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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**

1. Republican River Compact

The States are working towards hiring an arbitrator and finalizing the arbitration schedule.

**WATER RIGHTS MATTER**

2. Concerning the Water Rights of the Upper Eagle Regional Water Authority, Case No's. 03CW78, 98CW205, 98CW270, 02CW403, and 06CW97; Water Division 5

As described in previous reports, these cases involve the Authority's continued use of an outdated table of monthly depletion rates to calculate the replacements of depletions to the Eagle River. The State submitted the last global settlement proposal regarding these cases. The settlement proposal was rejected, and no counter-proposal has been made by the Authority. A key legal issue as to the meaning of the Authority's decree in Case No. 00CW83, as described below under Case No. 08CW145, may be resolved by the Water Court as early as December. Such a resolution may be helpful in moving settlement forward. Meanwhile, Supreme Court appeals in Case No. 98CW205 and 98CW270 are pending regarding the water court's dismissal of the State's retained jurisdiction petitions in those two cases. The State's opening briefs in both appeals will be filed by November 9, 2009. The water court found that its retained jurisdiction could only be invoked to remedy actual injury and not to preclude future injury. The State argues the retained jurisdiction statute expressly contemplates the water court exercising its retained jurisdiction to preclude future injury. Claims for declaratory and injunctive relief regarding the interplay of certain Authority decrees remain pending before the water court in both Case No. 98CW205 and 98CW270. Case Nos. 03CW78, 02CW403 and 06CW97 are pending before the Water Court. Case No. 06CW97 was dismissed by the Water Referee

because the Authority lost its right to its replacement sources for this augmentation plan and a proposed exchange. The Authority has protested this decision to the Water Judge, claiming that it could change replacement sources and retain the same priority date for the claimed exchange. The CWCB has taken no position on this issue, which the State and Division Engineers raised with the Court.

3. Wolfe/CWCB v. Upper Eagle Regional Water Authority, Case No. 08CW145 Division 5

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. The parties await a ruling, which could be entered by the end of the year.

4. Upper Yampa Water Conservancy District, Case No's. 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, Case No. 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 will 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 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. A team from the CWCB and Attorney General's Office successfully negotiated protective terms and conditions to include in the final decree. In general, the terms allow notice to the CWCB of any additional sources of replacement water and of new augmented structures. The UAWCD will maintain the initial burden in all instances to show that these additions will not injure CWCB instream flow rights. The CWCB will also have the opportunity to comment on any additions and may resort to a Court determination of any disputes over whether the UAWCD has successfully demonstrated a lack of injury. The Court recently entered a final decree for this plan.

6. Town of Breckenridge, Case No. 08CW73, Water 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. Upon filing a motion for reconsideration 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 and requested a hearing on the issue. The Water Judge declined to set a hearing and instead set a conference call for November 20, 2009 and stated that he hoped to rule on the matter before that time.

7. Application of Robert Gregg Sease, Case No. 08CW10, Water Division 3

As of 2007, Applicant Robert Gregg Sease had constructed a combination of approximately 45 ditches, ponds and dams, which divert water from Sheep Creek, tributary to Saguache Creek. These structures are located within the reach of a 2 cfs instream flow right on Sheep Creek decreed in Case No. 82CW226. There were no water rights decreed to these structures nor was the Applicant operating under a Substitute Water Supply Plan or Plan for Augmentation.

The Division of Water Resources issued numerous Cease and Desist Orders from 2003 through 2007 against Mr. Sease directing him to either remove the structures or obtain a plan for augmentation. When these Cease and Desist Orders proved ineffective, the Division of Water Resources filed a judicial enforcement action against Mr. Sease (Case No. 07CW53, Water Division 3). As part of a settlement reached in that matter, Mr. Sease agreed to obtain a plan for augmentation to replace the out-of-priority depletions caused by these structures.

Mr. Sease filed a Plan for Augmentation and Change of Water Rights in Case No. 08CW10. The CWCB filed a Statement of Opposition to protect its instream flow right on Sheep Creek. Based on a review of Applicant's 26a2 disclosures, there is some concern that the Plan for Augmentation does not adequately replace to the entire instream flow reach and may not replace at all in dry years. The case is scheduled for a 3 day trial to commence on January 19, 2010.

8. Concerning the Application of: Vail Associates, Inc., and The United States of America, in Eagle and Summit Counties, Colorado, Case No. 07CW210, Division 5

On November 13, 2009, the Division 5 Water Court will hear arguments before Judge Boyd to determine whether the CWCB's injury with mitigation rule is a valid use of the CWCB's authority to enter into stipulations for decrees that continue to preserve the natural environment while allowing some use of water that affects an instream flow.

Pagosa Area Water and Sanitation District and San Juan Water Conservancy District v. Trout Unlimited No. 08SA354

On remand from the Supreme Court's decision in Pagosa I, the District Court for Water Division No. 7 entered a conditional decree for the Pagosa Area Water and Sanitation District and the San Juan Water Conservancy District (the "Districts") based upon a planning period extending to the year 2055.

In this appeal, Trout Unlimited challenged the length of the planning period and contended that the evidence in the record did not support the conditionally-decreed amounts of water. The Supreme Court upheld the Water Court's finding that the 2055 planning period is reasonable, but held that the record did not support the amounts of water decreed and remanded the case for a determination of water amounts reasonably necessary to serve the Districts' reasonably anticipated needs during the planning period, above its current water supply. The Districts projected nearly twice the population as shown in the Colorado Water Conservation Board's June 2009 draft study titled "Colorado's Water Supply Future."

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.

9. Grand Canyon Trust v. Bureau of Reclamation

This case involves the Bureau of Reclamation's operation of Glen Canyon Dam and implementation of the 5 Year Experimental Plan involving one High Test Flow and 5 years of Fall Steady Flows released from Glen Canyon Dam. Grand Canyon Trust filed suit against Reclamation, its Commissioner, and the Fish and Wildlife Service (FWS) in US District Court of Arizona, alleging that: 1) Reclamation's use of a Modified Low Fluctuating Flow regime for Glen Canyon Dam operations violates the Endangered Species Act (ESA) (Claims 1-3); 2) Reclamation has violated the ESA and NEPA by failing to complete Biological Opinions and Records of Decisions for each Annual Operating Plan (Claims 4-5); and 3) Reclamation and the FWS have violated NEPA, ESA and the Grand Canyon Protection Act in implementing the 5 year Experimental Plan on the Colorado River (Claims 6-8). The seven Basin States (Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming) and the Southern Nevada Water Authority joined this litigation as intervenors, as did major water and power users in May 2008.

Over the past year, the court has dismissed claims 4-5 (AOP), 6 (Experimental Plan NEPA) and 8 (Experimental Plan GCPA). It has also granted summary judgment in favor of Grand Canyon Trust with regard to Claim 7 (Experimental Plan – ESA), and ordered FWS to provide a more reasoned analysis of its 2008 Biological Opinion for the 5 Year Experimental Plan with regard to the MLFF aspects of the Plan by October 30, 2009. In the interim, the court stayed Claims 1-3 pending completion of the revised Biological Opinion. Consistent with the court's order, FWS distributed a Supplemental Biological Opinion to all parties on November 2, 2009 that concludes



MLFF, in the context of the Glen Canyon Adaptive Management Program, does not jeopardize endangered species or adversely modify their critical habitat in the Grand Canyon. Opening briefs regarding the validity of the Supplemental Biological Opinion in conjunction with the 2008 Opinion and Claims 1-3 are due by December 4, 2009.

Finally, Grand Canyon Trust filed a Motion for Rule 54(b) certification of claims 4-6 and 8 on June 15, 2009. 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. The Court denied this motion on August 11, 2009. As a result, no appeals will be allowed until after the court rules on the remaining pending claims.

#### 10. Binational Negotiations with Mexico

Representatives and advisors to the Colorado River Basin States (including the CWCB, DNR and Subunit) as well as water districts, municipal water delivery agencies, environmentalists and other stakeholders in both the United States and Mexico have been and continue to negotiate in coordination with the Bureau of Reclamation and International Boundary Water Commission (IBWC) to address water management issues in the Colorado River Basin. Through these negotiations, the parties have begun to identify potential bi-national opportunities to manage the Colorado River resource in the face of the current drought, impending critical water supply needs in both the U.S. and Mexico and changes in management of the Colorado River System.

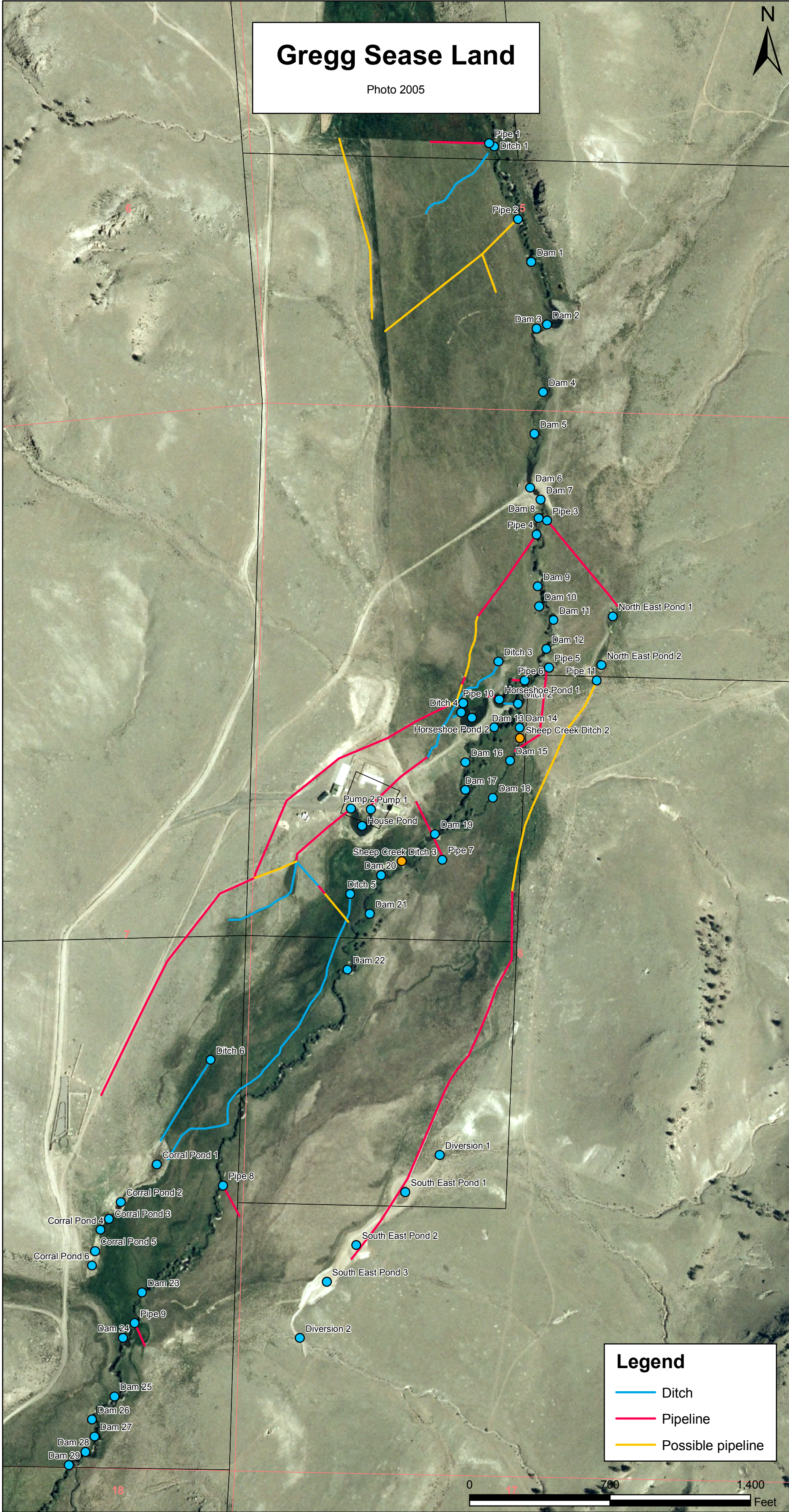
The current, informal negotiation process involves coordination of the U.S. and Mexico Core Groups and Consultative Groups through the IBWC. In general terms, the Core Groups advise the IBWC Commissioners regarding projects and processes that, according to designated work groups from each country, may be mutually agreeable and beneficial to both the US and Mexico. The Consultative Group advises the Commissioners regarding the legal and policy framework within which any binational project or process must operate. Upon reaching consensus through this informal process, the Department of State and its counterpart in Mexico (Ministry of Foreign Affairs) will have to negotiate and develop agreements to implement the binational programs agreed to by the parties.

At the present time, the parties are in the process of developing and analyzing various models that will identify the sensitivities, costs and benefits of projects and concepts that may be of binational interest. The US parties continue to coordinate during the modeling process to maintain a consensus in negotiating position and to develop the presentation of modeling results to present to Mexico at the next binational meeting at the end January. Next steps in the negotiating process are also expected to be discussed at the January following a mutual understanding of the modeling results.



**Gregg Sease Land**

Photo 2005



### Legend

- Ditch
- Pipeline
- Possible pipeline

— Ditch

— Pipeline

— Possible pipeline



Structure

6

5

Recharge Pond

FILED Document  
CO Alamosa County District Court 12th JD  
Filing Date: Oct 23 2009 7:11PM MDT  
Filing ID: 27716226  
Review Clerk: Erin Castoe

Sease Property

Horseshoe Pond #1

Horseshoe Pond #2

SHEEP CREEK D 2

House Pond

SHEEP CREEK D 3

Sheep Creek







7

8

### Legend

div3\_diversions

NAME

-  SHEEP CREEK D
-  SHEEP CREEK D 2
-  SHEEP CREEK D 3
-  SHEEP CREEK NO 776 D
-  Perforated Drain Pipe
-  Sheep Creek Ditch