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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, 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: (1) the manner in which the proposed rule provided additional clarity regarding existing agriculture exemptions; and (2) the proposed rule’s continued consistency with Section 101(g) of the CWA.

The 2020 Rule was published in the Federal Register on April 21, 2020 and was scheduled to take effect sixty (60) days later. 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 held a remote oral argument in November 2020.

On April 2, 2021, one day after denying a motion filed by EPA and the Army Corps to hold the appeal in abeyance, the 10th Circuit issued a decision reversing the District Court's order staying the 2020 Rule in Colorado. The 10th Circuit's judgment reversing the stay went into effect on April 26, 2021 when the Court issued its mandate in the case.

In the District Court case, EPA and the Army Corps moved jointly with Colorado to extend the briefing schedule to allow the federal agencies time to reconsider the 2020 Rule. Two motions for extension have been granted to date, and Colorado's opening brief on the merits of its claims is currently due to be filed on June 14, 2021.

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 compacts 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.

4. 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 in this case, 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. On March 26, 2021, East Cheyenne filed a Rule 56(h) motion, asserting that the method in the Rules for determining replacement obligations for Compact Compliance Plans is unlawful under Colorado law. The State Engineer filed his response on April 16, 2021. The trial is expected to last approximately three (3) weeks and is scheduled for early 2022.

5. 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 Republican River Compact Commissioner, State Engineer Kevin Rein, in these and other interstate discussions as they arise.

6. Colorado River Demand Management Storage Agreement and Investigations

In March 2019, the seven Colorado River Basin States executed a suite of agreements called the Drought Contingency Plan (“DCP”). The DCP includes Upper and Lower Basin elements and is in effect until December 31, 2025. It is beyond the scope of this Report to summarize each agreement, but for purposes of this Report,

the relevant agreement is the Demand Management Storage Agreement (“DMSA”).¹ The DMSA authorizes the storage of up to 500,000 acre-feet of water in the Colorado River Storage Project Act Initial Units if and when a Demand Management program is set up in the Upper Basin. The DMSA does not require that a Demand Management program be established. Rather, it provides the legal mechanism to store water conserved under a Demand Management program if, and only if, the Upper Division State Commissioners to the Upper Colorado River Commission agree to the feasibility and requirements of such a program after consulting with the Lower Division States and reaching agreement with the Secretary of the Interior on specific operations and determine there is a need for such a program.

Colorado Investigations: The Colorado River Subunit continues to provide counsel to CWCB staff on the next steps in the Demand Management Feasibility Investigation.

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.

7. 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

¹ Additional information relating to the DCP and the agreements can be found at <https://www.usbr.gov/dcp/index.html>.

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 for this proposed project, 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.

8. 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. On March 5, 2021, Plaintiffs filed a renewed motion to supplement the administrative record and for leave to take discovery of the federal government regarding Plaintiffs' fourth claim for relief, which alleges that the federal government improperly failed to prepare a supplementary environmental impact statement. The federal government responded on March 24, 2021, and the Plaintiffs filed a reply on April 2, 2021. As before, the States have not taken a position. The joint proposed case management schedule will be due fourteen (14) days after the court's resolution of the administrative record and discovery issues. 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.

9. Mississippi v. Tennessee, No. 143 Original

This case is now before the U.S. Supreme Court on exceptions to the special master's report, which were filed on February 22, 2021. The Federal and Interstate Water Unit filed an amicus brief on April 30. At the time of this writing of this Report, Idaho, Nebraska, North Dakota, Oregon, South Dakota, and Wyoming had joined the brief. At issue is whether a state can recover damages against another state for intrastate use of an interstate natural resource that has not been apportioned by compact or judicial equitable apportionment (here, an aquifer). The Unit believes that such claims can only arise if there is already an apportionment of the resource. The special master's report supports that position.

INTRASTATE MATTERS

10. Application of Cache la Poudre Water Users Assn., City of Fort Collins, City of Greeley, Colorado Water Trust, Northern Colorado Water Conservancy District, City of Thornton and CWCB, Case No. 21CW3056, Water Division 1

On April 29, 2021, the CWCB, along with six other applicants, filed an application in water court for an instream flow augmentation plan on the Cache la Poudre River. This is the first of this type of augmentation plan, and the filing follows the passage of HB20-1037, codified at § 37-92-102(4.5) C.R.S., confirming the ability of the CWCB to file an augmentation plan to augment stream flows. Because it is the first of its kind, the application will likely draw opposition, though the project partners conducted significant outreach prior to filing the application in an effort to minimize opposition to the plan. Statements of opposition are due June 30, 2021.

11. Application of Jerry and Julie Henderson, Larry Knowles, Hartmut and Isabel Koelsch, The Lee R. Wheeler Living Trust dated March 20, 2002, The Vickie Wheeler Living Trust dated March 20, 2002, Thomas and Karen Laier, and Delbert and Janet Jones, Case No. 19CW3086, Water Division 2

This case involved claims for storage water rights, direct flow water rights, and a change of water right on Three Elk Creek and a claim by the applicants that their storage operations predate CWCB's instream flow water right and are therefore entitled to protection under section 37-92-102(3)(b), C.R.S. CWCB opposed the application to ensure the applicants' claims would not injure the instream flow water right on Three Elk Creek and to confirm the applicants' claimed preexisting uses under section 37-92-102(3)(b), C.R.S. CWCB and the applicants stipulated to a version of the proposed ruling that included terms and conditions protective of the instream flow right and recognized use that existed at the time of the instream flow water right, and filed a stipulation with the water court on March 9, 2021.

12. Application of Highland Investments, Case No. 19CW3112, Water Division 5

This is an application for ground water rights, water storage rights, appropriative rights of exchange and augmentation plan along the Fraser River. The CWCB filed a statement of opposition to protect instream flow rights on the Fraser and Colorado Rivers, Pole Creek, and Crooked Creek against injury resulting from operation of the augmentation plan and exchanges. The decree includes specific terms and conditions for how the applicant must operate the augmentation plan depending on the calling instream flow water right, and the CWCB and the applicant filed a stipulation with the court on April 6, 2021.

13. Application of JAK Ventures, LLC, Case No. 20CW3013, Water Division 4

This is an application for a ground water right for two gravel pits, a change of water rights for two ditch rights from irrigation to augmentation, and a plan for augmentation. The CWCB filed a statement of opposition to protect its instream flow water right on East Creek from potential injury from operation of one of the gravel pits and expansion of use of the changed water rights. The parties agreed on terms and conditions to protect the instream flow right and stipulated to entry of the decree on April 7, 2021.

14. Application of Mountain Mutual Reservoir Company, Case No. 19CW3154, Water Division 1

This is an application to add replacement supplies to previously decreed exchanges and for court approval of new appropriative rights of substitution and exchange. CWCB filed a statement of opposition to protect instream flow rights that might be injured by operation of the substitutions or exchanges. The CWCB and the applicant agreed to terms and conditions to protect instream flow rights, and included a term making clear that the CWCB is not bound to the terminology used in this case to describe the applicant's exchange operations under a water exchange project, as such terminology may change. The stipulation between the CWCB and the applicant was filed on April 12, 2021.