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STATE OF COLORADO
DEPARTMENT OF LAW

November 3, 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.

The Compacting States of Colorado, New Mexico, and Texas 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 on summary judgment and historical division of water between New Mexico and Texas. The Compacting States believe the consent decree fully resolves the compact dispute.

On July 3, 2023, the Special Master issued a Report in which he recommended that the Court grant the Compacting States' motion to enter a consent decree. The Special Master found that the remaining disputes among the United States, New Mexico, and non-state entities can be addressed in other fora without the participation of Texas, Colorado, or the Court and that the consent decree resolves the dispute over the Texas and downstream New Mexico apportionments and protects the Texas apportionment as well as treaty water for Mexico as against New Mexico's actions.

The United States filed exceptions to the report arguing: (1) the consent decree improperly disposes of the claims of the United States, (2) the consent decree imposes

new obligations on the United States, and (3) the consent decree is inconsistent with the Rio Grande Compact. The Compacting States will file a joint reply brief by December 4, 2023.

2. 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).¹ The DCP includes Upper and Lower Basin elements and is in effect until December 31, 2025. The DROA Parties developed a 2023 Drought Response Operations Plan (2023 Plan) in accordance with the DROA. 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 occurred on May 17, 2023, for each Upper Division State's Commissioner to the UCRC to vote on the 2023 Plan. The 2023 Plan was approved by the UCRC at that meeting and subsequently confirmed by Reclamation. 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.

3. 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 for 2024 is December 18, 2023. The Upper Division States through the UCRC and Reclamation will review the proposals through early 2024. 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.

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 in August 2022 with finalization in April 2023 consistent with the Drought Response Operations Plan Framework (Framework). The 2023 Plan must meet all the requirements of the DROA 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 feasibility 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.

4. National Environmental Policy Act (NEPA) Process for Near-term Colorado River Operations Revised Draft Supplemental EIS Operations at Lake Powell and Lake Mead

On November 17, 2022, DOI issued a Notice of Intent to prepare a Supplemental Environmental Impact Statement (SEIS) to modify operations under the 2007 Interim Guidelines. Colorado submitted its own letter and joined an Upper Division States' letter to identify initial scoping concerns for the SEIS, both of which were submitted on December 20, 2022. On December 13, 2022, the Colorado River Basin States agreed to work to develop a consensus framework agreement alternative. A six-state consensus modeling alternative (Arizona, Colorado Nevada, New Mexico, Utah, and Wyoming) was submitted on January 30, 2023, for consideration in the SEIS analysis. On April 14, 2023, Reclamation released the draft SEIS, initiating the 45-day comment period with comments due on May 30, 2023. On May 22, 2023, Reclamation announced that the draft SEIS would be revised to include analysis of a third action alternative proposed by the Lower Division States. Reclamation pulled

the draft SEIS and terminated the comment deadline. The revised draft SEIS was issued on October 27, 2023, Comments are due on or before December 11, 2023.

5. National Environmental Policy Act (NEPA) Process for Guidelines of Post-2026 Operations at Lake Powell and Lake Mead

Reclamation formally initiated an environmental review process under the National Environmental Policy Act (“NEPA”) to prepare an Environmental Impact Statement (“EIS”) for the development of Post-2026 Operations. On June 16, 2023, the Bureau of Reclamation (“Reclamation”) issued a Request for Comments on the *Notice of Intent To Prepare an Environmental Impact Statement and Notice To Solicit Comments and Hold Public Scoping Meetings on the Development of Post-2026 Operational Guidelines and Strategies for Lake Powell and Lake Mead* (“NOI”), 88 FR 39455. Through the June 16, 2023, Notice, Reclamation is requesting comments on: (1) the scope of specific operational guidelines; (2) strategies; and (3) any other related issues that should be considered in the upcoming EIS.

In addition to joining the Comment Letter submitted by the Basin States of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming, and the Upper Division States of Colorado, New Mexico, Utah, and Wyoming Letter through the Upper Colorado River Commission (“UCRC”), Colorado also submitted comments. NOI Comments from the Upper Division States are available at: <http://www.ucrccommission.com/upper-division-states-and-the-upper-colorado-river-commission-ucrc-comment-on-reclamations-notice-of-intent-for-a-supplemental-eis-for-the-2007-interim-guidelines/>.

On October 20, 2023, the Bureau of Reclamation’s issued a *Federal Register Notice of the availability of the Summary Scoping Report on the Development of Post-2026 Operational Guidelines and Strategies for Lake Powell and Lake Mead* (“FRN”), 88 FR 72535 (October 20, 2023).

The Scoping Summary Report provides a summary of the comments received during the public scoping process and describes Reclamation’s current, preliminary assessment of the proposed federal action, purpose and need, and scope of the environmental analysis to be included in the draft environmental impact statement (“DEIS”) and that it is anticipated that the DEIS will be published in December 2024 for public review as part of the NEPA process.

The FRN states that Interior’s intends to “adopt and implement the guidelines in a manner consistent with the Law of the River.” The FRN defines the Law of the River as “[t]he treaties, compacts, decrees, statutes, regulations, contracts, and other legal documents and agreements applicable to the allocation, appropriation, development, exportation, and management of the waters of the Colorado River Basin.

6. 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 Colorado River Basin States (New Mexico originally 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. 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. Plaintiffs’ opening brief was filed on June 1, 2023. After requesting and receiving an extension, the Federal Defendants and the States filed answer briefs on August 2, 2023; the States also joined the Federal Defendants’ answer brief. Also, on July 20, 2023, New Mexico filed an unopposed motion to intervene, which was granted on August 22, 2023. On August 30, 2023, New Mexico filed its joinder in the States’ answer brief. On September 22, 2023, Plaintiffs filed their reply brief. The case is now fully briefed, and we await further action from the Ninth Circuit. Our attorneys continue to lead the coordination effort among the Basin States.

7. Sackett v. Environmental Protection Agency, No. 21-454 (U.S. Supreme Court) (Waters of the United States)

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), to determine whether the U.S. Court of Appeals for the 9th Circuit applied the proper test for determining whether wetlands are

waters of the United States (WOTUS) under the Clean Water Act (CWA), 33. U.S.C. § 1362(7).

While that case was still pending, the EPA and the USCAE published a final revised definition of WOTUS. This January 2023 rule is based on the rule that was in effect before 2015. Then, on May 25, 2023, the Supreme Court announced its decision in *Sackett*. The Court significantly rolled back the scope of federal jurisdiction to regulate wetlands as WOTUS under the CWA. The Court rejected the “significant nexus test” relied on by the EPA and USCAE and instead held that, for there to be federal jurisdiction over a wetland under the CWA, first, the wetland must be adjacent to a relatively permanent body of water connected to traditional interstate navigable waters, and, second, the wetland has a continuous surface connection with that water, making it difficult to determine where the “water” ends and the “wetland” begins.

The *Sackett* decision invalidated parts of the January 2023 rule. Therefore, the EPA and the USACE amended key aspects of the regulatory text to conform it to the Court’s decision. The conforming rule, “Revised Definition of ‘Waters of the United States’; Conforming,” became effective on September 8, 2023. As a result of ongoing litigation on the January 2023 Rule, the agencies are implementing the definition of “waters of the United States” under the January 2023 Rule, as amended by the conforming rule, in 23 states, the District of Columbia, and the U.S. Territories. In the other 27 states and for certain parties, the agencies are interpreting “waters of the United States” consistent with the pre-2015 regulatory regime and the *Sackett* decision until further notice.

INTRASTATE MATTERS

8. In October 2023 the Water Conservation Unit on behalf of the CWCB filed applications in water court for the following instream flow water rights:

- Cross Creek ISF, Water Div. 4. The Cross Creek instream flow water right is located in the natural stream channel of Cross Creek from its headwaters to the confluence with Lottis Creek, a distance of approximately 2.48 miles, in the amount of 0.72 cfs (04/01 - 04/30), 1.4 cfs (05/01 - 07/31), 0.85 cfs (08/01 - 08/31), 0.63 cfs (09/01 - 09/30), 0.27 cfs (10/01 - 03/31), absolute.
- West Steuben Creek ISF, Water Div. 4. The West Steuben Creek instream flow water right is located in the natural stream channel of West Steuben Creek from its headwaters to the confluence with Steuben Creek, a distance of approximately 5.39 miles, in the amount of 2.2 cfs (04/01 - 04/30), 4.5 cfs (05/01 - 07/31), 1.5 cfs (08/01 - 09/30), 1.1 cfs (10/01 - 11/30), 0.8 cfs (12/01 - 03/31), absolute.
- Kelly Creek ISF, Water Div. 4. The Kelly Creek instream flow water right is located in the natural stream channel of Kelly Creek from its headwaters

to the confluence with Red Canyon Creek, a distance of approximately 1.59 miles, in the amount of 1.2 cfs (04/01 - 04/30), 2.6 cfs (05/01 - 05/31), 2.7 cfs (06/01 - 06/30), 1.2 cfs (07/01 - 07/31), 0.45 cfs (08/01 - 10/31), 0.2 cfs (11/01 - 03/31), absolute.

- Red Canyon Creek ISF, Water Div. 4. The Red Canyon Creek Instream Flow Water Right is located in the natural stream channel of Red Canyon Creek from its headwaters to the confluence with Big A Creek, a distance of approximately 3.2 miles, in the amount of 5 cfs (04/01 - 04/31), 6.2 cfs (05/01 - 07/31), 3 cfs (08/01 - 09/30), 2.3 cfs (10/01 - 10/31), 1 cfs (11/01 - 03/31), absolute.

9. In September 2023 the Water Conservation Unit on behalf of the CWCB filed a statement of opposition in the following case:

- Sopris Mountain HOA, Case No. 22CW3010, Water Div. 5

10. In October 2023 the Water Conservation Unit on behalf of the CWCB stipulated to entry of a decree in the following cases:

- Bar A Ranch, Case No. 21CW3176, Water Div. 5
- Blue River Valley Ranch Lakes Assoc., Case No. 22CW3059, Water Div. 5

11. Bar A Ranch, Case No. 21CW3176, Water Div. 5

Applicant sought direct flow and water storage rights with senior appropriation dates. The CWCB filed a statement of opposition to determine the applicability of section 37-92-102(3)(b) C.R.S. on a portion of applicant's claims and to protect instream flow rights on Rock Creek and Egeria Creek from injury. As a result of negotiations, the applicant modified its claims and parties agreed to terms and conditions to prevent injury, including terms and conditions for the application of section 37-92-102(3)(b), C.R.S., and the CWCB stipulated to entry of the decree on October 5, 2023.

12. Blue River Valley Ranch Lakes Assoc., Case No. 22CW3059, Water Div. 5

Applicant sought approval of a plan for augmentation to replace out of priority depletions to the Blue River associated with evaporative losses from three ponds. One replacement source under the augmentation plan is located downstream of the depletion accrual locations, and the Applicant sought approval of an exchange project with respect to such replacement source. The CWCB filed a statement of opposition to protect its instream flow water rights in the Blue River adjudicated in Case Nos. 87CW0294, 87CW0295, 87CW0296, 87CW0297, 87CW0298, and 87CW0299. The exchange project was proposed to operate within the stream reach protected by the instream flow water adjudicated in Case No. 87CW0295. The CWCB and Applicant agreed to terms and conditions to protect the instream flow water rights, and the CWCB stipulated to entry of the decree on October 13, 2023.