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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 Supreme Court is considering the Special Master's First Report, which recommends denying New Mexico's motion to dismiss and the motions to intervene by two local water districts. The Unit filed exceptions to the First Report regarding the factual conclusions that are unnecessary to decide the motions and the United States' role in the process. The United States, New Mexico, intervening water users and amici have all filed exceptions to consider as well. Texas did not. Responses to these exceptions are due in early August.

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. The State Engineer and the Unit had settlement meetings scheduled in Alamosa on June 14, and will return on July 17 for more meetings. The Unit has settled with seven parties as of June 29. 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.

3. Arkansas River Compact Administration

The Army Corps of Engineers and Arkansas River Compact Administration have both signed off on the Colorado and Kansas State Engineers' Agreement for 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. The Agreement is for a one-year period, but serves as the first important step to assisting Colorado Parks and Wildlife's efforts to obtain a permanent pool at John Martin Reservoir. 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 resolved all but one of the additional issues contained in their August 24, 2016 resolution. During their meeting in Manhattan, KS on May 25, the States agreed to accounting procedures for past and future water short years. The States also approved past years' accounting using those new accounting procedures. Such accounting changes will also apply every year from 2007 forward. The States are meeting on July 6 to discuss the future of water in Bonny Reservoir, which is the only remaining issue contained in their August 24, 2016 resolution.

In addition to the resolution issues, the State Engineer is exploring methods to address Nebraska's concerns with Colorado's past uses between 2005-2014.

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 commented on the second draft of the proposed legislation. We circulated a revised draft in response to their comments and have scheduled a deadline for their subsequent comments and will hold another meeting to discuss the legislation on July 19. 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. Jim Hutton Educational Foundation v. Wolfe et al., 17SA5

The Unit's counsel for the Groundwater Commission took the lead on the Answer Brief for the interlocutory matter up for appeal in this case. Specifically, the appeal focuses on the dismissal of Hutton's second claim, challenging the application of SB10-52, amending 37-90-106, C.R.S., as unconstitutional when applied to the Northern High Plains Designated Groundwater Basin. This provision covers the remedy available to a petition to change the boundaries of a designated groundwater basin. The Colorado Groundwater Commission intervened as a defendant and moved to dismiss this claim for lack of subject matter jurisdiction. The Commission is the agency charged with applying the statute, but Hutton had not yet asked the Commission to take action. The trial court granted the motion, agreeing that it did not have jurisdiction and that the matter was not ripe. All briefing has been completed but oral argument has not yet been set. Note: Counsel for the Division of Water Resources is not participating at this time in the appeal.

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. 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 Intervenor's opposed the site visit but not a telephonic status conference with the Judge to determine the status of his review. Federal Defendants opposed both.

8. 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. Thus far, projects in Utah Wyoming and New Mexico have been finalized. The final projects in Colorado and New Mexico are expected to be finalized this summer as well. 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.

9. Drought Reservoir Operations

The Unit is working in coordination with the Colorado Water Conservation Board and Upper Colorado River Commission to have the Upper Basin Drought Reservoir Operation Agreement finalized and ready to implement concurrently with a Lower Basin Drought Contingency Plan, and before risking critical elevations at Lake Powell. This Agreement is intended to set forth the process by which the Department of the Interior and Commission will work together to utilize the Colorado River Storage Project's primary reservoirs (Glen Canyon Dam, Flaming Gorge, Aspinall Unit, and Navajo Reservoir) to maximize beneficial use of Colorado River water in the Upper Basin during drought emergencies. In fulfilling this purpose, the Agreement focuses on: (1) protecting 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) preserving the Upper Colorado River Commissions' role in when and how to accomplish drought response in a manner that preserves collaborative relationships with federal agencies.

10. 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 operational, 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.

11. 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 has been coordinating with the Colorado Water Conservation Board, Upper

Colorado River Commission, Lower Basin States, and Department of the Interior to finalize a new Minute and related domestic agreements before the end of the year. Meetings to ensure consensus on language in the Minute and domestic agreements have been occurring regularly throughout May and June, and are expected to continue with a tentative deadline for finalizing by early fall.

12. Additional Agreements

As the Upper and Lower Basins continue to pursue drought contingency planning, the parties are concurrently pursuing additional agreements to help ensure respective interests and consensus can be maintained on river between now and 2026. These “Additional Agreements” include a Companion Agreement to the drought contingency plans that is signed by the Upper and the Lower Basins as well as the Department of the Interior, and a Triggering Agreement between the Governors’ Representatives for the 7-Basin States. The current expectation is for the Companion Agreement to accompany the final drought contingency plans for the Upper and Lower Basins, and is intended to set forth the parties’ understandings of how the plans will be implemented in a way that respects the interests of the respective basins.

The Triggering Agreement is related to how provisions of the Mexico Minute regarding Mexico’s drought contingency planning will be triggered when the Lower Basin Drought Contingency Plan is finalized. The Minute is expected to be executed prior to the drought contingency plans in the United States. However, Mexico’s plans to address drought contingencies are contingent upon the Lower Basin implementing its plan. In the interests of protecting and defining authorities for how the Mexico drought operations will be triggered, and to protect each state’s role regarding Colorado River operations, the 7-States’ Governor’s Representatives and Secretary of the Interior are working to finalize an agreement on how to trigger the key elements of the Mexico Minute in a way that respects interests and protects rights and obligations.

13. Water Bank Working Group

The Unit has been coordinating with the Colorado Water Conservation Board to help advise the Working Group on next steps and respond to characterizations regarding the role and purpose of the Group. Discussions continue as the parties investigate water banking options within the Colorado River Basin of Colorado.

14. Florida v. Georgia, No. 142, Original

Colorado is considering whether to draft an amicus brief in support of the Special Master’s Report, which recommends denying Florida’s request to equitably apportion flows in the Apalachicola-Chattahoochee-Flint River Basin. The Report

finds that Florida bears the burden of proving its injury and that its proposed remedy would redress that injury. In setting forth the burden of proof, the Report distinguishes this case involving two states that follow the doctrine of riparian rights, from earlier cases involving states that follow the doctrine of prior appropriation. The Report ultimately recommends denying Florida's petition for equitable apportionment because it finds Florida failed to prove that its proposed remedy—a cap on Georgia's consumptive use of water—would redress its injury.

In addition to strictly applying the burden of proof to Florida, the Report avoided Florida's argument that Georgia has a duty to conserve and augment stream flows for the benefit of Florida. Overall, the Report confirms Colorado's understanding of the law of equitable apportionment and does not appear to offer any arguments that might diminish Colorado's rights under its compacts or equitable apportionment decree. Colorado is meeting with counsel for Georgia to discuss what issues Colorado might address in an amicus brief.

INTRASTATE MATTERS

15. Application for water rights by the Colorado Water Conservation Board on Turkey Creek, in El Paso and Teller Counties, 16CW3085, Division 2

On May 16, 2017, the Water Court for Water Division 2, issued a decree for the Turkey Creek instream flow water right, in the amount of 3.7 cfs (5/1 - 8/31), 1.8 cfs (9/1 - 11/30), 1.0 cfs (12/1 - 3/31), and 2.7 cfs (4/1 - 4/30), to preserve the natural environment to a reasonable degree in the reach of Turkey Creek from the confluence of East Fork and West Fork Turkey Creeks to the confluence with an unnamed tributary, a distance of approximately 2.38. No statements of opposition were filed, and the Division Engineer filed a supportive Summary of Consultation.

16. Application for water rights by the Colorado Water Conservation Board on West Fork Turkey Creek, in El Paso, Fremont and Teller Counties, 16CW3086, Division 2

On May 16, 2017, the Water Court for Water Division 2, issued a decree for the West Fork Turkey Creek instream flow right in the amount of 2.1 cfs (5/1 - 8/31), 0.75 cfs (9/1 - 11/30), 0.5 cfs (12/1 - 3/31), and 0.75 cfs (4/1 - 4/30), to preserve the natural environment to a reasonable degree in the natural stream channel of West Fork Turkey Creek from its headwaters to the confluence with East Fork Turkey Creek, a distance of approximately 3.98 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 East Hawxhurst Creek, in Mesa County, 16CW3154, Division 5

On May 21, 2017, the Water Court for Water Division 5, issued a decree for the East Hawxhurst Creek instream flow right in the amount of 1.7 cfs (4/15 - 6/30), and 0.46 cfs (7/1 - 4/14), to preserve the natural environment to a reasonable degree in the natural stream channel of East Hawxhurst Creek from the outlet of McCurry Reservoir to the confluence with West Hawxhurst Creek, a distance of approximately 5.75 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 West Hawxhurst Creek, in Mesa County, 16CW3160, Division 5

On May 21, 2017, the Water Court for Water Division 5, issued a decree for the West Hawxhurst