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

August 31, 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 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 10<sup>th</sup> Circuit Court of Appeals. The 10<sup>th</sup> Circuit Court 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 10<sup>th</sup> Circuit issued a decision reversing the District Court's order staying the 2020 Rule in Colorado. The 10<sup>th</sup> 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. Colorado's opening brief on the merits of its claims was due to be filed on June 14, 2021. However, on June 9, the EPA and the Army Corps announced that they intend to revise the definition of WOTUS and that they will be initiating new rulemaking. In light of the announcement, Colorado filed a motion to extend the briefing schedule thirty (30) days and is discussing with the parties how to proceed.

In July 2021, the parties jointly moved to hold the case in abeyance for six months, which was granted. As a result, the case is stayed until January 14, 2022.

On August 4, 2021 the EPA and the Corps issued a [Federal Register Notice](#) which seeks pre-proposal feedback (feedback on rules, regulations, and guidance in existence prior to the 2020 Rule) as they work on developing a revised definition of "Waters of the United States." They also announced their intent to do a first-step "foundational" rulemaking to repeal the 2020 Rule and recodify the pre-2015 regulatory regime. Comments are due to the agencies on September 3<sup>rd</sup>. The Federal and Interstate Unit attorneys are part of an interagency team to provide input on a draft comment letter responding to the agencies' questions.

## 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 Special

Master's order on summary judgment held that the water between lower New Mexico and Texas is split on a 57% - 43% basis as provided by the Bureau of Reclamation's Rio Grande Project. What constitutes the Project's water supply will be an issue for trial.

At the end of June, Texas submitted a motion to the Special Master to amend its Complaint to include additional claims against New Mexico. The other parties have submitted briefs in response to the motion. Colorado filed a brief that urged the Special Master to require Texas to file a motion for leave to amend its complaint with the United States Supreme Court because the added claims would implicate the rights of Colorado and other parties not active in this suit, and the claims are beyond the scope of the dispute that the Court agreed to hear. During the pretrial conference on August 27, the Special Master agreed and directed Texas to file with the Supreme Court.

Trial before the Special Master was set to begin September 13, 2021. However, Texas moved to continue the trial for at least six months, because its lead counsel cannot attend the trial in person until then. During the pretrial conference, the Special Master indicated he would split the trial into virtual and live phases. The virtual phase will likely begin in October 21. The live phase will begin six months later..

### 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 in order to achieve flow objectives. 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 depletion plan 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 depletion plan 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, 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 and East Cheyenne filed its reply on April 30, 2021. East Cheyenne’s expert report disclosures were due on June 28, 2021. No such disclosures were filed, but East Cheyenne reserved the right to call and cross-examine the State’s expert witnesses. The trial is scheduled for three (3) weeks in early 2022 but given the lack of expert testimony from East Cheyenne, it is certain to be much shorter.

#### 5. 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).<sup>1</sup> 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, reach agreement with the Secretary of the Interior on specific operations, and determine there is a need for such a program.

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

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.

#### 6. 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 the Project.

7. 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 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.

8. 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. The State of Colorado filed an amicus brief on April 30. Joining the brief were Idaho, Nebraska, North Carolina, North Dakota, Oregon, South Dakota, and Wyoming. 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 State believes that such claims can only arise if there is already an apportionment of the resource. The special master’s report supports that position. Mississippi and Tennessee filed sur-replies on June 7. The United States Supreme Court has set oral argument for October 4, 2021.

## INTRASTATE MATTERS

9. Application of Eastern Rio Blanco Metropolitan District and Town of Meeker, Case No. 19CW3031, Water Division 6

This case is an application for groundwater, surface water, and storage water rights and approval of a plan for augmentation. The CWCB filed a statement of opposition to protect its instream flow water right on the White River from a potential flow through operation and to ensure applicant replaces out of priority depletions in time, place, and amount under the augmentation plan. The parties were able to agree on terms and conditions to be included in the decree and the CWCB stipulated to entry of the decree on August 2, 2021.

10. The CWCB filed statements of opposition to the following water court applications:

- 153 LLC, Case No. 21CW3082, Water Division 5
- Yellow Dog Ranch, Case No. 21CW3016, Water Division 6
- USA, Bureau of Land Management, Case No. 21CW3014, Water Division 3
- USA, Bureau of Land Management, Case No. 21CW3029, Water Division 7
- Vail Summit Resorts, Case No. 21CW3090, Water Division 5
- Elk Run Ranch Aspen Holdings, LLC and 4303 Snowmass Creek, LLC, Case No. 21CW3085, Water Division 5
- Elk Run Ranch Aspen Holdings, LLC and 4303 Snowmass Creek, LLC, Case No. 21CW3086, Water Division 5

11. A decree was issued for the following instream flow water right:

- Kelso Creek Instream Flow Water Right, Case No. 20CW3072 Water Division 4 Decreed for 0.85 cfs (09/01 - 03/31), and 2.4 cfs (04/01 - 08/31), absolute, in the natural stream channel of Kelso Creek from its headwaters to the confluence with Bear Gulch, a distance of approximately 9.89 miles.