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STATE OF COLORADO
DEPARTMENT OF LAW

January 19, 2024

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 (Compact). The Bureau of Reclamation's (Reclamation) Rio Grande Project delivers water to southern New Mexico, west Texas, and Mexico. Colorado is participating as a signatory to the 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 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 Compact apportionments. The United States objects to the consent decree on the grounds that the U.S. did not agree to it, it creates obligations for the U.S., and it introduces new requirements under the Compact. The Compacting States have disagreed with these objections, based largely on the

preexisting duty of the U.S. to comply with the Compact and the fact that the U.S. has no claim to enforce the Compact independent of the dispute among the Compacting States.

The parties have concluded briefing their support or objection to the consent decree with the Supreme Court. The Court has not yet set an oral argument schedule, but it is likely to be sometime this spring.

2. 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).¹ The DCP includes Upper and Lower Basin elements and is in effect until December 31, 2025. The Drought Response Operations Agreement (DROA) is part of the DCP for the Upper Division States. On February 27, 2023, at the 300th meeting of the Upper Colorado River Commission (UCRC), the Upper Division States, through the UCRC, approved an amendment to the 2022 DROA 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 the DROA effectively protected critical elevations at Lake Powell and that Lake Powell elevation was not projected to drop below the critical elevations during the remainder of the 2022 DROA Plan year.

At this time, a 2023 DROA Plan is in place for recovery of water released from Flaming Gorge and Blue Mesa reservoirs in accordance with the DROA. The 2023 DROA Plan consists of the Drought Response Operations Plan Framework (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 DROA Plan. The 2023 DROA Plan was approved by the UCRC at that meeting and subsequently confirmed by Reclamation. The 2023 DROA 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.

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

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 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 (SCPP) legislation originally enacted in 2014. The SCPP was reauthorized in December 2022 through 2024, and the deadline for proposals for 2024 was December 18, 2024. Anticipated approval of these proposals is early March 2024. The Upper Division States, through the UCRC and Reclamation, will review the proposals through March 2024. The SCPP 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 the 2023 DROA Plan, which was finalized in April of 2023, consistent with the Framework. The 2023 DROA Plan was required to meet all the requirements of the DROA and the Framework. These requirements included, but were 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) Consideration of an Upper Basin Demand Management program as interstate and intrastate feasibility investigations are completed.
- (4) Implementation, in cooperation with Reclamation, of the Bipartisan Infrastructure Law for Upper Basin DCP funding to accelerate enhanced measurement, monitoring, and reporting infrastructure to improve water management tools across the Upper Division States.
- (5) Continuing 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 Process for Guidelines of Post-2026 Operations at Lake Powell and Lake Mead

Reclamation formally initiated 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, 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 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. 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 through the UCRC, Colorado also submitted comments.²

On October 20, 2023, Reclamation issued a *Federal Register Notice of the Availability of the Summary Scoping Report on the Development of Post-2026 Operational Guidelines and Strategies for Lake Powell and Lake Mead* (FRN), 88 FR 72535 (Scoping Summary Report). The Scoping Summary Report provides a summary of the comments received during the public scoping process and describes Reclamation's current, preliminary assessment of the proposed federal action, purpose and need, and scope of the environmental analysis to be included in the draft environmental impact statement (DEIS). It is anticipated that the DEIS will be published in December of 2024 for public review and comment as part of the NEPA process. The FRN states that the Department of the Interior (Interior) intends to "adopt and implement the guidelines in a manner consistent with the Law of the River." The FRN defines the Law of the River as "[t]he treaties, compacts, decrees, statutes, regulations, contracts, and other legal documents and agreements applicable to the allocation, appropriation, development, exportation, and management of the waters of the Colorado River Basin."

5. Save the Colorado, et. al. v. Dept. of the Interior, et. al., 23-15247 (9th Cir.)

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 Interior's (Federal Defendants) environmental analyses and decision under the 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

² NOI Comments from the 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/>.

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. Plaintiffs' 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. Also, on July 20, 2023, New Mexico filed an unopposed motion to intervene, which was granted on August 22, 2023. On August 30, 2023, New Mexico filed its joinder in the other Basin States' answer brief. On September 22, 2023, Plaintiffs filed their reply brief. The case is now fully briefed, and oral argument is scheduled for February 6, 2024. Our attorneys continue to lead the coordination effort among the Basin States.

INTRASTATE MATTERS

6. In October 2023 the Water Conservation Unit on behalf of the CWCB filed applications in water court for the following instream flow water rights:
 - Herman Gulch ISF, Case No. 23CW3149, Water Div. 1. The Herman Gulch instream flow water right is located in the natural stream channel of Herman Gulch from its headwaters to the confluence with Cl Creek, a distance of approximately 3.64 miles, in the amount of 0.4 cfs (04/01 - 04/30), 4 cfs (05/01 - 07/31), 0.7 cfs (08/01 - 08/31), absolute.
 - Curecanti Creek ISFs, Case No. 23CW3073, Water Div. 4. The Curecanti Creek (Upper) instream flow water right is located in the natural stream channel of Curecanti Creek from its headwaters to the confluence with Commissary Gulch, a distance of approximately 9.9 miles, in the amount of 1.5 cfs (03/01 - 03/31), 8.5 cfs (04/01 - 07/15), 2.5 cfs (07/16 - 07/31), absolute.

The Curecanti Creek (Lower) instream flow water right is located in the natural stream channel of Curecanti Creek from the confluence with Commissary Gulch to the confluence with Morrow Point Reservoir, a distance of approximately 10.1 miles, in the amount of 3 cfs (03/01 - 03/31), 11.8 cfs (04/01 - 07/15), 4.8 cfs (07/16 - 07/31), 0.4 cfs (08/01 - 09/30), 1.4 cfs (10/01 - 11/30), 0.6 cfs (12/01 - 02/28), absolute.

- Cameron Creek ISF, Case No. 23CW3074, Water Div. 4. The Cameron Creek instream flow water right is located in the natural stream channel of Cameron Creek from its headwaters to the confluence with Lottis Creek, a distance of approximately 3.69 miles, in the amount of 1.1 cfs (04/01 - 09/30), 0.64 cfs (10/01 - 10/31), 0.5 cfs (11/01 - 03/31), absolute.
- Van Boxel Creek ISF, Case No. 23CW3075, Water Div. 4. The Van Boxel Creek Instream Flow Water Right is located in the natural stream channel of Van Boxel Creek from its headwaters to the confluence with Little Cimarron River, a distance of approximately 7.75 miles, in the amount of 2.5 cfs (04/01 - 04/30), 7.8 cfs (05/01 - 06/30), 7.1 cfs (07/01 - 07/31), 1.5 cfs (08/01 - 08/31), 0.4 cfs (09/01 - 09/30), absolute.
- Monitor Creek ISF, Case No. 23CW3076, Water Div. 4. The Monitor Creek Instream Flow Water Right is located in the natural stream channel of Monitor Creek from the confluence with Little Monitor Creek to the confluence with Potter Creek, a distance of approximately 8.29 miles, in the amount of 4.6 cfs (04/01-05/31), 3.6 cfs (06/01-06/30), absolute.
- Hack Lake, Case No. 23CW3162, Water Div. 5. The Hack Lake Natural Lake Level Right is located in Garfield County and gets its source water from Hack Creek, Tributary to Sweetwater Creek, tributary to the Colorado River.
- Piceance Creek ISFs, Case No. 23CW3032, Water Div. 6. The Piceance Creek (Upper) Instream Flow Water Right is located in the natural stream channel of Piceance Creek from its headwaters to the confluence with an unnamed tributary, a distance of approximately 6.93 miles, in the amount of 0.2 cfs (07/01 - 02/29), 0.8 cfs (03/01 - 03/31), 1.5 cfs (04/01 - 04/30), 1.4 cfs (05/01 - 05/31), and 0.8 cfs (06/01 - 06/31), absolute.

The Piceance Creek (Lower) ISF Instream Flow Water Right is located in the natural stream channel of Piceance Creek from the confluence with an unnamed tributary to the Piceance Ditch headgate, a distance of approximately 3.69 miles, in the amount of 0.4 cfs (07/01 - 02/29), 1.5 cfs (03/01 - 03/31), 2.9 cfs (04/01 - 05/31), and 1.5 cfs (06/01 - 06/30), absolute.

- Cottonwood Creek ISF, Case No. 23CW3083, Water Div. 4. The Cottonwood Creek Instream Flow Water Right is located in the natural stream channel of Cottonwood Creek from the Hawkins Ditch headgate to the confluence with Roubideau Creek, a distance of approximately 23.30 miles, for all of the unappropriated flow that is available from April 1 to September 30, effective after the flow rate in Cottonwood Creek exceeds 183 cfs until such time that the flow rate recedes to 3.6 cfs or until September 30 whichever occurs first, subject to a development allowance.
- Monitor Creek ISF, Case No. 23CW3084, Water Div. 4. The Monitor Creek Instream Flow Water right is located in the natural stream channel of Monitor Creek from the confluence with Little Monitor Creek to the confluence with Potter Creek, a distance of approximately 8.29 miles, in the amount of all of the unappropriated flow that is available from April 1 to September 30, effective after the flow rate in Monitor Creek exceeds 111 cfs until such time that the flow rate recedes to 4.6 cfs (4/1 - 5/31), 3.6 cfs (6/1 - 6/30) or 3.6 cfs, or until September 30, whichever occurs first, subject to a development allowance.
- Potter Creek ISFs, Case No. 23CW3085, Water Div. 4. The Potter Creek (Upper) Instream Flow Water Right is located in the natural stream channel of Potter Creek from the USFS property boundary to the confluence with Monitor Creek, a distance of approximately 8.10 miles, in an amount that initiates at 177 cfs and protects all unappropriated streamflow until such time that the flow rate recedes to the existing instream flow right of 4 cfs (4/1 - 6/15), 1.8 cfs (6/16 - 7/31), 1.4 cfs (8/1 - 2/29), or until September 30, whichever occurs first, subject to a development allowance.

The Potter Creek (Lower) Instream Flow Water Right is located in the natural stream channel of Potter Creek from the confluence of Monitor Creek to the confluence with Roubideau Creek, a distance of approximately 1.72 miles, in an amount that initiates at 225 cfs and protects all unappropriated streamflow until such time that the flow rate recedes to the existing instream flow right of 4 cfs (4/1 - 6/15), 1.8 cfs (6/16 - 7/31), 1.4 cfs (8/1 - 2/29), or until September 30, whichever occurs first, subject to a development allowance.

7. In November and December, 2023 the Water Conservation Unit on behalf of the CWCB filed a statement of opposition in the following case:
 - Pickard, Christopher and Heather, Case No. 23CW3040, Water Div. 7
 - Treasure Mountain Ranch, Inc., Case No. 23CW3152, Water Div. 5
8. In November and December, 2023 the Water Conservation Unit on behalf of the CWCB stipulated to entry of a decree in the following cases:

- Gateway Snowmass, Case No. 21CW3110, Water Div. 5
- Elk Run Ranch Aspen Holdings LLC et al, Case No. 21CW3086, Water Div. 5
- Elk Run Ranch Aspen Holdings LLC et al, Case No. 21CW3085, Water Div. 5
- Elk Ridge Mining and Reclamation LLC, Case No. 21CW3076, Water Div. 4
- Triview Metropolitan District, Case No. 21CW3044, Water Div. 2