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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

FEDERAL & INTERSTATE MATTERS

1. Rio Grande -Texas v. New Mexico and Colorado, No. 141 Original

Texas has brought this interstate compact dispute before the U.S. Supreme Court alleging that New Mexico was allowing well pumping below Elephant Butte Reservoir to interfere with the Rio Grande Compact. Texas named Colorado as a defendant because it is a signatory to the Compact, but did not bring any claims against Colorado. As a plaintiff/intervenor, the United States asserts essentially the same allegations against New Mexico as Texas. The focus of the claims is along the Rio Grande Project area, from Elephant Butte Reservoir above Las Cruces, New Mexico to below El Paso, Texas. The extent to which operations at Elephant Butte reservoir are implicated in the litigation could trigger Colorado interests in the case. Moreover, how the case may set precedent for compact law going forward is also of keen interest to Colorado. Accordingly, Colorado remains involved in each phase of litigation to assure that any outcome does not negatively affect its interests in the Rio Grande Compact or create adverse jurisprudence for interstate compact litigation generally. The case, referred to a special master, is currently in the discovery phase. Texas and the United States submitted expert reports earlier this summer. Rebuttal expert reports are due October 31, 2019. Our attorneys have been actively participating in numerous depositions of Texas experts as well as factual witnesses in New Mexico and Texas to make sure the scope of the case remains contained and the issues do not implicate Colorado interests. Trial before the Special Master is tentatively set for late 2020. Colorado remains involved in each phase of the litigation to assure that any outcome does not negatively affect its

interests in the Rio Grande Compact or create adverse jurisprudence for interstate compact litigation generally.

2. Division 3 Rules, 15CW3024 and Division 3 Subdistricts

As a result of the Water Judge's approval in March 2019 of the "Rules Governing the Withdrawal of Groundwater in Water Division 3 and Establishing Criteria for the Beginning and End of the Irrigation Season in Water Division 3 for All Irrigation Water Rights" (Rules), all ground water uses subject to the Rules will have to operate under a plan that remedies "injurious stream depletions" and sustains the confined aquifer. Well users may do this by decreed plans for augmentation that also comply with the requirements in the Rules or by Groundwater Management Plans approved by the State Engineer. Injurious stream depletions are determined through groundwater modelling developed for the Rio Grande Decision Support System. Well users may also propose alternate methods to determine their injurious stream depletions if such a method is at least as accurate as the model. Well users can remedy injurious stream depletions to senior surface water users by replacing water or by other agreed upon means. However, plans cannot unreasonably interfere with Colorado's Rio Grande Compact obligations. The Rules also establish the criteria for the beginning and end of the irrigation season for all irrigation water rights, both ground water and surface water. The irrigation season is presumptively set as April 1 to November 1, with allowances for exceptions as determined by the Division Engineer. Our attorneys have been working with the Division of Water Resources to clarify how the Rules and the timing for approval of Groundwater Management Plans and Annual Replacement Plans as set forth under the Rules will be implemented.

Most recently, water users within the Rio Grande Water Conservation District are forming subdistricts as part of the process to comply with the Rules. Our attorneys have been working with the Division of Water Resources to advise on subdistrict creation and plan development consistent with the Rules. At present, three subdistricts have been formed in Division 3 and are operating under approved groundwater management plans pursuant to the Rules. Subdistrict No. 1 is located within the southern portion of the closed basin area of the San Luis Valley. Subdistrict No. 2 is found along the alluvial area of the Rio Grande approximately between Del Norte and Alamosa. Subdistrict No. 3 is in the Conejos basin north to the La Jara area. Other subdistricts have been established and are currently formulating and submitting their groundwater management plans for State Engineer approval. These include subdistrict No. 4 near San Luis Creek, subdistrict No. 5 along lower Saguache Creek, and subdistrict No. 6, which generally covers groundwater users in the Alamosa and La Jara creek areas. This Division of Water Resources recently approved the Ground Water Management Plan for subdistrict No. 6 and filed notice of such approval with the Court.

3. Arkansas River Compact Administration

The Federal & Interstate Water Unit attorneys continue to work with the Division of Water Resources to address interstate issues pending with Kansas in the Arkansas River basin. Such issues include: (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. A number of meetings are set to occur in November on these and other issues in anticipation of the annual meeting of the Arkansas River Basin Administration in early December. While work continues to progress, there are no developments to report at this time.

4. Republican River – Compact Rules

On January 11, 2019, 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 Court has approved the State Engineer's proposed case management plan over the objection of two parties. Staff from the Division of Water Resources and Colorado's compact compliance modeling expert have performed cursory outreach to explain the rationale for particular rules and better understand specific concerns. In December, after protestors have filed statements indicating which rules they object to, the scope of the case will be better defined. Soon thereafter, the Court will hold a status conference to set a trial date. There is still considerable hope that all matters sought to be protested will be addressed and the need for any trial obviated.

5. 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 any potential Demand Management program.

At the state level, our attorneys are coordinating with CWCB staff to implement the 2019 Demand Management Feasibility Work Plan. To this end, work groups on specific topics have been established and initial meetings are being scheduled. Each workgroup is considering specific aspects and questions associated with a potential demand management program. The state team is compiling public summaries of each meeting as they occur. Additionally, our attorneys have been working with the Division of Water Resources to answer questions and provide information to the Division Engineers and their staff regarding the status and purpose of demand management, should it become a consideration.

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. There will be an ongoing need to assure any regional investigations are well coordinated and complimentary to intrastate investigations. Our attorneys are working with the Commissioner for Colorado and her staff in furtherance of these considerations.

6. Navajo Nation v. Dept. of the Interior, et al.- 3:03-CV-00507-GMS

On August 23, 2019, Judge G. Murray Snow in the United States District Court for the District of Arizona rejected Plaintiff's Renewed Motion for Leave to File its Third Amended Complaint, thereby dismissing a lawsuit that has been ongoing for over fifteen years.

The Navajo Nation initially filed suit in 2003 after the Department of the Interior ("DOI") and Lower Colorado River Basin water users had finalized the 2001 Interim Surplus Guidelines, 2003 Quantified Settlement Agreement, and a series of other agreements around water banking and accounting in the Lower Colorado River Basin. In its complaint, the Navajo Nation asserted that DOI had taken actions that violated the National Environmental Policy Act ("NEPA") and the Administrative Procedures Act ("APA"), contradicted the federal government's trust responsibility to the Nation, and ultimately undermined the Navajo Nation's ability to access water it asserted it was entitled to under a reserved water right that had yet to be

confirmed. The case was stayed for ten years as the Navajo attempted to negotiate a reserved water rights settlement within Arizona. The court lifted the stay in 2013 when the negotiations proved unsuccessful.

Upon lifting the stay, the Navajo Nation moved to amend its complaint and added additional claims. Colorado moved to intervene when it became clear that the case may call into question Upper Basin interests in management of the Colorado River System as set forth in the 2007 Interim Guidelines, and related documents. Colorado's participation and interest has been limited to whether and to what extent the claims would alter or affect the current operations of the Colorado River System in the Upper Colorado River Basin and releases from Lake Powell.

The District of Arizona dismissed Navajo Nation's case in 2014. The Navajo Nation appealed to the 9th Circuit Court of Appeals. In 2017, the 9th Circuit upheld dismissal of most of Navajo's claims, including the NEPA and APA claims relating to the 2007 Interim Guidelines that were of concern to Colorado. The court concluded, however, that the Navajo Nation may have standing to bring other claims if pled properly. The Navajo Nation again filed a Motion for Leave to Amend the Complaint when the case was remanded back to the District Court. As part of their Motion, the Navajo made assertions regarding NEPA that gave Colorado pause to consider continuing participation in the case. However, ultimately Colorado monitored, but did not participate in this part of the case. The court has since denied the Navajo's Motion and the Navajo have again sought to appeal this final ruling. The attorneys in the Federal & Interstate Water Unit will continue to monitor the case during the appeal.

7. 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.

8. Upper Colorado River Basin Fund Memorandum of Agreement

Attorneys in the Federal & Interstate Water Unit at the Attorney General's Office continue to work with CWCB staff and Reclamation to manage project improvements funded pursuant to Colorado's allocation under the Upper Colorado River Basin Fund MOA (MOA). Since reaching consensus on a Communications Management Plan, our attorneys have participated in monthly calls with CWCB

staff and Reclamation to review implementation of approved projects and manage Colorado's MOA allocation.

At the regional level, our attorneys continue to coordinate with the Colorado Commissioner and her staff to identify issues and possible paths forward with other Upper Division States, Western Area Power Authority, Colorado River Energy Distribution Association, and Bureau of Reclamation in consideration of renewing or extending the current Basin Fund MOA beyond 2026.

9. Save the Colorado, et. al. v. Dept. of the Interior, et. al., 3:19-cv-80285 (U.S. Dist. Arizona, Prescott Division) (L-TEMP)

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 Department of the Interior's environmental analyses and decision under the National Environmental Policy Act (NEPA) to re-operate Glen Canyon Dam according to criteria set forth in the 2016 Long-Term Experimental and Management Plan (L-TEMP). They assert that the Department violated NEPA and the Administrative Procedure Act because it acted arbitrarily and capriciously in: (1) failing to incorporate specific climate change data into the environmental analyses; (2) improperly narrowing the purpose and need statement in the EIS; (3) failing to consider decommissioning the dam, fill Lake Mead first, and run of river operations as reasonable alternatives; (4) failing to conduct a supplemental EIS; and (5) failing to reasonably explain the relationship between the guidance documents and the decision not to consider the above alternatives. Plaintiffs ask the court to vacate the Environmental Impact Statement and Record of Decision approved for the L-TEMP operations, declare that the Department acted arbitrarily and capriciously based on the five (5) claims, and/or that the Department must perform additional NEPA analyses. Finally, Plaintiffs request preliminary and permanent injunctive relief as necessary.

The federal defendants must file an Answer or Motion to Dismiss in early December. The attorneys of the Federal & Interstate Water Unit are currently evaluating the Complaint to advise on whether and to what extent Colorado's interests may be implicated in this lawsuit.

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

The parties have briefed this case 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).

The case has been fully briefed and our attorneys are set to participate in oral argument at the 10th Circuit on November 19.

11. Save the Colorado v. U.S. Bureau of Reclamation, USDC Colo., No. 1:17-cv-02563-REB (Windy Gap Firing Project)

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. Our office represents the state of Colorado, who intervened in this case to protect four interests: (1) securing a 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.

This case is now fully briefed and awaiting scheduling of oral argument.

12. Platte River Recovery Implementation Program.

This program is designed to address land and water needs for endangered species and their habitats on the Platte River in Nebraska. The signatory parties (United States, Colorado, Nebraska, and Wyoming) have identified goals for habitat improvement and related monetary support to help the whooping crane, interior least tern, piping plover, and pallid sturgeon. Through the recovery program, the signatories obtain Endangered Species Act permitting for past water projects and can allow future water development. Colorado's participation provides coverage for water-related activities on the South Platte River that would otherwise impact downstream flows. The signatories are working on formalizing a thirteen-year extension to the First Increment of the Program. This would bring the term of the First Increment to 2032. While many Program milestones have already been achieved, this extension allows continued implementation of the Nebraska

Depletion Plan and reductions to target flow shortages. Achieving the First Increment milestones will help inform goals for the next increment of the program. The attorneys within the Federal and Interstate Water Unit continue to advise the Department of Natural Resources and staff at the Colorado Water Conservation Board on the terms and provisions of any program extension.

INTRASTATE MATTERS

13. Trout Creek instream flow appropriation

This matter was set for administrative hearing on November 19, 2019, however based on settlement discussions the parties believe that at least some concerns raised by opposers Knott Land and Livestock Company and Twentymile Coal can be narrowed or resolved by CWCB staff and BLM taking additional stream measurements on Trout Creek. Parties have agreed it is appropriate to take such measurements in early July and late August/early September of 2020, and the Parties will coordinate with regard to the specific timing of such measurements. To allow for these additional measurements the hearing was continued until November 2020.

14. The following instream flow water right has been decreed:

- Miners Creek ISF, Case No. 18CW3014, Div. 3. The Miners Creek instream flow water right is located in the natural stream channel of Miners Creek from its headwaters to the confluence with Prong Creek, a distance of approximately 4.35 miles, in the amount of 0.56 cfs (09/01 - 04/30), and 1.0 cfs (05/01 - 08/31).

15. The CWCB filed water court applications for the following instream flow water rights:

- Himes Creek, Case No 19CW3028, Div. 7 filed September 25, 2019
- Carnero Creek, Case No. 19CW3012, Div. 3 filed September 30, 2019
- Bonnett Creek, Case No. 19CW3064, Div. 2 filed October 1, 2019

Will Davidson was recently hired at the Attorney General's Office and he will be advising CWCB staff generally and representing the CWCB in water court cases. Will interned at the Attorney General's Office in 2014. During law school at the University of Colorado Will worked on the Acequia Assistance Project, providing pro bono legal assistance to irrigators in Costilla County in the San Luis Valley. After graduating from CU, Will spent a year clerking for Water Judge Hartmann in Water Division 1. Since 2016, Will has been in private practice as a

water attorney at Moses, Wittemyer, Harrison and Woodruff, P.C., in Boulder, representing clients as both applicants and opposers before the water courts and providing general counsel to clients in water transactions. Will obtained a Bachelor of Arts degree from St. John's College in Santa Fe, New Mexico, and is a volunteer for Wildlands Restoration Volunteers.