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STATE OF COLORADO
DEPARTMENT OF LAW

February 22, 2021

TO: Colorado Water Conservation Board

FROM: Phil Weiser, Attorney General
Lain Leoniak, 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 January 23, 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.

In 2019, 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 21, 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 10th Circuit Court held a remote oral argument in November 2020 and has yet to rule on that appeal.

On February 2, 2021, EPA and the Army Corps filed a motion in the 10th Circuit to hold the appeal in abeyance for sixty (60) days to allow the agencies to reconsider the 2020 Rule. Colorado supported that motion, and the intervenor-defendants opposed it. The 10th Circuit has not yet ruled on the abeyance motion.

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 filed dispositive motions on key aspects of compact obligations in early November of 2020. The Parties have also entered formal settlement talks with Judge (retired) Wanger of California as the mediator. Trial before the Special Master remains tentatively set for the summer of 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 exploring 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. Water users in the eastern end of the basin have long been looking for more efficient storage locations than Pueblo Reservoir. 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.

Colorado provided a proposal to Kansas and Kansas responded that initial proposal on September 28, 2020. Colorado provided an answer to Kansas's response on February 2, 2021. The parties will continue to work towards a 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. Colorado recently proposed to Kansas, Reclamation, and other project stakeholders that Colorado permanently take on primary responsibility for performing this review. Kansas has not yet responded to our proposal.

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 Ground Water 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 and filed expert report disclosures on February 8, 2021. The trial is expected to last approximately three (3) weeks and is scheduled for early 2022.

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, 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 the Colorado Water Conservation Board 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 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. 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. Plaintiffs objected to the sufficiency of that record. After briefing of the issue (the States did not take a position), the court rejected Plaintiffs' challenge to the record on February 4, 2021 but did so without prejudice. Thus, in its order, the court provided Plaintiffs the opportunity to file a new motion by March 5, 2021, identifying with specificity the documents Plaintiffs believe were improperly excluded from the record. If Plaintiffs choose not to move to supplement the record, the parties must file a joint proposed case management schedule by March 12, 2021; if Plaintiffs again seek to supplement the record, the joint proposed case management schedule will be due fourteen (14) days after the court's resolution of the administrative record issue. We anticipate substantive briefing sometime later this year, after the record issue is resolved. Our attorneys continue

to lead the coordination effort among the Basin States.

10. Hill v. Warsewa, Case No. 2020 CA 1780 (Colorado Court of Appeals)

In this case a fisherman, Hill, claimed that a landowner, Warsewa, could not prevent him from wading in the Arkansas River, alleging that 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. The case was removed to federal district court. Upon motions by the State and Warsewa, the federal 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 to the Tenth Circuit, the appellate panel disagreed and remanded to the federal 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 State and Warsewa filed motions to dismiss yet again, and the Fremont County District Court agreed with the State and Warsewa, 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 and an Opening Brief on December 17, 2020. The State and Warsewa filed Answer Briefs on January 21, 2021. Hill's Reply Brief was filed on February 11, 2021.

INTRASTATE MATTERS

11. Application for Water Rights of City of Boulder, City of Lafayette, and CWCB, Case No. 17CW3212, Water Division 1

City of Boulder and City of Lafayette filed this application for water storage rights for the Gross Reservoir Environmental Pool for the enlargement of Gross Reservoir. Applicants claimed instream flow use by the CWCB pursuant to future water delivery agreements that may be entered into by Boulder and/or Lafayette and the CWCB. The CWCB filed a statement of opposition to protect existing instream flow rights from injury and to work with Boulder on the potential acquisition of an interest in their water storage right. CWCB became a co-applicant in the case in July of 2019 and Boulder and the CWCB entered into a water delivery agreement in September of 2019.

Arapahoe County Water and Wastewater Authority (ACWWA) and East Cherry Creek Valley Water & Sanitation District (ECCV) argued Boulder cannot properly apply for a water right with an instream flow use attached to it, and that the CWCB cannot acquire an interest in a conditional water right under section 37-92-102(3)(c.5), C.R.S. Boulder and the CWCB filed a motion for determination of question of law on the issues and the matter was fully briefed and awaiting a decision from the

court when parties were able to reach a settlement. Boulder, Lafayette, CWCB, ACWWA and ECCV signed stipulations on January 21, 2021, and the stipulations required withdrawal of the pending motions for determination of question of law. Denver Water, who was monitoring the case due to its interest in Gross Reservoir, stipulated on January 29, 2021. The court vacated the trial, which was set to begin on March 1, 2021, on February 11, 2021.