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STATE OF COLORADO
DEPARTMENT OF LAW

March 3, 2023

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. Navajo Nation v. U.S. Dep't of the Interior, et al., No. 21-1484 (US Supreme Ct.)

Colorado, along with the Lower Division States, is an intervenor in this case. The Navajo Nation asked the court to direct the federal government to “investigate the Nation’s needs for water from the Colorado River, to develop a plan to meet those needs, and to manage the Colorado River consistent with the plan.” (Appellant’s Opening Brief at 7). The 9th Circuit Court agreed and directed that the Nation’s argument for an injunction include the federal government exercising “its authority over the management of the Colorado River consistent with the plan.” (Opinion at 18-19). The 9th Circuit also determined that DOI documents demonstrate trust responsibilities, like the 2007 Interim Guidelines, in which the court found that “...the final EIS relating to Interior’s shortage guidelines acknowledges that the federal government impliedly reserved water in an amount necessary to fulfill the purposes of the Navajo Reservation.” (Opinion at 30).

The State Intervenors timely filed a Petition for Certiorari on May 17, 2022. The Department of the Interior, through the Solicitor General, also filed a timely Petition for Cert. on July 17, 2022. Petitions from both the State Intervenors and the United States were granted. Merits briefs, which included a separate merits brief from the State of Colorado, were timely filed by the Petitioners on December 19, 2022.

Response briefs were filed February 1, 2023, and reply briefs are set to be filed March 3, 2023. Oral argument is scheduled for March 20, 2023.

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 ensure 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.

The Compacting States have reached a settlement, as described in a proposed consent decree, on the apportionment of water among them pursuant to the Rio Grande Compact. The consent decree uses a delivery index based on the Special Master's order and historical division of water between New Mexico and Texas. The Compacting States assert that the consent decree fully resolves the compact dispute. The United States opposes the consent decree on the grounds that it should have operational discretion for the Rio Grande Project regardless of compact apportionments and should be able to litigate other claims against New Mexico. A hearing was held February 6, 2023, to consider substantive arguments on the consent decree. The Compacting States asked the Special Master to recommend the Supreme Court approve the consent decree as the complete resolution of the suit. We are awaiting the Special Master's decision.

3. Hill v. Warsewa, Supreme Court, 2022SC118

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 appealed, and oral argument was held on January 11, 2022. On January 27, 2022, the Court of Appeals issued its decision, finding that Hill lacked standing to pursue his quiet title claim but had standing to

pursue his declaratory judgment claim. The Court also held that Hill had stated a plausible claim for relief with respect to his declaratory judgment claim. The State filed a petition for a writ of certiorari on April 11, 2022, requesting review by the Colorado Supreme Court. Colorado Water Congress filed an amicus brief supporting the State's petition on April 18, 2022, and collectively the Colorado Farm Bureau, Taylor Placer, Ltd., Crystal Creek Homeowners Association, Jackson-Shaw/Taylor River Ranch, LLC, and the Wilder Association also filed an amicus brief supporting the State's petition. Hill's response and cross-petition were filed on May 9, 2022, and the State's combined reply brief and opposition to Hill's cross-petition was filed on May 23, 2022. Hill did not file a reply brief on the cross-petition. On December 12, 2022, the Court granted the State's petition and denied the petitions on all other issues. The State's opening brief was filed on February 2, 2023, and Hill's response is due on March 9, 2023. The State filed a joint request for oral argument in early May, which the Court granted on January 30, 2023, but the exact date and time has not yet been set.

4. Colorado River Drought Contingency Plan Drought Response Operations Agreement – Framework and 2022 DROA Plan

In March 2019, the seven Colorado River Basin States executed a suite of agreements called the Drought Contingency Plan (DCP).¹ 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 Drought Response Operations Agreement (DROA). The Upper Division States and the Bureau of Reclamation, signatories to the 2019 Drought Response Operations Agreement (DROA), together with the Upper Colorado River Commission (collectively, the DROA Parties), have developed a 2022 Drought Response Operations Plan (2022 Plan) in accordance with the DROA. The 2022 Plan consists of the Framework document and Attachments A through H to the Framework and covers the period from May 1, 2022, to April 30, 2023 (2022 Plan Year). At the 295th Special Meeting of the Upper Colorado River Commission (UCRC), each Upper Division State's Commissioner to the Upper Colorado River Commission voted for the Commission to approve the 2022 Plan. The Secretary approved the 2022 Plan on May 6, 2022. The 2022 Plan is a temporary measure among the Upper Division States and Reclamation to balance risks to key infrastructure at Glen Canyon Dam with resources at the Colorado River Storage Project Initial Units. In recognition of the substantial, continuing vulnerability of the Colorado River system to climate change, drought, and depleted storage, the Subunit attorneys will continue to support the work of Colorado's Commissioner to engage with federal partners, Tribes, and the Lower Basin States to build new long-term solutions that adapt the Colorado River system to a future with reduced water supplies. On February 27, 2023, at the 300th meeting of the UCRC, the Upper Division

¹ Additional information about the Drought Contingency Plans and the agreements can be found at: <https://www.usbr.gov/dcp/>

States through the UCRC approved an amendment to the 2022 Plan to suspend DROA releases from Flaming Gorge reservoir beginning March 1, through April 30, 2023 due to improved hydrologic conditions in the Upper Basin and the fact that DROA effectively protected critical elevations at Lake Powell and that Lake Powell elevation is not projected to drop below the critical elevations during the remainder of the 2022 Plan Year.

5. The Upper Division States' 5 Point Plan in Response to the Bureau of Reclamation's Call for Further Cooperative Actions in the Colorado River

On July 18, 2022, and in response to the request made by the Commissioner of the Bureau of Reclamation for the Colorado River Basin States to take additional actions in light of the continued drought and depleted storage, the Upper Division States developed a 5 Point Plan that includes the following elements:

(1) Amendment and reauthorization of the System Conservation Pilot Project legislation originally enacted in 2014. The System Conservation Pilot Project was reauthorized in December 2022, through 2024 and the deadline for proposals is March 1, 2023. The UCRC will review the proposals through March 2023. The Pilot Project is a voluntary, temporary, and compensated program available to interested and willing water users in the Upper Division States and intended to mitigate drought impacts in the Upper Basin.

(2) Development of a 2023 Drought Response Operations Plan (2023 Plan) in August 2022 with finalization in April 2023 consistent with the Drought Response Operations Plan Framework (Framework). A 2023 Plan must meet all the requirements of the Drought Response Operations Agreement and the Framework. These requirements include, but are not limited to, determining the effectiveness of any potential releases from upstream Initial Units to protect critical elevations at Glen Canyon Dam, and ensuring that the benefits provided to Glen Canyon Dam facilities and operations are preserved.

(3) Consider an Upper Basin Demand Management program as interstate and intrastate investigations are completed.

(4) Implement, in cooperation with Reclamation, the Bipartisan Infrastructure Law for Upper Basin Drought Contingency Plan funding to accelerate enhanced measurement, monitoring, and reporting infrastructure to improve water management tools across the Upper Division States.

(5) Continue strict water management and administration within the available annual water supply in the Upper Division States, including implementation and expansion of intrastate water conservation programs and regulation and enforcement under the doctrine of prior appropriation.

Reclamation data shows that Lower Basin and Mexico depletions are more than double the depletions in Colorado and the other Upper Division States. Therefore, additional efforts to protect critical reservoir elevations must include significant

actions focused downstream of Lake Powell. Otherwise, the effectiveness of the 5 Point Plan will be severely limited.

6. Save the Colorado, et. al. v. Dept. of the Interior, et. al., 3:19-cv-08285 (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 (“Federal Defendants”) 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 January 26, 2022, Plaintiffs filed a motion for summary judgment, and the Federal Defendants filed their combined response and cross-motion for summary judgment on March 13, 2022. The intervenors’ briefs, including the intervening States’ response brief, cross-motion, and joinder in the Federal Defendants’ cross-motion, were filed on April 8, 2022. Plaintiffs’ response to the Federal Defendants’ brief was filed on May 6, 2022, and their response to intervenors’ briefs was filed on May 20, 2022. The States’ reply brief, as well as the Federal Defendants’ reply brief, were filed on June 17, 2022, after the Federal Defendants sought and received a one-week extension. The States also joined in the Federal Defendants’ reply brief. Oral argument on the motions took place in-person on October 7, 2022. Our attorneys argued on behalf of the Basin States and continue to lead the coordination effort among the Basin States. On December 23, 2022, the court issued its order, denying Plaintiffs’ motion and granting the federal defendants’ and the State intervenors’ motions for summary judgment.

On February 16, 2023, the Plaintiffs filed a notice of appeal to the Ninth Circuit. No briefing deadlines for that appeal have been set.

INTRASTATE MATTERS

7. Application of Sustainable Water Supply Group, Case No. 21CW3026, Water Division 3

The CWCB filed a statement of opposition to this application for approval of a plan for augmentation to protect instream flow water rights in Division 3. The planned operations involved both decreed and administrative exchanges and the CWCB was able to negotiate terms and conditions in the decree to protect instream flow rights from injury from those operations. The CWCB stipulated to entry of the decree, and

the CWCB's stipulation with the applicant was filed with the court on February 13, 2023.

In January and February 2023, the Water Conservation Unit on behalf of the CWCB has filed or will file a statement of opposition in the following cases:

- City of Aurora, Case No. 22CW3185, Water Div. 1
- Colorado Parks and Wildlife, Case No. 22CW3049, Water Div. 3
- Quartz Land Co., Case No. 22CW3091, Water Div. 4
- Lally, Patrick, Case No. 22CW3044, Water Div. 5
- Too Well Ranch, Case No. 22CW3132, Water Div. 5
- Richard C. Blum Family Partnership, Case No. 22CW3125, Water Div. 5
- Sopris Mountain Ranch HOA, Case No. 22CW3129, Water Div. 5
- Mainland Ranch P1, Case No. 22CW3128, Water Div. 5
- Mainland Ranch P2, Case No. 22CW3130, Water Div. 5
- Mainland Ranch P3, Case No. 22CW3131, Water Div. 5
- Colorado Parks and Wildlife, Case No. 22CW3050, Water Div. 7
- Bootjack Ranch, Case No. 22CW3049, Water Div. 7

In February 2023 the Water Conservation Unit on behalf of the CWCB stipulated to entry of a decree in the following case:

- Sustainable Water Augmentation Group, Case No. 21CW3026, Water Div. 3

In February 2023 decrees were entered for the following instream flow water rights:

- Redstone Creek ISF, Case No. 21CW3208, Water Div. 1
- North Fork Little Thompson ISF, Case No. 21CW3220, Water Div. 1