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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 significantly limit 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 December 7, 2021, the EPA and Army Corps issued a Federal Register Notice for a Revised Definition of Waters of the United States. The Federal and Interstate Unit attorneys are part of an interagency team and provide input on communications with EPA and the Army Corps of Engineers including, most recently, contributing to Colorado's comment letter on the Revised Definition of WOTUS. Colorado's comments were timely submitted on February 7, 2022.

On January 24, 2022, the U.S. Supreme Court issued an order of certiorari in *Sackett v. the EPA*, 622 F.3d 1139, 1147 (9th Cir. 2010), to determine whether the U.S. Court of Appeals for the 9<sup>th</sup> Circuit set forth the proper test for determining whether wetlands are waters of the United States under the Clean Water Act, 33. U.S.C. § 1362(7). The Sacketts' brief on the merits is due April 11, 2022. The response brief from EPA and the Corps is due June 10, 2022. While the EPA intends to engage in rulemaking in tandem with the U.S. Supreme Court's review in the *Sackett II* case, the Court's decision could impact the EPA's planned rulemaking defining what are waters of the United States.

## 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.

The parties are currently involved in mediated settlement discussions and have stayed the next phase of trial.

3. Hill v. Warsewa, Court of Appeals, 2020CA1780

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. After some back and forth between the state and federal courts, on September 14, 2020, the Fremont County District Court granted the State's Motion to Dismiss finding that, while Hill had asserted an injury-in-fact, he nevertheless lacked standing because he was unable to show "a personal legally protected right that is his to assert in a judicial forum." Hill filed his appeal on October 16, 2020. Hill filed his opening brief on December 17, 2021, and attorneys from the Federal and Interstate Unit prepared and filed Colorado's answer brief on January 21, 2021. Oral argument was held on January 11, 2022. On January 27, 2022, the Court of Appeals issued its decision, finding that Hill lacked standing to pursue his quiet title claim but had standing to pursue his declaratory judgment claim. The Court also held that Hill had stated a plausible claim for relief with respect to his declaratory judgment claim. The State will be petitioning for a writ of certiorari to request review by the Colorado Supreme Court. The petition is due April 11, 2022.

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 court denied East Cheyenne's motion, finding that it was not entitled to judgment as a matter of law. 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. On December 27, 2021, the State Engineer filed an unopposed motion *in limine*, limiting East Cheyenne to presentation of evidence only on rules it previously identified and preventing East Cheyenne from presenting any expert testimony in its case-in-chief and the Court granted the motion. The trial occurred on January 31, 2022, and February 1, 2022. After East Cheyenne presented its case, the State Engineer moved for a directed verdict pursuant to C.R.C.P. 41. On February 20, 2022, the Water Court granted the motion, and directed the State Engineer to file a proposed final judgment.

#### 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.

Colorado Investigations: The Colorado River Subunit continues to provide counsel to CWCB staff on the next steps in the intrastate 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,

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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>.

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 and are working through the tasks. 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. 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 did not take a position. On October 21, 2021, Plaintiffs withdrew their motion, and the parties filed a joint proposed case management schedule on November 5, 2021 and attended a Scheduling Conference on November 12, 2021. Pursuant to the Court’s order subsequent to that conference and Plaintiffs’ later request for a two-week extension, Plaintiffs’ summary judgment motion was filed on January 26, 2022, with the federal defendants’ combined response and cross-motion for summary judgment due on March 11, 2022. The intervenors’

briefs, including the intervening States' response brief and potential cross-motion and/or joinder in the federal defendants' cross-motion, is due April 8, 2022. The States have been consulting with the federal defendants regarding responses and cross-motions. Our attorneys continue to lead the coordination effort among the Basin States.

### INTRASTATE MATTERS

7. Application of Grand County Water and Sanitation District, Case No. 19CW3129, Water Division 5

Applicant sought appropriate rights of exchange, conditional storage right and plan for augmentation to continue to provide water to a portion of the Town of Winter Park. The CWCB filed a statement of opposition to protect its instream flow water rights on the Colorado River, Fraser River, and Vasquez Creek. The CWCB and Applicant were able to agree on terms and conditions in the decree to prevent injury to the instream flow water rights and the CWCB stipulated to entry of the decree on January 20, 2022.

8. Application of St. Vrain Water Conservancy District, Case No. 21CW3018, Water Division 1

Applicant sought to amend a plan for augmentation decreed in Case No. 02CW334. The CWCB filed a statement of opposition to ensure that Applicant properly replaces out of priority depletions in time, place, and amount to protect a number of the CWCB's instream water rights in the St. Vrain River Watershed from injury. The CWCB and Applicant were able to agree on terms and conditions to prevent injury and the CWCB stipulated to entry of the decree on January 25, 2022.

9. Application of Cornerstone Winter Park Holdings, et.al., Case No. 20CW3185, Water Division 5

Application for new 150 cfs hydropower right on St. Louis Creek The CWCB filed a statement of opposition to protect its instream flow water rights on St. Louis Creek, the Fraser River, and the Colorado River. The applicant ultimately agreed to terms and conditions ensuring the right would be non-consumptive, would not deplete a reach of stream or impound water, and reducing the claimed flow rate during the winter. The stipulation between the CWCB and the applicant was entered with the court on January 28, 2022.

10. Application of Harvey & Seaton Cattle Co., LLC, Case No. 19CW3035, Water Division 6

Application for change of water rights and plan for augmentation. The CWCB filed a statement of opposition to protect its instream flow water right on the White River from injury resulting from operation of the augmentation plan. This application was filed in conjunction with the application in Case No. 19CW3036, and together the decrees provide for new water rights and augmentation of depletions from a pond all on Strawberry Creek Ranch west of Meeker. The parties agreed to terms regarding operation of the water rights and the augmentation plan and the stipulation between the CWCB and the applicant was filed on February 9, 2022.

11. Application of Harvey & Seaton Cattle Co., LLC, Case No. 19CW3036, Water Division 6

Application for new water storage right, including freshening flows, and direct flow right. The CWCB filed a statement of opposition to protect its instream flow water right on the White River from injury resulting from operation of the water rights. The application was filed in conjunction with the application in Case No. 19CW3035, and together the decrees provide for new water rights and augmentation of depletions from a pond all on Strawberry Creek Ranch west of Meeker. The parties agreed to terms regarding operation of the water rights and the augmentation plan and the stipulation between the CWCB and the applicant was filed on February 9, 2022.

12. Application of Yellow Jacket Water Conservancy District, Case No. 19CW3017, Water Division 6

Application for change of conditional water storage rights dating back to 1977. The CWCB filed a statement of opposition to protect its instream flow water rights on Big Beaver Creek and the White River from injury. The applicant claimed in-river piscatorial use, and, considering other water rights the applicant was changing for the same claimed purposes, the CWCB question the amount of water claimed for the new uses. The applicant ultimately included reference in its decree to instream flow use being pursuant to a contract with the CWCB and agreed to dismiss the other pending application. The stipulation between the applicant and CWCB was filed on a stipulation on February 10, 2022.

13. Application of the Basalt Water Conservancy District, Case No. 19CW3143, Water Division 5

Application for appropriative right of exchange and plan for augmentation for Applicant's water service area "A-5" located upstream of Ruedi Reservoir using replacement from releases from Ivanhoe Reservoir or augmentation by exchange using releases from Ruedi. The CWCB filed a statement of opposition to protect its

instream flow water rights on Ivanhoe Creek, the Fryingpan River, and the Roaring Fork River. The CWCB and Applicant worked with CPW in developing the decree terms, and the stipulation between Applicant and the CWCB was filed with the court on February 11, 2022.

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

- City of Boulder, Case No. 21CW3236, Div. 1
- Heath Mills, Case No. 21CW3081, Div. 2
- Town of Poncha Springs, Case No. 21CW3086, Div. 2
- Aegis Ranch Ventures, LLC, Case No. 21CW3075, Div. 4
- Elk Ridge Mining and Reclamation, Case No. 21CW3076, Div. 4
- Peter McGrath and Janet E. Fox, Case No. 21CW3166, Div. 5
- Bar A Ranch, Case No. 20CW3165, Div. 5
- Rudd, Eric, Case No. 21CW3171, Div. 5
- Snowmass Club, LLC, Case No. 21CW3175, Div. 5
- Town of Minturn, Case No. 21CW3180, Div. 5
- Crystal River Ranch Co, LLC, Case No. 21CW3182, Div. 5
- Remnant Investors, LLLP, Case No. 21CW3052, Div. 6
- Cogswell, David Y. Case No. 21CW3058, Div. 6