

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

November 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 blocking implementation of the 2020 Rule. 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. The Court has scheduled oral argument in the appeal of the preliminary injunction order for November 18, 2020. The argument will be held remotely.

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. The parties will be filing dispositive motions on key aspects of compact obligations in early November of 2020. The Parties are also beginning formal settlement talks with Judge (retired) Wanger of California as the mediator. 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 No. 19CW3253 (Water Division 1).

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.

Kansas recently provided a response to Colorado's proposal, and Colorado is working through Kansas's concerns. 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. After numerous settlement meetings, it appears as if a non-litigated solution is unobtainable. Thus, our attorneys have begun preparing for litigation of 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 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 next steps in the Demand Management Feasibility Investigation.

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 continue to engage in sovereign-to-sovereign discussions on issues related to the Demand Management Feasibility Investigation and allowing the Tribes to assess the manner in which they would like to engage in the process for the next steps in the investigation.

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 has finalized the services contracts, scopes of work, and task orders for the various contracting entities. There is an ongoing need to ensure 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. On September 8, 2020, Colorado submitted comments on the Draft Environmental Impact Statement outlining Colorado's legal and technical concerns. Colorado also joined in a 6-Basin States' Letter to the Secretary of the Interior asking for additional time for the Basin States to resolve significant law of the river concerns. Utah has asked the Department of the Interior for additional time to review the comments received and work through outstanding legal issues with the 6 Basin States. The attorneys in the Colorado River Subunit continue to coordinate with Colorado's Commissioner to the Upper Colorado River Commission to resolve outstanding issues with Utah.

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 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 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 Basin States and with legal, technical and clerical assistants and Colorado River Advisors to reassess the effectiveness of the Guidelines based on Colorado's individual views. The Subunit is currently coordinating with technical contractors and Reclamation regarding Reclamation's

draft Report of the 7.D Review. Comments are due to Reclamation no later than November 13, 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 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. Briefing is now completed, and we await a decision from the Court. We anticipate substantive briefing sometime next year after the record issues are resolved. 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. The Court agreed, finding that Hill failed to show a personal, legally protected right, an individual remedy, or a private cause of action, and dismissed the case. Hill filed a notice of appeal on October 16, 2020. The record is due December 18, 2020.

INTRASTATE MATTERS

12. Application for Water Rights of Frank Vesely Revocable Trust, Case No. 18CW3050, Water Division 6

Applicant filed an application for an absolute water right for the Minniear Ditch on Beaver Creek, tributary to the Yampa River, for irrigation use. Applicant claimed an appropriation date and a date of beneficial use prior to the priority of CWCB instream flow water rights on the Yampa River, Elk River, Willow Creek and Beaver Creek. The CWCB's opposition focused on verifying Applicant's claimed uses to which the instream flow rights are subject under section 37-92-102(3)(b), C.R.S. Applicant and the CWCB were able to agree to the historical use and season of use of the claimed water right to which CWCB's instream flow water rights are subject and entered into a stipulation on September 16, 2020.

13. Application for Water Rights of Rocking JL Ranch, Case No. 19CW3102, Water Division 4

Applicant filed an application for a conditional underground water right to pump groundwater tributary to the Cimarron River for a cidery and tasting resort, as well as a plan for augmentation to replace out of priority depletions caused by the underground water right and the conditional water storage and direct-flow water rights Applicant claimed in Case No. 19CW3103, Water Division 4, described below. The CWCB filed a statement of opposition to the application to protect instream flow water rights on the Cimarron River from potential injury resulting from operation of the conditional underground water right and plan for augmentation. The CWCB obtained terms and conditions that protect the instream flow water rights by ensuring that the augmentation plan replaces all out of priority depletions owed to the instream flow water rights in the proper time, location, and amount. The CWCB stipulated to entry of a decree on September 28, 2020.

14. Application for Water Rights of Rocking JL Ranch, Case No. 19CW3103, Water Division 4

Applicant filed an application for a conditional water storage right and a conditional direct-flow irrigation right on an unnamed tributary to the Cimarron River to provide water for a cidery, tasting resort, and cider-apple orchard. Applicant also claimed a conditional appropriative right of exchange to facilitate operation of the augmentation plan Applicant claimed in Case No. 19CW3102, Water Division 4, described above, to allow Applicant to exchange releases from Blue Mesa Reservoir up the Cimarron River to the locations where Applicant's claimed water rights would deplete the Cimarron River. The CWCB filed a statement of opposition to the application to protect instream flow water rights on the Cimarron River from

potential injury resulting from operation of Applicant's claimed storage, direct-flow, and exchange water rights. The CWCB obtained terms and conditions that protect the instream flow water rights and stipulated to entry of a decree on September 28, 2020.

15. The CWCB decreed an instream flow water right in the following case:

- Gold Creek ISF, Case No. 19CW3049, Water Division 4 – The instream flow right runs from its headwaters to the Tarkington Ditch headgate, a distance of approximately 10.32 miles, in the amount of 4.0 cfs (04/15 - 07/10).