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STATE OF COLORADO
DEPARTMENT OF LAW

January 16, 2020

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

Discovery continues in this interstate compact litigation before the Special Master. New Mexico submitted its expert rebuttal reports on October 31, 2019, and included modeling and other information involving over 6 terabytes of data. The parties now realize that use of Veritext cloud storage for these and other case files may become cost prohibitive. The Unit is coordinating with Deputy AG Beatie to identify options for managing this data going forward.

Our attorneys remain involved in each phase of the litigation to assure that any outcome does not negatively affect Colorado's interests in the Rio Grande Compact or create adverse jurisprudence for interstate compact litigation generally. Currently, Colorado's expert consultants are working with the legal team to review expert reports and modeling and to develop strategies for preserving Colorado's interpretation of the Compact. Concurrently, discovery continues in the case, and trial before the Special Master is tentatively set for late 2020.

2. Arkansas River Compact Administration

Our attorneys participated with Colorado's Compact Administration representatives at the Annual Arkansas River Compact Administration meeting on December 4-5. During the meeting, the parties discussed the Bureau of Reclamation's request to revise the process for the 10 year review of the Trinidad Project and options for conducting a pilot project on creation and operation of a new multi-user Colorado

subaccount in John Martin Reservoir. No formal action was taken, but all parties committed to further investigation with the possibility of action at a special meeting in 2020 if consensus can be attained.

3. Republican River – Compact Rules

The Republican River Compact Rules are pending in the Division 1 Water Court. 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 filed statements of opposition or support in Water Court. Since late November, the legal team has negotiated and agreed to stipulations with eight (8) opposing parties, and three other parties have withdrawn their opposition. The only remaining opposer is East Cheyenne Groundwater Management District, which seems to object to compact accounting and the compact model as approved by the three compacting states. If forced to litigate on these issues, the trial is expected to last approximately three (3) weeks. The legal team, however, is hopeful that it will be able to convince East Cheyenne to withdraw its protest or come to a stipulated agreement.

4. Republican River – Interstate Compact Administration

Kansas, Nebraska and Colorado conducted a Republican River Compact Administration meeting via conference call on December 6. During the call, Kansas raised concerns with the 2016 Resolution regarding Harlan County Reservoir (in NE). At this time, no specifics regarding the concerns were identified or discussed. Rather, the parties agreed to evaluate and discuss them at a future call in 2020. Our attorneys will continue to counsel Colorado’s Compact Commissioner in these and other interstate discussions as they arise.

5. Colorado River Demand Management Storage Agreement and Investigations

Demand Management, as currently contemplated, is the temporary, voluntary, compensated reduction in consumptive use of Colorado River water. 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.

The Colorado River Subunit continues to provide counsel to CWCB staff on implementation of the 2019 Demand Management Feasibility Work Plan. The work plan has three elements: regional workshops, workgroups, and continued education and outreach. Eight (8) different work groups have been meeting to identify key issues related to Demand Management that should be framed for public consideration at future workshops and ultimately by the CWCB Directors. The Work Plan's Project Management Team, which is comprised of CWCB, Division of Water Resources, and Department of Natural Resources staff along with Colorado River Subunit members are compiling public summaries of each workgroup meeting, which are available at CWCB's Demand Management website. Additionally, the second regional workshop will be January 29 at the Colorado Water Congress conference. Additionally, our Subunit 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 to assess Demand Management and the various issues such a program would implicate throughout the Basin. There is an ongoing need to assure any regional investigations are well coordinated and complimentary to intrastate investigations. The Subunit attorneys are working with the Commissioner for Colorado and her staff in furtherance of these efforts and considerations.

6. Reassessment of the 2007 Interim Guidelines for Lower Basin Shortages and Coordinated Operations of Lake Powell and Lake Mead.

The Colorado River Subunit attorneys will continue to advise Colorado's Commissioner during the processes for reassessing the 2007 Interim Guidelines, which is expected to commence in early 2020. The Guidelines inform the volume of annual releases to be made from Lake Powell consistent with the Colorado River Compact and related law of the river. The Guidelines could not be successfully finalized in 2007 without consensus among the seven Colorado River Basin States, who hold the rights and obligations related to the use of water under the compacts. The term of the Guidelines is 2007 to 2025 with the understanding that no later than December 31, 2020, the Secretary of the Interior would review the effectiveness of the Guidelines in consultation with the Basin States.

At the Colorado River Water Users Association Conference, the Secretary of the Interior announced on December 13 that the Bureau of Reclamation will initiate a review of the effectiveness of the 2007 Interim Guidelines for Lower Basin Shortages and Coordinated Operations of Lake Powell and Lake Mead beginning in early 2020. This is not commencement of a NEPA or formal decision making process regarding what future operation of the Colorado River System should look like. Rather, it is a look back to assess what worked, what did not and why. As part of the review process, the Secretary committed to consulting with the 7-

Colorado River Basin States consistent with the express terms of the Guidelines. He also committed to including input from other interests, namely the tribes and stakeholders in the basin. This step is viewed as the foundational evaluation needed to help inform future operations of the Colorado River System. It also allows additional time to implement the recently approved Drought Contingency Plan and evaluate the effectiveness of those tools as well.

Concurrently, Colorado's Commissioner to the Upper Colorado River Commission is working with CWCB and Attorney General staff and Alternate Commissioners to prepare for efforts to reassess the effectiveness the Guidelines. She is developing a process for building the public's trust and confidence in the State's representation on these matters, identifying and filling information gaps based on input from Colorado's constituency, and developing a strategy for negotiating new terms among the 7-States as needed.

7. 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 a 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 Procedures 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 LTEMP operations, declare that the Department acted arbitrarily and capriciously based on the 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 filed an Answer or Motion to Dismiss on December 6, 2019. Additionally, the Court has set a scheduling conference for late January. Our attorneys are coordinating with counsel from the other Basin States to explore whether and how to respond to the litigation.

INTRASTATE MATTERS

8. Application for Water Rights of City of Fort Collins-Loveland Water District, the North Weld County Water District, and the East Larimer County Water District, Case No. 17CW3160, Division 1

Applicants filed an application to change the types and places of use, including a change of use from direct flow to storage and subsequent beneficial uses, alternate points of diversion, and extraterritorial use. Applicants also claimed the appropriation of return flows that would otherwise be owed to the river. CWCB filed a statement of opposition to protect instream flow water rights that could be injured by the application, primarily due to extra-territorial water use. The applicants and CWCB ultimately agreed to include in the decree terms and conditions limiting extraterritorial uses to such places within the Cache La Poudre River Basin as is necessary to fulfill return flow replacement obligations under the decree. The applicants also dropped their claim to appropriate return flows. Further, the decree prohibits use that creates a depleted reach of stream that would affect an instream flow right. CWCB stipulated to entry of the decree on November 19, 2019.

9. Application for Water Rights of City of Aurora, Case Nos. 17CW3205 and 18CW3121, Division 1

These cases concern applications to change water rights associated with two ditches from irrigation to a variety of uses and to new places of use. The City of Aurora also sought the right to lease or sell the changed water rights to others for extraterritorial use (i.e., use outside of its service area) in each case. The CWCB possesses numerous instream flow water rights in the South Platte River Basin which could be injured by such undefined extraterritorial use and filed a statement of opposition to ensure protective terms and conditions were included in any decree entered in each case. After multiple meetings, negotiations and exchanges of proposed terms, the City of Aurora and CWCB were able to agree upon terms and conditions in the decree that require Aurora to include in its water supply contracts for the subject rights notice that the use or exchange of the subject water in a manner that would deprive a decreed instream flow right of water is prohibited, and the parties stipulated to entry of the decree in both cases on November 20, 2019.

10. Application for Water Rights of City of Aurora, Case Nos. 18CW3218, 18CW3219, and 18CW3220, Division 1

These cases concern applications for determinations of underground water rights for the City of Aurora. In each case the City of Aurora sought ground water rights for a variety of uses and places of use, including the right to lease or sell the water rights to others for extraterritorial use (i.e., use outside of its service area) in each case. The CWCB possesses numerous instream flow water rights in the South Platte River

Basin which could be injured by such undefined extraterritorial use and filed a statement of opposition to ensure protective terms and conditions were included in any decree entered in each case. After multiple meetings, negotiations and exchanges of proposed terms, the City of Aurora and CWCB were able to agree upon terms and conditions in the decree that require Aurora to include in its water supply contracts for the subject rights notice that the use or exchange of the subject water in a manner that would deprive a decreed instream flow right of water is prohibited, and the parties stipulated to entry of the decree in each case on December 20, 2019.

11. Application for Water Rights of Alice Springs Land and Cattle Company, LLC, Case Nos. 17CW3203, Division 1

This case concerns an application for conditional storage rights and a plan for augmentation. The CWCB possesses two instream flow water rights on the North Fork of the Cache La Poudre River which could be injured by the Applicant's claims. After a settlement conference, negotiations, and numerous exchanges of proposed terms, the Applicant and CWCB were able to agree upon terms and conditions in the decree that will prevent injury to the instream flow water rights and acknowledge how Applicant must operate its plan for augmentation in the event of a call from the instream flow water rights. CWCB and Applicant were also able to agree on the process the Applicant must go through to add additional replacement sources to the plan for augmentation. Following agreement on these terms and conditions and language in a stipulation, CWCB stipulated to entry of the decree on January 9, 2020.

12. The following instream flow water rights have been decreed:

- Cold Spring Creek ISF, Case No. 19CW3047, Div. 4. The Cold Spring Creek instream flow water right is located in the natural stream channel of Cold Spring Creek from Amalla Spring to the confluence with Pauline Creek, a distance of approximately 1.23 miles, in the amount of 0.25 cfs (07/01 - 04/30), and 0.40 cfs (05/01 - 06/30), absolute.
- East Fork Little Cimarron River ISF, Case No. 19CW3048. The East Fork Little Cimarron River instream flow water right is located in the natural stream channel of East Fork Little Cimarron River from the headwaters to the confluence with the Little Cimarron River, a distance of approximately 6.45 miles, in the amount of 1.0 cfs (01/01-04/30), 2.8cfs (05/01-06/30), and 1.2 cfs (07/01- 12/31), absolute.

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

- Stout Creek ISF, Case No. 19CW3069, Div. 2 filed November 6, 2019

- Baker Creek, Case No. 19CW3077, Div. 2 filed December 12, 2019
- Disappointment Creek, Case No. 19CW3035, Div. 7 filed December 20, 2019