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May 7, 2010

**TO:** Colorado Water Conservation Board

**FROM:** John W. Suthers  
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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As described in previous reports, these cases involve the Authority's continued use of an outdated table of monthly depletion rates to calculate the replacements of depletions to the Eagle River. It appears that a key legal issue as to the meaning of the Authority's decree in Case No. 00CW83, as described below under Case No. 08CW145, will proceed to trial in August. This issue has been preventing settlement from moving forward. However, it now appears that the Authority is willing to separate this issue from the issue regarding the outdated table of monthly depletion rates, which may clear a path to settlement of Case Nos. 98CW205, 98CW270, 03CW78 and 02CW403. New settlement offers have been exchanged and are under consideration. Meanwhile, on March 4, 2010, the Supreme Court heard oral arguments in the appeals in Case No. 98CW205 and 98CW270 regarding the water court's dismissal of the State's retained jurisdiction petitions in those two cases. The State appealed the water court's finding that the water court's 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 still 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 downstream, 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 also approved a sweeping change in the location of use of over 70 water rights. Such an interpretation 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, downstream point of diversion for certain specifically described water rights, and did not approve any change in location of use. The water judge found that the decree is ambiguous and the court will consider extrinsic evidence of what the parties intended in the stipulated decree. This was good news for the State because virtually all of the extrinsic evidence shows that the State's position is correct. This evidence includes what the water judge found to be admissions on the record by the Authority's water counsel, Glenn Porzak, during Case No. 00CW83, that this case only involved a change to a downstream alternate point of diversion. Mr. Porzak now appears poised to testify on behalf of the Authority that his previous admissions are being misinterpreted. This case is scheduled to go to trial on August 23, 2010.

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

As mentioned in the previous Report of the Attorney General, Sease filed for a Plan for Augmentation and Change of Water Rights in Case No. 08CW10. This application was in response to a judicial enforcement action filed on behalf of the State and Division Engineers (collectively "Engineers") to enjoin Sease's unlawful uses of water. Two sources of replacement water are proposed for use within the augmentation plan; the first is a native irrigation right and the second is a transmountain irrigation right originating in water division 4. The CWCB filed a Statement of Opposition in order to protect its instream flow rights in water divisions 3 and 4. The Engineers are also opposers of record in this case. The trial has been scheduled for 3 days beginning on August 10, 2010.

5. On May 3, 2010, in Water Division 4, Judge J. Steven Patrick entered Findings and Ruling of Referee and Decree of the Water Court in the following CWCB instream flow cases:

Case No. 09CW74, Schafer Gulch;

Case No. 09CW76, Bent Creek;

Case No. 09CW77, Clear Fork East Muddy Creek;

Case No. 09CW79, East Elk Creek; and

Case No. 09CW80, Grizzly Gulch.

6. Colorado Springs and Aurora. Case No. 95CW272, Water Division 5

This application by the cities of Colorado Springs and Aurora seeks to change the remaining conditional rights decreed to the Homestake Project in the Eagle River basin to new points of diversion, places of storage, and for use on the West Slope. The conditional rights include over 80,000 acre feet of storage for Homestake Reservoir and several direct flow surface diversions. The application also seeks new conditional rights for a reservoir on Homestake Creek, a well field in Eagle Park, and two plans for augmentation. Unresolved issues remain regarding potential injury to the CWCBC's instream flow rights located in the Eagle River basin. The CWCBC has rights on the Eagle River and several of its tributaries. The application's proposed well field, alternate points of diversion and storage, and augmentation plans may adversely impact the instream flows. Significant concerns remain about applicants' ground water modeling and their ability to accurately replace out of priority depletions from wells. Applicants also assert foreign water rights for water used in the basin of origin. Also of continuing concern are the numerous new exchanges using rights senior to the instream flows that would create new conditions on the river. The CWCBC staff continues to negotiate for protective terms and conditions. A trial is scheduled to begin June 23, 2010.

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 legal counsel on developments concerning the Colorado River. The Subunit's recent work for these entities has been focused on:

- The state's allocation of water from the Animas-La Plata Project;
- The Draft Colorado River Water Availability Study;
- Inquiries on compact administration consistent with the Upper Colorado River Basin Compact;
- Inquiries concerning the Upper Colorado Basin Fund;
- Scoping comments on behalf of the 7-Basin States concerning the Long-Term Experimental Protocol of High Flow Tests from Glen Canyon Dam;
- Testimony on behalf of the Upper Division States and UCRC at the Congressional field hearings of the House Subcommittees on National Parks, Forests and Public Lands and on

Water and Power regarding challenges facing Grand Canyon National Park and Collaboration between the Basin States and the Federal Government;

- Implementation of the Interim Guidelines for Lower Basin Shortages and Coordinated Operation of Lake Powell and Lake Mead;
- 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;
- Comments to the Draft Eligibility Report for the Uncompahgre Planning Area; and
- Ongoing imaging and coding of Colorado River documents.

Interstate Litigation with respect to Colorado River matters:

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

In accordance with the Court's approval in January 2010, Grand Canyon Trust has lodged a second supplemental complaint alleging three additional claims, which include: 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.

On March 5, 2010, the Federal Defendants filed a Notice informing the Court that as a result of formal concerns lodged by the Zuni Tribe, the Secretary of the Interior was postponing the non-native fish removal expeditions for 2010 and was reinitiating consultation with the Fish and Wildlife Service. In their Notice, the Federal Defendants indicated that such action is not, at this time, expected to interfere with or influence the ongoing litigation. The Federal Defendants agreed to apprise the Court as soon as possible if any developments change this expectation.

On March 11, 2010, both Grand Canyon Trust and the Federal Defendants moved for summary judgment on the pending claims. Briefing for both motions was completed on April 16, 2010. The Basin States, along with the other intervening parties, joined in the Federal Defendants' briefing. In addition, the intervenor group for CREDA provided a one page response focused on challenging the Trust's assumptions concerning impacts to power as a result of changes in operations at Glen Canyon Dam. The Irrigation & Electric Districts' Association in Arizona, an individual member of CREDA, also filed a motion to provide an amicus brief, which is still pending.

Oral argument on the matter is set for May 7, 2010 at the U.S. District Court of Arizona. The Subunit will provide counsel to represent the Basin State Intervenor, including Colorado, at this hearing.

8. Quantified Settlement Agreement (QSA) Verification Proceedings JC4353

The Subunit continues to provide counsel to Colorado and UCRC representatives following the aftermath of the Superior Court of Sacramento County's decision to invalidate 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*. Because the package of QSA documents provide a foundation for California to consent to current 7-State and federal agreements, the outcome of these proceedings may influence California's approach to basin state relations and Colorado River operations in the future.

Specifically, the Court's final ruling on January 13, 2010 and judgment on February 17, 2010 invalidated the "Joint Powers Authority Creation and Funding Agreement" and "Environmental Cost Sharing Agreement" portions of the package 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." Such provisions, the Court reasons, violate California's Constitution by authorizing the state to contract for amounts well over the constitutional debt limit and contractually bind future legislators' hands. Because the agreements comprising the QSA package are so interrelated and interdependent, the Court also concluded that the unconstitutionality of one contract invalidated them all.

A number of California water users as well as the State of California have appealed to Superior Court's decision to the California Court of Appeals. In conjunction with their appeals, the Imperial Irrigation District, Metropolitan Water District, and San Diego County Water Authority, moved to stay the lower court's ruling pending appeal. In support of its motion, SDCWA asked the Upper Colorado River Commission and the Lower Basin States to execute affidavits on the importance of the QSA. With the counsel of the Subunit, the Upper Division States agreed to execute a declaration through the UCRC's legal counsel that focused on the importance of maintaining 7-State relationships through ongoing reservoir, Mexico and basin study negotiations. The Subunit will coordinate with the other Basin States to determine the need for a coordinated Basin State *amici* brief.

Water Division 3 Ground Water Rules - The State Engineer considered further public comment at meetings in Alamosa on April 28, 2010. Rules drafting at this point is at a pause, waiting for the modelers and engineers to produce the engineering related to establishing response areas (sections of the valley floor where water diversions share hydrologic commonalities), and creating default response functions for those areas, which correspond to the relationship between well pumping and injurious depletions to the surface waters. This engineering would also inform upcoming discussions of a sustainable supply of water in the aquifers, and in the watershed as a whole: how to define it, measure it, attain it, and then maintain it.

Since Subdistrict No. 1 is already formed, and a Water Court decision on their Plan of Water Management is pending, there was discussion on how a subsequent promulgation of the State Engineer's Ground Water Rules would impact that subdistrict. As well, there was discussion on how the Rules would influence and impact the efforts of the other anticipated subdistricts.

An additional concern is the length of time necessary to form a subdistrict, draft the subdistrict's plan of water management, and get it approved by both the State Engineer and the Water Court. In the meantime, how can that subdistrict use its available water supplies? After the promulgation of the State Engineer's Ground Water Rules, water users may only use water if they are enrolled in an augmentation plan, an SWSP, or a subdistrict plan of water management. There was discussion about whether a mechanism similar to an SWSP could be employed to allow water users to pump, while their subdistrict is forming and working on their plan. This office plans to provide some direction on that legal question.

A final concern is the fact that in many areas of the San Luis Valley, the aquifer is below what has been identified as the "red light" (too low to pump) levels tolerable. In that instance, some sort of "phase in" provisions need to be drafted to allow water users to use some of their water resources while trying to build up their area aquifer levels to a healthy state. If we did not have some provision in this regard, there could be drastic economic impacts on farmers.

The State Engineer signed and promulgated the Irrigation Season Policy, SE Policy 2010-1. He also announced that due to insightful comments from many stakeholders, further development of the proposed statewide Wetlands Policy is on hold.

A tentative meeting was set for May 27, 2010, in Alamosa. If the engineering is still not underway, a second meeting date of June 16, 2010 was chosen.