

PHIL WEISER
Attorney General

NATALIE HANLON LEH
Chief Deputy Attorney General

SHANNON STEVENSON
Solicitor General

TANJA WHEELER
Associate Chief Deputy Attorney
General



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

STATE OF COLORADO
DEPARTMENT OF LAW

March 1, 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 fully briefed the issues~~ with the Supreme Court. ~~The Court has not yet set an oral argument schedule, but it is likely to be sometime this spring~~ Oral argument is scheduled for March 20. Texas and New Mexico will be arguing on behalf of the three states. Colorado is working closely with both states to help them prepare for argument and defend Colorado's interests.

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

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

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 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~~2023. 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.)

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/>.

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 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~~ The Ninth Circuit heard oral argument on February 6, 2024. ~~Our attorneys continue to lead the coordination effort among the Basin States.~~ We are awaiting the court's decision.

INTRASTATE MATTERS

6. In January and February 2024, the Water Conservation Unit on behalf of the CWCB filed or will file a statement of opposition in the following cases:

- Everist Land Holdings LLC, Case No. 23CW3182, Div. 5
- Bonanza Boy LLC, Case No. 23CW3054, Div. 7
- Girl Scouts of Colorado, Case No. 23CW3170, Div. 1
- Eldora Enterprise LLC, Case No. 23CW3176, Div. 1
- Britten, Dennis et al, Case No. 23CW3054, Div. 2

- Upper Eagle Regional Water Authority, Case No. 23CW2305, Div. 5
 - The Ranches at Devils Thumb Inc, Case No. 23CW3209, Div. 5
 - Sun River Run Ranch RV LLC et al, Case No. 23CW3218, Div. 5
 - Lower Pasture LLC, Case No. 23CW15, Div. 6
7. In January and February 2024, the Water Conservation Unit on behalf of the CWCB stipulated to entry of a decree in the following cases:
- City and County of Broomfield, Case No. 20CW3216, Div. 1
 - Halo Ranch LLC, Case No. 23CW05, Div. 4
 - Town of Poncha Springs, Case No. 21CW3086, Div. 2
 - Sylvan Lakes Metropolitan District, Case No. 22CW3026, Div. 2
 - Red Mountain Ranch Partnership LLLP, Case No. 22CW3042, Div. 5
 - Peter M McGrath et al, Case No. 21CW3166, Div. 5
 - Remnant Investors LLLP, Case No. 21CW3052, Div. 6
 - Montezuma Valley Irrigation Company, Case No. 18CW3052, Div. 7