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**Natural Resources and
Environment Section**

May 2, 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. Colorado is participating as a signatory to the Compact.

The Supreme Court heard oral argument on March 20, 2024, regarding a settlement reached by the three compacting states and opposed by the United States. An opinion is likely this summer.

2. 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 (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 that remain on-going:

- (1) Amendment and reauthorization of the System Conservation Pilot Project (SCPP) legislation originally enacted in 2014.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. 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. For the SCPP in 2024, 52 system conservation implementation agreements and verification plans have been executed for Colorado projects.

- (2) Consideration of an Upper Basin Demand Management program as interstate and intrastate feasibility investigations are completed.
- (3) 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.
- (4) 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.

3. 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.¹

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

¹ 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/>.

(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). On March 5, 2024, the Upper Division States submitted their alternative for analysis by the Bureau of Reclamation as part of the NEPA process. 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."

4. Save the Colorado, et al. v. U.S. 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 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) 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 Ninth Circuit heard oral argument on February 6, 2024.

On April 24, 2024, the Ninth Circuit affirmed the District Court's opinion. The Ninth Circuit held that Federal Defendants' purpose and need statement was reasonable, that it considered a reasonable range of alternatives, and that it took the proper hard look at the environmental consequences of the proposed action. The Ninth Circuit did, however, agree with Plaintiffs' argument that Federal Defendants improperly failed to provide an explanation for its refusal to prepare a supplemental environmental impact statement, but the court found that error was harmless. We now await Plaintiffs' next action. Unit attorneys continue to lead the coordination effort among the Basin States.

INTRASTATE MATTERS

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

- Town of Eagle, Case No. 24CW3023, Div. 5

6. In March and April 2024, the Water Conservation Unit on behalf of the CWCB stipulated to entry of a decree in the following cases:

- Two Creeks Holdings LLC, Case No. 22CW3035, Div. 5
- Namuranch LLC, Case No. 22CW3053, Div 5
- Hall, Troy R, Case No. 18CW3054, Div. 7

7. In March and April 2024, the following instream water rights were decreed:

- Curecanti Creek, 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), and 2.5 cfs (07/16 - 07/31). 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), and 0.6 cfs (12/01 - 02/28).

- Herman Gulch, Case No. 23CW3149, Water Div. 4. The Herman Gulch Instream Flow Water Right is located in the natural stream channel of Herman Gulch from its headwaters to its confluence with Clear Creek, a distance of approximately 3.64 miles, in the amount of 0.4 cfs (04/01 - 04/30), 4.0 cfs (05/01 - 07/31), and 0.7 cfs (08/01 - 08/31).
- Cross Creek Instream Water Flow Right, Case No. 23CW3070, Div. 4. The Cross Creek Instream Flow Water Right is located in the natural stream channel of Cross Creek from its headwaters to the confluence with Lottis Creek, a distance of approximately 2.48 miles, in the amount of 0.72 cfs (04/01 - 04/30), 1.4 cfs (05/01 - 07/31), 0.85 cfs (08/01 - 08/31), 0.63 cfs (09/01 - 09/30), and 0.27 cfs (10/01 - 03/31).