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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, 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 that 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' compact claims. The United States, New Mexico, intervening water users and amici have all filed exceptions to consider as well. All parties and amici filed responses and sur-replies. Briefing was completed at the end of August. Oral argument, if any, has not yet been set.

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. To that end, the Unit is finalizing discovery and preparing motions for determinations of question of law regarding burdens of proof to streamline parts of the case. Concurrently, the Unit, in coordination with the Division of Water Resources, continues to conduct settlement discussions in Alamosa. 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. Colorado's Compact Compliance Pipeline (CCP) and Bonny Reservoir Disputes.

Colorado, Kansas, and Nebraska held the annual meeting of the Republican River Compact Administration in August. The State Engineer is exploring methods to

repay Colorado's past over-use between 2005 and 2014. During those years, Colorado exceeded its compact allocations by about 85,000 AF. For its 76,000 AF over-use, Nebraska was required to pay Kansas \$5.5 Million in Orig. No 126. Now Nebraska has been looking to Colorado to make up for Colorado's past overuse by delivering additional water from Compact Compliance Pipeline. The State Engineer is comparing the cost of pumping that water against cash payment to Nebraska and Kansas.

4. 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.

In response to jurisdictional concerns over the rules, the State Engineer has decided to propose legislation to grant jurisdiction to the Water Court, Division 1, to promulgate the rules that would apply to designated basin wells. We have met several times with attorneys who represent water users in the basin to discuss drafts of that legislation. The hope is to present a draft of the legislation the Interim Water Resources Review Committee once the draft legislation is near agreement amongst the water users and State Engineer. The State Engineer does not anticipate at this time submitting the rules to Water Court until that legislation has been finalized.

5. Tip Jack Simple Change case, 16CW3092

This case arises in the Republican River basin and involves a change of point of diversion. Plaintiff is The Hutton Foundation, which is also the Plaintiff in *Jim Hutton Educational Foundation v. Wolfe et al.*, 17SA5 (see below). The Unit, in coordination with the Water Resources Unit, previously filed a motion for determination for question of law regarding whether the case qualified under the simple change statute due to an intervening inflow between the decreed diversion point and the requested diversion point. Such an inflow would disqualify moving the diversion point under the statute (essentially because it defeats the presumption of no change to historical use). . In its Response to the Units' Motion, the Foundation included a cross-motion under C.R.S. § 37-86-111 (2016) (seeking an alternative means to move its diversion point without having to quantify historical use). The Units subsequently filed two separate documents, a Reply to their Response and a Response to the Foundation's cross-motion. In the Response to the cross-motion, the Units argue that § 37-86-111 – which was designed for lateral and upstream headgate relocations when there has been a change to a stream channel

because of events such as floods – does not permit the move contemplated by the Foundation, a move of over 2 miles downstream. Once the Foundation files a Reply to its cross-motion, the briefing will be complete.

5. Jim Hutton Educational Foundation v. Rein et al., 17SA5

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. The Unit's counsel for the Division of Water Resources is not participating at this time in the appeal. All briefing has been completed and oral argument is set for November 14, 2017.

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 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.

7. Upper Colorado River Basin System Conservation Pilot Program

The Unit continues to coordinate agreements and procedures for implementing Round 3 of the System Conservation Pilot Program in the Upper Colorado River Basin. Thus far, projects in Utah and Wyoming have been finalized. The final projects in Colorado and New Mexico are also close to finalization. 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. To this end, the CWCB staff coordinated

a tour in mid-August of some of the SCPP projects in Colorado for interested state, non-governmental organization and funding representatives. This tour provided much appreciated context to the size and scope of operations and considerations that the Upper Basin faces in implementing voluntary conservation for system benefits.

Currently the funding entities and Upper Colorado River Commissioner are considering next steps to the SCPP program. At the request of funders and other interested entities, the UCRC is exploring options for implementing a fourth and final round of the SCPP, as well as exploring lessons to incorporate for assessing whether and how to develop a broader demand management program if and when needed. The Unit is involved with CWCB staff in these endeavors.

8. Drought Reservoir Operations

The Unit is working in coordination with the CWCB 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.

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 CWCB 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. To this end, the Unit is also involved in discussing legislative options that would be applicable in the Upper and Lower Basins, respectively. 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. Additional Agreements

As the Upper and Lower Basins continue to pursue drought contingency planning, it has become apparent that additional agreements are necessary to protect respective interests and reach consensus on river operations 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. As part of this agreement, the parties are contemplating proposing joint legislation that would ensure the plans remain within the authorities of the parties involved and remain consistent with the Law of the River.

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 avoid political pressure to accept a Lower Basin plan that may otherwise be unacceptable to some parties, the 7-States’ Governor’s Representatives and Secretary of the Interior have finalized an agreement on how to trigger the key elements of the Mexico Minute in a way that respects interests and protects rights and obligations.

The Unit has coordinated with the Upper Colorado River Commission, CWCB and Department of Natural Resources to negotiate the final provisions for this agreement. It is now in the process of being reviewed by DOI leadership and respective boards for approval with an expectation that it can be finalized and approved by late September.

11. Mexico Minute 323 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. This new document, Minute 323, is in final form. The United States is poised to execute the document along with Mexico following completion of the approval process by relevant decision makers among the 7-Colorado River Basin States and federal agencies. To ensure no obstacles to executing the Minute, Reclamation has obtained approvals from the Senate Foreign Relations Committee on the content of the Minute, and the Department of State has subsequently noted its concurrence. Such approvals were premised in part on the federal government concluding a series of related domestic agreements with the 7-States that are related to Minute 323. These agreements include the Triggering Agreement (see above), a Memorandum of Assurances among the 7-Basin States and federal parties on how the Minute will be implemented and interpreted, a contributed funds agreement among lower basin entities and the Bureau of Reclamation, an interim operating agreement among the 7-States and Bureau of Reclamation on how to operate the reservoirs consistent with existing laws to accomplish provisions within the minute, and other related documents. The 7-States and other entities involved are in the process of obtaining approvals to execute these agreements. The expectation is that all agreements, including Minute 323, could be finalized and executed as early as late September or early October.

12. Water Bank Working Group

The Unit continues to coordinate with the CWCB to help advise the Working Group on next steps. Discussions continue as the parties try to map out what the next steps for investigating water banking options within the Colorado River Basin of Colorado continue.

13. Wildearth Guardians v. Jewell, 16CV1724, U.S. Dist. Ct., D.C.

Wildearth Guardians has challenged BLM's decision to lease lands for oil and gas development in Colorado, Utah, and Wyoming. In particular, Wildearth Guardians challenge the decision under NEPA for BLM's alleged failure to consider the potential cumulative impacts on the climate if all of those leases are developed. Colorado was granted intervention in this case, together with Wyoming and Utah. Plaintiffs have filed their opening brief for summary judgment. The Court recently granted an extension for responses. Those are now due on September 22. Colorado and Utah are collaborating with Montana on the response brief.

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

Colorado filed 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. Colorado's brief supported the recommendations of the Special Master and emphasized the importance of requiring the complaining State, Florida in this case, to prove its entire case by clear and convincing evidence.

15. 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. The Department of Natural Resources 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.

ESA RELATED MATTERS

16. 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. Update: Colorado filed its opening brief on July 21st. Petitioner-intervenor briefs from Utah and Gunnison County are due August 4th. The Federal Defendants' response brief is not due until November 6th.

INTRASTATE MATTERS

17. Application for Instream Flow Water Rights by the Colorado Water Conservation Board on Unnamed Tributary to Crooked Creek, in Park County, 16CW3135, Division 1

On July 7, 2017, the Water Court for Water Division 1 issued a decree for the Unnamed Tributary to Crooked Creek instream flow water right in the amount of 0.23 cfs (10/1 - 4/31), and 0.62 cfs (5/1 - 9/30), to preserve the natural environment to a reasonable degree in the reach of the natural stream channel of the Unnamed Tributary to Crooked Creek from its headwaters to the Silverheels Ditch headgate, a distance of approximately 3.86 miles. The City of Aurora filed a statement of opposition to ensure its water rights in the upper South Platte basin would be protected. Aurora stipulated without raising any major issues. The Division Engineer filed a supportive Summary of Consultation.

18. Application for Instream Flow Water Rights by the Colorado Water Conservation Board on Balm of Gilead Creek in Park County, 16CW3130, Division 1

On August 24, 2017, the Water Court for Division 1 issued a decree for the Balm of Gilead Creek Instream Flow Water Right in the amount of 0.6 cfs (5/1 - 8/31), 0.35 cfs (9/1 - 10/31), 0.24 cfs (11/1 - 3/31), and 0.35 cfs (4/1 - 4/30), absolute, to preserve the natural environment to a reasonable degree in the natural stream channel of Balm of Gilead Creek from its headwaters to the Bureau of Land Management (BLM) property boundary, a distance of approximately 4.49 miles. The City of Aurora filed a statement of opposition to ensure its water rights in the upper South Platte basin would be protected. Aurora stipulated without raising any major issues. The Division Engineer filed a supportive Summary of Consultation.

19. Application for Instream Flow Water Rights by the Colorado Water Conservation Board on Pruden Creek, in Park County, 16CW3131, Division 1

On August 24, 2017, the Water Court for Division 1 issued a decree for the Pruden Creek Instream Flow Water Right in the amount of 0.24 cfs (11/1 - 3/31), 0.4 cfs (4/1 - 4/31), 1.0 cfs (5/1 - 8/31), 0.4 cfs (9/1 - 10/31), absolute, to preserve the natural environment to a reasonable degree in the natural stream channel of Pruden Creek from the United States Forest Service (USFS) property boundary to the Bureau of Land Management (BLM) property boundary, a distance of approximately 0.49 miles. The City of Aurora filed a statement of opposition to ensure its water rights in the upper South Platte basin would be protected. Aurora stipulated without raising any major issues. The Division Engineer filed a supportive Summary of Consultation.

20. Application for Water Rights of Music Meadows LLC, Case No. 16CW27, Division 2

This case concerned an application for a change of water rights for several ditches in Custer County. Specifically, the Applicant sought changes in points of diversion and a correction of an established but erroneously described point of diversion under section 37-92-305(3.6), C.R.S. (2017). The Colorado Water Conservation Board opposed the application in order to protect several instream flow water rights on Grape and Music Pass Creek, creeks from which the Applicant's subject water rights are diverted. Applicant and the CWCB entered into a stipulation in which the CWCB acknowledges that the instream flow rights are subject to those of Applicant's uses that existed prior to the instream flow water rights pursuant to 37-92-102(3)(b), and prevents the Applicant from diverting beyond historical use of the water rights if the CWCB's instream flow water rights are not met.

21. Application for Water Rights of YMCA of the Rockies, Case No. 16CW3037, Division 5

YMCA filed an application for two exchanges and to change decreed points of diversion of existing conditional water rights on Pole Creek to locations downstream in order to facilitate their use with a more efficient and reliable infrastructure design. Each new point of diversion will consist of up to three wells or a single infiltration gallery, depending on the yield of water at each site. Each of the water rights may be diverted at either of the new points of diversion, but the original points of diversion were relinquished. YMCA dropped its claimed exchanges and after several additional revisions to the decree, the CWCB determined that its instream flow water right would not be injured by the proposed changes. The Court entered an order approving the stipulation with CWCB on August 18, 2017.

22. Application for Water Rights of the City of Ft. Collins, Case No. 14CW3167, Division 1

The City of Ft. Collins filed an application for new appropriations and changes of water rights, which the CWCB opposed in order to protect its instream flow water rights. The application in this case raised a number of key issues for the CWBC, including claims made by municipal applicants that are largely undefined in order to give the applicant more flexibility in the future as to how it can legally use the water right. After two days of mediation and prior to a five-week trial scheduled to begin October 1 2017, the CWCB reached a settlement with Ft. Collins, in which Ft. Collins agreed to post-decree notifications so the CWCB will get information on the actual intended use of the water right when such use is known.