

PHIL WEISER
Attorney General

NATALIE HANLON LEH
Chief Deputy Attorney General

ERIC R. OLSON
Solicitor General

ERIC T. MEYER
Chief Operating Officer



RALPH L. CARR
COLORADO JUDICIAL CENTER
1300 Broadway, 10th Floor
Denver, Colorado 80203
Phone (720) 508-6000

STATE OF COLORADO
DEPARTMENT OF LAW

September 3, 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 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 2020 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 2020 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 had sixty (60) days from the time it was published to challenge the 2020 Rule. 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 10th Circuit Court of Appeals. On August 14, 2020, Defendants and Intervenor-Defendants filed Reply Briefs in the 10th Circuit appeal of Federal District Court Judge Martinez' preliminary injunction order. Defendant Intervenor continues to seek expedited argument the week of September 21-24, 2020 or, in the alternative, asks the Court to reverse based on the briefs. The Court has not yet responded.

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 and the legal team is participating in depositions that are scheduled to conclude in early September 2020. The parties will be filing dispositive motions on key aspects of compact obligations in October of 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. Colorado is also negotiating a common interest agreement with the South Platte Water Related Activities Program to facilitate cooperation in evaluation of a water rights application from the City of Parker and the Lower South Platte Conservancy District, case 19CW3253.

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.

However, progress has slowed due 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.

There is only one remaining opposer, East Cheyenne Groundwater Management District. Our attorneys recently had a settlement meeting involving the State Engineer and the board of East Cheyenne and determined that more progress might

be made if the attorneys were not present. The State Engineer and the board president of East Cheyenne had another settlement meeting, 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.

6. Republican River – Interstate Compact Administration

Kansas, Nebraska and Colorado recently attended, via Zoom, the annual Republican River Compact Administration Meeting on August 21, 2020, and will 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 the 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 recently concluded meetings 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 compiled public summaries of each workgroup meeting, which are available at CWCB's Demand Management website. This and the work of the Work Groups culminated in a report that was provided to the CWCB Board of Directors July 2020. The final Demand Management Regional Workshop is scheduled for August 26, 2020. A Demand Management Workshop for the CWCB Board of Directors is scheduled to be held September 2, 2020 with the CWCB Board.

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 continue to engage 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. In a meeting held August 21, 2020, it was determined that the representatives from the Southern Ute Indian Tribe plan to participate in the CWCB Board Workshop.

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 implicates across the Basin. To this end, the Upper Colorado River Commission is in the process of finalizing the services contracts, scopes of work, and task orders for the various contracting entities with the goal of having the Contracts finalized by September 15, 2020. 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 Upper Colorado River Commissioner for Colorado and her staff in furtherance of these efforts and considerations.

8. Lake Powell Pipeline Project NEPA Process

The Lake Powell Pipeline Project (“LPPP” or “Project”) is a project proposed by the Utah Board of Water Resources that would deliver water from Lake Powell, near Page, Arizona to a reservoir near St. George, Utah. The water will be used to meet future water demands and enhance water supply reliability for communities in Southeastern Utah. The effect of the Project would be the diversion of water from the Upper Basin portion of the State of Utah to serve communities in the Lower Basin portion of Utah. As a fellow Upper Colorado River Basin State, Colorado respects Utah’s interest in the LPPP to plan for current and future water demands. Colorado supports administering and managing the Colorado River system and its reservoirs to meet the needs of Colorado River basin states provided that such activities do not jeopardize Colorado’s significant, legally protected rights to the Colorado River. At this time, comments to the draft Environmental Impact Statement are due September 8, 2020. Colorado plans to comment. The attorneys in the Colorado River Subunit are currently coordinating with CWCB staff and Colorado’s Commissioner to the Upper Colorado River Commission on drafting such comments.

9. 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. The SubUnit is currently coordinating with CWCB Staff and Reclamation regarding Reclamation's 7.D Review process currently underway.

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 permission to intervene. On June 2, 2020, the Department of Justice filed the Administrative Record. Plaintiffs have until August 28, 2020 to file a challenge to this Record. Our attorneys continue to lead the coordination effort among the Basin States.

11. Hill v. Warsewa, Case No. 2018 CV 030069 (Colorado District Court for Fremont County)

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 and remanded to Fremont County district court. On July 27, 2020, the State and Warsewa filed motions to dismiss in Fremont County district court. The State's motion asserted that Hill lacks standing and fails to state a claim upon which relief can be granted. Briefing on the motions will be complete on August 31, 2020.

INTRASTATE MATTERS

12. Application for Water Rights of Snowmass Water and Sanitation District, Case No. 17CW3258, Water Division 5

Applicant filed an application for a conditional water right for the Roaring Fork Intake Pipeline on the Roaring Fork River as a supplemental source of supply for the District, as well as a plan for augmentation to replace out of priority diversions at the Pipeline, and conditional appropriative rights of exchanges to exchange releases from Reudi Reservoir up the Roaring Fork River and Snowmass Creek. CWCB has instream flow rights decreed on Snowmass Creek and the Roaring Fork River that could be injured by the application and the CWCB was primarily concerned about the augmentation plan properly replacing depletions to prevent injury to those rights. Through negotiations with Snowmass Water and Sanitation District (SWSD), CWCB obtained terms and conditions that would protect the instream flow water rights when SWSD is operating its water rights and the CWCB stipulated to entry of the decree on July 27, 2020.

13. Application for Water Rights of Double RL, Case No. 18CW3064, Water Division 4

Applicant filed an application for a conditional water storage right, to make a conditional water storage right absolute, and to amend an augmentation plan. CWCB filed a statement of opposition to the application to protect instream flow water rights on West Fork Dallas Creek, Dallas Creek, and the Uncompahgre River from potential injury resulting from operation of the plan for augmentation and

because applicant claimed appropriation dates that are senior to the instream flow water rights, potentially triggering § 37-92-102(3)(b) and making the instream flow rights subject to applicant's uses. The applicant and the CWCB agreed to terms and conditions for the augmentation plan to protect the instream flow rights and clearly delineated which of the applicant's water rights are junior to the instream flow rights and to which uses the instream flow rights are subject.

14. The CWCB obtained decrees for instream flow water rights in the following cases:

- Marvine Creek ISF, Case No. 19CW3011, Water Division 6 – The instream flow right runs from the outlet of Lower Marvine Lake to the confluence with West Marvine Creek, a distance of approximately 7.1 miles, in the amount of 5.9 cfs (11/01 - 03/31) and 13.1 cfs (04/01 – 10/31).
- West Marvine Creek ISF, Case No. 19CW3012, Water Division 6 – the instream flow right runs from the West Marvine Creek headwaters to the West Marvine Ditch headgate, a distance of approximately 9.08 miles, in the amount of 2.9 cfs (11/01 – 03/31) and 4.6 cfs (04/01 – 10/31).
- North Fork White River (Upper, Middle, and Lower) ISFs, Case No. 19CW3014, Water Division 6
 - Upper North Fork White River instream flow water right runs from the outlet of Trappers Lake to the confluence with Skinny Fish Creek, a distance of approximately 1.52 miles, in the amount of 2.0 cfs (11/01 – 03/31) and 3.5 cfs (04/01 – 10/31).
 - Middle North Fork White River instream flow water right runs from the confluence with Skinny Fish Creek to the confluence with Big Fish Creek, a distance of approximately 2.47 miles, in the amount of 7.8 cfs (11/01 – 04/30) and 34 cfs (05/01 – 10/31).
 - Lower North Fork White River instream flow water right runs from the confluence with Big Fish Creek to the confluence with Ripple Creek, a distance of approximately 4.38 miles, in the amount of 23 cfs (11/16 – 05/10), 74 cfs (05/11 – 09/15) and 60 cfs (09/16 – 11/15).

- Disappointment Creek (Upper and Lower) ISFs, Case No. 19CW3035, Water Division 7
 - Upper Disappointment Creek instream flow water right runs from the confluence with Morrison Creek downstream to the historic location of a USGS gage, a distance of approximately 21.71 miles, in the amount of 1.8 cfs (01/01 - 01/31), 2.6 cfs (02/01 - 03/15), 14 cfs (03/16 - 06/30), 8 cfs (07/01 - 07/15), 5.8 cfs (07/16 - 07/31), and 2.2 cfs (08/01 - 12/31).
 - Lower Disappointment Creek instream flow water right runs from the historic location of a USGS gage downstream to the confluence with the Dolores River, a distance of approximately 37.8 miles, in the amount of 5 cfs (03/01 - 03/15), 9.8 cfs (03/16 - 06/15), and 5 cfs (06/16 - 06/30).

- Himes Creek ISF, Case No. 19CW3028, Water Division 7 -- The instream flow right runs from the Himes Creek headwaters to the Himes Ditch headgate, a distance of approximately 2.0 miles, and is for all the unappropriated flow (01/01 – 12/31).