

PHIL WEISER
Attorney General

NATALIE HANLON LEH
Chief Deputy Attorney General

ERIC R. OLSON
Solicitor General

ERIC T. MEYER
Chief Operating Officer



RALPH L. CARR
COLORADO JUDICIAL CENTER
1300 Broadway, 10th Floor
Denver, Colorado 80203
Phone (720) 508-6000

STATE OF COLORADO
DEPARTMENT OF LAW

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TO: Colorado Water Conservation Board

FROM: Phil Weiser, Attorney General
Lain Leoniak, First Assistant Attorney General
Jen Mele, First Assistant Attorney General

RE: Report of the Attorney General

FEDERAL & INTERSTATE MATTERS

1. **Waters of the United States (WOTUS)**

On January 23, 2020, Andrew Wheeler, Administrator of EPA, signed the *Navigable Waters Protection Rule: Definition of "Waters of the United States"* (the "2020 Rule"). That rule redefines Waters of the United States ("WOTUS") to significantly limit the scope of federal jurisdiction to regulate water quality.

In 2019, Governor Jared Polis and Attorney General Phil Weiser submitted to the EPA and the U.S. Army Corps of Engineers comments on a similar draft of the rule. Among other things, those comments explained that Colorado does not support any rollback of federal jurisdiction beyond the approach taken by the George W. Bush administration, set forth in what was known as the *Revised Guidance on Clean Water Act Jurisdiction Following the Supreme Court Decision in Rapanos v. U.S. and Carabell v. United States* ("2008 guidance"). The state's comments specifically objected to the 2020 Rule in that it would remove from federal jurisdiction many Colorado waters that are currently within federal jurisdiction under the 2008 guidance. In addition, Colorado indicated two areas of support for the 2020 Rule: additional clarity regarding the existing agriculture exemption(s); and continued consistency with Section 101(g) of the CWA.

The 2020 Rule was published in the Federal Register on April 21, 2020 and was scheduled to take effect sixty (60) days later. In May 2020, Colorado filed for a Preliminary Injunction in the United States District Court of Colorado blocking

implementation of the 2020 Rule. On June 19, 2020, the Court granted the Preliminary Injunction. On June 23, 2020, the Department of Justice filed a notice of appeal to the 10th Circuit Court of Appeals. The 10th Circuit Court held a remote oral argument in November 2020.

On April 2, 2021, one day after denying a motion filed by EPA and the Army Corps to hold the appeal in abeyance, the 10th Circuit issued a decision reversing the District Court's order staying the 2020 Rule in Colorado. The 10th Circuit's judgment reversing the stay went into effect on April 26, 2021 when the Court issued its mandate in the case.

In the District Court case, EPA and the Army Corps moved jointly with Colorado to extend the briefing schedule to allow the federal agencies time to reconsider the 2020 Rule. Two motions for extension have been granted to date. Colorado's opening brief on the merits of its claims was due to be filed on June 14, 2021. However, on June 9, the EPA and the Army Corps announced that they intend to revise the definition of WOTUS and that they will be initiating new rulemaking. In light of the announcement, Colorado filed a motion to extend the briefing schedule thirty (30) days and is discussing with the parties how to proceed.

In July 2021, the parties jointly moved to hold the case in abeyance for six months, which was granted. As a result, the case is stayed until January 14, 2022.

On December 7, 2021, the EPA and Army Corps issued a Federal Register Notice for a Revised Definition of Waters of the United States. The Federal and Interstate Unit attorneys are part of an interagency team and provide input on communications with EPA and the Army Corps of Engineers including, most recently, contributing to Colorado's comment letter on the Revised Definition of WOTUS, due February 7, 2022.

2. 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.

Our attorneys remain involved in each phase of the litigation to assure that any outcome does not harm Colorado's interests in the Rio Grande Compact or create adverse jurisprudence for interstate compact litigation generally. The Special Master's order on summary judgment held that the water between lower New Mexico and Texas is split on a 57% - 43% basis as provided by the Bureau of

Reclamation's Rio Grande Project. What constitutes the Project's water supply will be an issue for trial.

Trial before the Special Master has two initial settings on the liability phase. The first, held remotely, began October 4, 2021, and lasted to the end of November. The second, to be held in Iowa, will start March 14, 2022 and last about two months. Following the trial on liability the parties may conduct a damages and remedy trial phase. The parties are currently involved in mediated settlement discussions.

Texas recently attempted to add new claims against New Mexico regarding its Compact administration upstream of the Rio Grande Project. Colorado opposed this effort. The Special Master declined to allow this amendment and instructed Texas to file a motion for leave to amend its complaint directly with the Supreme Court. Texas has indicated it plans to file these new claims this month.

3. Hill v. Warsewa, Court of Appeals, 2020CA1780

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. After some back and forth between the state and federal courts, on September 14, 2020, the Fremont County District Court granted the State's Motion to Dismiss finding that, while Hill had asserted an injury-in-fact, he nevertheless lacked standing because he was unable to show "a personal legally protected right that is his to assert in a judicial forum." Hill filed his appeal on October 16, 2020. Hill filed his opening brief on December 17, and attorneys from the Federal and Interstate Unit prepared and filed Colorado's answer brief on January 21, 2021. Oral argument was held on January 11, 2022 and now we await a decision.

4. 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.

There is only one remaining opposer, East Cheyenne Ground Water Management District. After numerous settlement meetings, it appears as if a non-litigated solution is unobtainable. Thus, our attorneys have begun preparing for litigation of

these issues and filed expert report disclosures on February 8, 2021. On March 26, 2021, East Cheyenne filed a Rule 56(h) motion, asserting that the method in the Rules for determining replacement obligations for Compact Compliance Plans is unlawful under Colorado law. The State Engineer filed his response on April 16, 2021 and East Cheyenne filed its reply on April 30, 2021. Argument on the motion was held on October 22, 2021, and on November 16, 2021, the court denied East Cheyenne's motion, finding that it was not entitled to judgment as a matter of law. East Cheyenne's expert report disclosures were due on June 28, 2021. No such disclosures were filed, but East Cheyenne reserved the right to call and cross-examine the State's expert witnesses. On December 27, 2021, the State Engineer filed an unopposed motion *in limine*, limiting East Cheyenne to presentation of evidence only on rules it previously identified and preventing East Cheyenne from presenting any expert testimony in its case-in-chief. The trial is scheduled for three (3) weeks at the end of January 2022 but given the lack of expert testimony from East Cheyenne, it is likely to last only a few days.

5. Colorado River Demand Management Storage Agreement and Investigations

In March 2019, the seven Colorado River Basin States executed a suite of agreements called the Drought Contingency Plan (DCP). The DCP includes Upper and Lower Basin elements and is in effect until December 31, 2025. It is beyond the scope of this Report to summarize each agreement, but for purposes of this Report, the relevant agreement is the Demand Management Storage Agreement (DMSA).¹ The DMSA authorizes the storage of up to 500,000 acre-feet of water in the Colorado River Storage Project Act Initial Units if and when a Demand Management program is set up in the Upper Basin. The DMSA does not require that a Demand Management program be established. Rather, it provides the legal mechanism to store water conserved under a Demand Management program if, and only if, the Upper Division State Commissioners to the Upper Colorado River Commission agree to the feasibility and requirements of such a program after consulting with the Lower Division States, reach agreement with the Secretary of the Interior on specific operations, and determine there is a need for such a program.

Colorado Investigations: The Colorado River Subunit continues to provide counsel to CWCB staff on the next steps in the intrastate Demand Management Feasibility Investigation.

CWCB and the Colorado River Subunit continue to engage in sovereign-to-sovereign discussions on issues related to the Demand Management Feasibility Investigation, allowing the Tribes to assess the manner in which they would like to engage in the process for the next steps in the investigation.

¹ Additional information relating to the DCP and the agreements can be found at <https://www.usbr.gov/dcp/index.html>.

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 implicates across the Basin. To this end, the Upper Colorado River Commission has finalized the services contracts, scopes of work, and task orders for the various contracting entities and are working through the tasks. There is an ongoing need to ensure any regional investigations are well-coordinated and complementary to intrastate investigations. The Subunit attorneys are working with the Upper Colorado River Commissioner for Colorado and the Colorado Water Conservation Board staff in furtherance of these efforts and considerations.

6. 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 river.

Colorado and five other Basin States (New Mexico abstained from joining) were granted permission to intervene. On June 2, 2020, the Department of Justice filed the Administrative Record. Plaintiffs objected to the sufficiency of that record. After briefing of the issue (the States did not take a position), the court rejected Plaintiffs’ challenge to the record on February 4, 2021 but did so without prejudice. Thus, in its order, the court provided Plaintiffs the opportunity to file a new motion by March 5, 2021, identifying with specificity the documents Plaintiffs believe were improperly excluded from the record. On March 5, 2021, Plaintiffs filed a renewed motion to supplement the administrative record and for leave to take discovery of the federal government regarding Plaintiffs’ fourth claim for relief, which alleges that the federal government improperly failed to prepare a supplementary environmental impact statement. The federal government responded on March 24, 2021, and the Plaintiffs filed a reply on April 2, 2021. As before, the States did not take a position. On October 21, 2021, Plaintiffs withdrew their motion, and the parties filed a joint proposed case management schedule on November 5, 2021 and attended a Scheduling Conference on November 12, 2021. Pursuant to the Court’s order subsequent to that conference, Plaintiffs’ summary judgment motion is now due on January 12, 2022, with the federal defendants’ combined response and cross-motion for summary judgment due on February 25, 2022. The intervenors’ briefs, including the intervening States’ response brief and potential cross-motion and/or

joinder in the federal defendants' cross-motion, is due March 25, 2022. Our attorneys continue to lead the coordination effort among the Basin States.

7. Mississippi v. Tennessee, No. 143 Original

This case is now before the U.S. Supreme Court on exceptions to the special master's report, which were filed on February 22, 2021. The State of Colorado filed an amicus brief on April 30, 2021. Joining the brief were Idaho, Nebraska, North Carolina, North Dakota, Oregon, South Dakota, and Wyoming. At issue is whether a state can recover damages against another state for intrastate use of an interstate natural resource that has not been apportioned by compact or judicial equitable apportionment (here, an aquifer). The State believes that such claims can only arise if there is already an apportionment of the resource. The special master's report supports that position. Mississippi and Tennessee filed sur-replies on June 7. The United States Supreme Court heard oral argument on October 4, 2021.

The U.S. Supreme Court ruled on exceptions to the special master's report in this case on November 22, 2021. The court agreed with the special master, holding that the waters of the Middle Claiborne Aquifer are subject to the judicial remedy of equitable apportionment and dismissed Mississippi's complaint without leave to amend.

INTRASTATE MATTERS

8. Application of Thomas H. Smith, Case No. 19CW3061, Water Division 2

Applicant sought a change of water rights for a portion of the water rights decreed to the Hoosier Ditch on the North Fork of the South Arkansas River to allow storage of water in a pond for fire protection use in a subdivision. The CWCB filed a statement of opposition to protect its instream flow water right on the North Fork of the South Arkansas River from injury from potential expanded diversions under the changed right. The CWCB and Applicant were able to agree on terms and conditions to prevent such injury to be included in the decree, and the CWCB stipulated to entry of the decree on October 27, 2021.

9. Application of Upper Midnight LLC, Case No. 20CW3139, Water Division 5

Applicant sought refill storage water rights for several ponds located on applicant's property as well as approval of a plan for augmentation to replace out-of-priority depletions caused by applicant's ponds and direct-flow water rights. The CWCB filed a statement of opposition to ensure that applicant either curtailed its out-of-priority diversions or replaced its out-of-priority depletions in time, location, and amount as needed to prevent injury to the CWCB's instream flow water rights on

Castle Creek and the Roaring Fork River. The CWCB and applicant were able to agree on terms and conditions providing for such curtailment and replacement to be included in the decree, and the CWCB stipulated to entry of the decree on November 19, 2021.

10. Application of Big Fish Amalgamated, Case No. 20CW3176, Water Division 5

Application for new water rights and a plan for augmentation and exchange. The CWCB filed a statement of opposition to protect its instream flow water rights on Pole Creek, Crooked Creek, the Fraser River, and the Colorado River from injury resulting from operation of the augmentation plan and to determine whether a provision pursuant to 37-92-102(3)(b) CRS recognizing any instream flow rights as subject to any of applicant's uses should be included in the decree. The parties agreed to provisions regarding operation of the applicant's water rights both under the augmentation and in regard to protection under the Historic Users Pool of Green Mountain Reservoir, and to general terms that ensure the applicant replaces out of priority depletions in time, place, and amount under the augmentation plan. The stipulation between the CWCB and the applicant was entered with the court on December 20, 2021.

The CWCB filed statements of opposition to the following water court applications:

- Application of Merriman Living Trust, Case No. 21CW3087, Water Division 5
- Application of Mystery Ranch LLC, Case No. 21CW3125, Water Division 5
- Application of Summit Land Co., Case No. 21CW5, Water Division 5
- Application of Eagle-Vail Metro. Dist., Case No. 21CW3132, Water Division 5

A decree was issued for the following instream flow water right:

- Trout Creek Instream Flow Water Right, Case No. 20CW3055, Water Division 6, located on the natural stream channel of Trout Creek from the confluence with an unnamed tributary to the Koll Ditch headgate, a distance of approximately 6.64 miles, in the amount of 1.1 cfs (11/01–03/31), 5.7 cfs (04/01–06/30), and 5.0 cfs (07/01–10/31), absolute.

In December 2021 the CWCB filed for instream flow water rights on the following rivers:

- North Fork Little Thompson, Water Division 1
- Dry Gulch, Water Division 1
- Redstone Creek, Water Division 1

- East Fork Arkansas, Water Division 2
- Wildcat Creek, Water Division 4
- Elk Creek, Water Division 4
- Cow Creek, Water Division 4
- Rincon La Vaca, Water Division 7