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TO: Colorado Water Conservation Board

FROM: John W. Suthers
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Peter Ampe
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RE: Report of the Attorney General

FEDERAL & INTERSTATE MATTERS

Nothing to report.

WATER RIGHTS MATTER

1. Application of Upper Yampa Water Conservancy District, Division 5, 03CW53 The Board, along with the State and Division engineers, intervened in this application to divert water from Morrison Creek into and through Stagecoach Reservoir. The Board's primary concern was the applicant's proposal to use Morrison Creek water to meet its bypass flow requirements at Stagecoach Reservoir and the impact this operation would have on its instream flow right on the Yampa River below the confluence with Morrison Creek. The applicant agreed at trial to a term limiting operation of the proposed diversion to times when the Board's instream flow right was fully satisfied. Shortly after this stipulation was entered, however, the court dismissed the application on a mid-trial motion to dismiss brought by other objectors and the Engineers for failure by the applicant to provide adequate support for its claimed uses for the diversion. The case will likely be appealed on multiple grounds.

2. Concerning the Water Rights of the Upper Eagle Regional Water Authority, Division 5; 03CW78, 98CW205, 98CW270, 02CW403, and 06CW97

These cases involve the Authority's continued use of an outdated table of monthly depletion rates to calculate the replacements of depletions to the Eagle River. The table was approved by the water court in Case No. 03CW78, which provides for replacement by exchange from Wolford and Ruedi Reservoirs, and the table has been used by the Authority for Case Nos. 98CW205 and 98CW270, which provide for releases from Eagle Park Reservoir and Homestake Reservoir, respectively. The Authority now proposes to use the same table in pending Case Nos. 02CW403

(Miller Ranch project in Edwards/Berry Creek) and 06CW97 (replacement using Flattops water). The CWCB and the State and Division Engineers are opposing the Authority's continued use of the outdated table, and have invoked the retained jurisdiction provisions of the decrees in Case Nos. 03CW78, 98CW205 and 98CW270. The State also filed claims for declaratory and injunctive relief regarding these same cases. Both the CWCB and the Engineers are opposers in Case Nos. 02CW403 and 06CW97. The Authority filed motions to dismiss the retained jurisdiction petitions in Case Nos. 03CW78, 98CW205 and 98CW270 in 2007 because the Authority claimed that it had not made releases from its reservoirs during the irrigation season when injury from the table occurs. The Authority argued that retained jurisdiction could not be invoked until the augmentation plans fully operated and injured vested water rights. The water court denied the motions to dismiss in June, 2007, finding that genuine issues of material fact existed that could not be resolved through motions to dismiss. Nevertheless, on December 4, 2008, the water court entered an order in Case No. 03CW78 dismissing the State's retained jurisdiction petition. In that order, the court held that the plan for augmentation did not need to operate to the injury of vested water rights for the court to exercise its retained jurisdiction, but that the specific retained jurisdiction language of the decree prohibited the court's exercise of its retained jurisdiction until 75% of the exchanges involving Wolford and Ruedi Reservoirs first operated. The court's interpretation of this language is contrary to both the intent and understanding of the State and the Authority, and the State has filed a motion for reconsideration, which was denied by Judge Ossola. Subsequently, Alternate Water Judge Petre ruled in a separate case that the retained jurisdiction statute contemplates that the retained jurisdiction period starts on the date of the decree. Based on this subsequent ruling by Judge Petre, the State and Division Engineers will be filing a second motion for reconsideration, which should be decided by either Judge Petre or new Water Judge Boyd. On December 5, 2008, the water court entered an order in Case Nos. 98CW205 and 98CW270 dismissing the State's retained jurisdiction petitions. Contrary to its December 4th order, the court held that these plans for augmentation did indeed need to operate to the injury of vested water rights before the court could exercise its retained jurisdiction. Because the legal conclusion of the December 5th orders directly contradicts the legal conclusion of the December 4th order, the State filed motions for reconsideration, which were denied by Judge Ossola. The State and Division Engineers have decided to appeal the dismissals in Case Nos. 98CW205 and 98CW270 if a settlement cannot be reached with the Authority, and the CWCB staff will be considering whether to join in any such appeal in the event settlement efforts are not successful. Because the State's petitions are based on post-decree water use contemplated by each decree, the water court should exercise its retained jurisdiction to preclude injury under the augmentation plans before injury actually occurs. The State's claims for declaratory and injunctive relief in Case Nos. 03CW78, 98CW205 and 98CW270 were not dismissed by the court, and will move forward.

3. Wolfe/CWCB v. Upper Eagle Regional Water Authority, Division 5, 08CW145

Over the past year, the State has participated in global settlement discussions with the Authority regarding all of Case Nos. 03CW78, 98CW205, 98CW270, 02CW403, and 06CW97, described above. During those settlement discussions, a dispute arose over the proper interpretation of the Authority's decree in Case No. 00CW83. The Authority believes it approved a sweeping change in the location of use of over 70 water rights. The State believes the decree only approved an additional point of diversion for certain specifically described water rights. Because the

Authority is unwilling to settle any of the foregoing cases unless the State agrees with its interpretation of the decree in Case No. 00CW83, and because the Authority has asserted its interpretation of this decree as a defense in Case No. 02CW403, the State filed a complaint for declaratory relief to have the water court interpret the effect of the decree. The Authority filed a motion to dismiss the complaint because the Authority has not yet exercised its rights in accordance with its interpretation of the decree. The Court denied the Authority's motion to dismiss, and this case will move forward and may be resolved on motions for summary judgment.

DEFENSE OF THE COLORADO RIVER SUBUNIT

Legal Counsel with respect to Colorado River - The Colorado River Subunit continues to provide the Colorado Water Conservation Board, Department of Natural Resources, and the Upper Colorado River Commission with legal counsel on developments concerning the Colorado River. Most recently, the Subunit has:

- Provided counsel on the legal ramifications of potential recommendations concerning modifications to coordinated management of Lake Powell and Lake Mead as a result of the first year of implementation of the interim operating guidelines.
- Provided counsel to CWCB on recent criticism of current operations at Glen Canyon Dam and the Glen Canyon Adaptive Management Program.
- Provided the CWCB and State Engineer legal advice concerning compact administration.
- Continued to provide counsel to the CWCB regarding negotiations concerning whether and how Mexico should share in shortages of the Colorado River System.
- Provided counsel on administrative contracts to implement weather modification programs pursuant to agreement of Colorado River Basin States.
- Performed research and provided counsel on operation of the national Wild and Scenic River Act in conjunction with state water law.
- Administered ongoing implementation of the UCRC Imaging Project.

4. Grand Canyon Trust v. Bureau of Reclamation

The seven Basin States (Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming) and the Southern Nevada Water Authority intervened in this litigation in May 2008. On September 26, 2008, the Federal District Court in Phoenix ruled on the cross-motions for summary judgment and the motion to dismiss regarding the Bureau of Reclamation's alleged violation of the ESA in operating Glen Canyon Dam according to a modified low fluctuating flow regime (claims 1-3), and the Bureau's alleged violation of the ESA and NEPA for failing to prepare decisional documents before issuing the Annual Operating Plan each year (claims 4-5). The court granted the Federal Defendants' motion to dismiss and motion for summary judgment on claims 4 and 5 regarding the AOPs. The court stayed its ruling on claims 1-3, until after

briefing is completed by all parties on claims 6-8 (alleged violations of ESA, NEPA and Grand Canyon Protection Act by the Bureau and Fish and Wildlife Service). The court reasoned that the validity of the 2008 biological opinion, which address claims 6-8) must be determined before any ruling can be made on claims 1-3. Accordingly, claims 1-3 and 6-8 are still active claims.

On October 10, 2008, Plaintiff filed a Motion for Reconsideration regarding the September 26, 2008 Order. The judge denied this Motion in a November 11, 2008 Order and reconfirmed the rulings set forth in the September 26, 2008 Order. Pursuant to that Order, Plaintiff filed its motion for summary judgment on Claims 6-8 on November 14, 2008. The Federal Defendants filed a response and cross-motion for summary judgment on December 19, 2008. The Basin States filed a joinder in support of the Federal Defendants' response and cross-motion for summary judgment on January 9, 2009. Plaintiff filed its reply brief on January 30, 2009. Federal Defendants filed their reply brief on Claims 6-8 on February 20, 2009. CREDA, as Defendant-Intervenor, also filed a short substantive reply brief on Claims 6-8 on February 20, 2009. The Basin States and Water Districts, as Defendant-Intervenors, filed a joinder to Federal Defendants' reply brief on February 20, 2009 as well. Finally, both Plaintiff and Federal Defendants, as specifically requested by the court, filed supplemental briefs on the APA and proper standard of review in regard to Claims 1-3 on February 20, 2009. Defendant-Intervenors collectively filed a joinder to Federal Defendants' supplemental brief on that same date. All briefing is now completed for all pending claims, and the parties await a ruling or further instructions from the court.

5. Water Transfers Rule

This week the State filed a motion to intervene in support of EPA's Water Transfers Rule. The Rule would exempt water transfers from the need to get a discharge permit, if the transfer itself does not add any pollutants. The litigation is currently pending in the 2nd Circuit, but will soon be transferred to the 11th Circuit. We were joined by NM, AK, ID, NE, NV, SD, UT and WY. Colorado moved to intervene after New York and 8 other states filed a petition challenging the Rule.