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STATE OF COLORADO
DEPARTMENT OF LAW

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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

It is my pleasure to once again submit this report from the Attorney General's Office to the Colorado Water Conservation Board. From what you read in these reports, it may seem as though we are predominantly focused on litigation. After all, that's the caricature of what lawyers do and it's embedded in our system of water allocation, which as you well know has its own court system for confirming, changing, and augmenting water rights. In short, our system is a litigation-based system. But what is so important to remember is that water attorneys, consulting engineers, and water users work to develop solutions so that trials are seldom necessary or appropriate as the best means of resolving water right disputes within Colorado. If we in Colorado were focused primarily on resolving disputes through litigation, we would almost certainly end up in a far worse situation than through any number of collaborative solutions.

Thus, it's our belief that to be effective representatives for Colorado, we need to be ready and willing to protect our rights through litigation, but our first and best course of action is to be prepared for and effective at collaborative problem solving. Apropos of this joint meeting between the Interbasin Compact Committee (IBCC) and this Board, I wanted to share how much I appreciate our state's system of basin roundtables and the IBCC; they are a tremendous model of collaborative problem solving and provide a forum for developing effective strategies for water management in Colorado and beyond. As a newcomer to this community, I am so grateful to the leaders who helped develop the IBCC and basin roundtables as a forum for collaboration, innovation, and funding. And I can tell you that this culture also inspires me about the mindset and approach we need to bring to a range of other public policy challenges, from improving our criminal justice system to addressing the opioid epidemic.

I'm looking forward to joining the joint IBCC/CWCB discussion and seeing all the work we're doing in action.

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. The parties await the Special Master's ruling on the motions.

On July 1, the Special Master held a separate hearing for arguments on a Motion to Intervene by the Boyd Estate group. The Boyd Estate moved to intervene in the U.S. Supreme Court, alleging that their pre-state water rights could not be apportioned by the Rio Grande Compact and that the United States fraudulently converted their water rights for the Rio Grande Project. The Supreme Court referred the matter to the Special Master after the parties completed briefing. Colorado opposed intervention, arguing that the Boyd Estate had not met the standards for intervention in an interstate compact dispute. Following this hearing, the parties await the Special Master's recommendation for ruling on this motion.

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

2. Rio Grande Subdistricts No. 2 (18CW3010) and No. 3 (18CW3013), Water Division 3

As part of the process to implement the recently approved Rio Grande Groundwater Rules, water users within the Rio Grande Water Conservation District are forming subdistricts to raise funds through property assessments, to implement plans to replace injurious depletions from groundwater wells, and to maintain aquifer sustainability. The two most recently formed districts are No. 2, along the Rio Grande alluvial zone between Del Norte and Alamosa, and No. 3, in the Conejos river basin. By statute, the State Engineer must review and approve groundwater management plans proposed by these subdistricts. This approval is subject to objection by water users and review by the water court. The attorneys in the Federal & Interstate Water Unit have assisted the State Engineer and his staff through this process. As of June, the State Engineer and water court have approved the groundwater management plans for both Subdistrict Nos. 2 and 3, meaning that they can now proceed to operate under their annual replacement plans that implement the terms of the Rio Grande Rules.

3. Arkansas River Compact Administration

The Federal & Interstate Water Unit attorneys continue to work with the Division of Water Resources to address three interstate issues pending with Kansas 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; and (3) rectifying implementation of the Arkansas River Compact with the Division of Water Resources' statewide approach to historic return flows. While work continues to progress, there are no new developments to report at this time.

4. In the Matter of the Application for Water Rights of Lower Arkansas Water Management Association - 17CW3069

In this water rights application, Tri-State has challenged the administration of Lower Arkansas Water Management Association's (LAWMA) Rule 14 Plan, thereby calling into question the Rule 14 Use Rules themselves. These Use Rules were finalized and approved in the early 2000s as part of Colorado's efforts to assure and demonstrate continuing compliance with the Arkansas River Compact. Attorneys for the Federal & Interstate Water Unit at the Attorney General's Office filed a Motion to Intervene which was granted in mid-June. Subsequently, LAWMA has voluntarily agreed to amend its Water Rights Application and republish the resume notice, thereby significantly delaying the case. Our attorneys will continue to work with the Division of Water Resources to defend the Arkansas River Rule 14 Plan process going forward.

5. Republican River – Compact Rules

On January 11, the State Engineer filed Compact Rules with the Division 1 Water Court (the Rules). 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.

Approximately 15 parties have filed statements of opposition or support in Water Court. The State Engineer has proposed a case management plan, to which all but two parties have agreed. Our attorneys are working with the parties and judge to address the outstanding disagreements.

6. Hutton Foundation v. Rein, Case No. 15CW3018, Water Division 1.

The Foundation moved to dismiss its claims challenging the administration of the Republican River Compact. The Foundation had brought an action against the State Engineers and Colorado Parks and Wildlife alleging administration of the Republican River Compact and management of Bonnie Reservoir violated its water rights. The Foundation’s claims attacked the constitutionality of the Groundwater Management Act and administration of the Republican River Compact. The Groundwater Commission intervened as a defendant and successfully moved to dismiss the constitutional challenge to the Groundwater Management Act. The State Engineer promulgated rules for Compact administration during this litigation. The Rules, if approved, would clarify the administration of water in the basin and moot the Foundation’s claims. The State Engineer successfully moved to stay the Foundation’s litigation pending the resolution of the rules in Water Court. Subsequently, the Foundation has reportedly sold its water rights. As a result, the Foundation decided to drop its challenge to past administration. Moreover, the new water rights holders, CPW, Inc. (not to be confused with CPW (Colorado Parks and Wildlife)), has been substituted for the Foundation as the party involved in the Republican River Compact Rules proceedings.

7. Colorado River Demand Management Storage Agreement and Investigations

An element of the Upper Basin Drought Contingency Plan is the Demand Management Storage Agreement. This Agreement makes unfilled storage capacity at Lake Powell, the Aspinall Unit, Flaming Gorge Reservoir, and Navajo Reservoir 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.

Demand Management, as currently contemplated, is the temporary, voluntary, compensated reduction in consumptive use of Colorado River uses. Because the concept of Demand Management implicates many issues and questions in the Upper Basin, Colorado (as well as each of the other Upper Division States and Upper Colorado River Commission) has committed to investigating the feasibility of a potential Demand Management program.

At the state level, our attorneys continue to assist CWCB staff in creating a framework for analyzing a potential demand management program consistent with the Board's approval of the 2019 Work Plan. As part of the state process, the attorneys have drafted a potential disclosure agreement for work group participants to sign in order to help identify and frame the complex issues related to investigating demand management. Once the issues are identified and framed, the CWCB intends to provide the fully framed information for public consideration, comment and vetting.

The purpose of the disclosure agreement is twofold. First, it allows work group participants to fully explore the questions involving demand management in a frank and open manner without attribution. Second, it provides the CWCB and Attorney General's office opportunity to prepare for use of the information at a time when the state will also be initiating interstate discussions on re-examination of the Record of Decision for the 2007 Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations of Lake Powell and Lake Mead. Recognizing the duties that many work group members will have to their employers, any organizations with which they may be affiliated, and any other relevant groups, the agreement provides exceptions to the limited disclosure. In this way, the agreement is intended to strike a balance between the need for the CWCB to lead the investigative process in a manner that considers and protects the state's ongoing strategies in interstate forums while honoring the roles and perspectives of the subject matter experts who have been asked to provide insight and input to state staff as the demand management investigations proceed.

At the regional level, the Upper Colorado River Commission is on a parallel track. It is working to create a framework for the UCRC, through the states, to assess demand management and the various issues such a program would implicate throughout the Basin. The UCRC held its first Upper Basin workshop/listening session on demand management in Salt Lake City, Utah, on June 21. As advisors to the UCRC, our attorneys and CWCB staff presented and helped facilitate the meeting. Initial impressions from this meeting are that there is extensive interest in and concern with what demand management might look like throughout the

region. Moreover, there is a significant need to make sure any regional investigations are well coordinated and complimentary to intrastate investigations.

8. Colorado River Compact Compliance Study

In 2008, the General Assembly appropriated money and directed CWCB to undertake a study to consider various options for administering and/or avoiding the need for administration of water rights in the Colorado River to comply with the Colorado River Compact. These issues implicate legal interpretations and strategies regarding water rights administration within Colorado and among Colorado and the other six Colorado River Basin States. The Attorney General's Office continues to contract with Wilson Water Group to provide the technical expertise for this investigation.

9. Hill v. Waresewa, Appellate Case 19-1025, 10th Cir.

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 they claim, the Arkansas River was navigable at the time Colorado became a state.

The state moved to 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 a public trust framework or can turn its back on the public trust, but instead about whether a 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 on April 18. Our attorneys filed a Response Brief on June 21, 2019. Colorado Water Congress and a group of landowners filed amicus briefs in support of the state's position.

10. Save the Colorado v. U.S. Bureau of Reclamation, USDC Colo., No. 1:17-cv-02563-REB

Save the Colorado challenges the Bureau of Reclamation and Army Corps of Engineer's Final Environmental Impact Statement and Record of Decision approving the Windy Gap Firing Project. The Federal & Interstate Water Unit

represents the state of Colorado, who intervened in this case to protect four interests: (1) securing dependable water supply for the citizens of Colorado, (2) a significant financial interest in the project, (3) an interest in the fish and wildlife mitigation plans developed for the project, and (4) an interest in ensuring that storage, release, transport, and use of water from the project are consistent with state law and are administrable by the Colorado Division of Water Resources.

Save the Colorado filed its opening brief on May 23. Our attorneys are drafting a response to be filed by July 24, 2019. The state's response will focus on select issues, so as to avoid repetition with the federal agencies and water provider parties.

INTRASTATE MATTERS

11. Application of Adalberto Herrera, Case No. 2017CW6, Water Division 3

The applicant in this case sought to re-irrigate land that had been committed to dry-up in 2013 in support of a change of water right to instream flow purposes for the CWCB for 2.5 cfs in the Gabino Gallegos Ditch on the Alamosa River. Mr. Herrera sought to re-irrigate approximately 42 acres dried up during the change case and in exchange dry-up a different 42 acres of land historically irrigated by the ditch. The CWCB worked with Mr. Herrera and the Division Engineer to reach an agreement that the exchange of dry-up land could be accomplished without jeopardizing the CWCB's 2013 decreed change and without injury to the instream flow right. The applicant and the CWCB entered into a stipulation on April 29, 2019 and a decree was entered June 5, 2019.

12. Application of Don Johnson, Case No. 16CW3039, Water Division 6

In this application for water storage rights for Strawberry Hot Springs, Mr. Johnson claimed CWCB instream flow rights on the Elk River and Hot Spring Creek are subject to the water storage rights pursuant to 37-92-102(3)(b) for a portion of the diversions for the Springs. The CWCB agreed to terms and conditions regarding the details of the water storage rights to which its instream flow rights are subject and stipulated to entry of the decree on May 1, 2019.

13. Application for Water Rights of Sound of Music LLC, Case No. 17CW3008, District Court, Water Division 4

CWCB filed a statement of opposition to this application for a change of water rights and approval of a plan of augmentation to protect instream flow water rights on the San Miguel River and Big Bear Creek from injury. The applicant included

terms and conditions designed to protect the instream flow right from injury and the CWCB and Applicant stipulated to entry of the decree on May 1, 2019.

14. T&G Enterprises/Ackerman v. Big Elk Meadows Association, Case Nos. 17CV31102 in Larimer County (consolidated with 17CV31281 in Boulder County)

CWCB was named defendant in this matter in which plaintiff T&G filed a mechanic's lien against BEMA for alleged failure to pay for work completed after the 2013 flooding. The CWCB has issued three loans to BEMA and the collateral for those loans was the subject of the mechanic's lien. Defendant BEMA filed a motion for partial summary judgment regarding the claim for foreclosure of the property based on a procedural issue. T&G and BEMA were able to reach a settlement shortly thereafter regarding the amount to be paid and the parties filed a stipulated motion to dismiss on July 1, 2019. This court has not yet ruled on dismissal and the case is currently set for trial September 16-20, 2019.

15. Application of Colorado Water Conservation Board, Case No. 2018CW3198, Water Division 5

On June 16, 2019, the water court in Water Division 5 entered a decree for an instream flow right on Abrams Creek, for 0.75 cfs, May 1 through September 30, which is an increase on an existing instream flow right on Abrams Creek.