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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As described in previous reports, these cases involve the Authority's continued use of an outdated table of monthly depletion rates to calculate the replacements of depletions to the Eagle River.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. These matters will be fully briefed by January 19, 2010, and oral arguments will be requested in both matters. 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 a 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. Application of Robert Gregg Sease, Case No. 08CW10, Water Division 3

Sease filed a Plan for Augmentation and Change of Water Rights in Case No. 08CW10. The CWCB and the State and Division Engineers (collectively "Engineers"), among others, filed Statements of Opposition. One of the replacement sources in the plan for augmentation is the Tarbell Ditch, which is a transmountain water right diverted from Division 4 and applied to use in Water Division 3. The Tarbell Ditch is decreed for the irrigation of 1500 acres located downstream of Sease's Ranch Property. It was unclear from the Application whether Sease intended to change the type of use of the Tarbell Ditch water right prior to using it as a replacement source.

The Engineers filed a Motion for Determination of Question of Law seeking a determination from this Court on two issues: (1) whether a transmountain water right originally decreed for irrigation must be changed prior to being used for augmentation at an undecreed location; and (2) whether, when changing a transmountain water right, the applicant must prove that such change will not injure water users in the basin of origin. The Court granted the Engineers' Motion and concluded that, as a matter of law, a transmountain water right must be changed prior to use as a replacement source in an augmentation plan; and, as part of that change, the applicant must show that water users in the basin of origin will not be injured. The Court further concluded that, if the applicant elects to request the change of water right in Division 3 Water Court (the basin of use), the matter should also be published in Division 4 (the basin of origin) in the same manner and in the same publication as would be required if the application for change were filed in Division 4.

The case was scheduled for a 3 day trial to commence on January 19, 2010. As a result of the Court's Order, the trial has been continued to allow for publication in Division 4. It is anticipated that trial will be held sometime in the fall of 2010; however, the trial may be further postponed if additional parties choose to fie Statements of Opposition.

7. 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. Most recently, the Subunit has provided legal counsel to these entities regarding:

- Operations at Glen Canyon Dam and the role of the National Park Service and the Glen Canyon Adaptive Management Workgroup;
- Upper Colorado River Commission meetings;
- Inquiries concerning the Basin Fund;
- Compact administration;
- Planning and implementation of the Colorado River Basin Water Supply and Demand Study as part of the Bureau of Reclamation's Water Conservation Initiative;
- US and basin state negotiations with Mexico on potential efficiency, augmentation, and shortage sharing projects;
- Wild and scenic river negotiations;
- Ongoing imaging and coding of Colorado River documents.

Interstate Litigation with respect to Colorado River matters:

8. Grand Canyon Trust v. Bureau of Reclamation, et. al

This case involves operation of Glen Canyon Dam and implementation of the 5-Year Experimental Plan between 2008 and 2012. The Experimental Plan involves one High Flow Test and 5 years of Modified Low Fluctuating Flows (MLFF) in conjunction with Fall Steady Flows released from Glen Canyon Dam. Grand Canyon Trust filed suit against the Bureau of Reclamation, its Commissioner, and the Fish and Wildlife Service (FWS) in US District Court of Arizona alleging, in relevant part, that: 1) Reclamation's use of MLFF at Glen Canyon Dam violates the Endangered Species Act (ESA) (Claims 1-3); and 2) Reclamation's implementation of the Experimental Plan consistent with the 2008 Biological Opinion also violates the ESA (Claim 7). The remaining claims concerning Reclamation and the FWS's compliance with NEPA, the ESA and the Grand Canyon Protection Act have been dismissed. The seven Basin States (Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming) and the Southern Nevada Water Authority joined this litigation as joint intervenors, in May 2008, as did major water and power users.

In May 2009, the Court granted summary judgment in favor of Grand Canyon Trust (Experimental Plan – ESA), and ordered FWS to provide a more reasoned analysis of its 2008 Biological Opinion conclusions concerning the use of MLFF as part of the 5 Year Experimental

Plan. In the interim, the Court stayed Claims 1-3 pending completion of the revised Biological Opinion. In response, the FWS issued a 2009 Supplemental Biological Opinion on November 2, 2009. Its opinion relies on updated information as well as the 2009 Draft Recovery Goals for the Humpback Chub to conclude that MLFF, in the context of the Glen Canyon Dam Adaptive Management Program, does not jeopardize endangered species or adversely modify their critical habitat in the Grand Canyon.

Grand Canyon Trust has since filed a 60 day notice of lawsuit and moved to supplement its complaint with three additional claims, including: 1) Claim 9 – Challenge to the merits of the 2009 Supplemental BiOp and its Incidental Take Statement; 2) Claim 10 – Challenge to the 2009 Incidental Take Statement's compliance with NEPA; and 3) Claim 11 – ESA and APA challenges to the Draft Recovery Goals. Although the Federal Defendants and Intervenors objected to claim 10 as untimely and causing undue delay and undue prejudice, the Court granted the Trust's motion to assure that all issues are litigated together in a timely manner. (Order, dated January 7, 2010). The Court further reasoned that any futility argument associated with the new claims can be addressed on the merits of those claims. Therefore, the Trust will formally file a second supplemental complaint on January 27, 2010 after the 60 day notice period for the additional claims expires. Subsequent briefing on all pending claims (Claims 1-3 and 9-11) shall be completed by the end of March.

Most recently, the Court has ordered the parties as a results of its separate review of a news article in the Arizona Republic to provide briefs on how DOI's proposal to pursue a High Flow Experimental Protocol for Glen Canyon operations will impact the ongoing litigation. The States have been and continue to be in coordination with DOI and DOJ to respond by explaining that the Protocol is merely a proposal being considered in addition to the actions currently at issue in this litigation. Given the preliminary nature of the Protocol, which still has to go through the Adaptive Management Work Group, as well as NEPA and ESA evaluations, it should have no bearing on the litigation as it currently stands.

9. Quantified Settlement Agreement (QSA) Verification Proceedings JC4353

The Subunit is monitoring verification proceedings for California's 2003 Quantified Settlement Agreement and related documents. Together, these documents comprise an agreement among California water users, the State of California and the Department of the Interior to authorize and implement *water transfer and conservation measures to enable Southern California to operate within its 4.4 million acre-feet allocation of Colorado River water.* Specifically, the documents: 1) quantify the amount of Colorado River water the Imperial Irrigation District (IID) and Coachella Valley Water District (CVWD) are each entitled to under the 1931 California Seven Party Agreement (among California water users); and 2) provide a basis upon which California water users can develop firm water supplies for municipalities and environmental purposes without relying on more Colorado River water than it agreed to under the 1929 Boulder Canyon Project Act and as imposed by the Arizona v. California Supreme Court Decree. Because the package of QSA documents provide a foundation for California's consent to current 7-State and federal agreements, the outcome of these proceedings may influence California's current and future approach to basin state relations and Colorado River operations.

The Superior Court of Sacramento County issued a tentative ruling on December 10, 2009 that would invalidate the "Joint Powers Authority Creation and Funding Agreement" and "Environmental Cost Sharing Agreement" portions of the QSA package. According to the Court, these documents contain provisions that may "unconditionally commit [the State] to pick up the entire tab for mitigation costs [associated with less return flows to the Salton Sea] exceeding the capped contribution of the other QSA parties, notwithstanding the amount of those costs -- even if they ultimately amounted to millions or billions of dollars – and notwithstanding the State's budget, appropriations, or other control over expenditures." (Tentative Ruling at 15). Such provisions, the Court reasons, may violate California's Constitution by authorizing the state to contract for amounts well over the constitutional debt limit and contractually bind future legislators' hands. *Id.* at 16. Because the agreements comprising the QSA package are so interrelated and interdependent, the Court also concluded that the unconstitutionality of one contract could likely invalidate them all. *Id.* at 18.

Oral argument on the Court's tentative ruling was held on December 17, 2009. The IID board and Metropolitan Water District, among other, reportedly disputed the Court's rationale and potential invalidation of the QSA package in its entirety. The Court's final ruling is still pending.

Depending on the final ruling and the ultimate outcome of these proceedings, Colorado is considering options for collaborating with the other basin states to protect current and future Colorado River operations.