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STATE OF COLORADO
DEPARTMENT OF LAW

September 9, 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 10th Circuit Court of Appeals. The 10th 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 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. 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. Subsequently, the court extended the abeyance and administratively closed the case pending issuance of a new final rule regarding the definition of WOTUS. The parties must submit a joint status report and proposal for further proceedings within 14 days of the new final rule.

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 9th 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 was filed on June 10, 2022. Argument is set for October 3, 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 next phase of trial is postponed pending settlement efforts. A status conference is set for September 27, 2022.

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 were filed on May 9, 2022, and the State's combined reply brief and opposition to Hill's cross-petition was filed on May 23, 2022. Hill did not file a reply brief on the cross-petition. The petition is now fully briefed and we await the Court's decision.

4. 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).¹ 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. The Secretary approved the 2022 Plan on May 6, 2022. The 2022 Plan is a temporary measure among the Upper Division States and Reclamation to balance risks to key infrastructure at 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.

5. The Upper Division States' 5 Point Plan in Response to the Bureau of Reclamation's Call for Further Cooperative Actions in the Colorado River

On July 18, 2022, and in response to the request made by the Commissioner of the Bureau of Reclamation for the Colorado River Basin States to take additional actions in light of the continued drought and depleted storage, the Upper Division States developed a 5 Point Plan that includes the following elements:

(1) Amendment and reauthorization of the System Conservation Pilot Project legislation originally enacted in 2014. The amendment will provide for extension of the authorization and reporting periods to September 30, 2026, and September 30, 2027, respectively, and seek funding to support the program in the Upper Basin. Upon obtaining reauthorization, the necessary funding, and finalizing any required agreements, we intend to reactivate the program in the Upper Basin in 2023.

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

(2) Development of a 2023 Drought Response Operations Plan (2023 Plan) in August 2022 with finalization in April 2023 consistent with the Drought Response Operations Plan Framework (Framework). A 2023 Plan must meet all the requirements of the Drought Response Operations Agreement and the Framework. These requirements include, but are not limited to, determining the effectiveness of any potential releases from upstream Initial Units to protect critical elevations at Glen Canyon Dam, and ensuring that the benefits provided to Glen Canyon Dam facilities and operations are preserved.

(3) Consider an Upper Basin Demand Management program as interstate and intrastate investigations are completed.

(4) Implement, in cooperation with Reclamation, the Bipartisan Infrastructure Law for Upper Basin Drought Contingency Plan funding to accelerate enhanced measurement, monitoring, and reporting infrastructure to improve water management tools across the Upper Division States.

(5) Continue strict water management and administration within the available annual water supply in the Upper Division States, including implementation and expansion of intrastate water conservation programs and regulation and enforcement under the doctrine of prior appropriation.

However, Reclamation data shows that Lower Basin and Mexico depletions are more than double the depletions in Colorado and the other Upper Division States. Therefore, additional efforts to protect critical reservoir elevations must include significant actions focused downstream of Lake Powell. Otherwise, the effectiveness of the 5 Point Plan will be limited.

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. Plaintiffs’ response to the Federal Defendants’ brief was filed on May 6, 2022, and their response to

intervenor's briefs was filed on May 20, 2022. The States' reply brief, as well as the Federal Defendants' reply brief, was filed on June 17, 2022, after the Federal Defendants sought and received a one-week extension. The States also joined in the Federal Defendants' reply brief. The summary judgment motions are now fully briefed, and oral argument on the motions will take place in-person on September 16, 2022. Our attorneys continue to lead the coordination effort among the Basin States.

7. Colorado Multi-User Account in John Martin Reservoir

Colorado has been negotiating with Kansas for several years on the creation of a new storage account in John Martin Reservoir (JMR). The existing operating plan for JMR only permits storage for specific enumerated accounts, leaving many Colorado water users unable to utilize JMR even though there is storage capacity available. Kansas and Colorado have now agreed on a pilot project, creating the new account, which will help facilitate more efficient water usage for Colorado water users. Although water quality is not part of the Compact, the account is also expected to improve water quality below JMR, as water in JMR is of better quality than water in the stream, and the new account will allow for replacement of historical return flows out of JMR instead of replacing from other sources. The Arkansas River Compact Administration approved the pilot project at a special meeting on July 1, 2022.

INTRASTATE MATTERS

8. Rehoboth Land Partners Case No. 19CW3045, Water Division 4

Rehoboth Land Partners filed an application seeking to change certain water rights back to their originally-decreed types and places of use and to vacate the findings of the subject water rights' previous change decree entered in Case No. 07CW202. The CWCB filed a statement of opposition to protect its instream flow rights on Spring Creek, Horsefly Creek, East Fork Spring Creek, San Miguel River, and the Dolores River from injury. On July 29, 2022, applicant and the CWCB entered into a stipulation requiring the inclusion of protective terms and conditions for the CWCB's instream flow rights in any final decree to be entered by the water court.

9. Williams Fork Valley Ranch Case No. 19CW3174, Water Division 5

Williams Fork Valley Ranch, LLC filed an application seeking surface water rights, storage water rights, and a change of water right. The CWCB filed a statement of opposition to protect its instream flow rights decreed on the Williams Fork River and the Colorado River against injury from the applicant's claimed water rights and operations. On July 27, 2022, applicant and the CWCB entered into a stipulation requiring the inclusion of protective terms and conditions in any final decree to be entered by the water court.

10. Q4 Snowmass Ranch Case No. 21CW3014, Water Division 5

Applicant filed an application seeking a storage right, surface water right, plan for augmentation, and appropriative right of exchange. The CWCB filed a statement of opposition to protect its instream flow rights decreed on Snowmass Creek and the Roaring Fork River against injury from the applicant's claimed water rights and operations. On July 27, 2022, the parties entered into a stipulation requiring the inclusion of protective terms and conditions in any final decree to be entered by the water court.

11. Starview Holdings, LLC, Case No. 19CW3061, Water Division 5

Applicant filed an application for a number of small ponds to be filled by the Red Mountain Ditch, which diverts from Hunter Creek, tributary to the Roaring Fork River. Applicant also requested approval for a plan for augmentation to replace out-of-priority depletions from the ponds, and an appropriative right of exchange to replace depletions using downstream replacement sources. The CWCB filed a statement of opposition to protect its instream flow water rights on the Roaring Fork River and Hunter Creek from injury. Applicant and the CWCB were able to reach an agreement on appropriate terms and conditions to protect the CWCB's instream flow water rights, and applicant and the CWCB entered into a stipulation on August 8, 2022.

12. Upper Arkansas Water Conservancy District, Case No. 21CW3033, Water Division 2

Applicant filed an application seeking findings of diligence and to make absolute portions of conditional exchanges decreed in Case No. 04CW96. That case decreed a number of exchanges throughout the Upper Arkansas River Basin, including through a number of CWCB instream flow water rights. The CWCB filed a statement of opposition to ensure applicant was correctly operating its exchanges consistent with the terms and conditions from the 04CW96 decree and to address issues with the exchanges that applicant claimed as absolute. The CWCB and applicant were able to resolve those issues and entered into a stipulation on July 21, 2022.

13. Glade Reservoir

On August 10, 2022 the Division 1 Water Court entered a decree in Case No. 18CW3216 on a joint application by Northern Colorado Water Conservancy District and the Colorado Water Conservation Board to protect flows released from Glade Reservoir to mitigate the impacts of the new reservoir on fish and wildlife resources. This was the first water court application of its kind under §37-92-102(8) CRS (HB

18-170) for the protection of reservoir releases to comply with a fish and wildlife mitigation plan under §37-60-122.2 CRS.

In July and August 2022, the Water Conservation Unit on behalf of the CWCB filed a statement of opposition in the following cases:

- Red Mountain Ranch Partnership, 22CW3042, Div. 5
- Wolf Land Co., Case No. 22CW3030, Div. 4
- Two Creeks Holdings, LLC, Case No. 22CW3050, Div. 5
- Namu Ranch, LLC, Case No. 22CW3053, Div. 5
- Blue River Valley Ranch Lakes Assoc., Case No. 22CW3059, Div. 5