

**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**

May 5, 2022

**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*, 8 F.4th 1075 (9th Cir. 2021) ("*Sackett II*"), 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 was timely filed on 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 ensure 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 appealed, and 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 filed a petition for a writ of certiorari on April 11, 2022, requesting review by the Colorado Supreme Court. Colorado Water Congress filed an amicus brief supporting the State's petition on April 18, 2022, and collectively the Colorado Farm Bureau, Taylor Placer, Ltd., Crystal Creek Homeowners Association, Jackson-Shaw/Taylor River Ranch, LLC, and the Wilder Association also filed an amicus brief supporting the State's petition. Hill's response and cross-petition (if any) is due on May 9, 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 was 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 prepared 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. On March 4, 2022, the State Engineer filed a proposed final judgment, which the Water Court adopted the same day.

5. Colorado River Drought Contingency Plan Drought Response Operations Agreement – Framework and 2022 DROA Plan

In March 2019, the seven Colorado River Basin States executed a suite of agreements called the Drought Contingency Plan (DCP).<sup>1</sup> 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 Drought Response Operations Agreement (DROA). The Upper Division States and the Bureau of Reclamation, signatories to the 2019 Drought Response Operations Agreement (DROA), together with the Upper Colorado River Commission (collectively, the DROA Parties), have developed a 2022 Drought Response Operations Plan (2022 Plan) in accordance with the DROA. The 2022 Plan consists of the Framework document and Attachments A through H to the Framework and covers the period from May 1, 2022 to April 30, 2023 (2022 Plan Year). At the 295th Special Meeting of the Upper Colorado River Commission, each Upper Division State's Commissioner to the Upper Colorado River Commission voted for the Commission to approve the 2022 Plan. It was subsequently transmitted to the Secretary of the Interior for approval. The 2022 Plan is a temporary measure among the Upper Division States and Reclamation to balance risks to key infrastructure at

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<sup>1</sup> Additional information about the Drought Contingency Plans and the agreements can be found at: <https://www.usbr.gov/dcp/>

Glen Canyon Dam with resources at the Colorado River Storage Project Initial Units. In recognition of the substantial, continuing vulnerability of the Colorado River system to climate change, drought, and depleted storage, the Subunit attorneys will continue to support the work of Colorado’s Commissioner to engage with federal partners, tribes, and the Lower Basin States to build new long-term solutions that adapt the Colorado River system to a future with reduced water supplies.

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 (“Federal Defendants”) 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 January 26, 2022, Plaintiffs filed a motion for summary judgment, and the Federal Defendants filed their combined response and cross-motion for summary judgment on March 13, 2022. The intervenors’ briefs, including the intervening States’ response brief, cross-motion, and joinder in the Federal Defendants’ cross-motion, was filed on April 8, 2022. The States consulted 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 Hartman Family Trust, Case No. 20CW3100, Water Division 4

Applicant filed an application for water storage rights, groundwater rights, surface water rights, change of water rights, appropriative rights of exchange, and a plan for augmentation. The application claimed an upstream move of a point of diversion and exchanges through instream flow reaches on Dallas Creek and the Uncompahgre River. The CWCB filed a statement of Opposition to protect its instream flow water rights from injury. 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 March 31, 2022.

8. Application of Bar Ni Corporation, Case No. 20CW3029, Water Division 2

Applicant filed an application for a change of water right for its ownership interest the Santistevan Ditch, located on the Purgatoire River, for storage in a pond owned by Applicant and to augment depletions from other ponds owned by Applicant. The CWCB filed a statement of opposition to ensure that the application did not cause injury to its decreed instream flow water right on the Purgatoire River. Applicant and the CWCB agreed on terms and conditions to prevent an expansion of use and to prevent injury to the instream flow right from the upstream move of a change of point of diversion and the CWCB stipulated to entry of the decree on April 21, 2022.

9. Application of Consolidated Mutual Water Company, Case No. 18CW3230, Water Division 1

Applicant filed an application for a change of water rights seeking to change its shares in the Agricultural Ditch and Reservoir Company and the Golden Canal and Reservoir Company from irrigation, domestic, and power uses to a variety of new uses but primarily for municipal purposes. The application also claimed new places of use for the subject shares. The CWCB filed a statement of opposition to protect its instream flow right on Fall River from injury from the change of water rights. The Applicant and the CWCB agreed to terms and conditions to be included in the final decree to prevent injury to the CWCB's instream flow right and the CWCB stipulated to entry of the decree on April 22, 2022.

10. Case stats:

The CWCB entered into stipulations in the following cases:

- Hartman Family Trust, Case No. 20CW3100, Div. 4
- Bar Ni Corporation, Case No. 20CW3029, Div. 2
- Consolidated Mutual Water Company, Case No. 18CW3230, Div. 1

The CWCB filed statements of opposition in the following cases:

- Town of Eagle, Case No. 22CW3014, Div. 5
- MC McLain Flats, Case No. 22CW3017, Div. 5

Decrees were issued for the following instream flow water rights:

- Elk Creek Instream Flow Water Right, Case No. 21CW3066, Div. 4, decreed for 0.2 cfs (08/16 - 04/30), 1.5 cfs (05/01 - 07/10), and 0.65 cfs (07/11 - 08/15), absolute, in the natural channel of Elk Creek from its headwaters to the confluence of Coal Creek, a distance of approximately 2.66 miles.

- Wildcat Creek Instream Flow Water Right, Case No. 21CW3070, Div. 4, decreed for 0.35 cfs (12/01 - 03/31), 0.65 cfs (04/01 - 04/30), 2.1 cfs (05/01 - 08/31), 0.6 cfs (09/01 - 11/30), absolute, in the natural channel of Wildcat Creek from the outlet of Green Lake to the confluence with Coal Creek, a distance of approximately 2.48 miles.