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**Office of the Attorney General**

May 9, 2018

**TO:** Colorado Water Conservation Board

**FROM:** Cynthia H. Coffman, Attorney General  
Karen Kwon, First Assistant Attorney General  
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**RE:** Report of the Attorney General

**FEDERAL & INTERSTATE MATTERS**

1. Rio Grande -Texas v. New Mexico and Colorado, No. 141 Original

Following the Supreme Court's order allowing the United States to proceed with Rio Grande Compact claims against New Mexico, the Court discharged Special Master Grimsal and referred the case to a new special master (Hon. Melloy from the 8<sup>th</sup> Circuit). The parties are now proceeding with pretrial preparations. No claims for relief are asserted against Colorado. However, Colorado is pursuing a non-waiver agreement to preserve its rights and avoid expanding the litigation beyond the dispute with New Mexico in light of the fact the degree to which the Federal Rules of Civil Procedure's requirement for mandatory cross-claims or counter-claims is unclear. If agreed to, the non-waiver agreement would permit Colorado to not file an answer or any claims, while not waiving its right to do so later. Colorado would still be allowed to participate in litigating the claims asserted by other parties. New Mexico's answer is due in May and the case will be at issue on June 1, 2018.

2. Division 3 Ground Water Rules, Case No. 15CW3024

The parties finished the 13-day trial in February and completed post-trial closing briefs in early April. The water court will now decide whether to approve the rules for the Rio Grande basin to require replacement of injurious well depletions. The primary issue at trial was whether the complex computer model offered by the State was adequate. The model is used to derive requirements for well users to replace their injurious impacts on surface water rights. In the absence of a reliable impact prediction by the model, the rules impose no replacement obligation. The challengers argued that the model did not accurately predict depletions to their springs. They also protested the requirement that, in the absence of accurate model predictions, they be required to demonstrate the impact of well pumping on the springs.

### 3. Arkansas River Compact Administration

The Unit coordinated with the Division of Water Resources and the Arkansas River Compact Administration to provide comments to the Bureau of Reclamation on its 10-Year review of the Trinidad Project (2005-2014). As part of this review, Reclamation concluded for the first time that it could not tell whether there was an impact to Kansas and downstream Colorado water users as a result of the Project operations. The Unit will continue working with the appropriate entities to determine next steps, as needed.

Additionally, the Unit continues to provide legal counsel on Compact matters regarding: (1) legal questions related to Agreement B to the Operating Principles; (2) advising Colorado's representatives on accounting for flood control administration based on questions raised by Kansas and Colorado; and (3) evaluating options for ARCA to approve requests for diversion under Article V.H of the Operating Principles in a timely fashion if and when needed in the future. Colorado.

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

Colorado continues to negotiate settlement with Kansas to resolve Colorado's past over-use of water between 2003 and 2013. Colorado already signed and publicly announced an agreement in which Colorado agrees to repay Nebraska for its over-use. Over the past couple of months, it appears that Colorado and Kansas may have reached a conceptual agreement that would allow Colorado to settle its past debts to Kansas, invest additional money in the basin to ensure ongoing and future compact compliance, and close the door on past issues. The Unit is coordinating with the State Engineer and client agencies to assure that the conceptual agreement is accurately captured in writing to be agreeable to both states.

### 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 before risking critical elevations at Lake Powell. This Agreement establishes a 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. Following discussion of the draft Agreement with Lower Colorado River Basin States and Department of the Interior as part of the joint efforts to develop Drought Contingency Plans, the Unit is coordinating with the Upper Colorado River Commission to clarify terms and identify processes that provide further assurance on how the system would be operated. The Unit expects additional meetings of the Upper Colorado River Commission and with the Department of the Interior and Lower Colorado River Basin to confirm consensus on final terms in an effort to finalize the agreement 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 temporary, voluntary conservation of Colorado River water for compensation to help ensure continued compliance under the Colorado River Compact. The Upper Colorado River Commission continues to explore the feasibility of demand management to meaningfully protect against drought through the System Conservation Pilot Program. The Unit continues to coordinate with the Upper Colorado River Commission and CWCB staff to implement the fourth year of the Program in Colorado. This has included coordinating with Commission, Upper Basin, and funding representatives to evaluate proposed projects and make recommendations for Commission approval. The Unit also continues to coordinate with the CWCB staff to confirm project activities and develop proposed funding and project contracts for 2018 projects.

Concurrently, the Unit is coordinating with CWCB staff to implement an intrastate demand management outreach program that focuses on informing interested stakeholders 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 are coordinating to compile the input from these 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 is to utilize 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. Initial outreach began in March, continued through April and will extend through the Spring and early Summer.

## 7. Lower Basin Drought Contingency Plan

The Lower Division States, primary water user entities, and Bureau of Reclamation have drafted an 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 Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead, 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 has been coordinating with the CWCB and Upper Colorado River Commission to evaluate the plan, and to identify potential mechanisms to protect the Upper Basin. The completion of the plan depends in part on consensus among the 7-Basin States and the Department of the Interior on both the Upper and Lower Basin Contingency Plans. This has recently been complicated by intra-state complications in California (negotiating agreement on how the internal entities will share the drought contingency contributions) and Arizona (internal dispute over who has the authority to decide matters related to the Colorado River). California entities continue to work through their complications, but the disputes in Arizona have essentially stalled any progress on contingency planning negotiations among the 7-States. (See Central Arizona Water Conservation District issue below).

## 8. Central Arizona Water Conservation District (CAWCD) Position

In early April, it became known that the CAWCD had adopted a policy to promote the greatest releases possible from Lake Powell under the 2007 Interim Guidelines by making calculated water orders that make sure the reservoir conditions are in a “sweet spot” to allow “bonus water” to be released to Lake Mead. Such releases are at the expense of storage at Lake Powell and the Upper Basin, and contrary to the Upper Basin’s expectations for successful collaboration and problem solving among the 7-Colorado River Basin states during a 18+ year drought. The Unit helped the Upper Colorado River Commission draft a letter to Arizona’s principle representative for Colorado River matters and copied to CAWCD, rejecting the CAWCD policy and putting them and the other river stakeholders on notice that such actions threaten the health of the system and the foundation upon which solutions are achieved on the river. CAWCD subsequently met with the Commission on April 30, and apologized for the insensitive use of words to describe its complicated management decisions. However, at that time, CAWCD was unable to demonstrate that it could work with the State of Arizona and thereby prevent any further interference with basinwide efforts to protect the Colorado River system

under drought conditions. Whether progress will occur in the near future remains to be seen.

Also on April 30, the Upper Colorado River Commission met with the Bureau for Reclamation Commissioner Brenda Burman. During that meeting, the Upper Division States and Commission made clear their desire to finalize drought contingency planning in a way that protects storage in both basins, and avoids exploitation of river operations for the benefit of one at the expense of many. The Commissioner subsequently met with the Lower Colorado River Basin States on May 2. A report out from that meeting had not occurred at the time of this update. The Unit will continue to work with the Upper Colorado River Commission and CWCBC to set in motion appropriate strategies for assuring protection of the State's compact entitlement as events develop.

9. Audubon Society of Greater Denver v. United States Army Corps of Engineers, et. al., Case No. 14CV02749, D. Colo.

The Unit represents the Colorado Department of Natural Resources, a Defendant-Intervenor, 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. Audubon filed its opening brief on March 1 and simultaneously moved for an expedited appeal. The Court denied the motion, in part because Audubon waited to file its opening brief until 10pm on the filing deadline. The Unit is coordinating with the other Intervenor to draft a Joint Response brief that was filed May 2.

10. Hill v. Waresewa, Case No.18-CV-00277, D. Colo.

Colorado moved to intervene for a limited purpose to have this river access case between a fisherman and landowner dismissed. The fisherman claims that the State of Colorado, rather than the landowner, holds title to the riverbed of part of the Arkansas River. The complaint alleges that the Arkansas River around Texas Creek was navigable at the time Colorado became a State. As a consequence, the complaint alleges that Colorado, and not defendant, took title to the riverbed at the time of statehood. Therefore, the complaint alleges, the riverbed is public and the defendant landowner cannot prevent the plaintiff fisherman from wading on the riverbed. It further claims that the public nature of the riverbed extends for a large distance of the Arkansas River. Defendant did not answer the complaint and the court clerk entered default on March 20. Because the complaint seeks to decide matters that are the purview of the State, the State should be a party to the case. However, the sovereign nature of the State precludes it from being forced into court

without its consent. Accordingly, unless the State consents to jurisdiction, the Court cannot decide the case.

### INTRASTATE MATTERS

11. In March, 2018 the Water Conservation Unit on behalf of the CWCB stipulated to entry of a decree in five water court cases:
  - Park Center Water District, Case No. 15CW3005, Water Division 2
  - Morrison Creek Metropolitan District, Case No. 09CW72, Water Division 6
  - Morrison Creek Metropolitan District, Case No. 14CW3047, Water Division 6
  - Home Supply Ditch Co., Case No. 15CW3123 , Water Division 5
  - Valley at Winter Park Water District, Case No. 16CW3036, Water Division 5
12. In April, 2018 the Water Conservation Unit filed a statement of opposition on behalf of the CWCB in the following 3 water court cases:
  - Hightower, John, Case No. 17CW3014-1
  - Oldcastle SW Group, Inc., Case No. 18CW3026-5
  - Hancock, Randall & Renate, Case No. 16CW17-2
13. Decrees for an instream flow water rights were entered in the following cases:
  - Unnamed Tributary to Rough & Tumbling Creek ISF, Case No. 17CW3149, Division 1 (no opposers)
  - Brush Creek ISF, Case No. 17CW3063, Division 4 (no opposers)
  - West Fork Terror Creek ISF, Case No. 17CW3072, Division 4 (no opposers)
  - Dolores River ISF, Case No. 15CW3111, Division 4 – Motion for Summary Judgment Granted 04/05/18, Decree Entered: 04/10/18. This application for an instream flow water right on the Dolores River followed a contested administrative hearing. At the hearing, the opposers requested the CWCB include as a part of its appropriation a depletion allowance for future, unknown development. After discussion by the CWCB Board at the hearing, the board unanimously rejected the proposal and voted to move forward with the water court application for the Dolores River instream flow water right. The

CWCB filed the administrative record with the water court and then moved for summary judgment, arguing that it made the statutorily required determinations for appropriation of an instream flow water right, that the Court's review is limited to the record, and the decision to move forward with the appropriation is a policy decision entitled to deference. Opposers opposed the motion and argued that the CWCB failed to recognize its legal authority to adopt a development allowance at the contested hearing, and therefore it acted improperly in appropriating the instream flow right. The court rejected the opposers' argument, granted the CWCB's motion and entered a decree for the instream flow right.