for a final decree.

20. Concerning the Application for Water Rights of Stillwater Ranch Open Space Association, Case No. 14CW3096, Water Division 5

On March 31, 2017, the Colorado Water Conservation Board (CWCB) entered into a stipulation with the applicant in this case. The application seeks a change of water rights for a portion of the Nellie Bird Ditch, multiple junior water rights, and an augmentation plan with appropriative rights of exchange. The water rights are located on the Roaring Fork River just upstream of the City of Aspen. During the first of 11 scheduled depositions, the parties began settlement discussions and reached a settlement in concept. A 6-day trial was scheduled to begin March 20, 2017, but was vacated in early March when the parties represented to the judge that settlement was imminent but more time was required to memorialize the settlement. The CWCB has agreed to a form of decree to which all parties have agreed, but the other parties have not yet entered stipulations because they require additional documents to finalize the settlement concept. The CWCB will continue to monitor the case for stipulations by the other parties and a final decree.

21. Application For Water Rights of the City of Ft. Collins, 14CW3176, District Court, Water Division 1U

Ft. Collins filed an application requesting a change of some of its water rights as well as for absolute storage rights for several off channel reclaimed gravel pits, approval of an augmentation plan for the ponds, including augmentation of periodic dewatering, as well as conditional appropriative rights of substitution and exchange. There are over a dozen objectors and progress has been slow in resolving the issues raised by the objectors. The CWCB is concerned that Ft. Collins has not shown a need for the claimed appropriation of return flows or for the reuse component of the changed right and therefore the proposed change is speculative. The CWCB is also concerned that the current proposed decree does not provide

notice to the CWCB when Ft. Collins proposes to use the changed water outside of its current service area in the vicinity of an instream flow right. The matter is set for a four week trial in October, and the Water Judge has mandated mediation, which will take place with retired Water Judge John Kuehnhold on August 21 and 22.