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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 MATTERS

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As described in previous reports, these cases involve the Authority's continued use of an outdated table of monthly depletion rates to calculate the replacements of depletions to the Eagle River. On May 24, 2010, the Supreme Court reversed the water court's dismissal of the State's retained jurisdiction petitions in Case Nos. 98CW205 and 98CW270, which sought to block the Authority's use of the outdated table. The unanimous Supreme Court decision written by Justice Hobbs confirmed that the State properly sought to invoke the water court's retained jurisdiction in order to preclude injury from the Authority's use of the table, and the State did not need to wait for actual injury to occur. Justice Hobbs reiterated the Court's disdain for the Authority's table of fixed monthly depletion rates, which was never based on the Authority's actual mix of uses during the irrigation season. After the entry of this ruling, the parties engaged in new settlement negotiations and, at this writing, appear to have reached a settlement in these matters pending final review and approval by Jennifer Gimbel and Dick Wolfe. The Authority and the State appear to have reached agreement upon a methodology for accounting for the Authority's

actual mix of water uses during the irrigation season. This accounting will better reflect the Authority's actual out-of-priority depletions to the Eagle River. The pending settlement will resolve the State's participation in all five matters identified above and will include a partial settlement regarding a new application filed by the Authority in Case No. 09CW192.

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 had argued that this decree also approved a sweeping change in the location of use of over 70 water rights. Such an interpretation of the decree would significantly harm the CWCB's instream flow rights on the Eagle River. The State had filed a complaint for declaratory relief asking the water court to interpret the decree. However, as part of the settlement of the Authority cases described above, the Authority has finally conceded the State's position that the decree in 00CW83 did not change the location of use of any of the Authority's water rights. The Authority's previous position was based on the opinion of the Authority's legal counsel, Glenn Porzak, but his opinion was not supported by the Authority's own engineer, Thomas Williamsen, who had verified the application in 00CW83. It is expected that the ten-day trial set for August will be vacated upon completion of the settlement which, at this writing, is pending final approval by Jennifer Gimbel and Dick Wolfe.

4. Concerning the Application for Water Rights of the Eagle River Water & Sanitation District, Case No. 08CW77, Water Division 5

This case involved an augmentation plan for developments proposed for the Wolcott area along the Eagle River. Recently, lands in the Wolcott area were included within the areas to be served by the Eagle River Water & Sanitation District. Under the augmentation plan, the District will replace its out-of-priority depletions from diversions at Wolcott with releases from two upstream reservoirs, the Eagle Park Reservoir and the Homestake Reservoir. Recently, the water court approved the settlement reached by the parties, which included the District, the CWCB, the State and Division Engineers and certain Grand Valley water users. A final decree has been entered and the four-day trial set for August has been vacated.

5. In the Matter of the Application of Water Rights of the Town of Minturn, Case No. 05CW262, Water Division 5.

This case involved Minturn's application to change its senior municipal ditch water right and two of its municipal well water rights to alternate points of diversion along Cross Creek. After the water court ruled that a change of municipal water rights is subject to the same historic consumptive use limitations as a change of other tributary water rights, Minturn withdrew its claim to change its senior municipal ditch water right. Subsequently, Minturn reached a settlement with the CWCB and the State and Division Engineers for the entry of a proposed decree that prevents injury to the CWCB's instream flow water rights on Cross Creek and the Eagle River. The trial set to begin in July will focus on outstanding ownership issues unrelated to injury to water rights from the change application. Neither the CWCB nor the Engineers will be participating in the trial. Minturn's applications for new junior water rights and for an

augmentation plan to serve the new ski development area recently annexed into Minturn remains pending in Consolidated Case Nos. 06CW264 and 07CW225, but a settlement of these cases also appears likely at this time.

6. 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.

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

This application by the cities of Colorado Springs and Aurora seeks to change 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; new conditional rights; a well field in Eagle Park; and two plans for augmentation. The CWCB entered into a stipulation regarding the surface water components of the claims. Applicants also agreed to not seek a determination of the foreign water status for water used in the basin of origin and that a court must confirm a right for reuse or successive use on the West Slope before such use. The CWCB and Division of Water Resources also made a joint motion with applicants to bifurcate the case. This allowed the stipulated surface rights to proceed, while requiring a new trial setting to present any ground water claims. Because pro se parties contested the application, a trial was held June 23, 2010. The court is taking the case under advisement and is expected to issue the decree within two weeks. Applicants have six months in which to set a date for the ground water case.

8. CWCB and Board of County Commissioners of Pitkin County, Case No. 10CW184, Water Division 5

On June 30, 2010, CWCB and Pitkin County filed a change of water rights application for the Stapleton Brothers’ Ditch to allow use of the water right for instream flow purposes on Maroon Creek and the Roaring Fork River in Pitkin County. The Trust Agreement between CWCB and Pitkin County was approved at the November 2009 Board meeting. The Stapleton Brothers’ Ditch is the first of several water rights that Pitkin County will allow CWCB to use for instream flow purposes. This is also the first change of water right case to be filed under H.B. 08-1280. The deadline for filing statements of opposition is August 31, 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:

- US and Basin State negotiations with Mexico on potential efficiency, augmentation, and shortage sharing projects;
- Inquiries on compact administration consistent with the Upper Colorado River Basin Compact;
- Inquiries concerning the Upper Colorado Basin Fund;
- Inquiries on the application of the Federal Advisory Committee Act to Colorado River activities
- Monitoring development of the Long-Term Experimental Protocol of High Flow Tests from Glen Canyon Dam;
- 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; and
- Ongoing imaging and coding of Colorado River documents.

Interstate Litigation with respect to Colorado River matters:

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

After 2+ years of litigation, the Court issued a substantive order on June 29, 2010 granting, in large part, summary judgment in favor of the Federal Defendants and Joint Intervenors' (including the Basin States'). Of the outstanding claims 1-3 and 9-11, the Court granted Defendants summary judgment on claims 1 (ESA jeopardy), 2 (ESA adverse modification of critical habitat); 10 (Incidental Take Statement violation of NEPA); and 11 (Draft Recovery Goals violation of ESA). The Court further granted Defendants partial summary judgment on claim 9 (validity of 2009 Supplemental Biological Opinion) and kept claim 3 (Taking in violation of ESA) under advisement.

In its order, the Court held in relevant part:

- 1) The US Fish and Wildlife Service (USFWS) adequately explained its reasoning in the 2009 Supplemental Biological Opinion for concluding that modified low fluctuating flows (MLFF) from Glen Canyon Dam, in conjunction with the proposed actions under the 5-Year Experimental Plan, will not jeopardize the humpback chub or adversely modify or diminish its critical habitat in conflict with the ESA (Claims 1, 2 and 9);

- 2) The USFWS' change of position regarding MLFF and effects on humpback chub was not arbitrary and capricious, but rather based on a valid definition of adverse modification, the best science available in the Draft 2009 Recovery Goals, and the new information identifying likely benefits that MLFF may provide by suppressing warm water non-natives that prey on and compete with the chub (Claims 1, 2, and 9);
- 3) The complexity associated with achieving ESA compliance while respecting the religious and cultural views of the tribes in the area "aptly illustrates the complex set of interests Reclamation must balance in operating the Dam. Those interests include not only the endangered species below the Dam, but also tribes in the region, the seven Colorado River basin states, large municipalities that depend on water and power from Glen Canyon Dam, agricultural interests, Grand Canyon National Park, and national energy needs at a time when clean energy production is becoming increasingly important."
- 4) The USFWS must reevaluate the 2009 Incidental Take Statement (ITS) because it currently fails to demonstrate why the adult based consultation trigger either accurately measures the take of young chub (which are expected to be affected by the MLFF operations) or correctly identifies the level at which the take of young chub becomes excessive. The Court further provided that USFWS must explain why no reasonable and prudent measures other than monitoring the effects of the proposed action are necessary (Claims 3 and 9).
- 5) The USFWS' 2009 Incidental Take Statement does not violate NEPA (Claim 10); and
- 6) The USFWS' reliance on the 2009 Draft Recovery Goals as the best available science does not violate the ESA (Claim 11).

As part of its order, the Court provided USFWS until September 1, 2010 to revise the 2009 ITS consistent with the order. Plaintiff will then be allowed to file memorandum on or before September 24, 2010 addressing its position on the validity of the revised ITS, the merits of Claim 3 in light of the revised ITS and any remedies the Court should impose if summary judgment is granted in favor of the Trust. Responses to any memorandum filed by the Trust are due October 15, 2010.

The Subunit will continue to coordinate with the Defendant Intervenors and Federal Defendants to finalize a sufficient ITS and an appropriate brief in response to any motions filed by Plaintiff.

10. Quantified Settlement Agreement (QSA) Verification Proceedings JC4353

The California Court of Appeals granted the various Motions to Stay Judgment pending appeal. No additional information at this time. Opening briefs are reportedly not due until later this year.

The Subunit will coordinate with the other Basin States to determine the need for a coordinated Basin State *amici* brief at the appropriate time.

11. Water Division 3 Ground Water Rules

The State Engineer considered further public comment at meetings in Alamosa on June 15, 2010 in Alamosa. He is still waiting for the modelers and engineers to produce needed engineering. A briefing was given on Judge Kuenhold's May 27, 2010 Findings of Fact, Conclusions of Law, Judgment and Decree, in which the Court approved Subdistrict No. 1's Amended Plan, with the addition of 19 Terms & Conditions. There was a discussion on the terms and conditions related to public notice and transparency in the operations of a Subdistrict and its Ground Water Management Plan, and how those Findings could be incorporated into the draft Ground Water Rules. The Judge's Order spoke to retained jurisdiction, the replacement of post-pumping (or lagged) depletions, the federal Closed Basin Project, and phreatophytes. This office will continue to analyze the instruction of this lengthy Court decision. The State Engineer's Office will initiate the scheduling of the next public meeting, based on the modelers' progress.

12. Republican River Compact

Supreme Court litigation - Colorado and Nebraska both filed responses to Kansas' Motion for the Court to accept their petition against Nebraska; they made no specific claims against Colorado. The Court evaluates whether or not to exercise its discretion to accept the case on two fronts: first, if all procedural hurdles are complete and there is no other forum for the dispute; and, second, whether the claims are of such dignity as to rise to the level of importance for the Supreme Court to accept the case. Colorado argued that Kansas had met the first prong as they complied with the required dispute resolution procedures but did not agree or disagree that the case was of sufficient dignity for the Court to accept the Petition. We also let the court know additional issues were proceeding through the required dispute resolution procedures and any State may seek to expand the issues if the Court accepts the Petition.

Non-binding Arbitration - The non-binding arbitrations involving the Colorado Compliance Pipeline has gone through hearing. There are two separate arbitrations (the CCP and the NE crediting issue) that are proceeding contemporaneously. The hearing is set for July 12-14, after the date of this memorandum. Counsel will provide information concerning the hearing at the board meeting. Written closing arguments/briefs are due July 30, the Arbitrator must issue her decision by Sept. 30 and the states have until Nov. 1 to give notice as to whether they will accept or reject the arbitrator's recommendation(s).

13. Arkansas River Compact

The State Engineer entered a stipulation with the Southeastern District resolving its statement of opposition in the Irrigation Improvement Rules case on June 17, and is pursuing stipulations with the remaining 19 Opposers. The next deadline in the case is for Opposers' expert reports on July 17.