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STATE OF COLORADO
DEPARTMENT OF LAW

May 11, 2020

TO: Colorado Water Conservation Board

FROM: Phil Weiser, Attorney General
Lain Leoniak, Acting First Assistant Attorney General
Jen Mele, First Assistant Attorney General

RE: Report of the Attorney General

FEDERAL & INTERSTATE MATTERS

1. Waters of the United States (WOTUS)

On April 21, 2020, Andrew Wheeler, Administrator of EPA, signed the *Navigable Waters Protection Rule: Definition of "Waters of the United States"* (the "2020 Rule"). That rule redefines Waters of the United States ("WOTUS") to limit significantly the scope of federal jurisdiction to regulate water quality.

Last year, Governor Jared Polis and Attorney General Phil Weiser submitted to the EPA and the U.S. Army Corps of Engineers comments on a similar draft of the rule. Among other things, those comments explained that Colorado does not support any rollback of federal jurisdiction under the *Revised Guidance on Clean Water Act Jurisdiction Following the Supreme Court Decision in Rapanos v. U.S. and Carabell v. United States* ("2008 guidance") issued by the George W. Bush administration. Those comments also set forth Colorado's objection that the rule would remove from federal jurisdiction many Colorado waters that are currently within federal jurisdiction under the 2008 guidance. In addition, Colorado indicated two areas of support for the rule: additional clarity regarding the existing agriculture exemption; and continued consistency with Section 101(g) of the CWA; The 2020 Rule was published in the Federal Register on April 22, 2020. Parties have sixty (60) days from the time it is published to challenge the 2020 Rule. Coordination meetings between affected executive branch agencies were held April 6, and 23, 2020. Attorney General Weiser indicated in a press release that he intends to challenge the 2020 Rule.

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

Our attorneys remain involved in each phase of the litigation to assure that any outcome does not harm 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 the Special Master has set a case management hearing for May 1, 2020. Trial before the Special Master remains tentatively set for early 2021.

3. Platte River Recovery Implementation Program

Colorado continues to meet its Plan for Future Depletions by mitigating impacts of new water-related activities in the North and South Platte basins. The state continues to monitor and report water use information pursuant to Colorado's Plan for Future Depletions and evaluate future water needs in the basins.

4. Arkansas River Compact Administration

Colorado continues to work with Kansas to create and operate a new multi-user Colorado subaccount in John Martin Reservoir. Colorado water users are seeking to establish the account because it would better enable them to manage their water resources. Pueblo Reservoir is in danger of spilling, and water users in the basin are looking for alternative storage locations. The account would also assist water users in complying with the Arkansas River Basin's Irrigation Improvement Rules, which require water users to provide historical return flows to Kansas when implementing irrigation efficiencies such as installing center pivot sprinklers and lining ditches and ponds.

In furtherance of this concept, our attorneys participated in a Special Engineering Committee (SEC) telephonically on April 13, 2020. However, progress was slowed, as Kansas officials had been on administrative leave for two weeks in response to Covid-19. The next meeting is scheduled for June 4, 2020. The parties will continue to work towards a WY2021 pilot project for the new Colorado multi-user account in John Martin Reservoir.

Our attorneys have also been coordinating with Kansas and Bureau of Reclamation representatives regarding the process for performing the next 10-year review on the Trinidad Project. The 10-year review is a requirement of the Trinidad Project Operating Principles and is intended to review operations of the project to ensure that it has not had a detrimental impact on downstream water users in Colorado and Kansas. On April 15, 2020 our attorneys received a letter from the Area Manager at the Bureau of Reclamation. The letter explains Reclamation's continued

position that they will not perform the next review for the period 2015-2024, without significant concessions from Colorado and Kansas. This letter was forwarded to our clients (Colorado's ARCA commissioners and DWR staff). Our attorneys will confer with our clients and discuss a potential joint response to the letter, if any, with Kansas. The States and Reclamation have set a schedule to periodically reconvene to work through these issues.

5. 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.

The only remaining opposer, East Cheyenne Groundwater Management District, has been working with a modeling expert to try and understand the Republican River Compact Administration Groundwater Model and that expert has been coordinating with the State's expert. Our attorneys have a status conference scheduled for May 19, 2020 to advance settlement discussions if possible. If forced to litigate on these issues, the trial is expected to last approximately three (3) weeks and is scheduled for early 2022 with expert reports due in early 2021. Preston Hartman entered an appearance as co-counsel in the case.

6. Republican River – Interstate Compact Administration

Kansas, Nebraska and Colorado continue to convene monthly via phone to work on issues including, but not limited to, management of Harlan Reservoir in Nebraska consistent with the terms and understandings of the parties in the Republican River settlement documents. Our attorneys will continue to counsel Colorado's Compact Commissioner in these and other interstate discussions as they arise.

7. Colorado River Demand Management Storage Agreement and Investigations

Colorado Investigations: 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. The eight (8) different work groups continue to meet 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, our Subunit attorneys continue to coordinate 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.

CWCB and the Colorado River Subunit have met with representatives of the Southern Ute Indian Tribe and the Ute Mountain Ute Indian Tribe to discuss tribal interests related to Demand Management. At the request of the Tribes, CWCB and the Tribes are currently engaging in sovereign-to-sovereign discussions on these issues and allowing the Tribes to assess the manner in which they would like to engage in the process. The next Tribal Interests Meeting is scheduled for May 11, 2020.

Regional Investigations: At the regional level, the Upper Colorado River Commission is on a parallel track with Colorado to assess Demand Management and the various issues such a program would implicate across the Basin. To this end, the Commission is currently evaluating proposals for contractors to assist in evaluating regional issues related to demand management. There is an ongoing need to assure any regional investigations are well coordinated and complementary to intrastate investigations. The Subunit attorneys are working with the Commissioner for Colorado and her staff in furtherance of these efforts and considerations.

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

The 2007 Interim Guidelines for Lower Basin Shortages and Coordinated Operations of Lake Powell and Lake Mead 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.

The Bureau of Reclamation initiated its internal review of the effectiveness of the Guidelines in January 2020. This review process does not kick off 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.

Colorado's Commissioner to the Upper Colorado River Commission is working with her counterparts in the 7 Basin States and with staff from the CWCB and Department of Law and Alternate Commissioners and other Colorado River Advisors to reassess the effectiveness the Guidelines based on Colorado's individual views. Our attorneys are currently coordinating with attorneys from the Basin States on a draft 7 Basin States Letter to submit to Reclamation in May 2020.

9. Renegotiation of the 2011 Upper Basin Fund Memorandum of Agreement

The Upper Basin Fund Memorandum Of Agreement ("MOA") is an agreement entered into in 2011 between the four Upper Division States, the Bureau of Reclamation ("Reclamation"), the Western Area Power Administration ("WAPA"), and the Colorado River Energy Distributors Association ("CREDA") ("Parties"). The MOA provides a mechanism for the Upper Division States to access excess hydropower revenues made available through the Colorado River Storage Project Act for operations, maintenance, and replacement for certain types of irrigation projects in each of the Upper Division States, known as "participating projects."

Our attorneys are representing the CWCB and Colorado River Commissioner during the Memorandum of Agreement 2 ("MOA 2") negotiation process. The MOA 2 is currently in "for discussion purposes only" draft form and negotiation of the substantive provisions related to what projects would qualify for available funds and implementation issues for approved projects is on-going. Nothing has been formally agreed to at this time. The deadline for reaching a final draft has been extended to May 29, 2020.

10. 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"). 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 Colorado River.

On April 2, 2020, Six Basin States (New Mexico abstained from joining) jointly filed a motion to intervene. Our attorneys led the drafting effort for both the motion and the reply. On April 23, the Court granted the States' motion to intervene as of right, which means that the Basin States were able to successfully claim an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the States' abilities to protect those interests. The federal defendants were to file the administrative record on April 3, 2020. However, the federal defendants filed a motion for extension until June 2, 2020 which was granted by the Court.

11. Hill v. Warsewa, No. 19-1025, 10th Cir.

In this case a fisherman, Hill, claimed that a landowner, Warsewa, could not prevent him from wading in the Arkansas River because the underlying riverbed belongs to the State, rather than the landowner. Hill's theory was that the River was navigable in 1876 and that the State, therefore, took title at statehood under the doctrine of navigability. Upon motions by the State and Warsewa, the District Court dismissed for lack of prudential standing because Hill asserted the rights of a third party—the State, and asserted a generalized grievance. On appeal, the appellate panel disagreed and remanded to the District Court. Upon reconsideration, the District Court found it lacked jurisdiction because Hill failed to assert injury to any right of his own. Accordingly, the federal District Court remanded the case to state court in Fremont County where it may face similar threshold challenges.

INTRASTATE MATTERS

12. Application for Water Rights of Steamboat Springs, 17CW3043, Water Division 6

This case concerned an application by Steamboat Springs for a storage right in Casey's Pond, just outside of Steamboat Springs. The pond is essentially on-channel in Burgess Creek, proximate to the confluence with the Yampa River. CWCB has an instream flow right on Burgess Creek down to the confluence with the Yampa River. Steamboat also sought an exchange to exchange water released from Stagecoach River down the Yampa River and up into the pond. Steamboat had filed a companion case in 17CW3042 in which it sought to change previously changed water rights, including the Hoyle and Knight Ditch, on Fish Creek, to be stored in Casey's Pond. Steamboat ultimately withdrew its application in 17CW3042, and CWCB and the Steamboat were able to reach agreement on terms

and conditions to be included in the decree for 17CW3043 that are protective of the instream flow water right. CWCB stipulated to entry of the decree on February 21, 2020.

13. Application for Water Rights of John Hightower and Melissa Hightower, Case No. 18CW3014, Water Division 2

Applicants filed an application seeking water storage rights, a change of water right, and approval of a plan for augmentation. The CWCB filed a statement of opposition to protect its instream flow water rights on Bear Creek over concerns of expansion of use and issues surrounding water storage. After both parties filed expert disclosures and expert reports, the parties were able to resolve the case. The stipulated decree includes terms and conditions that are protective of the Bear Creek instream flow right and the CWCB stipulated to entry of the decree on March 5, 2020.

14. Application for Water Rights of City of Monte Vista, Case No. 16CW3024, Water Division 3

Applicant filed for change of water rights, appropriative rights of exchange, and approval of a plan for augmentation. The CWCB possesses numerous instream flow water rights in Water Division 3 and the Rio Grande River Watershed that could be injured by Applicant's claims and so filed a Statement of Opposition primarily due to concerns regarding the proposed appropriative rights of exchange. The Applicant and CWCB were able to agree upon terms and conditions to be included in the decree that are protective of the instream flow rights and a stipulation between the parties was filed on March 11, 2020.

15. Application for Water Rights of Evergreen Metropolitan District, Case No. 17CW3217, Water Division 1

Applicants filed for conditional storage rights for the Buchanan Ponds on Troublesome Creek, a tributary to Bear Creek. Evergreen also sought a change of water rights of portions of the Robert Lewis Ditch for Evergreen's municipal use, as well as storage in Evergreen Reservoir, Bear Creek Reservoir, Soda Lakes, and the Buchanan Ponds and appropriative rights of exchange into these storage facilities. CWCB has instream flow rights on Bear Creek, as well as storage rights in Bear Creek Reservoir. CWCB is also working with Evergreen, among other entities, on the potential reallocation project for Bear Creek Reservoir. Evergreen's Robert Lewis Ditch rights changed in this case may be stored in Bear Creek Lake when the reallocation is completed. Through negotiations with Evergreen, CWCB

obtained terms and conditions that would protect the its instream flow water rights when Evergreen is operating its exchanges and entered into a stipulation on March 17, 2020.

16. Application for Water Rights of the Evans Ranch Preservation Association and Mountain Mutual Reservoir Company, Case No. 18CW3211, Water Division 1

Applicants filed for water rights and a plan for augmentation. The CWCB opposed the case primarily due to concerns with the proposed plan for augmentation and its potential injurious effect on CWCB's instream flow water rights on Bear and Vance Creeks, as well as Applicants' claims that its water storage rights qualify for protections under §37-92-102(3)(b), C.R.S. Applicants and CWCB ultimately agreed upon terms and conditions in the proposed decree protective of the instream flow rights, including the extent of the use of the storage rights at the time of the instream flow appropriation. The stipulation between the parties was filed with the court on March 23, 2020.

17. Application for Water Rights of RP on TC, LLC, Case No. 18CW02, Water Division 2

Applicant sought to change a portion of the Hill No. 1 Ditch water right located on Texas Creek in Fremont County. The Hill No. 1 Ditch water right was changed in an earlier case to allow the water right to be used to augment a pond on Applicant's property. The application in the immediate case sought to cancel the plan for augmentation (out-of-priority depletions from the pond would no longer occur) so that the water right dedicated to the augmentation plan could instead be used to irrigate portions of Applicant's property that had been dried-up in the previous case. The CWCB filed a statement of opposition to prevent injury to its instream flow water right on Texas Creek. The Hill No. 1 Ditch water right had been quantified in the previous change case, but the decree from that case was ambiguous on how return flows would be replaced. Applicant and the CWCB were able to reach an understanding on how return flows would be replaced, and Applicant and the CWCB entered into a stipulation on April 10, 2020.

18. Application for Water Rights of CJC Properties/Eagle River WSD, Case No. 17CW3249, Water Division 5

This case is an application for change of water rights, appropriative rights of exchange and plan for augmentation for use by CJC in its service area. CWCB opposed the application due to concerns about expansion of use and injury to instream flow water rights on the Eagle River under the augmentation plan, including the applicants' method of calculation of historical consumptive use to which the applicants are entitled as a result of the changed water right. The CWCB

and applicants agreed to terms and conditions protective of the instream flow water rights and entered into a stipulation on April 14, 2020.

19. Application for Water Rights of Fort Collins-Loveland Water District, Case No. 19CW3019, District Court, Water Division 1

Applicant filed an application seeking to quantify its municipal return flows attributable to the use of fully reusable water sources for use in an augmentation plan to meet return flow obligations. Applicant also claimed the right to reuse and successively use its municipal return flows by sale, contract, or exchange. The CWCB filed a statement of opposition to protect against injury to its instream flow water rights primarily because Applicant's claims to sell or contract for its municipal return flows did not identify a place of use. Applicant and the CWCB agreed to terms and conditions in the decree requiring use of Applicant's municipal return flows only after a subsequent decree or pursuant to an approved substitute water supply plan, and stipulated to entry of a form of the decree on April 15, 2020.

20. Application for Water Rights of Connell Development Co., Case No. 18CW3162, Water Division 5

Applicant filed for a storage right and an approval of a plan for augmentation, including appropriative right of exchange. Applicant's storage right claimed its source of supply as the Frying Pan River and Muccawanago Creek and Spring, a tributary to the Frying Pan River. The CWCB filed a statement of opposition to protect its instream flow water rights in the Frying Pan River. Applicant and the CWCB entered into a stipulated decree on April 16, 2020, that includes terms and conditions protective of the CWCB's instream flow water right.

21. US Forest Service, Case No. 18CW3055, Water Division 2

This application is for a plan for augmentation and exchange to augment depletions arising from storage in Lake Isabel. The water right for Lake Isabel has an appropriation date of 1935, and the CWCB filed a statement of opposition in the case to evaluate the application of § 37-92-102(3)(b) C.R.S. to the Saint Charles River instream flow water right. The CWCB and the applicant were able to agree to terms and conditions that appropriately recognized practices associated with the Lake Isabel water right that were in existence at the time of the instream flow appropriation, and the CWCB stipulated to entry of the decree on April 16, 2020.

22. Municipal Subdistrict of Northern Colorado Water Conservancy Dist., Case No 17CW3176, Water Division 5

This application is for a determination of water rights to confirm certain agreements and water rights of Northern and to confirm the Colorado River

Connectivity Channel can be operated without an augmentation plan and that such operation does not change the Windy Gap decrees, modify or change the point of diversion of the Windy Gap Project, or change the location of the Colorado River. The CWCB filed a statement of opposition to protect its instream flow water right on the Colorado River directly below Windy Gap Reservoir. After agreeing to terms and conditions to provide for measurement of the stream flow to allow for administration of the instream flow water right, the CWCB stipulated to entry of the decree on April 16, 2020.

23. Application for Water Rights of North Weld County Water District, Case No. 17CW3057, Water Division 1

Applicant filed an application seeking a change of water rights, alternate points of diversion, alternate places of storage, and appropriative rights of exchange. The CWCB filed a statement of opposition to protect against injury to its instream flow rights and to ensure that historical return flows accrued to the stream in time, place, and amount. Applicant and the CWCB entered into a stipulated decree on April 27, 2020, which includes terms and conditions protective of the CWCB's instream flow rights, including that the Applicant is not authorized to use the subject water right to replace historical return flows or augment out-of-priority depletions occurring outside Applicant's service areas unless such uses are authorized by a subsequent decree or approved substitute water supply plan.

24. The CWCB decreed instream flow water rights in the following cases:

- Coal Creek ISF, Case No. 17CW3064, Water Division 4

The instream flow right runs from the Coal Creek headwaters to the Spann Nettick Ditch headgate, in the amount of 1.3 cfs (01/01 - 03/31), 5.9 cfs (04/01 - 08/15), 3.7 cfs (08/16 - 11/30), and 2 cfs (12/01 - 12/31). Decreed March 9, 2020.

- Bonnett Creek ISF, Case No. 19CW3064, Water Division 2

The instream flow water right runs from the Bonnett Creek headwaters to the confluence with the Cucharas River, in the amount of 0.4 cfs (09/01-03/31); 1.0 cfs (04/01-06/30); and 0.55 cfs 07/01-08/31). Decreed April 21, 2020.

- Stout Creek ISF, Case No. 19CW3069, Water Division 2

The instream flow right runs from the BLM/USFS property boundary to the confluence with an unnamed tributary, in the amount of 3.5 cfs

(05/01 - 06/30), 1.5 cfs (07/01 - 08/31), and 0.6 cfs (09/01 - 04/30).
Decreed April 29, 2020.