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STATE OF COLORADO
DEPARTMENT OF LAW

May 2, 2019

TO: Colorado Water Conservation Board

FROM: Phil Weiser, Attorney General
Karen Kwon, First Assistant Attorney General
Jen Mele, First Assistant Attorney General

RE: Report of the Attorney General

Since our March Colorado Water Conservation Board meeting, I reached an important milestone: my first 100 days on the job. For me, working with the water community is a highlight of the job. The level of creativity, teamwork, and dedication of this community is truly special. That's why I am sad to report that I will not be able to attend our May meeting. I am glad, however, to leave you in the capable hands of the Department of Law attorneys who work so diligently on your behalf, and hope to join you at the next meeting.

I wish Director Celene Hawkins congratulations on her more-than-well-deserved Emerging Leader Award, which she will receive on May 3rd at the Water Education Colorado event. I wish I could be there to celebrate with all of you. I am also very proud of our team and everyone's hard work to address the situation on the Colorado River. Landing a seven-state Drought Contingency Plan and federal legislation to bless it was no small task. You all should be proud of what you were able to accomplish. Here's to more collaborative, creative, innovative successes in the years to come, especially as we dig more deeply into implementation of the DCP.

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 actions that impact Rio Grande Project water deliveries. The Project delivers water to southern New Mexico, west Texas, and Mexico. Colorado is participating as a signatory to the Rio Grande Compact, which is currently at issue in the case. However, the state has no claims asserted against it and is not asserting any claims at this time. Colorado reached an agreement with the other

parties that allows the state to avoid filing an answer or any counter claims in the suit. The agreement also permits Colorado to assert any defenses or claims later, should it find it necessary. This allows Colorado to avoid taking a position on issues until it has more information and can avoid expanding the scope of the suit.

The Special Master heard oral argument on April 2, 2019 regarding: (1) Texas and the United States' Motions to Strike or for Summary Judgement on New Mexico's counterclaims; and (2) Texas and New Mexico's Motions for Judicial Determinations of Law regarding the Special Master's First Report. Senior Assistant Attorney General Chad Wallace presented Colorado's positions in briefing and at the hearing, explaining Colorado's issues with: (1) the United States' assertion of sovereign immunity from compulsory counterclaims regarding the Compact; (2) Texas' assertion that equitable defenses are not appropriate in compact litigation; (3) Texas and the United States' assertions that New Mexico's counterclaims are inappropriate because the issues are not related to the compact; and (4) Texas' assertion that the Supreme Court's ruling on whether the United States can bring a compact claim is sufficient to determine the law of the case for this ongoing litigation. Moreover, Colorado asserted that because the Court never adopted the Special Master's First Report and because most of the discussion material in the Report itself is expressly recognized as merely background purpose, the First Report should not serve as the law of the case going forward. The parties await the Special Master's ruling on the motions.

Concurrently, the parties continue to schedule and take depositions and prepare for trial, which is set for fall of 2020.

2. Arkansas River Compact Administration

Our attorneys continue to work with clients to address three interstate issues pending in the Arkansas River basin: (1) the process for conducting the 10-Year review for the Trinidad Project; (2) an agreement to create a new multi-user Colorado subaccount in John Martin Reservoir ("JMR"); and (3) reconciling implementation of the Arkansas River Compact with the Division of Water Resources' statewide approach to historic return flows.

Trinidad Project: The Trinidad Project was authorized for construction by the Corps of Engineers (Corps) under Public Law 85-500 as a multipurpose project including flood control, irrigation, fish and wildlife preservation, and recreation. The Project includes an irrigation purpose for which the Bureau of Reclamation has a contract with the Purgatoire River Water Conservancy District (District) for repayment of the reimbursable cost allocated to the irrigation purpose. The irrigation portion of the Project was constructed to provide a more reliable source of water for lands within the project area that had been irrigated since the 1860s. The Project lands

included areas served by eleven different ditches and extend about 25 miles downstream of the City of Trinidad on either side of the Purgatoire River.

Reclamation developed operating principles as part of its irrigation report with an objective to operate the Project in such a manner as to secure the greatest benefits from the available water supply consistent with the laws and policies of Colorado and the United States, including the Arkansas River Compact between Colorado and Kansas. The Operating Principles include a requirement for a periodic review (10-Year) of the operating Principles and Project operations.

Although required to perform a 10-year review under the Operating Principles, Reclamation announced in October that it might stop. After some discussions with Reclamation in November, its primary concern appears to be financial; there is too much time spent for too little result.

Our attorneys are working with the Division of Water Resources and Arkansas River Compact Administration (“ARCA”) representatives for Colorado on a plan to accomplish the next 10-year review of the Trinidad Project. Reclamation has proposed a process where Colorado and Kansas prepare the bulk of the report and agree on the data to be used in the report, and Reclamation will compile and evaluate that information and produce a 10-year review. Reclamation offered a proposed resolution for this approach at December ARCA meeting, but both Colorado and Kansas felt that would be too ambitious, primarily because the proposal does not offer any specifics or process for resolving when Colorado and Kansas cannot agree on the report specifics or the data. Moreover, ARCA is but one signatory to the Trinidad Operating Principles. Instead, the states have offered a counterproposal, where all the parties work on an agreement which ARCA can then adopt through a resolution after all other parties have executed the agreement. This proposed agreement would identify how Colorado and Kansas will go through the process of preparing the report and data, and would provide a process to follow if the states cannot agree. Our attorneys have initiated research and review of this approach and will continue to represent the Colorado representatives to ARCA (CWCB Director, State Engineer, and Director of Water Quality at CDPHE) and Division of Water Resources (“DWR”) administrative staff during this process.

Multi-Purpose Colorado account in John Martin Reservoir. JMR is currently operated pursuant to an operating plan approved by the Arkansas River Compact Administration (ARCA). This Plan allows for water stored in JMR to be allocated according to specific accounts to, among other things, better inform water allocation between Colorado and Kansas and allow for efficient uses among Colorado water users. In addition to these accounts, JMR frequently has excess capacity storage. A number of water users in the Arkansas Basin do not have access to the water in specific accounts or excess capacity at JMR. This leads to the inefficient use of water resources among some water users in the basin. Colorado is exploring with

Kansas the possibility of approving a new account under the JMR Operating Plan to be utilized by those Colorado water users that do not currently have an account. Our attorneys is working with the Division of Water Resources to continue negotiations to obtain this approval with Kansas.

Rectifying compact administration and approach for historic return flows. Our attorneys are working with the Division of Water Resources to rectify how to determine when compact conditions are met in the context of the Division of Water Resources' statewide approach to historic return flows in change cases. In many cases across the state, applicants have included decree conditions that provide that historic return flows do not have to be maintained in times of "free river" and DWR has determined that the condition is generally acceptable. However, when applied under the context of Division 2 and the Arkansas River Compact, it is not entirely clear when there would be conditions that would allow Colorado water users to not have to maintain historic return flows or to freely use water beyond decreed amounts, because it is not clear that such water would not be owed to Kansas absent specific findings from ARCA. Whether JMR is spilling plays a role here too. The Unit is working with DWR to make sure the general application of a statewide position does not overshadow the specific requirements for compact administration in Arkansas River Basin.

3. Republican River Compact Rules

On January 11, the State Engineer filed Compact Rules with the Division One Water Court (the "Rules") under the State Engineer's compact rule power. *See* C.R.S. §37-80-104. The Rules require all water users to participate in a Compact Compliance Plan—either the Republican River Water Conservation District's Compact Compliance Pipeline or an alternative plan. The Rules set forth operating requirements for the Republican River Water Conservation District's existing plan, as well as for alternative plans and the method of determining the amount of replacement water that will be required as part of any alternative plan.

Four parties filed statements opposing the rules in Water Court. Nine parties filed statements in support of the rules. Our attorneys will be working with all parties and the court to develop a case management order and setting the case for trial. At the same time, our attorneys will be working with parties who oppose the rules to see whether their concerns can be resolved prior to trial.

4. Colorado River Drought Contingency Planning (DCP)

On March 19, 2019, the seven Colorado River Basin States documented consensus on a DCP to forestall declining reservoir storage at Lake Powell and Lake Mead below critical elevations. In so doing, the Governor's Representative for each state signed a joint letter to Congress with the DCP documents and proposed legislation attached.

The letter set forth the basis for the DCPs and requested that Congress provide legislative approval and direction for the Secretary of the Interior to implement the DCPs this year.

On March 27th, the Senate Subcommittee for Energy and Water held a hearing in which members of both the Upper and Lower Basins and the Bureau of Reclamation testified in support of the DCP. On March 28th, each of the seven Governors' Representatives from the Colorado River Basin and the Commissioner of Reclamation testified before the House subcommittee for Water, Oceans and Wildlife. Subsequently, Congress passed the federal legislation necessary to implement the DCP agreements on April 9, 2019, and the President signed that legislation on April 16, 2019.

Concurrently, the Upper Division States and Upper Colorado River Commission consulted with Reclamation and the Lower Basin parties to reach consensus on exhibits for Lower Basin Intentionally Created Surplus to help implement the Lower Basin DCP. In response to that consultation, the Upper Colorado River Commission provided notice via letter that the Upper Division States are prepared to proceed to execution of the documents.

All Basin States and the Secretary of the Interior are set to sign all of the DCP agreements in the upcoming weeks, which will then trigger implementation of Mexico's Binational Water Scarcity Plan agreed to under Minute 323 to the 1944 Treaty with Mexico. Mexico has agreed to make contributions to Lake Mead in proportion to those that will be made by the Lower Basin States pursuant to the Lower Basin DCP. Higher Lake Mead elevations benefit Colorado and the other Upper Basin States by benefitting Lake Powell.

a. Upper Basin Drought Contingency Plan

The principal goal of the Upper Basin DCP is to help assure continued compliance with the 1922 Colorado River Compact. It does so by protecting the critical elevations at Lake Powell. Lake Powell acts as the Upper Basin's compact security by storing water in wet years to ensure the Upper Basin can meet its compact obligations in dry years. Protecting Lake Powell elevations also reduces the risk that Colorado water users will have to endure mandatory compact curtailment in prolonged periods of dry hydrology.

The Upper Basin DCP is also intended to maintain hydropower generation at Lake Powell. In addition to providing a reliable power supply for customers, including those in Colorado, revenues from hydropower fund many important purposes, including: (1) repaying construction costs of federal projects like the Aspinall Unit and Animas La Plata Project; (2) continued operation and maintenance of federal reservoirs authorized under the Colorado River Storage Project Act, ("CRSPA"); (3) continued

funding and implementation of environmental and other programs—which allow continued water use and development; (4) mitigating salinity in the Colorado River; and (5) funding water projects in Colorado and the other Upper Basin States. To these ends, hydropower generation helps assure that Colorado has the ability to use and develop its 1922 Compact apportionment.

To achieve these goals, the Upper Basin DCP consists of two agreements: The Drought Response Operations Agreement and the Demand Management Storage Agreement.

Drought Response Operations Agreement

An element of the Upper Basin Drought Contingency Plan is the Drought Response Operations Agreement. This agreement establishes a process to identify whether and how to rely on water stored in federal reservoirs as needed to reduce the risk of Lake Powell dropping below a target elevation of 3,525 feet above mean sea level. It essentially establishes a process to move water from where it is already stored to where it is needed—Lake Powell. This Agreement:

- Only applies to the Initial Units of CRSPA: Lake Powell, Flaming Gorge, Aspinall, and Navajo reservoirs. It does not affect participating projects under the CRSPA.
- Guarantees Colorado and the other Upper Division States have a role in how the decision is made.
- Assures that all Initial Units are considered uniformly.
- Precludes the release of any water needed to satisfy existing uses. It does not affect any existing or future contracted water uses in Colorado.
- Provides for recovery of storage as soon as practicable.

Under the Agreement, Colorado and the other Upper Division States have the right to participate in all aspects of plan development and implementation which includes the recovery of any released storage. Additionally, the Agreement provides for public outreach during the process, where Colorado and other planning participants will work with relevant water users and stakeholders regarding potential drought response operations.

Demand Management Storage Agreement and Investigations

An element of the Upper Basin Drought Contingency Plan is the Demand Management Storage Agreement. The Demand Management Storage Agreement makes unfilled storage capacity at the CRSPA Initial Units available for use by Colorado and the other Upper Basin States at no charge. This storage capacity is available if the Upper Colorado River Commission (“UCRC”) requests its use to store water conserved as part of an Upper Basin demand management program.

The Agreement does not establish an Upper Basin demand management program, but does set forth the minimum framework under which the Upper Basin can access the storage prior to 2026.

The purpose of a demand management program will be to reduce consumptive uses in a temporary, voluntary, and compensated manner if needed in times of drought, to help assure continued compact compliance without impairing existing water rights. If, after study, Colorado and the other Upper Basin States determine that a demand management program is feasible, they may then develop and implement a program. A demand management program can only be implemented if approved independently by each of the Upper Division States' Compact Commissioner.

Colorado, along with the other Upper Basin States and the UCRC, are now poised to investigate the feasibility of an Upper Basin demand management program. Many outstanding issues must be investigated before a program is deemed feasible and established. The investigation will include outreach and input from interested Colorado water users and stakeholders, consistent with the parameters set forth in the Colorado Water Conservation Board's Support and Policy Statement and Demand Management Work Plan. Any program must also work within Colorado and the other three Upper Basin States. Demand Management, as currently contemplated, is the temporary, voluntary, compensated reduction in consumptive use of Colorado River uses.

Staff from the Colorado Water Conservation Board and Attorney General's Office are now working to implement the initial stages of Colorado's Demand Management work plan. The Upper Basin states are on a parallel track, and are also working on creating a framework for the Upper Colorado River Commission and the Upper Division States to collectively assess demand management and the various issues such a program would implicate.

b. Lower Basin Drought Contingency Plan

The Lower Basin Drought Contingency Plan consists of a Lower Basin Drought Contingency Plan Agreement and an attached Lower Basin Drought Contingency Operations document. Together, these documents are designed to require Arizona, California, and Nevada to contribute additional water to Lake Mead storage at predetermined elevations, and create additional flexibility to incentivize additional voluntary conservation of water to be stored in Lake Mead. With Congress' approval of the Drought Contingency Plan agreements, including the Lower Basin documents, the parties to the Lower Basin DCP are poised to execute the documents and implement the DCP in the upcoming weeks.

c. Colorado River Companion Agreement

In addition to the Upper and Lower Basin DCP documents, the parties have also developed a “companion agreement” in which the parties endorse both the Upper Basin and Lower Basin DCPs, agree to implement both DCPs in good faith, agree to consult during operations to avoid future litigation, and reserve legal rights in the future. This document also preserves the parties’ separate ability to enforce the agreements against the United States if needed. As such, this agreement maps out the relationship of the parties during implementation of the DCP. (See Drought Contingency Plans, supra).

5. Aspinall Unit Operations

Our attorneys continue to coordinate with clients from the Division of Water Resources and the CWCB to engage the Bureau of Reclamation in discussions on how to operate the Aspinall Unit consistent with state water law and the Record of Decision. A meeting is scheduled for May 2nd to discuss these and related matters with the Upper Colorado Director of the Bureau of Reclamation. Our attorneys will attend these meetings along with staff from the Colorado Water Conservation Board.

6. Basin Fund MOA-Colorado Allocation and Project Management

The Basin Fund MOA is an agreement that allows the Upper Colorado River Division States to access revenues for hydropower production at CRSPA facilities to fund operation, maintenance, and replacement activities at specific facilities within the Upper Basin. Colorado’s allocation is approximately \$73 million.

In determining which projects to fund under the MOA, Reclamation rescinded a few fairly large projects based upon a solicitor’s interpretation of how to treat “existing facilities” within participating projects authorized pursuant to the CRSP Act. When exploring the appropriateness of this rescission, our attorneys and CWCB staff uncovered additional questions to investigate regarding Reclamation’s implementation of the Basin Fund MOA and its accounting for approved projects. At the CWCB Board’s direction, our attorneys and CWCB staff have prioritized getting to the bottom of the implementation and accounting issues before tackling any legal issues, including lack of communication and transparency in developing and administering projects, managing project modifications with significant cost overruns, and Reclamation’s accounting and handling of cost overruns.

Our attorneys continues to coordinate with the CWCB staff to discuss with Reclamation the current and future operation of the Basin Fund MOA in Colorado consistent with direction from the Board. Together they are devising next steps for

administration of existing MOA funds and planning for whether and how to renew the MOA for future years.

7. Animas La Plata Operation, Maintenance & Replacement (ALP OM&R) Association Amendment to Exhibit A of the Inter-Governmental Agreement

As a holder of water rights from the Animas La Plata Project, the CWCB is a member of the ALP OM&R Association that governs operation of the facility. Counsel for the members of the ALP OM&R Association, including our attorneys in conjunction with CWCB staff, have been engaged in a re-negotiation of Exhibit A to the Intergovernmental Agreement to develop more detailed shortage sharing provisions among the members in the event of drought. To develop these provisions, the parties first require clarification as to who can access the joint pool and in what amounts and to what extent. Our attorneys continues to represent the CWCB in these discussions and will report developments as they arise.

8. Hill v. Warsewa, 18-cv-300069, Fremont County District Court, Colorado

This case is on appeal to the 10th Circuit, after Magistrate Tafoya dismissed the complaint for lack of prudential standing. At its core, the case involves a fishing access dispute, in which Plaintiff fisherman alleges that the State of Colorado, rather than the landowner, holds title to the riverbed of part of the Arkansas River because, so he alleges, the Arkansas River was navigable at the time Colorado became a state.

The State moved dismiss the complaint on several grounds, including prudential standing. Magistrate Tafoya agreed that Plaintiff lacks prudential standing to pursue the case in any forum. She noted that the case is not about whether Colorado has adopted the public trust doctrine or can turn its back on its responsibilities to the public trust, but instead about whether citizen with no ownership right can bring the case to court as framed. The decision closely follows 10th Circuit case law that our attorneys cited on prudential standing. *See e.g., The Wilderness Soc. v. Kane Cnty, Utah.*, 632 F.3d 1162 (10th Cir. 2011) (determining that a plaintiff lacked prudential standing where it rested its claims on the government's property rights instead of asserting a valid right to relief of its own).

Plaintiff filed his opening brief. A group of law professors represented by the DU Environmental Law clinic will be requesting leave to file an *amicus* brief in support of Plaintiff. Our Answer Brief will be due on May 22. Any briefs of *amici* in support of the State's position will be due on May 29.

9. Clean Water Act—Waters of the United States

On behalf of the Division of Water Resources and CWCB, the Federal & Interstate Water Unit collaborated with Colorado Department of Public Health and Environment, Colorado Department of Agriculture, and Colorado Parks and Wildlife to draft a single letter commenting on the Environmental Protection Agency's Proposed Rule to redefine the term Waters of the United States that are subject to federal jurisdiction under the Clean Water Act. Following that effort, the State submitted its comment letter on April 15.

INTRASTATE MATTERS

10. Needmore Water, LLC, 15CW3056, Water Division 6

Needmore sought to adjudicate two ditch water rights with 1919 appropriation dates. The CWCB filed a statement of opposition to protect instream flow rights on Big Creek and Elk River, because Needmore claimed its two water rights could utilize section 37-92-102(3)(b), C.R.S., which provides that instream flow appropriations are subject to "present uses" being made by other water users on the date of an instream flow appropriation. Needmore provided an affidavit and other evidence that convinced the CWCB that Needmore's two water rights qualified as an existing use at the time of the instream flow appropriations under section 37-92-102(3)(b). The CWCB signed a stipulation with Needmore on April 8, 2019.

Four Mile Protection District, 16CW3198, Water Division 1---Four Mile filed this application to adjudicate water storage rights and a plan for augmentation for four off-channel ponds used as sources of water for firefighting and training. Four Mile claimed these storage rights could utilize section 37-92-102(3)(b), C.R.S., which provides that instream flow appropriations are subject to "present uses" being made by other water users on the date of the relevant instream flow appropriation. The CWCB has both appropriated and acquired instream flow rights potentially affected by the application, and argued based on the statutory language and legislative history of section 37-92-102(3)(b), that only its appropriated instream flow rights, not its acquired instream water rights, are subject to 37-92-102(3)(b). Four Mile disagreed with this legal position, however to settle the case agreed to stipulate to entry of a decree only applying 102(3)(b) to the appropriations, and preserving its legal position regarding acquisitions in the stipulation. The Court entered the decree on April 16, 2019.

11. Riverside Ditch and Allen Extension Co., Case No. 16CW3062 and Hancock, Randall & Renate, Case No. 16CW0017, Water Division 2.

The CWCB filed a statement of opposition in *Hancock* and a motion to intervene in *Riverside Ditch*, because these Three Elk Creek water rights were not being

administered under a stipulation between the parties as junior to the CWCB's instream flow water rights on that creek. CWCB negotiated a settlement of the cases which included a rotational use agreement, and recognized the CWCB's instream flow right and a claim by Riverside under 37-92-102(3)(b) for uses that were in existence at the time of the appropriation of the Three Elk Creek instream flow right. CWCB stipulated to entry of a decree in both cases on April 16, 2019.

12. Application of City of Boulder, Case No. 17CW3195, Division 1

Application for water storage right for the Evert Pierson Kids' Fishing Ponds, for which applicant claimed applicability of section 37-92-102(3)(b). The applicant provided information sufficient to demonstrate the claim and noted in the stipulation Boulder's commitment to protecting the instream flow, and the CWCB stipulated to entry of the decree on April 4, 2019.

13. Protest to Rules Governing Review of an Substitute Water Supply Plan for Agricultural Protection Water Rights pursuant to HB 16-1228, Case No. 17CW3057, consolidated with 17CW3152, Div. 2

HB 16-1228 established a program in Water Divisions 1 and 2 to allow a portion of an irrigation water right to be used for a use besides irrigation through renewable one year transfers. The bill directed the CWCB to develop criteria and guidelines for establishment of an agricultural water protection program to monitor water that remains in agricultural under the program, and DWR to promulgate rules governing SWSPs for the change of the portion of the agricultural right taken out of agricultural use and being leased or loaned. DWR filed the draft rules with the court on October of 2017, the CWCB stipulated to the draft rules on April 11, 2109, and the rules became effective on April 22, 2019.

14. Upper Arkansas Water Conservancy District, Case No. 17CW3037, Water Division 2.

On March 15, 2019, the CWCB entered a stipulation with the applicant that resolved the issues between the parties related to this applicant for a change of numerous water rights. The stipulation reflected an agreement by the applicant to provide notice to the CWCB of contract trades and exchanges so that the CWCB can work to protect its decreed instream flow rights. The applicant has two other pending cases in which the CWCB is an opposer and in which the parties are working to resolve similar issues.

15. In March 2019 the water court entered a final decree for an instream flow water right in the following case:

- Dutchman Creek ISF, Case No. 18CW3041, Water Division 4
- Coyote Wash ISF, Case No. 18CW3043, Water Division 4