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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

Texas has filed suit alleging that “various actions of New Mexico deprive Texas of water to which it is entitled under the 1938 [Rio Grande] Compact,” which equitably apportioned “the waters of the Rio Grande above Fort Quitman, Texas.” The United States moved to intervene to protect its interests “on the Rio Grande Project, a federal reclamation project operated by the Bureau of Reclamation.” In his First Interim Report, the Special Master recommended that the U.S. Supreme Court deny New Mexico’s motion to dismiss, but that it grant New Mexico’s motion to dismiss the United States’ complaint “to the extent it fails to state a claim under the 1938 Compact.” Moreover, to the extent that the United States has stated plausible claims against New Mexico under federal reclamation law, the Report recommends the Court extend its original, but not exclusive, jurisdiction to resolve the claim alleged by the United States. Colorado filed two exceptions to the First Interim Report regarding the factual conclusions that are unnecessary to decide the motions and the United States’ role in the process. The United States and New Mexico also filed exceptions regarding the United States’ authority and right to enforce interstate compacts and the justification for the conclusions and decisions set forth in the Report, respectively. Briefing on exceptions filed by the parties and informed by the amici was completed at the end of August. On October 10, 2017, the Court ordered the Clerk of the Court to “set the exception of the United States and the first exception of Colorado [regarding the role of the United States in compact cases] to the Special Master’s Interim Report for oral argument in due course.” The Unit has since confirmed that oral argument will likely be set for January 8, 2017. The Unit is coordinating with Colorado’s Solicitor General and Rio Grande water experts within Colorado, and others to prepare for the argument.

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. Discovery has ended, and the Unit is awaiting a ruling on a motion for determination of question of law that could streamline parts of the case. Concurrently, the Unit, in coordination with the Division of Water Resources, continues to conduct settlement discussions in Denver and Alamosa. The Unit achieved settlement with several parties in October, and expects to settle with at least nine more parties in November. Barring unforeseen developments, it appears that one major party will not agree to settle, thereby necessitating a two-three week trial (shortened from estimated 8-weeks) concerning the Rio Grande Decision Support System Groundwater Model and well impacts to specific water rights.

3. Arkansas River Compact Administration

The Unit has begun coordinating with the State Engineer and Director of the Colorado Water Conservation Board to prepare for the annual Arkansas River Compact Administration meeting scheduled for early December. The Unit is: (1) coordinating with Kansas to discuss potentially mutually agreeable modifications to the bylaws at the next ARCA meeting; (2) attending the Trinidad Project 10-year review meeting and evaluating draft documents from the Bureau of Reclamation regarding that review that will be a topic of discussion at the ARCA meeting; and (3) briefing the State Engineer and Director of CWCB, as new members of the Colorado ARCA team, on the primary issues and topics for the ARCA meeting.

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

The State Engineer is negotiating with Nebraska and Kansas to repay Colorado's past over-use of water between 2003 and 2013. The states have confirmed that during those years Colorado exceeded its compact allocations by about 90,000 AF. For its 76,000 AF over-use, Nebraska was forced to pay Kansas \$5.5 Million in Orig. No 126. Colorado has been meeting with Kansas and Nebraska to determine whether they can reach a monetary settlement that will address each party's interests and provide certainty for current and future operations within the Republican River Basin going forward.

5. Republican River Compact Rules

The Unit represents the State Engineer in this matter. The State Engineer was 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 worked with attorneys representing water users in the basin on legislation to grant jurisdiction to the Water Court, Division 1 to oversee rules that would apply to designated basin wells. After several meetings to develop draft legislation, certain stakeholders indicated that they would not support any legislation. They instead propose to encourage the legislature to amend the boundary of the Republican River Water Conservation District.

6. Jim Hutton Educational Foundation v. Wolfe 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. 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 the Foundation 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 Foundation has appealed and oral argument is set for November 14. The Unit's counsel for the Division of Water Resources is not participating at this time in the appeal. The Unit's counsel for the Groundwater Commission is leading the argument on appeal. All briefing has been completed and oral argument is set for November 14, 2017.

7. Jim Hutton Education Foundation Application for Change of Water Rights, 16 CW 3092

The Water Rights and Federal & Interstate Water Units are working together in this change case to protect the intrastate administrative interests and interstate compact interests governed by the Division of Water Resources that may be affected by this case. On October 27, the Units received a favorable ruling from the Division 1 Water court on their Motion for Determination of Question of Law and the Hutton Foundation's cross-motion. The Unit's motion had sought a ruling that the Foundation does not qualify for a change in point of diversion under the simple change statute due to an intervening inflow between the decreed diversion point and the requested diversion point. The Water Court agreed. The Foundation's cross-motion sought a ruling in the alternative that it qualified to move its headgate under §37-86-111, C.R.S. The Units argued in response that the Foundation's application did not properly notice this claim and therefore the court lacked

jurisdiction. Additionally, the response set forth that this statute – 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 the Foundation seeks, a move of over 2 miles downstream. The Division 1 Water Court ruled in favor of the Units on the resume notice question, finding it had no jurisdiction. The Units will monitor the case to see if the Foundation files an appeal.

8. Upper Basin Drought Contingency Planning - Drought Reservoir Operations

The Unit continues to work in coordination with the CWCB and Upper Colorado River Commission to have an 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 target 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. The Unit is currently working with the Commission's legal committee to finalize the terms of a draft agreement for review and consideration by the Commissioners and Department of the Interior prior to the Colorado River Water Users Association Meeting in December.

9. Lower Basin Drought Contingency Plan

The Lower Division States and primary water user entities are in the process of confirming mutual agreement on key terms of a draft drought contingency plan for the Lower Colorado River Basin. The plan, as currently drafted, 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, the 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 or at the cost of the Law of the River. 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 task their staff to work with Reclamation and each other to reach consensus, if possible, before operational considerations are made for the next water year.

10. Mexico Minute 323 Development

Minute 323 to the 1944 Water Treaty was entered into force on September 27, 2017 when the U.S. Department of State and the Mexican Ministry of the Environment announced that they have exchanged letters approving the Minute as executed by the countries' respective Commissioners to the International Boundary and Water Commission the week of September 18. This Minute is intended to extend the provisions of Minute 319 (which is set to expire at the end of the year), and to include provisions that involve Mexico participating in additional shortage sharing as part of drought contingency planning on the River. As part of this process, the 7-States' Governors Representatives and Federal Government also finalized and executed a number of domestic agreements. These Agreements are needed to ensure the Minute can be operational in the United States consistent with the consensus understanding of the rights and obligations under the Law of the Colorado River. The IBWC Commissioners and many of the 7-States Principals were in Santa Fe on September 27 to, among other things, participate in an "entry of force" ceremony among the countries.

11. Colorado River Ecosystem v. Colorado, 17CV02316, D. Colo.

In a self reportedly "first complaint of its kind" the Deep Green Resistance with support from others has filed a complaint for declaratory judgment as next of friends on behalf of the Colorado Ecosystem. Per the complaint, the ecosystem asks the court to declare that it is a person that has specific rights capable of being violated by actions potentially taken by the state and its agencies. Unique and creative as it may be, the Unit has filed a Motion to Dismiss the Complaint on a number of procedural grounds. First, the complaint is barred by the State's sovereign immunity under the Eleventh Amendment of the Constitution. Second, the Complaint fails to prove constitutional standing under Article III of the U.S. Constitution. It alleges hypothetical future injuries that are neither fairly traceable to actions of the State of Colorado, nor redressable by a declaration that the ecosystem is a "person" capable of possessing rights. Third, the complaint presents a non-justiciable issue of public policy. Whether the ecosystem should have the same rights as people, and who should be allowed to assert those rights in federal courts, are matters reserved to Congress by the Constitution. Finally, even if the complaint could establish the court's jurisdiction in some form, it further fails to

state a claim upon which relief can be granted because it fails to demonstrate statutory standing under any federal statute. A response to the Motion is due by November 7th.

INTRASTATE MATTERS

12. Application for Water Rights of Nona Powell, Case No. 16CW3036, Division 6.

Nona Powell filed an application for correction of established but erroneously described points of diversion under § 37-92-305 (3.6), C.R.S. The CWCB filed a Statement of Opposition in order to review and verify the details of the claims and to ensure no impact to pending instream flow water rights on East Douglas Creek (15CW3049) and Soldier Creek (15CW3051) and to ensure consistency with the decrees in those cases. The CWCB was satisfied with the Applicant's documentation of its diversions and structure locations, and consistency with instream flow decrees. Stipulations were filed simultaneously in all three cases on September 6, 2017.

13. Application for Water Rights of Juniper Family Investments, LLC, Case No. 16CW3181, Division. 5.

The Applicant filed an application for a storage water right and approval of a plan for augmentation, including an appropriative right of exchange. The CWCB had several concerns with the proposed plan for augmentation and exchange and the potential impact on instream flow water rights, specifically, the adequacy of the plan to replace out of priority depletions in time place and amount. After discussion with the CWCB about its concerns, the Applicant agreed to withdraw its application for the plan for augmentation and appropriative right of exchange. The CWCB reached a stipulation with the Applicant on September 22, 2017.

14. Application for Water Rights of Specie Wilderness LLC, Case No. 16CW3047, Division 4.

The Applicant filed an application for conditional storage rights, changes of water rights, and approval of a plan for augmentation. The CWCB had several concerns regarding the application, mostly related to the operation of the plan for augmentation and potential injury to instream flow water rights. After extensive negotiations, the Applicant agreed to include a term and condition stating that all four of the CWCB's instream flow water rights in the vicinity of the subject water rights must be satisfied before the Applicant may fill the ponds at issue in the case. The CWCB reached a stipulation with the Applicant on September 8, 2017.

15. Application for Water Rights of Rio Cabana LLC, Case No. 14CW3051, Division 7.

This case concerned an application for new conditional water rights and a related augmentation plan. The CWCB opposed the application in order to protect instream flow water rights on the Florida River and to ensure the final decree is consistent with the Colorado Supreme Court decision *St. Jude's v. Roaring Fork Club*. Applicant and the CWCB entered into a stipulation on September 25, 2017, which the Court approved the next day.

16. Application for Instream Flow Water Rights by the Colorado Water Conservation Board on Yellow Creek, Case No. 16CW3040, Division 6

On October 7, 2017, the Water Court for Division 6 issued a decree for instream flow water rights to preserve the natural environment to a reasonable degree on two reaches of Yellow Creek, in the amount of 0.82 cfs (3/1 - 6/15) and 0.4 cfs (6/16 - 2/29) for the upper reach for 3.66 miles from the confluence with Barcus Creek to the confluence with Lambert Springs, and 1.8 cfs (3/1 - 6/15), and 1.2 cfs (6/16 - 2/29) for the lower reach for 3.45 miles from the confluence with Lambert Springs to the confluence with the White River. TerraCarta Energy Resources, LLC ("TCER"), which owns numerous water rights in the Yellow Creek basin for energy development, was the one opposer in the case. After agreeing to decree language clarifying that calls for the ISF rights must be based on measurements (although not tied to a specific stream gage), CWCB and TCER stipulated to entry of a decree.

17. Application for Water Rights of Redstone Water and Sanitation District, Case No. 16CW3164, Division 5

Applicant filed an application to change the point of diversion for water rights decreed to the East Creek Reservoir and Pipeline to alternate points of diversion ("APODs") lower on East Creek and on the Crystal River upstream from its confluence with East Creek. No change in type or place of use was requested. CWCB filed a statement of opposition to prevent injury to its instream flow water rights on East Creek and the Crystal River. Applicant agreed to include terms and conditions in the decree that it would divert at the APODs only when water is also legally and physically available at the original point of diversion, and that it would not divert at the Crystal River APOD when CWCB's instream flow water rights on the Crystal River are not satisfied. CWCB sent a signed stipulation with the Applicant on October 31, 2017.