



**JOHN W. SUTHERS**  
Attorney General

**CYNTHIA H. COFFMAN**  
Chief Deputy Attorney General

**DANIEL D. DOMENICO**  
Solicitor General

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

**OFFICE OF THE ATTORNEY GENERAL**

**STATE SERVICES BUILDING**  
1525 Sherman Street - 7th Floor  
Denver, Colorado 80203  
Phone (303) 866-4500

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**TO:** Colorado Water Conservation Board

**FROM:** John W. Suthers  
Attorney General

Peter Ampe  
Susan Schneider  
First Assistant Attorneys General

**RE:** Report of the Attorney General

**FEDERAL & INTERSTATE MATTERS**

1. **Animas-La Plata Project**

The Bureau of Reclamation reports that the A-LP pumps were tested in late April, with only minor mechanical issues discovered. Full-capacity 24 hours pumping into the Nighthorse Reservoir from the Animas River in Durango is expected to begin in mid-May. Maximum diversion should be approximately 130 cfs. The Division 7 Office reports that the Animas River at Durango is currently flowing about 1,500 cfs and that they do not anticipate a call on the river.

2. **Kansas v. Colorado**

Kansas invoked the retained jurisdiction of the U.S. Supreme Court regarding the sufficiency of the presumptive depletion factor for supplemental well pumping under the Use Rules. The experts from the two States have been attempting to resolve the matter under the Dispute Resolution Procedure. Meetings in April and May were promising, and drafts of an agreement have been exchanged. The States will likely decide to extend the dispute resolution deadlines in order to allow more time for settlement before the matter must be presented to ARCA or returned to the Court.

3. **Irrigation Improvement Rules in Division 2**

The State team is gearing up to file the rules in water court in June. They provided the completed Irrigation System Analysis Model (ISAM) with documentation to the Engineering Subcommittee on April 30 for their final comments in the peer-review process, and circulated a close-to-final Working Draft of the Rules to the Advisory Committee on May 1.

4. Republican River Compact

The non-binding arbitration hearing before Karl Dreher concluded April 14. The claims heard in the arbitration included Kansas' claim for damages against Nebraska for Compact violations in 2005 and 2006, Kansas' attempt to impose future compliance measures on Nebraska and Nebraska's proposed changes to the use of the RRCA Groundwater Model and other accounting matters.

The RRCA addressed Colorado's Compact Compliance Pipeline proposal at a special meeting on April 28<sup>th</sup>. Kansas and Nebraska voted against the proposal, but the meeting was continued to a later date to allow Colorado a final attempt to address Kansas' and Nebraska's concerns. If the proposal is rejected again, Colorado anticipates immediately invoking non-binding arbitration for this matter.

WATER RIGHTS MATTER

5. 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.

6. 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.

7. 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.

On April 9, 2009, the parties participated in oral argument before the court on all pending claims. On April 22, 2009, Federal Defendants filed a motion for leave to file a notice of supplemental citation in which they sought to point the court to various portions of the administrative record relevant to questions the court asked at the oral argument. On April 28, 2009, the court granted that motion and granted Plaintiff the right to file a brief in response to Federal Defendants' notice of supplemental citation by May 6, 2009. On April 29, 2009, Federal Defendants filed a Motion for Leave to File Notice of Recent Information. In this Motion, Federal Defendants seek to submit to the court two newly issued studies regarding Chub population trends that USGS released on April 27, 2009. The court has yet to rule on whether it will allow these studies to be considered. Judge Campbell indicated at the oral argument that the ruling would likely be completed within a few weeks after the oral argument. However, due to the motion granted on April 28, the final ruling will likely not be issued until later in May or June.