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**STATE OF COLORADO**  
**DEPARTMENT OF LAW**

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**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 beyond the approach taken by the George W. Bush administration, set forth in what was known as 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”). The state’s comments specifically objected to the rule in that it 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(s); 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. In May 2020, Colorado filed for a Preliminary Injunction in the United States District Court of Colorado. On June 19, 2020, the Court granted the Preliminary Injunction. On June 23, 2020, the Department of Justice filed a notice of appeal to the 10<sup>th</sup> Circuit Court of Appeals.

## 2. 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.

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, the legal team is participating in depositions that are scheduled to conclude in early September 2020. Trial before the Special Master remains tentatively set for early 2021.

## 3. Platte River Recovery Implementation Program

In 1997, Colorado, Wyoming, Nebraska and the Department of Interior formed a unique partnership with the goal of developing a shared approach to managing the Platte River. Water users from the three states and local and national conservation groups joined the effort. Together, these stakeholders developed an innovative approach for improving the management of the Platte including but not limited to flow objectives that are intended to improve Platte River flows compared to flow conditions when the Cooperative Agreement was signed. In addition, water use has increased or will increase above 1997 levels and must be offset. The three states and the federal government each have plans ("depletions plans") that describe how they will offset impacts to target flows from water-related activities that were started after July 1997.

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 another Special Engineering Committee (SEC) telephonically on June 4, 2020. However, progress was slowed, as Kansas officials had been on administrative leave for two weeks in response to Covid-19. 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. Our attorneys are coordinating with the State and Division Engineers as to next steps in response to Reclamation's concerns about the cost of the 10-year review and the States' involvement.

#### 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 recently had a settlement meeting involving the State Engineer and the board of East Cheyenne, and future meetings are contemplated. Scheduling of these meetings has been complicated as

a result of COVID 19 conditions and future meetings will probably be held by telephone.

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 continued to meet 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. A Tribal Interests Meeting was held June 22, 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 has recently concluded evaluation of 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 of the Guidelines based on Colorado's individual views. Our attorneys coordinated with attorneys from the Basin States on a 7 Basin States Letter that was submitted to Reclamation in May 2020. The SubUnit is currently coordinating with CWCB Staff and Reclamation regarding Reclamation's 7.D Review process currently underway.

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 represented the CWCB and Colorado River Commissioner during the Memorandum of Agreement 2 (“MOA 2”) negotiation process. The MOA 2 has been finalized and Colorado has provided signatures for the Agreement. The MOA 2 will take effect October 1, 2020 and run through October 1, 2037.

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.

Colorado and five other Basin States (New Mexico abstained from joining) were granted the motion to intervene. On June 2, 2020, the Department of Justice filed the Administrative Record. Plaintiffs have until July 14, 2020 to file a response to this Record. Our attorneys continue to lead the coordination effort among the Basin States.

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 East Larimer County Water District, Case No. 18CW3076, Water Division 1

Applicant filed this application seeking a change of water rights, alternate points of diversion, alternate places of storage, and appropriative right of exchange. CWCB filed a statement of opposition to protect its instream flow rights in the Cache la Poudre watershed from injury, to evaluate the claimed extraterritorial use and to ensure that historical return flows accrued to the stream in time, place, and amount. Applicant agreed to terms and conditions in the decree that CWCB believes are protective of its instream flow rights and the parties stipulated to a decree on May 8, 2020.

13. Application for Water Rights of the Town of Basalt, Case No. 17CW3174, Water Division 5

Applicant sought an application for an absolute right for Midland Pond, an enlargement of the Williams No. 1 Town Ditch to fill the Midland Pond, an enlargement of the Pan and Fork Ditch, a change of point of diversion of the Pan and Fork Ditch, an absolute ground water right for the Midland Pond Well, an augmentation plan to augment the Midland Pond Well, and an exchange from the confluence of the Roaring Fork River and the Frying Pan River up to the Williams Town Ditch, using releases from Reudi Reservoir as a substitute supply. CWCB has instream flow rights decreed on the Roaring Fork River and Frying Pan River that could be injured by the application, especially the exchange. Through negotiations with Basalt, CWCB obtained terms and conditions that would protect the instream flow water rights when Basalt is operating its water rights and the applicant and CWCB stipulated to a decree on May 28, 2020.

14. Application for Water Rights of Benjamin Wolin & Jennifer Rhodes, Case No. 18CW3239, Water Division 1

Applicants filed for a water storage right for 0.8 acre-feet (with continuous fill and refill) for an off-channel pond that fills from Boulder Creek, and an augmentation plan to replace out-of-priority depletions from the pond. The CWCB filed a statement of opposition to ensure its instream flow water rights on Boulder Creek in Boulder County, including senior water rights acquired and changed to instream

flow purposes, were not injured. The primary issue in the case was whether the instream flow rights are subject to Applicants' uses that existed prior to appropriation of the CWCB's instream flow right under section 37-92-102(3)(b), C.R.S. Applicants ultimately dropped the argument that 102(3)(b) applies to certain of the CWCB's instream flow rights and the CWCB and Applicants entered into a stipulation on June 5, 2020.

15. Application for Water Rights of Mid Valley Metropolitan District, Case No. 17CW3156, Water Division 5

Applicant filed this application seeking changes of water rights, approval of plan for augmentation including appropriative rights of exchange, and for alternate points of diversion. CWCB filed a statement of opposition in this matter to protect its instream flow right on the Roaring Fork River from injury by ensuring no expansion of use would result and ensuring that historical return flows accrued to the stream in time, place, and amount. Following a necessary amendment to the application, the CWCB and Applicant were able to reach settlement and agree upon protective terms and conditions in the decree. The stipulation was filed with the water court on June 18, 2020 and was approved by court order on June 22, 2020.

16. Application for Water Rights of the James and Tracy Frazier, Case No. 19CW5, Water Division 5

Applicants claimed a simple change in point of diversion pursuant to section 37-92-305(3.5) C.R.S. The CWCB filed a statement of opposition to prevent injury to instream flow water rights on Corral Creek and the Colorado River over concerns that the application did not qualify as a simple change under the statute and that an expansion of use could result from the change of water right. The applicant amended its application to delete the claim for a simple change of point of diversion, the parties agreed to protective terms and conditions under the change of water right that remained, and parties stipulated to a decree on June 23, 2020.

17. Application for Water Rights of Eagle Valley Clean Energy Case No. 19CW3037, Water Division 5

Applicant filed for a plan for augmentation and appropriative right of exchange for the purpose of augmenting out-of-priority depletions on the Eagle River in Eagle County. The CWCB filed a statement of opposition to ensure its instream flow water right on the Eagle River would not be injured. Applicant's claim tracked an augmentation plan previously decreed in Case No. 14CW3167, and the CWCB's concerns were generally limited to ensuring that the decree entered in this case is clear and can be administered so as to prevent injury to the instream flow right. The CWCB and Applicant entered into a stipulation on June 23, 2020.



18. Application for Water Rights of North Weld County Water District and East Larimer County Water District Case No. 19CW3059, Water Division 1

Applicants filed this application seeking a conditional water storage right. CWCB filed a statement of opposition to protect its instream flow rights from injury due to applicant's unspecified claimed place of use. CWCB and Applicants agreed to language in the decree stating Applicants' use of the subject water right through agreements is not authorized for use outside Applicants' service areas unless such uses are authorized by a subsequent decree or approved substitute water supply plan. The parties stipulated to a decree on May 8, 2020.

19. Piney Valley Ranches Trust, Case No. 19CW3068, Water Division 5

On May 6, 2020, the CWCB filed a Motion to Intervene, which was granted on May 7, 2020. The CWCB's instream flow water right on Piney Creek, pending in Case No. 17CW3236, will be subject to the water rights decreed in this Case No. 19CW3068 pursuant to § 37-92-102(3)(b) C.R.S. and the CWCB intervened in order to ensure the decree properly reflects discussions and negotiations between the parties regarding details of the subject water right.

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

- Baker Creek ISF, Case No. 19CW3077, Water Division 2 -- The instream flow right runs from the Baker Creek headwaters to the U.S. Forest Service property boundary, a distance of approximately 2.13 miles, in the amount of 2.1 cfs (05/01 - 06/30), 1.3 cfs (07/01 - 08/31), 0.5 cfs (09/01 - 03/31), and 1.0 cfs (04/01 - 04/30).
- Carnero Creek ISF, Case No. 19CW3012, Water Division 3 -- The instream flow water right runs from the confluence of the South Fork and Middle Fork Carnero Creeks to the confluence with the Mogotas Arroyo, a distance of approximately 9.81 miles, in the amount of 2.2 cfs (12/01-02/29); and 2.6 cfs (03/01-11/30).
- Prong Creek ISF, Case No. 18CW3016, Water Division 3 -- The instream flow right runs from the headwaters of Prong Creek to the confluence with South Carnero Creek, a distance of approximately 3.71 miles, in the amount of 0.4 cfs (09/01 - 04/30) and 4.2 cfs (05/01 - 08/31).