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Office of the Attorney General

March 6, 2018

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

On March 5, 2018, the U.S. Supreme Court issued its decision regarding the United States' ability to bring compact claims in this lawsuit despite it not being a party to the Rio Grande Compact. The United States had taken exception to the Special Master's recommendation that its claims under the compact be denied, and Colorado rebutted. Issuing the decision for the Court, Justice Gorsuch explained that the United States will be allowed to bring the compact claims it has asserted based on specific facts related to the case. Recognizing that the Court has sometimes permitted the United States to participate in compact suits to defend distinctively federal interests, the Court concluded that the U.S. could pursue its claims in this case because: (1) the federal government's water contracts were inextricably tied to the Compact; (2) New Mexico had conceded that the U.S. plays an integral role in Compact operation; (3) the U.S.'s treaty interests with Mexico are implicated; and (4) the U.S.'s claims seek the same relief as Texas and Texas does not object to the U.S. bring such claims. In allowing the U.S.'s compact claims against New Mexico, the Court made clear that such authorization should not be viewed as a general license for the U.S. to assert compact claims in any case, and that the decision does not determine whether the U.S. could initiation litigation to force a State to perform obligations under a compact or expand the scope of an existing controversy between states. The Court overruled all other exceptions to the Special Master's First Interim Report.

The Special Master has scheduled a status conference following the Court's decision which will be held on March 23rd. In preparation for the next stages of the case, Texas has circulated a draft Case Management Order for the parties to consider.

The Unit is reviewing and commenting on the CMO to assure sufficient time and information is provided to develop the case as needed.

2. Division 3 Ground Water Rules, 15CW3024

The Unit finished a 13-day trial in Alamosa, litigating challenges to groundwater and irrigation season rules promulgated by the State Engineer. The case involved complex issues, with numerous experts testifying to historical irrigation practices, Rio Grande Compact administration, and computer modeling of groundwater flows. At stake are the State Engineer's rules, which are intended to require replacement of injurious stream depletions caused by groundwater withdrawals, promote sustainability of the Rio Grande basin's aquifers, and which allow the State to meet its Compact obligations. Parties will be filing written closing statements and proposed findings and conclusions over the next month.

3. Arkansas River Compact Administration

The Unit is assisting the Division 2 Water Engineer, and Colorado's ARCA representatives to complete a second agreement with Kansas for securing a permanent conservation pool in John Martin Reservoir. It is also advising Division 2 on legal positions regarding administration of water in Colorado and its effects on compact compliance with Kansas, as well as administration of water releases from Trinidad Project for use by the Purgatoire Water Conservation District before the start of the irrigation season on March 1.

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.

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

Governors and Attorneys General for the States of Nebraska and Colorado have signed and publicly announced an agreement in which Colorado agrees (pending approval of the Projects Bill) to repay Nebraska for its past over-use of water between 2003 and 2013. The agreement resolves the existing controversies between the two states regarding Colorado's past use of water under the Republican River Compact and allows them to continue to work cooperatively.

This settlement provides funds that could be used in the Republican River Basin within Nebraska and creates additional opportunities for cooperative water management between the States. The agreement avoids the costs and uncertainty of litigation and furthers the principles of the Compact, including removing controversy and fostering interstate cooperation.

While it was initially understood that the settlement would be a three-state agreement among Nebraska, Kansas, and Colorado, it has not yet been possible for Kansas to accept the settlement offer from Colorado. Colorado continues to work with Kansas to determine whether an agreement can be reached in sufficient time for Colorado to seek appropriate funding via legislation.

5. 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 recently coordinated with the Commission's committees to unveil the draft agreement to Lower Colorado River Basin States and Department of the Interior as part of the joint efforts to develop Drought Contingency Plans. The Unit expects additional meetings to further explain the operations, and address questions raised by the Lower Basin and Interior in a timely fashion.

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: (1) continues to coordinate with the Upper Colorado River Commission and CWCB staff to implement the fourth round of the Program in the Upper Colorado River Basin. This has included coordinating with Commission, Upper Basin, and funding representatives to evaluate proposed projects and make recommendations for Commission approval. The Unit has also coordinated with the CWCB staff to confirm project activities and develop proposed funding and project contracts; and

(2) is working with CWCB staff to develop a demand management outreach program that will focus on informing interested stakeholders within the state on the status of current efforts within the Upper Basin and with the Lower Basin to develop drought contingency plans, introducing the concept of demand management and its potential relevance in Colorado, and identify concepts, issues and concerns that stakeholders may have with the demand management concept. The CWCB staff and Unit will then plan to use the information from the outreach efforts to inform potential positions or obstacles for the State to consider if pursuing demand management in Colorado and the Upper Basin. The goal will be utilizing this and other information to inform the state's position for providing more certainty in water uses on the Colorado River into the future and for promoting ongoing compact compliance consistent with the values and goals of Colorado.

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. Whether and to what extent the basins can agree to consensus legislation is the subject of ongoing negotiation.

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 from the Department of the Interior. While obstacles within the Lower Basin remain and consensus between the basins has yet to be achieved, 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.

9. 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 appeal of the District Court's decision upholding the EIS prepared by the Army Corps of Engineers for the Chatfield Reallocation Project. Shortly after appealing the decision below, Audubon sought a preliminary injunction to halt construction necessary to store additional water under the proposed reallocation. The Court of Appeals denied the motion. The case was then referred to mediation, where the parties agreed they were unlikely to settle the case. The parties are currently discussing the schedule for briefing and oral argument.

INTRASTATE MATTERS

10. T&G Enterprises, Inc. v. Big Elk Meadows Association, et. al., Case Nos. 17CV31102 (Larimer County) and 17CV 31281 (Boulder County)

The CWCB has been named as a defendant in these cases in which the plaintiff is suing the defendant pursuant to the mechanics' lien statute for alleged failure to pay for services and materials provided. The CWCB has approved three loans to defendant Big Elk Meadows, two of which were for reconstruction of reservoirs after the 2013 flooding, all of which may have as collateral the real property that is subject to the foreclosure action. The CWCB's answers were filed on January 31, 2018. While it seems to be a dispute over the amount owed and not an inability of the defendant to pay, the CWCB will participate in the lawsuit and protect its interest in the real property.

11. 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. 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 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 and Western Resource Advocates, Conservation Colorado Education Fund and San Juan Citizen's alliance filed replies on January 19, 2018. The River District and Southwestern filed a motion for leave to file a sur-reply, or in the alternative to strike the reply brief of Western Resource Advocates, Conservation Colorado Education Fund and the San Juan Citizen's Alliance. That motion was granted on February 26, 2018, and the sur-reply is due March 5, 2018.

12. Application of Colorado Water Conservation Board in Sand Creek, Case No. 2016CW3172, Water Division 1

On December 8, 2016, the CWCB filed an application for water right to preserve the natural environment to a reasonable degree in Sand Creek, a tributary of the Cache la Poudre River. Two statements of opposition were filed in the case by the City of Fort Collins and the Cache la Poudre Water Users Association. Both opposers negotiated with the CWCB and reached stipulations in 2017 without the need for any hearings in the matter. On December 21, 2017, the water referee entered a ruling of the referee in the case. On January 12, 2018, the Water Judge confirmed the ruling of the referee and entered the decree of the water court confirming the instream flow water right. The Sand Creek Instream Flow Water Right protects an instream flow of 1.5 cfs from July 1 through May 15 each year and a flow of 5.5 cfs from May 16 through June 30 each year in a stretch of Sand Creek that spans approximately 6.59 miles.

13. Application of Colorado Water Conservation Board in Lone Tree Creek, Case No. 2016CW3173, Water Division 1

On December 8, 2016, the CWCB filed an application for water right to preserve the natural environment to a reasonable degree in Lone Tree Creek, a tributary of the South Platte River in Weld County. Two statements of opposition were filed in the case by the City of Fort Collins and the Cache la Poudre Water Users Association. Both opposers negotiated with the CWCB and reached stipulations in 2017 without the need for any hearings in the matter. On December 21, 2017, the water referee entered a ruling of the referee in the case. On January 15, 2018, the Water Judge confirmed the ruling of the referee and entered the decree of the water court

confirming the instream flow water right. The Lone Tree Creek Instream Flow Water Right protects an instream flow of 0.3 cfs year round in a stretch of Lone Tree Creek that spans approximately 2.17 miles.

14. Application of Colorado Water Conservation Board in Boxelder Creek, Case No. 2016CW3174, Water Division 1

On December 8, 2016, the CWCB filed an application for water right to preserve the natural environment to a reasonable degree in Sand Creek, a tributary of the Cache la Poudre River. Two statements of opposition were filed in the case by the City of Fort Collins and the Cache la Poudre Water Users Association. Both opposers negotiated with the CWCB and reached stipulations in 2017 without the need for any hearings in the matter. On December 21, 2017, the water referee entered a ruling of the referee in the case. On January 12, 2018, the Water Judge confirmed the ruling of the referee and entered the decree of the water court confirming the instream flow water right. The Boxelder Creek Instream Flow Water Right protects an instream flow of 1.6 cfs from July 1 through May 15 each year and a flow of 5.0 cfs from May 16 through June 30 each year in a stretch of Boxelder Creek that spans approximately 4.72 miles.

15. Application for Water Rights of Crawford Properties, LLC, Case No. 16CW3177, Division 5

Applicant filed an application to change the place of use of shares in the Robinson Ditch in order to provide irrigation water to a housing development located near El Jebel on property that had historically been irrigated by the Robinson Ditch, but that had been dried up under an earlier change case. CWCB filed a statement of opposition to ensure that its instream flow water right on the Roaring Fork River was not injured. After agreeing on appropriate provisions for the replacement of historical return flows, CWCB entered into a stipulation with the Applicant, which was approved by the court on February 2. CWCB will continue to monitor the case as Applicant works to reach settlement with the other remaining opposer.

16. Application for Water Rights of Powdr – Copper Mountain, LLC, Case No. 16CW3169, Division 5

Applicant filed an application for a plan for augmentation to increase its snowmaking diversions from the annual 530 AF already authorized under existing decreed plans for augmentation to 775.5 AF annually. CWCB filed a statement of opposition to ensure that its instream flow water rights on Tenmile Creek, West Tenmile Creek, and the Blue River were not injured. One of the primary issues in the case was whether the water rights for the diversions that Powdr sought to augment would operate as senior to CWCB's instream flow water rights on West Tenmile Creek under a 1986 Memorandum of Understanding between CWCB and

Applicant's predecessor in interest. Applicant and CWCB settled and agreed to include specific language in the decree that Applicant would not divert at the structures to be augmented under this case when CWCB's instream flow water rights are calling. A stipulation between Applicant and CWCB was approved by the court on February 5. CWCB will continue to monitor the case as Applicant works to reach settlement with the other remaining opposers.

17. Application for Water Rights of City of Brighton, Case No. 15CW3012, Division 1

Brighton filed an application to change certain fully consumable water rights in its portfolio to confirm that these water rights may be leased or traded with other entities in the South Platte Basin. The CWCB opposed the application to ensure that its instream flow rights in Division One would not be injured by these agreements. The CWCB and Brighton entered into a stipulation, which the Court approved on February 14, 2018. The stipulation requires Brighton to provide notice of the agreements to the CWCB and provides the CWCB with an opportunity to object to extra-territorial use based on potential injury to instream flow water rights. There is currently a motion to vacate the scheduled trial pending before the Court.

18. Application of Byers Peak Properties, LLC; Byers Peak Downhill Properties, LLC; and Cornerstone Winter Park Holdings, LLC, Consolidated Case Nos. 14CW3097 & 14CW3098, Water Division 5

Applicants sought conditional groundwater rights, appropriative rights of exchange, and a plan for augmentation to support a residential and commercial development in Fraser, Colorado. The Colorado Water Conservation Board filed a statement of opposition in this case to protect instream flow water rights on St. Louis Creek, the Fraser River and the Colorado River. The CWCB raised a number of concerns in the case, including needing detail as to how the claimed exchanges would be operated given a pumpback feature and whether the plan for augmentation properly covered the anticipated depletions. The CWCB worked with Denver Water and Grand County, also opposers in the case, to protect environmental flows decreed in Case No. 11CW152. On February 26, 2018 the CWCB stipulated to entry of a decree that protects the CWCB's decreed instream flow water rights.

19. Application of Everist Land Holding LLC and the Town of Silverthorne, Case No. 16CW3040, Water Division 5

On June 1, 2016 the Applicants filed an amended application for a change of water right and for an appropriative right of exchange. Everist is the owner of water rights that are being transferred to the Town of Silverthorne pursuant to an annexation agreement that will provide water service to Everist upon transfer of its

water rights to the Town. The CWCB opposed the application in order to protect instream flow water rights on Willow Creek and the Blue River. The CWCB requested the applicant provide a historical consumptive use analysis and an analysis of the applicant's return flow obligation analysis to confirm no expansion of use would result from the change. The CWCB also requested protective terms and conditions regarding any exchange through reaches in which there is an instream flow water right, and terms and conditions to address lagged depletions from the wells. The CWCB stipulated to entry of a decree on February 26, 2018.

20. Application of Red Mountain Willoughby Associates, LLC, RMWW Holdings, LLC, RMWW Holdings 25 Year QPRT and RMWW Holdings 30 Year QPRT, Case No. 15CW3110, Water Division 5

On November 15, 2015 applicant filed an application was for water storage rights, change of water right, and plan for augmentation including appropriative rights of exchange. The CWCB opposed the application and raised a number of issues in order to protect instream flow rights on the Roaring Fork River and Hunter Creek including potential enlargement of the senior rights for the subject ditch, maintenance of return flows and proper detailing of the claimed exchanges. On February 27, 2018 the CWCB stipulated to entry of the decree that included terms and conditions to prevent expansion of use of the changed right and prevent injury to the CWCB's instream flow rights.