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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

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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

Our attorneys remain involved in each phase of the litigation to assure that any outcome does not negatively affect Colorado's interests in the Rio Grande Compact or create adverse jurisprudence for interstate compact litigation generally. Currently, Colorado's expert consultants are working with the legal team to review expert reports and modeling and to develop strategies for preserving Colorado's interpretation of the Compact. Concurrently, discovery continues in the case, and the Special Master has set a case management hearing in Cedar Rapids for March 31, 2020. Trial before the Special Master remains tentatively set for late 2020.

2. Arkansas River Compact Administration

Colorado continues to work with Kansas to create and operate a new multi-user Colorado subaccount in John Martin Reservoir. Colorado water users are seeking to establish the account because it would better enable them to manage their water resources. Pueblo Reservoir is in danger of spilling, and water users in the basin are looking for alternative storage locations. The account would also assist water users in complying with the Arkansas River Basin's Irrigation Improvement Rules, which require water users to provide historic return flows to Kansas when implementing irrigation efficiencies such as installing center pivot sprinklers and lining ditches and ponds.

In furtherance of this concept, our attorneys participated in the Special Engineering Committee (SEC) meeting held in Burlington on February 11 and 12. The SEC saw presentations by Colorado State University and Colorado Department of Public Health and Environment on water quality and how agricultural practices can impact water quality for downstream users. The rest of the SEC meeting was focused on preliminary negotiations on the account. Based on those discussions, it does not appear that there will be a pilot project set to go in WY 2020. The parties agreed, however, to work towards a 2021 pilot project. Kansas recognizes why Colorado users want the account, and the potential for benefits to water quality, but Kansas seeks assurance that the account will not result in less water flowing past the stateline. The next SEC meeting is scheduled for April.

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Our attorneys have also been coordinating with Kansas and Bureau of Reclamation representatives regarding the process for performing the next 10-year review on the Trinidad Project. The 10-year review is a requirement of the Trinidad Project Operating Principles, and is intended to review operations of the project to ensure that it has not had a detrimental impact on downstream water users in Colorado and Kansas. After the most recent review, completed by Reclamation in 2018 for the period of 2005-2014, Reclamation complained that the review was far too costly and asserted that because there is no legal requirement that they perform the review, they would not perform further reviews unless Colorado and Kansas, through the Arkansas River Compact Administration, agreed to numerous conditions related to the process for the 10-year review. Colorado and Kansas both expressed a general willingness to work with Reclamation on improving the 10-year review process and reducing the cost to Reclamation, but both states believe it is premature to finalize a new review process before the ArkDSS system, which will provide a surface water and consumptive use model for the Arkansas River Basin, is operational. Furthermore, the states believe that the process needs to be more comprehensive than that proposed by Reclamation. The States and Reclamation have set a schedule to periodically reconvene to work through these issues.

### 3. Republican River – Compact Rules

The Republican River Compact Rules are pending in the Division 1 Water Court. 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.

The only remaining opposer, East Cheyenne Groundwater Management District, has been working with a modeling expert to try and understand the Republican River Compact Administration Groundwater Model and that expert has been coordinating

with the State's expert. If forced to litigate on these issues, the trial is expected to last approximately three (3) weeks. The legal team, however, is reaching out to East Cheyenne to discuss its concerns and hopefully address matters so that it can withdraw its protest or come to a stipulated agreement.

4. Republican River – Interstate Compact Administration

Kansas, Nebraska and Colorado continue to convene monthly via phone to work on issues including, but not limited to, management of Harlan Reservoir in Nebraska consistent with the terms and understandings of the parties in the Republican River settlement documents. Our attorneys will continue to counsel Colorado's Compact Commissioner in these and other interstate discussions as they arise.

5. Colorado River Demand Management Storage Agreement and Investigations

Colorado Investigations: The Colorado River Subunit continues to provide counsel to CWCBC staff on implementation of the 2019 Demand Management Feasibility Work Plan. The work plan has three elements: regional workshops, workgroups, and continued education and outreach. The eight (8) different work groups continue to meet to identify key issues related to Demand Management that should be framed for public consideration at future workshops and ultimately by the CWCBC Directors. The Work Plan's Project Management Team, which is comprised of CWCBC, Division of Water Resources, and Department of Natural Resources staff along with Colorado River Subunit members are compiling public summaries of each workgroup meeting, which are available at CWCBC's Demand Management website.

The second regional workshop was held on January 29 at the Colorado Water Congress conference. Attendees heard report outs from representatives of each Work Group as to the work done to date and next steps. Attendees also participated in breakout sessions to address select questions posed by the various Work Groups and provided their feedback to CWCBC. During this workshop session and in other meetings, many Work Group members have identified overlapping issues, and have expressed an interest in better understanding what issues are being discussed and analyzed by the other Work Groups in the process. In response, the joint IBCC/CWCBC Meeting to be held March 4-5, will have dedicated time for Work Groups to meet with one another to discuss concepts, challenges and overlapping issues going forward.

Additionally, our Subunit attorneys continue to coordinate with the Division of Water Resources to answer questions and provide information to the Division Engineers and their staff regarding the status and purpose of demand management, should it become a consideration.

CWCBC and the Colorado River Subunit have met with representatives of the Southern Ute Indian Tribe and the Ute Mountain Ute Indian Tribe to discuss tribal

interests related to Demand Management. At the request of the Tribes, CWCB and the Tribes are currently engaging in sovereign to sovereign discussions on these issues and allowing the Tribes to assess the manner in which they would like to engage in the process.

Regional Investigations: At the regional level, the Upper Colorado River Commission is on a parallel track with Colorado to assess Demand Management and the various issues such a program would implicate across the Basin. To this end, the Commission is currently evaluating proposals for contractors to assist in evaluating regional issues related to demand management. There is an ongoing need to assure any regional investigations are well coordinated and complementary to intrastate investigations. The Subunit attorneys are working with the Commissioner for Colorado and her staff in furtherance of these efforts and considerations.

6. Reassessment of the 2007 Interim Guidelines for Lower Basin Shortages and Coordinated Operations of Lake Powell and Lake Mead.

The 2007 Interim Guidelines for Lower Basin Shortages and Coordinated Operations of Lake Powell and Lake Mead inform the volume of annual releases to be made from Lake Powell consistent with the Colorado River Compact and related law of the river. The Guidelines could not be successfully finalized in 2007 without consensus among the seven Colorado River Basin States, who hold the rights and obligations related to the use of water under the compacts. The term of the Guidelines is 2007 to 2025 with the understanding that no later than December 31, 2020, the Secretary of the Interior would review the effectiveness of the Guidelines in consultation with the Basin States.

The Bureau of Reclamation initiated its internal review of the effectiveness of the Guidelines in January 2020. This review process does not kick off a NEPA or formal decision-making process regarding what future operation of the Colorado River System should look like. Rather, it is a look back to assess what worked, what did not and why. As part of the review process, the Secretary committed to consulting with the 7-Colorado River Basin States consistent with the express terms of the Guidelines. He also committed to including input from other interests, namely the tribes and stakeholders in the basin. This step is viewed as the foundational evaluation needed to help inform future operations of the Colorado River System. It also allows additional time to implement the recently approved Drought Contingency Plan and evaluate the effectiveness of those tools as well.

Concurrently, Colorado's Commissioner to the Upper Colorado River Commission is working with her counterparts in the Upper Basin to develop an approach for assessing the Guidelines from an Upper Basin perspective. She is also working with staff from the CWCB and Department of law and Alternate Commissioners to reassess the effectiveness the Guidelines based on Colorado's individual views. This

includes, but is not limited to, building the internal assessment team, performing needs assessment/information gathering throughout the state, and ultimately developing a strategy for negotiating new terms the various stakeholders as needed. Our attorneys have been and will continue to provide counsel to the Commissioner and her team throughout these processes.

#### 7. Renegotiation of the 2011 Upper Basin Fund Memorandum of Agreement

The Upper Basin Fund Memorandum Of Agreement (“MOA”) is an agreement entered into in 2011 between the four Upper Division States, the Bureau of Reclamation (“Reclamation”), the Western Area Power Administration (“WAPA”), and the Colorado River Energy Distributors Association (“CREDA”) (“Parties”). The MOA provides a mechanism for the Upper Division States to access excess hydropower revenues made available through the Colorado River Storage Project Act for operations, maintenance, and replacement for certain types of irrigation projects in each of the Upper Division States, known as “participating projects.” It also serves to reduce power rates. The term and amount for the MOA is 2011 to 2025, with total annual disbursements to the Upper Division States of \$11.5 million scheduled from 2012 through 2025 for a total disbursement of \$161 million. Colorado’s allocation under the MOA is approximately \$74 million and the CWCB is the agency tasked with executing the MOA for the state.

While the MOA does not expire until September 2025, WAPA is currently conducting a rate study and has determined that a new MOA (“MOA 2”) would reduce power rates, thus benefitting power customers starting in 2021. As a result, the MOA signatories agreed to work together to determine if a new agreement could be reached by June 2020 in order to allow WAPA to include an MOA 2 in the current rate study.

Implementation of the current MOA has produced significant challenges regarding communication and management of the MOA projects between Reclamation and the respective states. These concerns, coupled with issues related to the amount to be allocated to the Upper Division States under an MOA 2 and the term of such an agreement have been the focus of negotiations to date.

Our attorneys are representing the CWCB and Colorado River Commissioner during the MOA 2 negotiation process. The MOA 2 is currently in “for discussion purposes only” draft form and negotiation of the substantive provisions related to what projects would qualify for available funds and implementation issues for approved projects is on-going. Nothing has been formally agreed to at this time.

8. Save the Colorado, et. al. v. Dept. of the Interior, et. al., 3:19-cv-80285 (U.S. Dist. Arizona, Prescott Division) (L-TEMP)

On October 1, 2019, Save the Colorado, Living Rivers and Center for Biological Diversity (Plaintiffs) filed suit in the U.S. District Court of Arizona to challenge the Secretary and Department of the Interior's environmental analyses and decision under the National Environmental Policy Act (NEPA) to re-operate Glen Canyon Dam according to criteria set forth in the 2016 Long-Term Experimental and Management Plan (L-TEMP). Colorado and the other Basin States have a significant interest in how and under what authorities Glen Canyon Dam is operated consistent with the Law of the Colorado River.

The federal defendants filed an Answer on December 6, 2019. Per the Court's scheduling order, the formal record must be lodged for review by April 3, 2020. Colorado River Energy Distributors Association has been granted intervention status. Our attorneys have coordinated with the other Colorado River Basin States to prepare a joint motion to intervene. Based on this coordination, our attorneys have prepared a six-states motion to intervene (New Mexico wants to abstain from being directly involved for internal reasons) that is currently being finalized for filing in early March.

9. Hill v. Warsewa, No. 19-1025, 10th Cir.

In this case a fisherman, Hill, claimed that a landowner, Warsewa, could not prevent him from wading in the Arkansas River because the underlying riverbed belongs to the State, rather than the landowner. Hill's theory was that the River was navigable in 1876 and that the State, therefore, took title at statehood under the doctrine of navigability. Upon motions by the State and Warsewa, the District Court dismissed for lack of prudential standing because Hill asserted the rights of a third party—the State, and also asserted a generalized grievance. On appeal, the panel disagreed and remanded to the District Court. The panel found that Hill had prudential standing because he asserted his own right and not the right of the State. The panel did not identify the source or nature of that right, but instead assumed his claimed right was valid for purposes of determining standing. The majority did not reach the issue of a generalized grievance. The dissent agreed that Hill had prudential standing, but would have found Hill asserted a generalized grievance and would have directed the District Court to remand the case to state court for lack of jurisdiction under 28 U.S.C. §1447(c). Warsewa has petitioned the 10<sup>th</sup> Circuit for a rehearing en banc.

### INTRASTATE MATTERS

10. Concerning the Application for Water Rights of Sheep Camp Holdings, LLC, Case No. 18CW3033, District Court, Water Div. 2

Applicant filed an application for change of water rights and a plan for augmentation to replace evaporative depletions from three ponds located in the Purgatoire River Basin. The CWCB filed a statement of opposition to ensure that its instream flow water rights on the Purgatoire River and South Fork of the Purgatoire River were not injured. The water rights being changed in this case were previously changed in 1985, and Applicant generally was able to rely on the determinations from that case. Applicant and the CWCB agreed that the uses of the ponds to be augmented existed prior to the 2009 appropriation of the instream flow water rights, and thus that section 37-92-102(3)(b), C.R.S., applied, and the Applicant and the CWCB entered into a stipulation on January 13, 2020.

11. B Lazy M Ranch Owners Assn., 18CW3044, Div. 2

This case concerned an application for a plan for augmentation for Jordan Reservoir, located on Hay Creek, tributary to Four Mile Creek, in Teller County. Applicant sought to augment the potentially injurious out-of-priority stream depletions caused by evaporation from the surface of the reservoir. Applicant's replacement supplies included consumptive use credits from a change of 0.15 cfs of the Watson Ditch No. 1 water right, as well as consumptive use water leased from Cripple Creek. Applicant also sought appropriative rights of exchange to exchange these replacement sources up to Jordan Reservoir. CWCB holds instream flow rights in the area on Four Mile Creek, and worked with Applicant to develop terms and conditions in the final decree to prevent injury to the instream flow rights as a result of the augmentation plan and exchanges, and the parties entered into a stipulation on January 15, 2020.

12. Concerning the Application for Water Rights of Gold Basin Mine, LLC, Case No. 18CW11, Water Div. 2

Applicant in this case sought a plan for augmentation to replace depletions to Cache Creek (a tributary to the upper Arkansas River) resulting from placer mining. The CWCB filed a statement of opposition to ensure that its downstream instream flow water right on Cache Creek was not injured. The CWCB determined that Applicant's operations existed prior to the 1998 appropriation of the instream flow water right, and thus that section 37-92-102(3)(b), C.R.S., applied to make the instream flow water right subject to Applicant's operations. Applicant and the CWCB reached agreement on the scope of Applicant's operations that were covered under this statute and entered into a stipulation on January 17, 2020.

13. Application for Water Rights of City of Loveland, Case No. 18CW3193, Div. 1

This case concerned an application by the City of Loveland to quantify its return flows and use that water for variety of uses and places of use. Loveland also sought the right to broadly lease, trade, exchange, and sell the water rights extraterritorially outside of its service area. The CWCB possesses numerous instream flow water rights in Water Division 1 and the Big Thompson River Basin which could be injuriously affected by Applicant's claims and filed a statement of opposition primarily due to concerns regarding the proposed extraterritorial use, the potential effect those claims may have upon CWCB's instream flow water rights, and to ensure protective terms and conditions were included in any decree entered in this case. Loveland and CWCB stipulated to entry of a decree containing terms and conditions the CWCB believes to be protective of its instream flow rights on January 22, 2020.

14. Town of Crested Butte, Case Nos. 16CW3085 and 16CW3086, Water Div. 4

Applicant filed two applications for changes of water rights on the same ditch to change the use and point of diversion for the water right, as well as appropriative rights of exchange for use of the changed right after it has been run through the municipal water system. After negotiating terms and conditions to ensure applicant properly maintains historical return flows and that no expansion of use would result from the change, stipulations with applicant were filed in both cases on January 24, 2020.

15. Double RL Company, Case No. 19CW3012, Water Div. 4

Applicant originally claimed a corrected point of diversion for the Lischke Ditch and a change of water right for the Brown Ditch. CWCB filed a statement of opposition to protect its instream flow right on Dallas Creek from an expansion of use resulting from the changed Brown Ditch. Applicant dropped its claim for the Brown Ditch and the CWCB signed a stipulation which was filed with the court on February 10, 2020.

16. Double RL Company, Case No. 18CW3065, Water Div. 4

CWCB filed a statement of opposition to this application for two water storage rights to protect instream flow water rights on Beaver Creek, Dallas Creek, West Fork Dallas Creek and the Uncompahgre River. Applicant claimed that its uses for one of the ponds were in existence as of the time of the appropriations of the affected instream flow rights, and therefore those instream flow water right are subject to those uses under 37-92-102(3)(b). The parties reached agreement as to the scope of the uses in existence as of the date of the instream flow appropriations, and parties stipulated to terms and conditions in a stipulation that was filed with the court on February 11, 2020.



17. Application of United States of America, Case No. 16CW3193, Div.1

This case concerned an application by the United States of America through the Bureau of Reclamation (“BOR”) for absolute water rights for non-consumptive, hydropower production. The claimed water rights divert a large amount of water from the Big Thompson River into a hydropower production facility and return the water unconsumed to the Big Thompson River at a different downstream locations. The CWCB holds three instream flow water rights within the reaches affected by BOR’s claimed water rights, and filed a statement of opposition to ensure those instream flow water rights were protected from injury and because BOR claimed appropriation and beneficial use dates that predated those of CWCB’s instream flow water rights. Initially, BOR claimed its water rights were entitled to an allowance under section 37-92-102(3)(b), C.R.S., which subjects the instream flow water rights to appropriations or practices in existence at the time of the appropriation of the instream flows, however, due to disagreement as to the extent that BOR’s historical operations affected the instream flow water rights, BOR ultimately dropped its claims under that statute. Instead, BOR agreed that its water rights will operate junior in priority to the instream flow water rights and the decree specifically provides that section 37-92-102(3)(b), C.R.S., does not apply to the decreed water rights. BOR and CWCB stipulated to entry of the decree on January 10, 2020.