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STATE OF COLORADO
DEPARTMENT OF LAW

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TO: Colorado Water Conservation Board

FROM: Phil Weiser, Attorney General
Karen Kwon, First Assistant Attorney General
Jen Mele, First Assistant Attorney General

RE: Report of the Attorney General

One of the things I learned very quickly as I learned about Colorado's water community—in my role as Dean of the Law School at the University of Colorado and then through my campaign to be Colorado's Attorney General—is how impressive this community's leadership is. Nowhere is that better reflected than on the Colorado Water Conservation Board. This is such a strong Board which, despite all the pressures, keeps what's best for Colorado as its guiding principle. It's also a time of change, and with that in mind, I wanted to take a moment to say thank you to the outgoing members: Russ George, Patti Wells, and Jay Gallagher. I know I would have enjoyed the opportunity to work with each of these leaders more, but the state is so lucky to have benefitted from their service. And I'm also excited to work with the newly-minted Board members: Jackie Brown, Gail Schwartz, and Jessica Brody. It's an honor to serve with you and I look forward to the work we can do together.

FEDERAL & INTERSTATE MATTERS

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

This suit focuses on claims asserted by Texas and the United States against New Mexico regarding actions that impact Rio Grande Project water deliveries. The Project delivers water to southern New Mexico, west Texas, and Mexico. Colorado is participating as a signatory to the Rio Grande Compact, which is currently 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.

In late December, Texas and the United States filed Motions to Strike or for Summary Judgement on New Mexico's counterclaims. Texas and New Mexico also filed Motions for Judicial Determinations of Law regarding the Special Master's First Report.

At the beginning of March, Colorado filed Responses to these Motions to the extent they implicated Colorado interests in the litigation and the broader effect that decisions on these motions could have on compact law in general. Specifically, Colorado took issue with: (1) the United States' assertion of sovereign immunity from compulsory counterclaims regarding the Compact; (2) Texas' assertion that equitable defenses are not appropriate in compact litigation; (3) Texas and the United States' assertions that New Mexico's counterclaims are inappropriate because the issues are not related to the compact; and (4) Texas' assertion that the Supreme Court's ruling on whether the United States can bring a compact claim is sufficient to determine the law of the case for this ongoing litigation. Moreover, Colorado asserted that the Special Master's First Report also does not serve as the law of the case going forward because the Court never adopted the Report and the Report, itself indicates that the discussion material is for background purposes and not the basis of the recommendation.

Replies to all Responses are due March 15, 2019 and oral argument is schedule for April 2, 2019 in Denver. Concurrently, the parties are scheduling and taking depositions and preparing for trial which is set for fall of 2020.

2. Arkansas River Compact Administration

Our attorneys continue to work with clients from the Division of Water Resources (DWR) and the Colorado Water Conservation Board to address two main interstate issues pending in the Arkansas River basin: a permanent agreement for a source of water to maintain the permanent pool in John Martin Reservoir (JMR) and an agreement to create a new multi-user Colorado subaccount in JMR. The permanent pool agreement was finalized in February. The multi-user subaccount continues to be negotiated.

The permanent fishery pool in JMR, managed by Colorado Parks and Wildlife (CPW), is authorized for up to 15,000 acre-feet. However, there has not been any dedicated source of water for the permanent pool (except for one small and very junior water right). This has forced CPW to purchase water on the spot market to "fund" the pool. This leads to the problem that CPW can purchase water when it is abundant, but when the fishery really needs the permanent pool – in times of drought – there is little water available for purchase. Thus, CPW has been working with the Lower Arkansas Water Management Association (LAWMA) and Colorado and Kansas to firm up supply for the fishery. The proposal is to have LAWMA manage the accounting and provide the water via a management agreement between it and CPW, but the Arkansas River Compact Administration (ARCA) must approve the sources and method of filling the permanent pool.

This arrangement for a potential permanent pool has been tested via a pilot effort for the past two irrigation seasons. The permanent pool has been receiving water from the Highland Canal pursuant to one-year temporary agreements between Colorado and Kansas for 2017 and 2018. In February 2019, after years of negotiation and pilot testing, ARCA approved a longer-term agreement to use of the Highland Canal as a source of water for the permanent pool in JMR during a Special February Meeting. Furthermore, the Kansas Chief Engineer and the Colorado State Engineer signed two agreements (MOUs) regarding the use of that water for the permanent pool. As a result, the two states have successfully resolved an issue that has been outstanding for the past 6+ years.

The second issue is related to exploring mechanisms to secure approval of a new Multi-Purpose Colorado account in JMR. Currently, the JMR 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 JMR, 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. The Unit is working with the Division of Water Resources to continue negotiations to obtain this approval.

In addition to the two items outlined above, our attorneys are working with the Division of Water Resources and ARCA representatives for Colorado to address the U.S. Bureau of Reclamation's stance on performing a 10-year review of the Trinidad Project. Although required to perform a 10-year review, Reclamation announced in October that it might stop. After some discussions with Reclamation in November, its primary concern appears to be financial; there is too much time spent for too little result. Reclamation has proposed a process whereby Colorado and Kansas prepare the bulk of the report and agree on the data to be used in the report, and Reclamation will compile and evaluate that information and produce a 10-year review. Reclamation offered a proposed resolution for consideration at December ARCA meeting, but both Colorado and Kansas felt that would be too ambitious, primarily because the proposal does not offer any specifics or process for when Colorado and Kansas cannot agree on the report specifics or the data. Moreover, ARCA is but one signatory to the Trinidad Operating Principles. Instead, the states have offered a counterproposal, where all the parties work on an agreement – not an ARCA resolution – in early 2019, and when all other parties sign that agreement, ARCA can then adopt it through a resolution, whether by special meeting or at the 2019 Annual Meeting. This proposed agreement would provide for how Colorado and Kansas will go through the process of preparing the report and data and would provide a process to follow if the states cannot agree. Our attorneys will continue to represent the Colorado representatives to ARCA (CWCB Director, State Engineer, and Director of Water Quality at CDPHE) and DWR administrative staff during this process.

3. Republican River Compact Rules

On January 11, the State Engineer filed Compact Rules with the Division One Water Court (the Rules) under the State Engineer's Compact rule power, C.R.S.

§37-80-104. The Rules require all water users to participate in a Compact Compliance Plan—either the Republican River Water Conservation District’s Compact Compliance Pipeline or an alternative plan. The Rules set forth operating requirements for the Republican River Water Conservation District’s existing plan, as well as for alternative plans and the method of determining the amount of replacement water that will be required as part of any alternative plan.

Anyone may object to the Rules by filing a statement of opposition in Water Court before April 11. If no objections are filed, the Rules will take effect automatically. At this time, our attorneys are preparing to address many statements of opposition as part of the rulemaking process.

4. Colorado River Drought Contingency Planning

The Colorado River Basin has experienced historic drought conditions since 2000. In light of this ongoing condition, the Colorado River Basin States and Department of the Interior have recognized 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, 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, Upper Colorado River Commission, Bureau of Reclamation and counterparts from the Lower Basin States to explore and evaluate the options and terms of any drought contingency plan. As of 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 included a 2-hour public webinar in which the documents were discussed and posted to the CWCB’s website, numerous basin roundtable meetings throughout the state, joint tribal sessions, water user association seminars, and other venues as invited.

In addition to the Drought Contingency Planning documents, the 7-States’ Principals and Department of the Interior agree that federal legislation essentially “blessing” the documents is appropriate. As of early December, it appeared that all parties but Arizona were in position to agree to submit the Drought Contingency Planning documents as drafted to the Congressional delegations for approval. However, because Arizona still needed time to work out internal implementation agreements and obtain intrastate legislative authority, the federal legislation was delayed. In mid-December, the Imperial Irrigation District Board in southern California also took formal action to withhold approval of the draft planning documents until certain conditions were met, including the need to secure sufficient resources to help address impacts at the Salton Sea. At the Colorado River Water Users’ Association conference in mid-December, the Commissioner of Reclamation

announced a deadline of January 31, 2019 for all parties to be ready and authorized to approve the documents. If that deadline could not be met, then Reclamation would consider recommendations on actions it should take to protect critical reservoir elevations going forward.

On January 31, 2019, the Arizona legislature passed legislation authorizing Arizona's Colorado River representative to proceed with forwarding the DCP planning documents to the Congressional Delegations. However additional matters, including authorizations from the Imperial Irrigation District and formalization of exhibits for projects to conserve and bank water in Lake Mead, required completion. Accordingly, because the parties were not ready to proceed with forwarding the DCP documents to Congress, the Commissioner of Reclamation issued a notice requesting input from the Governors of the Colorado River Basin States on appropriate action to take to reduce the risks the Colorado River Basin is facing. The requested input would be accepted between March 4 and March 19, 2019.

Our attorneys have coordinated with the client representatives and counterparts in other Basin States to finalize the necessary details that would allow the drought contingency planning documents to proceed to and be approved by Congress. Because it remains uncertain at this moment as to whether such documents can proceed prior to the March 19th deadline, the Unit has also been evaluating options and strategies for Colorado to consider as it identifies recommendations to the Bureau of Reclamation in response to the notice for input. The Unit will continue to coordinate with client representatives and state leadership to preserve Colorado's interests in the Colorado River either through the drought contingency planning process or through the process implemented to take actions in the absence of drought contingency plans.

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

We continue 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 Commission's role to accomplish drought response in a manner that preserves collaborative relationships with federal agencies. At the Upper Colorado River Commission's annual meeting in December, the UCRC commissioners unanimously supported approving the document as drafted if and when the other materials that comprise the drought contingency plan package are ready to be finalized as well.

b. 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 intra-state 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. Our attorneys worked 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. At the Upper Colorado River Commission's annual meeting in December, the UCRC commissioners unanimously supported approving the document as drafted if and when the other materials that comprise the drought contingency plan package are ready to be finalized as well.

c. Lower Basin Drought Contingency Plan

The Lower Division States, primary water user entities, and Bureau of Reclamation have prepared a draft drought contingency plan for the Lower Colorado River Basin. The draft plan includes entities within 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.

We coordinated with the CWCB and Upper Colorado River Commission to evaluate the plan, and identify potential mechanisms to further 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 confirmed in September 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. Nevada and most entities within California secured sufficient approvals to move forward at this time, and the Upper Colorado River Commission formally entered its consent to proceed with the plan as part of the drought contingency planning package during its annual meeting in December. Arizona secured necessary approvals to proceed with the drought contingency package on January 31, 2019. Currently, the parties are working through final details on exhibits to implement the plans and on identifying whether and to what extent issues raised by the Imperial Irrigation District can be overcome to proceed within finalizing the planning package. (See Drought Contingency Plans, *supra*).

d. 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 Unit helped draft and address comments related to this agreement, which comprises part of the drought contingency planning document package. (See Drought Contingency Plans, *supra*).

5. Colorado River Demand Management

In conjunction with drought contingency planning, the Unit continues to coordinate 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. To that end, the Unit also worked with CWCB staff to prepare a Statement of Support and Policy regarding the Colorado River Drought Contingency Plan and Demand Management in the Upper Basin. The Board unanimously approved the Statement when presented at the November meeting. Since then, the Unit has been coordinating with CWCB staff to continue outreach on the concept of demand management, and develop a proposed work plan for feasibility investigations within Colorado consistent with Board direction and in conjunction with any investigations or efforts undertaken by the Upper Colorado River Commission.

6. Colorado River Basin ESA Compliance Programs

Last year, federal legislation was introduced to extend funding for the Upper Colorado River Fish Recovery Program through 2023. However, guidance in the President's FY19 budget and a directive from the Office of Management and Budget

redirected 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 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 has been and continues to be a matter of concern as the Colorado River Basin enters its nineteenth year of drought conditions, which has drawn down reservoir levels and created significant water management challenges for the years to come.

As of September 2018, the President signed H.R. 5895 into law, which provides full funding for the Recovery Implementation Programs (RIPs) for FY 2019. The Bureau of Reclamation has identified separate funding for the Glen Canyon Dam Adaptive Management Program (GCDAMP) for FY 2019. Neither option, however, secures funding through 2023. Our attorneys have been working with the Upper Colorado River Commission and the RIPs Management Committee to obtain necessary legislation that would re-authorize the RIPs through 2023, provide funding for the RIPs through 2023, and secure a long-term funding solution for GCDAMP. The legislation failed to move during the lame duck session of Congress at the end of 2018. However, it received a favorable score from the Congressional Budget Office and identical language was introduced in the Senate as part of an Omnibus Lands Bill S. 47. The Senate and House of Representatives have both passed S. 47 and it is now awaiting Presidential signature. If enacted, the legislation will authorize funding through 2023 via annual appropriations and would no longer utilize hydropower revenues as set forth in the original authorizing legislation. The Recovery Program members have expressed support for previous versions of the same legislation.

7. 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 Lake Powell Pipeline in relation to the named sources of water for the Pipeline, 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 submitted the Motion to Intervene prior to the November 19, 2018 deadline, and will continue to coordinate with the CWCB to protect the State's interests concerning this project.

8. Aspinall Unit Operations

The Unit continues to coordinate with clients from the Division of Water Resources and the CWCB to engage the Bureau of Reclamation in discussions on how to operate the Aspinall Unit consistent with state water law and the Record of Decision. Following informal discussions at the January 2019 Colorado Water Congress' Annual Convention during which the Regional Director of the Upper Colorado Region at Reclamation suggested documenting the primary issues to address, the Unit assisted the client agencies in drafting a letter to the Reclamation Regional Director. The CWCB director sent the letter on February 27, 2019. The Unit will continue to coordinate with client agencies to advance the state's interests in operating the Unit consistent with state law and the terms of the Record of Decision going forward.

9. Basin Fund MOA-Colorado Allocation and Project Management

The Basin Fund MOA is an agreement that created a mechanism for the Upper Colorado River Division States to access excess hydropower revenues of operation, maintenance, and replacement on components within the participating projects authorized pursuant to the Colorado River Storage Project Act. Colorado's allocation is approximately \$73 million.

In determining which projects to fund under the MOA, Reclamation rescinded a few fairly large projects based upon a solicitor's interpretation of how to treat "existing facilities" within participating projects authorized pursuant to the CRSP Act. When exploring the appropriateness of this rescission, the Unit and CWCB staff uncovered additional questions to investigate regarding Reclamation's implementation of the Basin Fund MOA and its accounting for approved projects. At the CWCB Board's direction, the Unit and CWCB staff have prioritized getting to the bottom of the implementation and accounting issues before tackling any legal issues, including lack of communication and transparency in developing and administering projects, managing project modifications with significant cost overruns, and Reclamation's accounting and handling of cost overruns.

As part of this effort, the Unit has coordinated with CWCB to discuss with Reclamation the current and future operation of the Basin Fund MOA in Colorado. To this end, the Unit has assisted CWCB staff in, among other things, developing a communications management plan and identifying important modifications to the accounting spreadsheets for the MOA activities. Both items are still pending before Reclamation for review and finalization. At the Board's request, the CWCB staff have since elevated the discussion to the Upper Colorado Regional Director of Reclamation via an informal meeting at Colorado Water Congress' January Seminar and via letter dated February 27, 2019. In addition, the CWCB Board

directed CWCB and our legal team to develop two documents: (1) a Process for MOA Project Prioritization; and (2) a Budget Adjustment Guidance Document. These documents will be presented in open session to the CWCB Board during the March 2019 Board Meeting.

10. Animas La Plata Operation, Maintenance & Replacement (ALP OM&R) Association Amendment to Exhibit A of the Inter-Governmental Agreement

As a holder of water rights from the Anima La Plata Project, the CWCB is a member of the ALP OM&R Association, that governs operation of the facility. Counsel for the members of the ALP OM&R Association, including the Unit in conjunction with CWCB staff, have been engaged in a re-negotiation of Exhibit A to the Intergovernmental Agreement to develop more detailed shortage sharing provisions among the members in the event of drought. To develop these provisions, the parties first require clarification as to who can access the joint pool and in what amounts and to what extent. The Unit continues to represent the CWCB in these discussions and will report developments as they arise.

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

This case is on appeal to the 10th Circuit, after Magistrate Tafoya dismissed the complaint for lack of prudential standing. At its core, the case involves a fishing access dispute, in which 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.

The State moved dismiss the complaint on several grounds, including prudential standing. Magistrate Tafoya agreed that Plaintiff lacks prudential standing to pursue the case in any forum. She noted that the case is not about whether Colorado has adopted the public trust doctrine or can turn its back on its responsibilities to the public trust, but instead about whether citizen with no ownership right can bring the case to court as framed. The decision closely follows 10th Circuit case law that the Unit cited on prudential standing. *See e.g., The Wilderness Soc. v. Kane Cnty, Utah.*, 632 F.3d 1162 (10th Cir. 2011) (determining that a plaintiff lacked prudential standing where it rested its claims on the government's property rights instead of asserting a valid right to relief of its own).

Plaintiff obtained an extension until April 18 to file an opening brief. Assuming Plaintiff files on that day, the Unit will file an Answer on or before May 20.

INTRASTATE MATTERS

12. Concerning the Application for Water Rights of James Ritchie, Case No. 17CW3004, District Court, Water Division 6

Applicant sought approval for a change of water rights to divert at upstream points of diversion on Flag Creek, a tributary to the White River. The CWCB filed a statement of opposition to ensure that its instream flow water rights on the White

River and Miller Creek (another source of the water rights being changed) would not be injured. Most of the CWCB's efforts in the case were to ensure that the decree adequately described Applicant's return flow obligations and replacement sources. The CWCB and Applicant were able to agree on appropriate terms and conditions for the decree, and the CWCB stipulated to entry of the decree on February 19, 2019.

13. Concerning the Application for Water Rights of Central Colorado Water Conservancy District, 15CW3148, District Court, Water Division 1

Applicant sought approval of a water storage refill right in Chatfield Reservoir. The applicant sought a variety of uses for the right, including a claim that certain uses could be made in conjunction with the CWCB, which prompted the CWCB to file a SOP in the case. The applicant also claimed extraterritorial use of the subject water right. The applicant ultimately dropped the claim for CWCB's use of the water and limited use to within the boundaries of Central or its sub-districts, and required that augmentation use be only pursuant to decreed augmentation plans, so as to provide notice to the CWCB of any such use. The CWCB stipulated to entry of a decree on February 7, 2019.