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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

Texas' interstate suit against New Mexico alleges 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 has intervened 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 Texas' complaint, 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 that the Court extend its original, but not exclusive, jurisdiction pursuant to 28 U.S.C. §1251(b)(2) 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. At the Court's order, oral argument took place on January 8, 2018 to hear the United States' exception 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. The Unit coordinated with Colorado's Solicitor General and Rio Grande water experts within Colorado to prepare for the argument. Additionally, two moot court sessions were conducted in Washington D.C. during the first week in January.

Concurrently, the Special Master has denied Texas' request to proceed with its claims of the case, reasoning that: (1) there was no real time savings in filing answers now, especially as the Court has set argument for January 8th, (2) the Court may provide important guidance as a result of arguments on the exceptions, and (3) the Court has not recommitted the case to him for further proceedings.

## 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. Initially set to begin on January 2, 2018 for 8-weeks, the trial has been given a delayed start until mid-January, and is expected to potentially last 5 weeks. The Court has denied the Unit's motion for determination of question of law that could have streamlined the case, but a number of potential opposers have settled (or are in the process of settling with State Engineer) and the remaining issues revolve primarily around one remaining entity, the associated water users, and alleged well impacts to its specific water rights.

## 3. Arkansas River Compact Administration

The Unit attended the Arkansas River Compact Administration meeting during the first full week in December. At the meeting, ARCA was able to (1) coordinate modifications to the bylaws that are agreeable to both states; and (2) discussing options for continuing the temporary agreement for a permanent pool in John Martin Reservoir; and (3) discuss evaluating draft documents from the Bureau of Reclamation regarding the Trinidad Project.

In addition, at the request of DWR, the Unit is researching the value and application of Agreements to the 1980 operating principles to determine whether and to what extent any updates or modifications may be appropriate.

## 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. The Unit's counsel for the Division of Water Resources is not participating at this time in the appeal. On November 14, the Unit's counsel for the Groundwater Commission led the argument on appeal. The parties are now awaiting a decision from the Court.

#### 4. 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 Colorado River Basin States and Department of the Interior before finalizing in conjunction with the Lower Basin Drought Contingency Plan.

#### 5. Upper Basin Drought Contingency Plan – Weather Modification Programmatic Agreement

The Unit has coordinated with CWCB staff to evaluate and edit the Weather Modification Programmatic Agreement for the Colorado River Basin. The activities contemplated under the Agreement involve expanding and implementing cloud seeding activities in key locations of Utah, Wyoming and Colorado to help enhance or increase precipitation events during the water year. This Agreement is intended to work in concert with ongoing and new programs in Colorado (and other states), and to consolidate contracting efforts among the weather modification funders in the Lower Basin and New Mexico and the States where operating activities will take place (Colorado, Wyoming and Utah). The Agreement is a multi-year contract that sets forth conditions for funding and operations consistent with prior agreements made separately with each weather modification state. The term of the Agreement is up to nine (9) years. Funding for the program can be up to \$1.5 million in a single water year, and a maximum total of \$13.5 million for the duration of the Agreement. The expectation will be that exhibits for operations to

occur each year will be reviewed by a steering committee and approved in a timely fashion. Subsequently, funding transfers will be made to support the approved activities. Significantly, any water produced from weather modification activities in the Colorado River Basin will be deemed system water, and will not be earmarked for use by any particular state or entity.

6. Upper Basin Drought Contingency Plan - Exploring Demand Management Feasibility

Demand management is a final element for consideration in the Upper Basin's drought contingency planning. It is loosely defined as the voluntary conservation of Colorado River water for compensation to help ensure continued compliance under the Colorado River Compact. The Upper Colorado River Commission is currently exploring the feasibility of demand management to meaningfully protect against drought through the System Conservation Pilot Program. To this end, the Unit is coordinating with the Upper Colorado River Commission and CWCB staff to initiate the fourth round of the Program in the Upper Colorado River Basin. This has included updating and amending the Facilitation Agreement with various funding entities, issuing a Request for Application, performing an initial evaluation of the Applications submitted for projects in Colorado, and committing to a tentative timeline for project evaluation, approval and contracting. The Unit is also currently involved in evaluating all applications submitted for Round 4 and will work with the CWCB staff to set forth priorities for recommended approval of applications in meetings with the Upper Division States and funding entities on January 9. Based on those recommendations, the Unit will help present the applications to the Commission for consideration and approval, and begin the contracting process accordingly.

Concurrently, Colorado is exploring options for maintaining compact compliance through a number of venues, including, but not limited to, the Water Bank Working Group, the West Slope Risk Study, the Front Range Water Council modeling, and the CWCB's Compact Compliance Study. Additionally, the InterBasin Compact Committee is considering how help advise on avoiding compact curtailment, and other interested parties are developing white papers to inform elements for administering demand management (shepherding of water, etc). The Unit is currently coordinating with CWCB staff to identify ways to communicate information and streamline intra-state discussions to obtain the best available thinking and prepare a comprehensive and cohesive strategy for promoting compact compliance consistent with the values and goals of the state.

7. Drought Contingency Plans – Additional Considerations

As the Upper and Lower Basins continue to pursue drought contingency planning, it has become apparent that an additional agreement is necessary to protect respective interests and reach consensus on river operations between now and 2026. This “Additional Agreement” includes a Companion Agreement to the Drought Contingency Plans to be signed by the Upper and the Lower Basins as well as the Department of the Interior. 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.

#### 8. 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 in August 2018 for the next water year.

#### 10. Lake Powell Pipeline Project

In May, 2016, the Utah Board of Water Resources finalized its preliminary licensing proposal as part of the integrated licensing process, with the Federal Energy Regulatory Commission, to construct a 139 mile long pipeline from Lake Powell (just upstream of Glen Canyon Dam, near Page, Arizona) to Sand Hollow Reservoir

outside of St. George, Utah. The pipeline is characterized as a major unconstructed project with a capacity in excess of 525 Kwh/yr. It is intended to develop an additional 100,000 AF of Utah's allotment under the Colorado River and Upper Colorado River Basin Compacts in addition to generating hydropower. The Utah Board of Water Resources has requested that FERC serve as the lead agency as to the entire project. On December 11, 2017, FERC issued a tendering notice stating that the application is ready for environmental assessment and that the deadline to file a motion to intervene is February 11, 2018. It is expected that this project will require an Environmental Impact Statement consistent with NEPA but streamlined through the Integrated Licensing Process set forth under FERC. However, FERC also stated that it has not yet determined whether or not it will include the water delivery pipelines with the review of the hydropower components of the project or bifurcate and allow other federal agencies to lead the processes related to rights of ways and water development separately. The Unit has been and continues to assess the Project and advise CWCB and the Colorado Commissioner to the Upper Colorado River Commission in relation to Project's implications on the Law of the Colorado River and Glen Canyon Dam operations.

11. Upper Colorado Fish Recovery Implementation Program

The federal legislation seeking extension of funding for the Upper Colorado River Fish Recovery Program through 2023 has been introduced. If passed, it will create parity with the Cooperating Agreements entered into between the States as to cost-sharing and other elements of the Program and provide additional time to assess the status of the Program and determine next steps including additional funding sources. Sen. Cory Gardner is one of the co-sponsors of the Senate Bill. Both versions are currently expected to pass out of the House and Senate Committees in January 2018 and to become law without debate or controversy. The new legislation removes language requiring funding for the Program from power revenues in perpetuity. The Unit, has therefore, been working in coordination with CWCB staff and the Program representatives to discuss the future of the Program beyond 2023, what constitutes "recovery" of the species, and develop a framework for how to proceed. The group will reconvene in March 2018.

12. Animas La Plata Project Application for Change of Water Rights Case No. 17CW3002 Water Division No. 7

On December 14, 2017, Counsel for Applicant, ALP OM&R Association ("Association"), circulated a redlined version of a draft Decree in Case No. 17CW3002, changing the ALP water rights to allow for delivery of ALP Project water via direct diversion. Outstanding issues include, but are not limited to, concern as to the inclusion of federal bypass flow rates in the decree itself. This could be construed as recognizing the federal bypass flows as water rights contrary to state law and local water court rules. This issue was previously raised during the

settlement negotiations in Case No. 13CW3011 in which a favorable outcome was reached between the parties, including the State of Colorado. The Unit provided these and other comments to the draft Decree to Association's counsel on December 27, 2017.

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

The Unit represented the State of Colorado in this complaint asking the Court to declare the river ecosystem a person capable of possessing rights. Plaintiff, through next friends, amended the complaint prior to the deadline for filing a response to the State's Motion to Dismiss. The bases for the Motion to Dismiss included: (1) the Amended Complaint was barred by the State's sovereign immunity under the Eleventh Amendment of the Constitution; (2) the Amended Complaint failed to prove constitutional standing under Article III of the U.S. Constitution. It alleged hypothetical future injuries that were 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; (3) the Amended Complaint failed to demonstrate jurisdiction under any other federal statute; (4) the Amended Complaint presented a non-justiciable issue of public policy; and (5) even if the Amended Complaint could establish the Court's jurisdiction, it further failed to state a claim upon which relief can be granted because it failed to demonstrate statutory standing under any federal statute. The Unit filed the second Motion to Dismiss on December 1, 2017. On December 3, 2017, after conferring with the Unit, counsel for the ecosystem filed a Motion to Voluntarily Withdraw the Amended Complaint with Prejudice. The Court granted the Motion on December 4, 2017.

14. 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 Court upheld the Army Corps' NEPA analysis and rejected Audubon's challenges. Audubon has indicated it may seek a preliminary injunction on construction pending the outcome of an appeal. The Unit is prepared to respond accordingly.

### INTRASTATE MATTERS

Application for Instream Flow Water Rights by the Colorado Water Conservation Board on East Douglas Creek (Lower), Case No. 15CW3049, Division 6

On November 10, 2017, the Water Court for Division 6 issued a decree for an increase in instream flow water rights to preserve the natural environment to a reasonable degree in the natural stream channel of East Douglas Creek from the

confluence of Brush Creek to the confluence of Cathedral Creek, a distance of approximately 14.22 miles, in the amount of 0.5 cfs (5/1 – 10/15). The CWCB has a previously decreed instream flow water right on East Douglas Creek from the confluence with Brush Creek to the confluence with Cathedral Creek, in the amount of 1.5 cfs (1/1 – 12/31), decreed in Case No. 5-85CW258 with an appropriation date of May 3, 1985. The flow rates decreed in the current case are in addition to the amount of the existing instream flow water right. Statements of Opposition were filed by the Michal K. Brady Family Trust and Nona Powell. Opposers stipulated to entry of a decree.

16. Application for Instream Flow Water Rights by the Colorado Water Conservation Board on East Soldier Creek, Case No. 15CW3051, Division 6 |

On November 12, 2017, the Water Court for Division 6 issued a decree for instream flow water rights to preserve the natural environment to a reasonable degree in the natural stream channel of Soldier Creek from the confluence of Right Fork and Middle Fork Soldier Creek to the confluence with Cathedral Creek, a distance of approximately 3.67 miles. This application granted a decree in the amount of 0.40 cfs (4/1-9/30), absolute. Statements of Opposition were filed by the Michal K. Brady Family Trust and Nona Powell. Opposers stipulated to entry of a decree.

17. Application to Make Conditional Water Rights Absolute by the Colorado Water Conservation Board for Bear Creek Lake, 14CW3127, Water Div. 1

The CWCB owns two sets of storage rights in Bear Creek Lake near Morrison that were decreed in the late 1970s as absolute for piscatorial use and conditional for a number of uses. CWCB's application in 14CW3127 sought to make those water rights absolute for the remaining conditional uses. Consolidated Mutual Ditch Company, City of Evergreen, and City of Lakewood opposed the application. The CWCB argued that storage of water prior to the 2013 enactment of 37-92-301(4)(e) could be used to make all remaining conditional rights absolute based on absolute rights having been stored in the same facility. After extensive negotiations with opposers, the parties were able to reach a stipulated decree making the water rights absolute for all uses. The final decree entered December 4, 2017.

18. Application of Rainbow Falls Mountain Trout, 15CW3183, Water Division 1

Rainbow Falls is a fishing club located above Woodland Park. It has several on-channel ponds on Trout Creek and Big Spring Creek used for fish culture. Rainbow Falls' application sought absolute storage rights for the ponds and surface rights from a spring, as well as an augmentation plan to replace out of priority depletions from the ponds. CWCB owns decreed instream flow rights on Trout Creek and Horse Creek that could be affected by the application. The parties were able to agree to a decree that contains terms and conditions that require CWCB instream flow rights to be subject to many of the applicant's water rights, and terms and



conditions to otherwise prevent injury to the instream flow rights. Stipulation with the CWCB was filed on December 20, 2017.

19. Application for Instream Flow Water Rights by the Colorado Water Conservation Board on the Dolores River, Case No. 15CW3111, Division 4.

After a contested administrative hearing, the CWCB filed for an instream flow water right to preserve the natural environment to a reasonable degree in the natural stream channel of the Dolores River, from the confluence with the San Miguel River to a point where the bridge crosses the river located at lat 38 40 05N long 108 57 55W, a distance of approximately 33.15 miles. Statements of Opposition were filed by the Southwestern Water Conservation District, Dolores Water Conservancy District, Colorado River Water Conservation District, the San Juan Citizens Alliance, and Western Resource Advocates. The DWCD stipulated to entry of a decree on May 9, 2017. The CWCB filed a certified copy of the administrative record with the court on November 16, 2017. On November 21, 2017, the CWCB filed a motion for summary judgment, arguing that it made the statutorily required determinations, its policy decision is entitled to deference, and the court should affirm its agency action and enter a decree for the Dolores River instream flow right. On December 29, 2017, the River District and Southwestern filed a response to the motion, arguing that the CWCB failed, due to an incorrect and arbitrarily confined interpretation of its statutory authority, to recognize its legal authority to adopt a proposed *de minimis* depletion allowance, if it chose to do so. The CWCB's reply is due January 19, 2018.