



**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

September 4, 2009

**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. **Republican River Compact**

At the annual RRCA meeting on August 12, Colorado brought its proposed Pipeline to a vote. The RRCA voted 2-1 against the proposal. On August 21 Colorado invoked the mandatory non-binding arbitration process by providing written notice to Kansas and Nebraska. Under the proposed arbitration schedule, Trial will take place Feb 1-5, 2010, with a decision by March 1, 2010.

**WATER RIGHTS MATTER**

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

As described in previous reports, these cases involve the Authority's continued use of an outdated table of monthly depletion rates to calculate the replacements of depletions to the Eagle River. On May 28, 2009, Jennifer Gimbel and Dick Wolfe met with the Boards of Directors of the Upper Eagle Regional Water Authority, the Eagle River Water and Sanitation District, and the Eagle Park Reservoir Company in Vail. This meeting was helpful in establishing a direct dialogue between the parties. During this meeting, the parties agreed to a follow-up meeting in Vail on August 17<sup>th</sup> between the Authority's Board, the District's Board, CWCB Board Members (Geoff Blakeslee and John Redifer), Dick Wolfe, Jennifer Gimbel, respective legal counsel and staff. The purpose of the meeting was for the State to respond to and discuss a long list of questions raised by the Authority and the District. The State invested considerable time and effort preparing for this meeting and drafting written responses to the questions the Authority and the District had submitted. After receiving the State's written responses, the

Authority and the District decided to cancel the August 17<sup>th</sup> meeting less than a week before the meeting. The Authority proposed that the meeting time be dedicated instead to new settlement proposals, which the Authority was unwilling to provide to the State in advance and could not provide in time to allow the State to adequately prepare for the settlement discussions. Previously, the State had provided the last written settlement proposal and has now requested that the Authority submit a written counter-proposal that offers potential for meaningful progress toward settlement before the State decides whether another settlement meeting would be helpful. At this writing, no counter-proposal has been submitted by the Authority. In the meantime, a key legal issue as to the meaning of the Authority's decree in Case No. 00CW83, as described below, may be resolved by the Water Court as early as September. Such a resolution may be helpful in moving settlement forward. All other pending Authority matters described in last report to the Board are moving forward both before the Water Court and the Supreme Court.

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

This case involves a dispute over the proper interpretation of the Authority's decree in Case No. 00CW83, which approved the Edwards Water Facility as a third alternate point of diversion for some of the Authority's water rights. Based on one poorly-worded clause in the decree, the Authority argues that this decree approved a sweeping change in the location of use of over 70 water rights, which would adversely affect instream flow rights and the water rights of others, including the Grand Valley Water Users. The State believes the decree only approved an additional point of diversion for certain specifically described water rights, and did not approve any change in location of use. Cross-motions for the determination of questions of law regarding the interpretation of the decree in Case No. 00CW83 have been filed and briefed for the Court. Previously, the Court denied the Authority's attempt to block all discovery regarding what the Authority actually intended at the time of the decree, and the Court agreed with State that the Court could conditionally consider evidence regarding the circumstances surrounding the decree to determine whether or not it was ambiguous as to its true meaning. Since the last report, the State conducted the approved discovery and found documents in the Authority's files supporting the State's position. Significantly, none of the documents in the Authority's possession support the Authority's position. Pursuant to the Court's directive, the State submitted this additional evidence to the Court on August 14th, and the Authority has until September 1<sup>st</sup> to respond to this new evidence. The Court hopes to rule by September 23rd.

4. Upper Yampa Water Conservancy District, 07CW61&72, Water Division 6.

These consolidated cases both involve water rights for a proposed reservoir on Morrison Creek. The proposed reservoir and water rights could impact the CWCB's ISF right on Silver Creek, by inundating a portion of the reach, and the ISF right on the Yampa River, by changing the point of diversion for two senior water rights from below the ISF reach to above it. CWCB Staff is working diligently with applicant to craft a stipulation and decree language addressing both of these concerns. Upper Yampa agreed to this stipulation on August 31, 2009.

5. Upper Arkansas Water Conservancy District, 06CW32, Water Division 2

This case involves a plan for augmentation covering most of the service area of the district. The proposed plan is an "umbrella" type plan that proposes to augment all eligible structures within the area with a variety of existing and future replacement sources. The plan also acts to complement two existing plans for augmentation by expanding the areas of replacement and adding new types of eligible augmented structures. The CWCB has filed a statement of opposition to the application in order to protect a large number of instream flow rights in the tributaries of the Arkansas River. Because of the umbrella nature of the plan, all depletions and replacement sources are not now known. Moreover, the proposed plan may require augmentation by exchanges through instream flow reaches. Staff has made recommendations regarding terms and conditions necessary to protect the CWCB's water rights throughout the exercise of the plan is for augmentation. This case is presently scheduled for trial during the month of October, 2009.

6. Town of Breckinridge, Case No. 08CW73, Division 5

The CWCB filed a motion for reconsideration and protest to the water court in this case as the referee had ruled on a Motion for Determination of a Question of Law that the Applicant for a recreational in-channel diversion was entitled to call for water in excess of the amounts claimed in order to be able to put the amounts claimed to beneficial use. The referee reconsidered her decision and granted the CWCB's request; acknowledging that she had erred by granting the Applicant water in excess of the amounts noticed. The Applicant has filed a Motion to Vacate Order of Referee, Motion for Determination of Question of Law and Motion for Appointment of Senior Judge Ossola.

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 ("MLFF") 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 completion of briefing by all parties on claims 6-8 (alleged violations of NEPA, ESA 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 is the subject of Claim 7, must be determined before any ruling can be made on claims 1-3.

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 parties conducted further briefing on the motion and cross-motion for summary judgment on Claims 6-8 that concluded on February 20, 2009. Also, 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 May 26, 2009, the court issued an Order ruling in favor of the Federal Defendants on Claims 6 (NEPA) and 8 (GCPA). As a result, those claims are now dismissed. The court ruled in favor of the Plaintiff on Claim 7 and decided to take Claims 1-3 under advisement pending the completion of the remedy. In fashioning a remedy for Claim 7, the court remanded the 2008 Biological Opinion to the Fish and Wildlife Service for review and revision regarding the MLFF portion of the Biological Opinion. The Service has until October 30, 2009 to revise the Opinion. At that point, and depending on the substance of the Service's revision, the court will order the following: 1) further briefing on Claims 1-3; 2) a status conference with the parties to discuss how the Bureau of Reclamation will implement the revised Opinion (if the Service makes substantive revisions); 3) further discussion on the next steps in the litigation; and 4) some combination of the above.

On June 15, 2009, Plaintiff filed a Motion for Rule 54(b) certification of claims 4-6 and 8. In this Motion, Plaintiff seeks final certification on claims 4-6 and 8 for purposes of appealing those claims before final resolution of claims 1-3 and issuance of the revised Biological Opinion. On August 11, 2009, the Court denied Plaintiff's Rule 54(b) motion. As a result, no appeals will be allowed until after the court rules on the remaining pending claims.