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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  
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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

This suit focuses on claims regarding actions of Texas, the United States, New Mexico and the Republic of Mexico, and their alleged impacts on the Rio Grande Project water deliveries. The Project delivers water to southern New Mexico, west Texas and Mexico. The Parties have started discovery, with the first requests for production issued and depositions scheduled. This case will use extensive electronic discovery methods, with hundreds of gigabytes of documents being produced. The Special Master expects the Parties to start the trial in the fall of 2020.

Colorado is participating as a signatory to the Rio Grande Compact, which is at issue in the case. However, the state has no claims asserted against it and is not asserting any claims at this time. Colorado reached an agreement with the other Parties that allows the state to avoid filing an answer or any counter claims in the suit. The agreement also permits Colorado to assert any defenses or claims later, should it find it necessary. This allows Colorado to avoid taking a position on issues until it has more information and can avoid expanding the scope of the suit.

2. Special Improvement District No. 1, 07CW52, Division 3

This subdistrict of the Rio Grande Water Conservation District promulgated the second amended plan for water management, which the State Engineer approved. The changes deal primarily with contracting with water users outside the District boundaries and quantification of recharge to the unconfined aquifer within the District. S & T Farms filed an objection to this amendment, based largely on the burden of proof regarding recharge. A one-day trial will be held in April 10, 2019.

### 3. Arkansas River Compact Administration

The Unit coordinated with clients from the Division of Water Resources in anticipation of a Special Engineering Committee meeting with Kansas on October 8. The primary issues for the meeting were twofold. The first related to identifying a mechanism to provide a perpetual approval of the Highland Canal as a source of water for the Permanent Pool in John Martin Reservoir. John Martin Reservoir has been operated on temporary one-year Permanent Pool approvals for the past 2 years. One of those years was a wet year and the other a dry year. As such, there has been ample demonstration to Kansas that the agreement is beneficial to water users in both states under variable conditions. As a result of the meeting, it is not yet clear whether Kansas will provide a perpetual approval at the December meeting of the Arkansas River Compact Administration. If not, there will likely be an additional annual, temporary approval to occur for another year.

The second issue related to exploring mechanisms to secure approval of a new Multi-Purpose Colorado account in John Martin Reservoir. Currently, the John Martin Reservoir Operating Plan has specific accounts for which many water users do not have access even though the reservoir almost always has excess capacity. This leads to the inefficient use of water resources. Given that storage capacity exists in John Martin Reservoir, Colorado is seeking Kansas approval of a new account that could be utilized by those Colorado water users that do not currently have an account. To begin what is likely to be an extended negotiating process, the Special Engineering Committee will meet on November 6. Prior to that, the Division of Water Resources will provide a presentation on water exchanges at the request of Kansas. The Unit will participate to provide an understanding on the law as it relates to exchanges in Colorado.

### 4. Republican River Compact Negotiations

Colorado is currently negotiating with Kansas and Nebraska to extend the deadline by which it must remove from irrigation 25,000 acres of land in the South Fork Republican River basin under the 2016 Resolution of the Republican River Compact Administration. Since 2016, Colorado has been unable to enroll land in the Conservation Reserve Enhancement Program because the Farm Services Agency refused to approve amendments to its contract with Colorado under the CREP Program. Those amendments have now been approved, but there is no funding for CREP because the House and Senate are unable to agree on the substance of a farm bill. The States are exploring whether the extension can be reasonably tied to approval of a farm bill.

### 5. Republican River Compact Rules

The State Engineer is preparing to file rules in Division 1 Water Court to continue administering water consistent with the Republican River Compact (compact rules).

The rules would require all water users who are included in Colorado's Compact Accounting to participate in a plan to help the State maintain compact compliance. Most of the water users in the basin would be covered by the Republican River Water Conservation District's existing plan, which includes operating the Compact Compliance Pipeline. Those users who do not yet participate in the District's plan would be required to join that plan or create their own. The State Engineer revised the rules and statement of basis and purpose. He subsequently solicited comment on the draft rules document. The Unit is currently assessing the comments and will coordinate with the Division of Water Resources on edits to draft rules before they are filed with the Water Court.

#### 6. Colorado River Drought Contingency Plans

The Colorado River Basin is experiencing its 19<sup>th</sup> year of drought. In light of this ongoing condition, the Colorado River Basin States and Department of the Interior recognize a need to plan for drought contingencies that would help avoid or mitigate the uncertainties associated with fluctuating water supplies. Such plans require intra-state, interstate, regional, interstate and state to federal coordination and agreements that involve a series of negotiations to reach consensus. The Unit has been working with the Colorado Compact Commissioner, Colorado Water Conservation Board, and Upper Colorado River Commission to explore and evaluate the options and terms of any drought contingency plan. In mid-September, the States' Principals and Commissioner of Reclamation met to confirm the status of the draft plans and directed staff to proceed with performing public outreach and initiating processes for necessary approvals. Since then, the Unit has coordinated with the state representatives to prepare final review drafts of the planning documents for public distribution. It has also participated in a special meeting of the Colorado Water Conservation Board to walk through the terms of the documents, and been part of the public outreach efforts to help explain the purpose and need of the documents. These efforts include a 2 hour public webinar in which the documents were discussed and posted to the CWCB's website, numerous basin roundtable meetings in the Colorado River and Southwest Colorado basins, and the Grand Valley Water Users' Association Seminar. Additional outreach will be performed as meetings and seminars are scheduled.

In addition to the Drought Contingency Planning documents, the 7-States' Principals and Department of the Interior agree that federal legislation that essentially "blesses" the documents is appropriate. Once the terms of the Drought Contingency Planning documents are deemed to be on the path toward approval, they will be combined into a package for the Congressional delegations to consider. No vehicle for federal legislation has yet been identified and the timing for federal authorization must still be determined.

7. Upper Basin Drought Contingency Planning - Drought Reservoir Operations Agreement

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 establishes a process for the Department of the Interior and Commission to 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 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 has coordinated with the Upper Colorado River Commission to clarify terms and identify processes that provide further assurance on how the system will be operated. The Upper Basin members have confirmed that the Lower Basin and Reclamation accepted the edits to the draft Agreement. As such, this draft document has been prepared for final review and made available for public distribution and consideration. The Unit is coordinating with state representatives on preparing responses to the public's frequently asked questions and addressing concerns as they arise. (See Drought Contingency Plan, *supra*).

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

Exploring demand management is the second element for consideration in the Upper Basin's Drought Contingency Planning. It is loosely defined as the temporary, conservation of Colorado River water to help ensure continued compliance under the Colorado River Compact. At its June 20, 2018 meeting, the Upper Colorado River Commission approved a Resolution directing staff to:

- i. Work with interested parties to adapt the existing [System Conservation Pilot Program], or develop new pilots, to investigate outstanding considerations related to demand management;
- ii. Work with interested parties and entities to explore other possible mechanisms or opportunities to investigate outstanding considerations related to demand management; and

- iii. Support intrastate efforts to explore demand management mechanisms and considerations within each of the Upper Division States.

Additionally, the 7-States agreed to consider securing dedicated storage for water created as part of a demand management program, should such program be finalized and made operational in the future. The Unit has been working with Colorado's Compact Commissioner as well as staff from the CWCB and Upper Colorado River Commission to draft the authorizations and agreements to further these directives. The Upper Basin members have confirmed that the Lower Basin and Reclamation do not object to the terms as drafted at this time. As such, this draft document has been prepared as a final review draft and made available for public distribution and consideration.

Concurrently, the Unit has been 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 identifying concepts, issues and concerns that stakeholders may have with the demand management concept. Initial outreach began in March, has progressed through the Summer, and will through the Fall and Winter. The goal is to utilize this and other information to inform any state position on the feasibility and terms of a demand management program in a manner that will provide more certainty in water uses on the Colorado River into the future and promote ongoing compact compliance consistent with the values and goals of Colorado. At the September meeting of the Colorado Water Conservation Board, the directors heard testimony from stakeholders interested in and concerned by the concept of demand management. Additionally, there has been a number of Basin Roundtable meetings and seminars in which stakeholders are expressing opinions and concerns on demand management and its potential impacts to their respective communities. The CWCB conducted a Special Board Meeting on October 4 to consider the elements of the Drought Contingency Plans and determine related next steps for water policy considerations in Colorado. At that meeting, the Board directed staff to prepare a draft policy statement regarding the role of demand management going forward. The Unit is in the process of helping prepare that statement in anticipation of the November Board meeting.

## 9. 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 draft plan 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 protections and 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. The 7-States Principals recently confirmed at the September meeting, that there are no major outstanding issues to negotiate between the Upper and Lower Basin regarding this plan so long as the Upper Basin's elements of the Drought Contingency Plan can be approved and finalized. As such a final review draft has been prepared and made available for public distribution. (See Drought Contingency Plans, *supra*).

#### 10. Colorado River Companion Agreement

In addition to the Upper and Lower Basin Drought Contingency Plans, the 7-States coordinating committee was tasked with mapping out the terms of an additional agreement that would set forth the relationship between the Upper and Lower Basin and Secretary in implementing and enforcing each other's Drought Contingency Plans. The 7-State Principals considered this Agreement along with the rest of the DCP documents at the September meeting and confirmed that it was ready for public distribution. (See Drought Contingency Plans, *supra*).

#### 11. Colorado River Basin ESA Compliance Programs

While federal legislation seeking extension of funding for the Upper Colorado River Fish Recovery Program through 2023 has been introduced, guidance in the President's FY19 budget and a directive from the Office of Management and Budget redirects approximately \$23 million in Colorado River Storage Project (CRSP) power revenues from the Western Area Power Administration to the Treasury rather than transferring these funds to the Bureau of Reclamation (Reclamation) to continue support for important basin-wide programs (i.e., San Juan Fish Recovery Program, Glen Canyon Dam Long-Term Experimental Management Program, Upper Colorado River Fish Recovery Program). The 7 Basin States submitted a letter the first week in July seeking rescission of this directive because, among other things, loss of funding for the basin-wide programs will create greater uncertainty in multiple federal CRSP reservoir dam operations, including the operation of Glen Canyon Dam. This, in turn, will create insecurity for over 2,000 municipal, industrial, and agricultural water suppliers in the basin and impacts 2,500 Reclamation projects upstream of Lake Powell. This is a matter of concern as

the Colorado River Basin enters its nineteenth year of drought conditions, which have drawn down reservoir levels and created significant water management challenges for the years to come.

On September 21, 2018, the President signed H.R. 5895 into law. The bill provides full funding for the Recovery Implementation Programs. The Bureau of Reclamation has identified funding for the Glen Canyon Dam Adaptive Management Program (“GCDAMP”) for FY 19. The Unit continues to assist Upper Basin States through Upper Colorado River Commission and the Recovery Implementation Program (“RIP”) Management Committees to work for re-authorization of the RIPs through 2023, and for a long-term funding solution for GCDAMP.

## 12. Long-Term Experimental Management Plan at Glen Canyon Dam

The Long-Term Experimental and Management Plan for the operation of Glen Canyon Dam (“LTEMP”) analyzes potential impacts of various operating protocols for Glen Canyon Dam and the stretch of the Colorado River that flows through the Grand Canyon. Among these potential operational protocols are flow-related experiments, including a High Flow Experiment, which increases the amount of water released from Lake Powell for a short time period for the purposes of distributing sediment downstream and improving sandbars for recreational purposes. The Unit continues to coordinate with CWCB staff and Colorado’s Adaptive Management representative to monitor implementation of the LTEMP with the ultimate goal of coordinating with other parties and decision makers to ensure the state’s interests are protected and that management activities comply with the 2016 Record of Decision. The Adaptive Management Work Group and Technical Work Group, both Federal Advisory Committees on which Colorado is represented, analyze management options and assess potential effects on resources within the Canyon, including cultural resources, power production, endangered species, non-native fish, and other resources.

The Assistant Secretary for Water and Science within the Department of the Interior, with consultation from stakeholders including representatives from the seven Colorado River Basin States, has decided to implement a Fall High Flow Experiment to take place November 5-8. During this 60-hour flow event, 38,700 cfs will be released from Glen Canyon Dam. The annual releases, however, will be unchanged; other monthly releases will be reduced to accommodate the increased release in November. The impact of the high-flow event on other resources, including the endangered humpback chub will be closely monitored.

13. Lake Powell Pipeline

The Utah Board of Water Resources filed an application with the Federal Energy Regulatory Commission (“FERC”) in May 2016 to construct a pipeline from Lake Powell to Southwest Utah to develop an additional 100,000 AF of Utah’s allotment under the Colorado River Compact and the Upper Colorado River Compact. There are potential impacts to the operation of the Project in relation to the named sources of water for the Project, the Law of the Colorado River, and Glen Canyon Dam operations as a result of the pipeline project. In January 2018, the CWCB approved filing a Motion to Intervene. However, also in January, FERC suspended the proceedings to decide a jurisdictional issue. On September 20, 2018, FERC issued an order denying Utah’s Petition for Declaratory Order on Jurisdiction, limiting the scope of its review to the hydropower components of the project only. The Order granted Utah the option to amend the application. Also, it remains unclear if FERC will continue to serve as the lead agency for purposes of coordinating the EIS process. The Unit will submit the Motion to Intervene before the November 19, 2018 deadline, and continue to coordinate with the CWCB to protect the State’s interests concerning this project.

14. Audubon Society of Greater Denver v. United States Army Corps of Engineers, et. al, Appellate Case 18-1004, 10th Cir.

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 held oral argument September 24. Only Appellee and Appellant (no intervenors) argued. The parties currently are awaiting the Court’s decision.

15. Hill v. Warsewa, 18-cv-300069, Fremont County District Court, Colorado –

In this fishing access dispute, Plaintiff fisherman alleges that the State of Colorado, rather than the landowner, holds title to the riverbed of part of the Arkansas River because the Arkansas River was navigable at the time Colorado became a State. At its core, the complaint seeks to determine the State’s title in lands.

Currently pending before the Court are two motions to dismiss for lack of jurisdiction, Plaintiff’s motion to remand for lack of jurisdiction, and Plaintiff’s motion to certify to the Colorado Supreme Court the question of “the nature of the State’s title in navigable waterways.”

## INTRASTATE MATTERS

16. Application for Water Rights of Peak Materials, LLC (formerly known as Everist Materials, LLC), Case No. 15CW3079, Water Division 5.

This case concerns an application for a plan for augmentation, including an appropriative right of exchange to allow for the operation of a commercial sand and gravel operation in Grand County. The CWCB filed a statement of opposition to prevent injury to its instream flow water rights on Crooked Creek, the Fraser River and the Colorado River. Once the applicant provided revisions and clarification to the plan and how out of priority depletions would be replaced in time, place and amount, the CWCB stipulated to entry of the decree on September 7, 2018.

17. Concerning the Application for Water Rights of Copper Mountain Consolidated Metropolitan District, Case No. 17CW3063, Water Division 5

Applicant sought to change the conditional portion of a tributary well for diversion at several other wells as alternate places of diversion. The CWCB filed a statement of opposition to prevent injury to its instream flow water rights on Tenmile and West Tenmile Creeks. One of the primary issues in the case was how out-of-priority depletions would be replaced including Applicant's reliance on previously decreed augmentation plans. Applicant provided clarification and CWCB stipulated to entry of the decree on September 24, 2018.

The water court entered a final decree for an instream flow water right in the following cases:

- Piceance Creek ISF, Case No. 16CW3038, Water Division 6, decree entered October 8, 2018
- Willow Creek ISF, Case No. 16CW3044, Water Division 6, decreed entered October 8, 2018
- Fourmile Creek ISF, Case No. 16CW3040, Water Division 6, decree entered October 7, 2018
- McKinley Ditch ISF acquisition and change of water right (co-applicants with Colorado Water Trust), Case No. 14CW3108, Water Division 4, decree entered October 1, 2018
- Vallecito Creek ISF, Case No. 17CW3045, Water Division 7, decree entered September 19, 2108