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

September 7, 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.

On July 3, 2023, the Special Master issued a Report in which he recommended that the Court grant the Compacting States' motion to enter a consent decree. 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 Mexico's actions.

Any exceptions to the Report are due the first week of September. However, the United States has reached out to the Compacting States seeking an extension of time

of about a month in which to file any exceptions. The Unit attorneys will remain engaged if the United States files exceptions to the Report.

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

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 implementing 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. On August 29, 2023, the UCRC held the 304<sup>th</sup> Meeting of the UCRC to consider, among other things, whether or not to adopt a resolution that outlines clarifying criteria for future DROA releases in order to continue to meet the goals and intent of the DROA. 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.

3. 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:

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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/>

(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.

#### 4. National Environmental Policy Act (NEPA) Process for Guidelines of Post-2026 Operations at Lake Powell and Lake Mead

Reclamation is formally initiating an environmental review process under the National Environmental Policy Act (“NEPA”) to prepare an Environmental Impact Statement (“EIS”) for the development of Post-2026 Operations. On June 16, 2023, the Bureau of Reclamation’s (“Reclamation”) issued a Request for Comments on the *Notice of Intent To Prepare an Environmental Impact Statement and Notice To Solicit Comments and Hold Public Scoping Meetings on the Development of Post-2026 Operational Guidelines and Strategies for Lake Powell and Lake Mead* (“NOI”), 88 FR 39455. Through the June 16, 2023, NOI, Reclamation is requesting comments on: (1) the scope of specific operational guidelines; (2) strategies; and (3) any other related

issues that should be considered in the upcoming EIS. Comments were due August 15, 2023.

In addition to joining the Comment Letter submitted by the Basin States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming, and the Upper Division States of Colorado, New Mexico, Utah, and Wyoming Letter through the Upper Colorado River Commission (“UCRC”), Colorado also timely submitted comments. NOI Comments from Colorado and the other Upper Division States are available at: <http://www.ucrccommission.com/upper-division-states-and-the-upper-colorado-river-commission-ucrc-comment-on-reclamations-notice-of-intent-for-a-supplemental-eis-for-the-2007-interim-guidelines/>.

5. 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 originally 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, the Federal Defendants and the States filed answer briefs on August 2, 2023; the States also joined the Federal Defendants’ answer brief. The Plaintiffs’ requested and received an extension for filing their reply brief, which is now due on

September 22, 2023. Also, on July 20, 2023, New Mexico filed an unopposed motion to intervene, which was granted on August 22, 2023. New Mexico now has until September 5, 2023, to file a motion for joinder in the States' answer brief, which they are expected to do. Our attorneys continue to lead the coordination effort among the Basin States.

6. 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).

While that case was still pending, the EPA and the USCAE published a final revised definition of WOTUS. This January 2023 rule is based on the rule that was in effect before 2015. Then, 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 invalidated parts of the January 2023 rule. Therefore, the EPA and the USACE amended key aspects of the regulatory text to conform it to the Court's decision. The conforming rule, “Revised Definition of 'Waters of the United States'; Conforming,” became effective on September 8, 2023. Where the January 2023 rule is not enjoined, the agencies are implementing it, as amended by the conforming rule.

### INTRASTATE MATTERS

7. In July 2023 a decree was entered for the following instream flow water right:
  - Spruce Creek ISF, Case No. 22CW3115, Water Div. 5
8. In July 2023 the Water Conservation Unit on behalf of the CWCB has filed a statement of opposition in the following case:
  - BCP-ARR Water, LLC, Case No. 23CW3067, Water Div. 5

9. In June, July, and August 2023 the Water Conservation Unit on behalf of the CWCB stipulated to entry of a decree in the following cases:

- Cogswell, Case No. 21CW3058, Water Div. 6
- Yellow Dog Ranch, Case No. 21CW3016, Water Div. 6
- Caerus/Exxon Mobile, Case No. 19CW3003, Water Div. 6
- Van Aelstyn, Case No. 20CW3087, Water Div. 2
- Lovato, Case No. 10CW36, Water Div. 3

10. Spruce Creek ISF, Case No. 22CW3115, Water Div. 5

On August 27, 2023 a decree was issued for the Spruce Creek instream flow water right in Case No. 22CW3115. The Spruce Creek instream flow water right is located in the natural stream channel of Spruce Creek from the headwaters of Spruce Creek to a location just above the Hoagland Spruce Creek Flume, a distance of approximately 3.54 miles, in the amount of 0.4 cfs (04/15-06/30).

11. Yellow Dog Ranch, Case No. 21CW3016, Water Div. 6

Applicant sought 1) absolute water rights for two springs and four ponds which would supply irrigation water; 2) conditional water rights for one additional spring, four additional ponds, and a ground water well, with the ponds and ground water well providing irrigation water; and 3) approval of a plan for augmentation. The CWCB filed a statement of opposition to protect its instream flow water right in Elkhead Creek (17CW3031). As a result of negotiations, the applicant modified its claims and parties agreed to terms and conditions to prevent injury, including terms and conditions for the application of 37-92-102(3)(b), C.R.S. and the CWCB stipulated to entry of the decree on August 16, 2023.

12. Cogswell, Case No. 21CW3058, Water Div. 6

Applicant sought an absolute surface right for the Cogswell Enlargement of Pattison Ditch No. 2 in the amount of 0.5 cfs for direct use for irrigation of 28 acres and to provide freshening flows for the Cogswell Pond. Applicant also sought an absolute water storage right for Cogswell Pond in the amount of 1.53 AF for fish stocking and propagation, recreation, aesthetic, and irrigation of 28 acres. The CWCB filed a statement of opposition to protect its instream flow water right in Fawn Creek (80CW0379), from which the Pattison Ditch No. 2 diverts, and in the North Fork of the White River (W-3652H) and the White River (W-3652C), to which Fawn Creek is tributary. As a result of negotiations, the applicant modified its claims and parties agreed to terms and conditions to prevent injury, including terms and conditions for the application of 37-92-102(3)(b), C.R.S. and the CWCB stipulated to entry of the decree on June 30, 2023.