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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 redefined 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, but on appeal by the Department of Justice, the 10th Circuit Court of Appeals reversed the District Court's order staying the 2020 Rule in Colorado. Following extensions of the briefing schedule in the District Court case, on June 9, 2021, the EPA and the Army Corps announced that they intended to revise the definition of WOTUS and that they would be initiating new rulemaking.

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.

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 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. 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. Oral arguments were held on October 3, 2022, where the Court's conservative majority expressed skepticism on the "significant nexus" test applied by the 9th Circuit. A decision from the Court is expected in the coming months.

On December 30, 2022, while a decision in the *Sackett II* case was still pending, the EPA and the Corps published their final revised definition of WOTUS. This 2023 rule, which will take effect 60 days after it is published in the Federal Register, is based on the rule that was in effect before 2015. It governs which surface waters are protected from pollution by the federal government by determining if they are "relatively permanent" or have a "significant nexus" with larger navigable waterways. The decision in the *Sackett II* case very likely will determine to what extent the new rule is actually implemented.

Following the issuance of the revised rule, the parties to the District Court case discussed above filed a Stipulation of Voluntary Dismissal, and the court entered an order on January 9, 2023, terminating the case.

2. Navajo Nation v. U.S. Dep't of the Interior, et al., No. 19-17088 (9th Cir.)

Colorado, along with the Lower Division States, is an intervenor in this case. The Navajo Nation asked the court to direct the federal government to “investigate the Nation’s needs for water from the Colorado River, to develop a plan to meet those needs, and to manage the Colorado River consistent with the plan.” (Appellant’s Opening Brief at 7). The 9th Circuit Court agreed and directed that the Nation’s argument for an injunction include the federal government exercising “its authority over the management of the Colorado River consistent with the plan.” (Opinion at 18-19). The 9th Circuit also determined that DOI documents demonstrate trust responsibilities, like the 2007 Interim Guidelines, in which the court found that “...the final EIS relating to Interior’s shortage guidelines acknowledges that the federal government impliedly reserved water in an amount necessary to fulfill the purposes of the Navajo Reservation.” (Opinion at 30).

The State Intervenors timely filed a Petition for Certiorari on May 17, 2022. The Department of the Interior, through the Solicitor General, also filed a timely Petition for Cert. on July 17, 2022. Petitions from both the State Intervenors and the United States were granted. Merits briefs, which included a separate merits brief from the State of Colorado, were timely filed by the Petitioners on December 19, 2022. Response briefs are due February 1, 2023, and reply briefs are due March 3, 2023.

3. 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 Compacting States have reached a settlement, as described in a proposed consent decree, on the apportionment of water among them pursuant to the Rio Grande Compact. The United States was not a part of the final settlement talks. The United States filed a motion to strike the consent decree and related documents, arguing that the consent decree contained confidential information. After reviewing briefs and

hearing argument on the issue, the Special Master denied the motion, finding that the consent decree used public data, common engineering methods, and terms already embodied in the Rio Grande Compact. A hearing is set for the week of February 6, 2023, to consider substantive arguments on the consent decree. The Compacting States are all in support of the consent decree and will ask the Special Master to recommend the Supreme Court enter it. The United States opposes entry of the decree.

4. 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. On December 12, 2022, the Court granted the State's petition and denied the petitions on all other issues. The State's opening brief is due on January 23, 2023, but the State has requested a ten-day extension. The State also intends to request that the Court schedule oral argument this term, in May.

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).¹ The DCP includes Upper and Lower Basin elements and is in effect until December 31, 2025. It is beyond the scope of this

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

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.

6. 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.

(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.

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 (“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, were filed on April 8, 2022. Plaintiffs’ response to the Federal Defendants’ brief was filed on May 6, 2022, and their response to intervenors’ briefs was filed on May 20, 2022. The States’ reply brief, as well as the Federal Defendants’ reply brief, were 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. Oral argument on the motions took place in-person on October 7, 2022. Our attorneys argued on behalf of the Basin States and continue to lead the coordination effort among the Basin States. On November 14, 2022, Plaintiffs filed a motion to supplement the administrative record, based on the Department of Interior’s notice of intent to prepare a supplemental environmental impact statement for the 2007 interim guidelines. As with Plaintiffs’ previous attempts to supplement the administrative record, the Basin States did not take a

position on this issue. The court set an abbreviated briefing schedule for the supplementation issue, and it has now been fully briefed. On December 23, 2022, the court issued its order, denying Plaintiffs' motion and granting the federal defendants' and the State intervenors' motions for summary judgment.

INTRASTATE MATTERS

8. Application of Steven Knudson, Case No. 20CW3015, Water Division 5 –

This case involved an application for water storage water rights, a surface water right, and approval of a plan for augmentation including exchange. The CWCB filed a statement of opposition protect instream flow water rights on the Roaring Fork River and Snowmass Creek from injury, including to protect from a possible flow through right for applicant's ponds. CWCB and applicant were able to reach agreement regarding terms and conditions to be included in the decree and the CWCB stipulated to entry of the decree. The CWCB's stipulation was filed with the court on November 7, 2022.

9. Application of Southern Ute Indian Tribe, SIMCOE LLC & Hilcorp San Juan LP, Case No. 10CW6, Water Division

Applicants filed an application for approval of an augmentation plan for coalbed natural gas wells completed in the Fruitland Formation. The CWCB filed a statement of opposition given its interest in the pending application in Case Nos. 07CW89 and decreed instream flow water rights on the Florida River. CWCB and applicants were able to reach agreement regarding terms and conditions to be included in the decree and the CWCB stipulated to entry of the decree. The CWCB's stipulation was filed with the court on December 16, 2022.

10. Application of Vail Summit Resorts, Case No. 21CW3090, Water Division 5

Applicants filed for approval of a plan for augmentation including an appropriate right of exchange. The CWCB filed a statement of opposition to ensure that its instream flow water rights on the Blue River would not be injured by Applicant's claims and to ensure the resultant decree is consistent with a Memorandum of Agreement dated 1986, and amended in 1988, between the DNR and applicant's predecessor. CWCB and applicant were able to come to an agreement regarding terms and conditions to be included in the decree and the CWCB stipulated to entry of the decree. The CWCB's stipulation was filed with the court on December 28, 2022.

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

- M&M Industries, Inc., Cari Elizabeth Maknowski & Eric David Mankowski and Patricia Price and Robert Price, Case No. 22C3097, Div. 5
- LLH Operations, LLLP, Case No. 22CW3037, Div. 7
- Forbes Park Landowners Association, Case No. 22CW3042, Div. 3

In late November and December 2022, the Water Conservation Unit on behalf of the CWCB filed applications for the following instream flow water rights:

- Italian Creek, Case No. 22CW3079, Div. 4
- Lottis Creek, Case No. 22CW3082, Div. 4
- Spruce Creek, Case No. 22CW3115, Div. 5
- Kinney Creek, Case No. 22CW3123, Div. 5
- Deep Creek, Case No. 22CW3114, Div. 6
- Watson Creek, Case No. 22CW3116, Div. 6