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**STATE OF COLORADO**  
**DEPARTMENT OF LAW**

July 5, 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. 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 a violation of the Rio Grande Compact. The Project delivers water to southern New Mexico, west Texas, and Mexico. Colorado is participating as a signatory to the Rio Grande Compact.

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 believe the consent decree fully resolves the compact dispute. At a hearing on February 6, 2023, the Compacting States asked the Special Master to recommend the Supreme Court approve the consent decree as the complete resolution of the suit. The United States opposes the consent decree.

On July 3, 2023, the Special Master issued a 123-page Report in which he recommended that the Court grant the compacting states' motion to enter a consent decree comprising and settling all claims among them arising from the 1938 Rio Grande Compact. The special master concluded that the consent decree permissibly interprets ambiguities in the Compact by clarifying the Texas apportionment and the downstream portion of the New Mexico apportionment and that it is fair, reasonable, consistent with the Compact, and consistent with the scope of the present action. He further determined that although the Court permitted the United States to intervene

in this action to assert Compact claims against New Mexico, the United States should not be allowed to block the consent decree and force the compacting states to continue litigating this original jurisdiction action against their jointly and clearly expressed wishes. The special master found that the remaining disputes among the United States, New Mexico, and non-state entities can be addressed in other fora without the participation of Texas, Colorado, or the Court and that the consent decree resolves the dispute over the Texas and downstream New Mexico apportionments and protects the Texas apportionment as well as treaty water for Mexico as against New Mexican actions. The Unit attorneys will remain engaged in the event the United States elects to file exceptions to the Report.

2. State v. Hill, Supreme Court, 2022SC119

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 Supreme Court heard oral argument on Tuesday, May 2. On June 5, 2023, the Court ruled in the State's favor, finding Hill had no standing to pursue his declaratory judgment claim because his right of access, if any, depended on the antecedent question of whether the State owned the riverbed, which he did not have standing to pursue. On June 16, 2023, Hill filed a petition for rehearing, which the Court denied on June 26, 2023.

3. Colorado River Drought Contingency Plan Drought Response Operations Agreement – Framework and 2023 DROA Plan

In March 2019, the seven Colorado River Basin States executed a suite of agreements called the Drought Contingency Plan (DCP).<sup>1</sup> The DCP includes Upper and Lower Basin elements and is in effect until December 31, 2025. On February 27, 2023, at the 300<sup>th</sup> meeting of the Upper Colorado River Commission (UCRC), the Upper Division 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 facts 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. At this time, the DROA Parties are developing a 2023 Drought Response Operations Plan (2023 Plan) in accordance with the DROA. The 2023 Plan consists of the Framework document and Attachments A through H to the Framework and covers the period from May 1, 2023, to April 30, 2024. A Special Meeting of the UCRC occurred on May 17, 2023, for each Upper Division State's Commissioner to the UCRC to vote on the 2023 Plan. The 2023 Plan was approved by the UCRC at that meeting and subsequently confirmed by Reclamation. The 2023 Plan is a temporary measure among the Upper Division States and Reclamation to fully recover DROA releases that occurred under an emergency provision in 2021 and the DROA Plan in 2022. 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.

4. 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

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

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.

5. 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, intervened in this case. Colorado intervened to monitor the proceedings to be able to protect Colorado's significant legal interests in the Colorado River, should the need arise. 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 determined that the Navajo Nation's claim 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, including the Shortage Guidelines. "For example, 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 9th Circuit Court's opinion could have had significant impacts on Colorado's interests, the current implementation of the 2007 Interim Guidelines, and the post-2026 operations negotiations. The Court granted both the United States' and the State Intervenor's Petitions for Cert on November 7, 2022. Briefs were timely filed on 19, 2022. Colorado elected to submit its own brief separate from but not in conflict

with the other State Intervenors' brief. Oral argument was held March 20, 2023. On June 22, 2023, the U.S. Supreme Court issued an opinion. The 9<sup>th</sup> Circuit Court's Opinion was reversed. The Majority Opinion offered two possible paths for the Navajo Nation to obtain the relief sought: (a) new legislation and funding from Congress/President because it held that what the Navajo Nation sought was not within the scope of the federal courts' authorities to grant; and (b) intervene in other water rights cases to protect their rights.

6. Save the Colorado, et. al. v. Dept. of the Interior, et. al., 23-15247 (9th Cir.) (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) intervened. 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. 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. Appellants' opening brief was filed on June 1, 2023. After requesting and receiving an extension, all answer briefs are due on August 2, 2023. Our attorneys continue to lead the coordination effort among the Basin States.

7. Sackett v. Environmental Protection Agency, No. 21-454 (U.S. Supreme Court) (Waters of the United States)

On January 24, 2022, the U.S. Supreme Court issued an order of certiorari in *Sackett v. EPA*, 8 F.4th 1075 (9th Cir. 2021), to determine whether the U.S. Court of Appeals

for the 9th Circuit applied the proper test for determining whether wetlands are waters of the United States (WOTUS) under the Clean Water Act (CWA), 33 U.S.C. § 1362(7). The Sacketts' brief on the merits was timely filed on April 11, 2022. The response brief from EPA and the U.S. Army Corps of Engineers (USCAE) was filed on June 10, 2022. Oral arguments were held on October 3, 2022.

On December 30, 2022, while a decision in the *Sackett* case was still pending, the EPA and the USCAE published their final revised definition of WOTUS. This 2023 rule is based on the rule that was in effect before 2015. It governs which surface waters are protected from pollution by the federal government by determining if they are “relatively permanent” or have a “significant nexus” with larger navigable waterways, essentially the same test applied by the 9th Circuit in *Sackett*. The new rule went into effect on March 20, 2023, but was immediately subject to several legal challenges. Courts enjoined the rule from going into effect in 28 states (but not including Colorado).

On May 25, 2023, the Supreme Court announced its decision in *Sackett*. The Court significantly rolled back the scope of federal jurisdiction to regulate wetlands as WOTUS under the CWA. The Court rejected the “significant nexus test” relied on by the EPA and USCAE and instead held that, for there to be federal jurisdiction over a wetland under the CWA, first, the wetland must be adjacent to a relatively permanent body of water connected to traditional interstate navigable waters, and, second, the wetland has a continuous surface connection with that water, making it difficult to determine where the “water” ends and the “wetland” begins. The *Sackett* decision will largely invalidate the recent 2023 WOTUS rules. The EPA and USCAE recently announced that they intend to amend their WOTUS rules to be consistent with the *Sackett* decision, with a final rule issued by September 1, 2023.

### INTRASTATE MATTERS

#### 8. Remnant Investors, Case No. 21CW3052, Water Div. 6

Applicant sought conditional surface and storage rights. The CWCB filed a statement of opposition to protect instream flow water rights on Willow Creek and the Elk River from injury due to possible section 37-92-102(3)(b) C.R.S. implications and because of a potential flow through operation. The CWCB and Applicant were able to agree on terms and conditions to prevent injury to be included in the decree, and the CWCB stipulated to entry of the decree and the stipulation was filed on May 5, 2023.

#### 9. Eagle Vail Metro District, Case No. 21CW3132, Water Div. 5

Applicant sought water rights, a change of water rights, and a plan for augmentation and exchange. The CWCB filed a statement of opposition to protect its instream flow

water rights on the Eagle River from injury resulting from the change in point of diversion and to ensure out of priority depletions are properly replaced under the augmentation plan. The CWCB and Applicant were able to agree on terms and conditions to prevent injury to be included in the decree, and the CWCB stipulated to entry of the decree and the stipulation was filed on May 22, 2023.

10. Winter Park Water and Sanitation District, Case No. 20CW3138, Div. 5

Applicant sought water rights including water storage rights, plan for augmentation, and appropriative rights of exchange to cover diversions and depletions by water users in and around the Town of Winter Park and the Winter Park ski area based on anticipated increased use attributable to future development in the area. The CWCB filed a statement of opposition to protect its instream flow water rights on the Fraser and Colorado Rivers. Applicant and the CWCB were able to reach a settlement on terms and conditions to be included in the decree that are protective of the instream flow rights, and the CWCB stipulated to entry of the decree on June 1, 2023.

11. City of Boulder, Case No. 21CW3236, Water Div. 1

Applicant sought conditional water storage rights and appropriative rights of substitution and exchange for its high mountain reservoirs. The CWCB filed a statement of opposition to protect its instream flow water rights on Boulder Creek, Middle Boulder Creek, South Boulder Creek, South Fork Middle Boulder Creek, North Boulder Creek, and Jaspar Creek from injury as a result of operation of the exchanges and as a result of use after initial use by the City of Boulder. The CWCB and Applicant were able to agree on terms and conditions to prevent injury to be included in the decree, and the CWCB stipulated to entry of the decree on June 13, 2023.

12. Case filings

In May and June 2023, the Water Conservation Unit on behalf of the CWCB filed a statement of opposition in the following cases:

- Halo Ranch, LLC, Case No. 23CW5, Water Div. 5
- Tabernash Meadows Water & Sanitation District, Case No. 23CW3053, Water Div. 5

As noted above, in May and June 2023 the CWCB stipulated to entry of a decree in the following cases:

- Remnant Investors, Case No. 21CW3052, Water Div. 6
- Eagle Vail Metro District, Case No. 21CW3132, Water Div. 5

- Winter Park Water and Sanitation District, Case No. 20CW3138, Water Div. 5
- City of Boulder, Case No. 21CW3236, Water Div. 1