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

May 17, 2023

**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. 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 a violation of the Rio Grande Compact. The Project delivers water to southern New Mexico, west Texas, and Mexico. Colorado is participating as a signatory to the Rio Grande Compact.

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.

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 consent decree uses a delivery index based on the Special Master's order and historical division of water between New Mexico and Texas. The Compacting States believe the consent decree fully resolves the compact dispute. At a hearing on February 6, 2023, the Compacting States asked the Special Master to recommend the Supreme Court approve the consent decree as the complete resolution of the suit. The United States opposes the consent decree. We are awaiting the Special Master's decision.

2. State v. Hill, Supreme Court, 2022SC119

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 Supreme Court heard oral argument on Tuesday, May 2. We are awaiting the Court's decision.

3. Colorado River Drought Contingency Plan Drought Response Operations Agreement – Framework and 2023 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. On February 27, 2023, at the 300<sup>th</sup> meeting of the Upper Colorado River Commission (UCRC), the Upper Division States through the UCRC approved an amendment to the 2022 Plan to suspend DROA releases from Flaming Gorge Reservoir beginning March 1, through April 30, 2023 due to improved hydrologic conditions in the Upper Basin and the fact that DROA effectively protected critical elevations at Lake Powell and that Lake Powell elevation is not projected to drop below the critical elevations during the remainder of the 2022 Plan Year. At this time, the DROA Parties are developing a 2023 Drought Response Operations Plan (2023 Plan) in accordance with the DROA.

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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/>

The 2023 Plan consists of the Framework document and Attachments A through H to the Framework and covers the period from May 1, 2023, to April 30, 2024. A Special Meeting of the UCRC is scheduled for May 17, 2023, for each Upper Division State's Commissioner to the UCRC to vote on the 2023 Plan. The 2023 Plan is a temporary measure among the Upper Division States and Reclamation to fully recover DROA releases that occurred under an emergency provision in 2021 and the DROA Plan in 2022. 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.

4. 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 System Conservation Pilot Project was reauthorized in December 2022, through 2024 and the deadline for proposals is March 1, 2023. The UCRC will review the proposals through March 2023. The Pilot Project is a voluntary, temporary, and compensated program available to interested and willing water users in the Upper Division States and intended to mitigate drought impacts in the Upper Basin.

(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.

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 severely limited.

5. Save the Colorado, et. al. v. Dept. of the Interior, et. al., 23-15247 (9th Cir.) (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) intervened. 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 December 23, 2022, the court issued its order, denying Plaintiffs’ motion and granting the federal defendants’ and the State intervenors’ motions for summary judgment.

On February 16, 2023, the Plaintiffs filed a notice of appeal to the Ninth Circuit. Appellants’ opening brief is due June 1, 2023, and all answer briefs are due July 3, 2023.

### INTRASTATE MATTERS

6. City of Aurora Case No. 19CW3159 - Division 5

Applicant sought conditional appropriative rights of exchange and other exchange operations to move water available under Applicant's Twin Lakes shares that is released to the Roaring Fork River drainage from the confluence of the Roaring Fork and Fryingpan Rivers to Ruedi Reservoir and from Ruedi Reservoir to Ivanhoe Reservoir. The CWCB sought terms and conditions to ensure that the exchanges would not injure instream flow water rights on the Roaring Fork and Frying Pan Rivers and Ivanhoe and Lincoln Creeks. Applicant and the CWCB were able to reach a settlement on terms and conditions to be included in the decree that are protective of the instream flow rights, and the CWCB stipulated to entry of the decree on April 11, 2023.

7. Bailey Family Investment Co. LLLP and Cold Mountain Ranch, LLLP, Case No. 19CW3022 – Division 5

Applicant sought a change of water rights to change the place of use of a portion of the irrigation water rights decreed to the Lowline Ditch on the Crystal River due to the original place of use having been developed for housing. The CWCB filed a statement of opposition to protect its instream flow water right on the Crystal River from injury from potential expansion of use and change in return flow patterns under the changed right. The CWCB and Applicant were able to agree on terms and conditions to prevent such injury to be included in the decree, and the CWCB stipulated to entry of the decree on March 22, 2023.

8. Italian Creek Instream Flow Water Right – Case No. 22CW3079 – Division 4

The Italian Creek ISF water right was decreed in the amount of 0.7 cfs (04/01 – 10/31), absolute, in the natural stream channel of Italian Creek from South Italian Creek to the confluence with the Taylor River. CWCB has an existing instream flow water right on the same reach in the amount of 2.5 cfs (1/1 – 12/31), decreed in Case No. 84CW355. The flow rate decreed in this case is in addition to the amount of this existing instream flow water right.

9. Lottis Creek Instream Flow water right, Case No. 22CW3082 – Division 4

The Lottis Creek ISF water right was decreed in the amount of 2.1 cfs (04/01-10/31), absolute, in the natural channel of Lottis Creek from its headwaters to the confluence with the Taylor River. The CWCB has an existing instream flow water right on the same reach in the amount of 5 cfs (1/1 – 12/31), with an appropriation date of June 3, 1981, decreed in Case No. 83CW227.

10. Case filings

In March 2023, the Water Conservation Unit on behalf of the CWCB filed a statement of opposition in the following cases:

- Forbes Park Landowners Association, Case No. 23CW3000, Water Div. 3

There were no statements of opposition filed in April 2023.

In March and April 2023, the Water Conservation Unit on behalf of the CWCB stipulated to entry of a decree in the following cases:

- Bailey Family Investment Company LLLP and Cold Mountain Ranch LLLP, Case No. 19CW3022, Water Div. 5
- City of Aurora, Case No. 19CW3159, Water Div. 5

In March and April 2023 decrees were entered for the following instream flow water rights:

- Italian Creek ISF, Case No. 22CW3079, Water Div. 4
- Lottis Creek ISF, Case No. 22CW3082, Water Div. 4