



**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

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**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. **Kansas v. Colorado and Nebraska**

Kansas v. Nebraska and Colorado, No. 126 Original: Discovery is continuing among the States, primarily between Nebraska and Kansas. Written discovery was completed by November 1, and the exchange of Expert Reports and Responsive reports has begun, with opening expert reports served November 18 and responsive reports due in March 2012. The States have scheduled approximately 15 depositions over the next six weeks. No trial date has been set.

2. **Water Division 3 Ground Water Rules**

The Rules remain in draft stage, waiting for results of model runs after the RGDSS groundwater model has fully updated with more recent data and is recalibrated based on that new data.

3. **Special Improvement District No. 1 (2010 SA224)**

The Colorado Supreme Court upheld the Division 3 Water Court's approval of Subdistrict No. 1 in full. The Subdistrict is now working on its first annual replacement plan to replace injurious depletions caused by Subdistrict Well pumping.

## DEFENSE OF THE COLORADO RIVER SUBUNIT

### 4. Legal Counsel regarding Colorado River matters

The Subunit has provided the Colorado Water Conservation Board, Department of Natural Resources, and the Upper Colorado River Commission legal research, counsel, and/or advice on the following topics:

- Legal and policy implications of US and Basin State negotiations with Mexico on voluntary efficiency, augmentation, and shortage sharing projects, and domestic coordination of legal authority and compliance to accomplish bi-national agreements;
- Coordination on the Colorado River Compact Compliance Study;
- Coordination with the Water Bank Working Group;
- Coordination with the Basin States on the High Flow Experimental Protocol Environmental Assessment
- Coordination with the Basin States on participation in the Long-Term Experimental Management Program EIS process;
- Coordination with the Upper Colorado River Commission on processes and concepts for implementing the Upper Colorado River Basin Compact;
- Coordination and consultation with the Bureau of Reclamation and the seven Colorado River Basin states regarding Colorado River management under the Interim Guidelines;
- Coordination with the Colorado Advisors and with the Basin States on the Colorado River Water Supply and Demand Study; and
- Coordination and consultation with the Bureau of Reclamation and interested Colorado parties regarding Ruedi Reservoir debt retirement.

### Litigation with respect to Colorado River matters:

### 5. Grand Canyon Trust v. Bureau of Reclamation, et al. al.

The Federal Appellees filed their Opening Appellate Brief on December 16, 2012, opposing each of Grand Canyon Trust's assertions that operation of Glen Canyon Dam violated NEPA and the ESA. Subsequently, on December 30, 2011, the Fish and Wildlife Service issued a Final EA on non-native fish control below Glen Canyon Dam and a related Final Biological Opinion that provides ESA coverage for Glen Canyon Dam operations for the next 10 years. Finally, on January 4, 2012, the Federal Appellees filed a Suggestion of Partial Mootness premised on the recent publication of the Biological Opinion. Specifically, the Federal Appellees argued the new Biological Opinion on the High Flow Experimental Protocol and Non-native Fish Control rendered the Trust's claims regarding violation of the 1994 Biological Opinion and the inadequacy of the 2008 and 2009 Biological Opinions moot.

On January 4, 2012, the Subunit filed an Intervenor's Joinder and Supplemental Brief in support of Appellees, the U.S. Bureau of Reclamation, et. al. on behalf of the Seven Colorado River Basin States, several water user entities in the Lower Basin and the Colorado River Energy Distributors Association (CREDA). In addition to incorporating the Federal Appellees' arguments, the Intervenor's emphasized from their collective perspective; 1) their respective

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interests in the case; 2) the inappropriateness of requiring NEPA and ESA compliance on each report of the Colorado River Annual Operating Plan, Report; 3) the overreaching nature of the Trust's request that the Court supplant the authority of federal agencies to determine Glen Canyon activities; and 4) the mootness of Grand Canyon Trust's claims based on the absence of non-native fish control. In addition, the Intervenor's filed a Motion for the Court to Take Judicial Notice of the recently promulgated 2011 Biological Opinion, and the 2011 Annual Operating Plan and September 2011 24-Month Study. The latter documents were intended to illustrate to the Court the inaccuracies of the Trust's claims regarding operation of the Colorado River AOPs, as demonstrated through the comparison of projected and actual operations of the reservoirs in a highly variable water year.

On January 6, 2012, the Trust filed a Motion for Extension/Stay of Briefing on Appellees' Suggestion of Partial Mootness. Appellees filed a Response in Opposition on January 11, 2012 and the Intervenor's Joined the Appellees on January 13, 2012. If the appeal is not stayed, then oral argument will be set before the Court decides the merits. The Subunit will continue to coordinate the Intervenor's in this appeal and monitor developments closely.

#### 6. Quantification Settlement Agreement Cases

The Quantified Settlement Agreement ("QSA") is the result of 10 years of negotiations among California water entities, the federal government and the seven Basin States to help California limit use of Colorado River water to its compact entitlement of 4.4 million acre feet of water. A number of lawsuits challenging the QSA have been filed, most of which have been consolidated into two cases. Colorado is not directly involved in either case, and instead expects California to work out its intra-state use of Colorado River water internally. However, depending on how the cases progress and the issues are resolved, the other Basin States, including Colorado may have to intervene. We, therefore, continue to watch the status of QSA activities closely, and provide a summary as follows:

##### *CA Court of Appeals Case:*

On December 7, 2012, the California Court of Appeals, reversed the trial court's judgments and remanded the proceedings for validation of the QSA and the two California Environmental Quality Act actions for further proceedings. The Court held, in relevant part that:

- a) While relevant parts of the QSA agreement unconditionally obligate the state to pay the excess mitigation costs beyond those for which the Imperial Irrigation District, Coachella Valley District, and San Diego are responsible, the imposition of that obligation on the state does not violate the appropriation requirement under the California Constitution because nothing in the agreement authorizes those agencies the right to enforce the obligation by drawing money from the Treasury without an appropriation by the Legislature. As such, the state cannot be compelled to appropriate funds to satisfy its obligation. The Appellants have 60 days to appeal to the California Supreme Court (Superior Court).
  - b) To the extent the parties contend the QSA violates the debt limitations as provided in the CA constitution, they are wrong because the state's commitment to pay the excess mitigation costs is contingent on there being excess costs to pay
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and a contingent obligation does not qualify as a debt or liability within the meaning of the constitution.

- c) For guidance on remand, the trial court lacks subject matter jurisdiction to adjudicate claims under the federal Clean Air Act and the National Environmental Policy Act. (These claims have already been raised in Federal Court, *see below*).
- d) The trial court erred in determining the CEQA actions moot and therefore they are remanded for adjudication.

No further action has been taken in this case at this time.

#### *US District Court Case*

Imperial County Air Pollution Control District and Imperial County have filed a second QSA case in U.S. District Court, naming the Secretary of the Interior and Commissioner of Reclamation as Defendants and the primary water entities in Southern California as parties of interest. This challenge asserts that water transfers contemplated under the QSA should not be allowed to occur until air pollution at the Salton Sea (which would otherwise have received the water intended for transfer) is addressed. Briefing and oral argument on this challenge have also been completed. No decision has been made.

#### *Negotiations*

While the two cases proceed, MWD, IID, Coachella Valley and San Diego County Water Authority are also discussing with the Bureau of Reclamation other options for addressing issues concerning the Salton Sea. Based on updates provided during the Colorado River Water Users Association Meeting in Las Vegas on December 15, 2011, there remain a number of outstanding issues to be addressed before these entities can come to any mutual agreement. The other six Colorado River Basin States continue to monitor this process to assure that California remains within its 4.4 MAF allocation and complies with the Law of the River.

### WATER RIGHTS MATTERS

#### 7. Application for Water Rights of the Colorado Water Conservation Board in San Miguel County (11CW129)

The Board of County Commissioners of Montrose County, Farmers Water Development Company, Richards & Richards and Tri-State Western Fuels filed statements of opposition in the San Miguel instream flow water rights case. All parties involved allege that they have water rights that may be affected by the ISF and that those rights will be injured unless proper terms and conditions are imposed on the proposed ISF appropriation. They also claim that the Board must be held to strict proof as to all elements of the appropriation. They also claim that there is not enough water available to protect the natural environment and that the amount of water claimed by the applicant is not the minimum amount necessary to protect the environment to a reasonable degree. Montrose County additionally alleges that the determinations are not supported by substantial evidence in the administrative record, are arbitrary and capricious and a

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denial of the statutory and constitutional rights, powers, privileges, and immunities of Montrose County and its citizens.

8. Farmers Water Development Co. v. Colorado Water Conservation Board (11CV7019)

Farmers Water Development Company ("Farmers") filed a Complaint for a Declaratory Judgment in Denver District Court, which the CWCB responded to with a Motion to Dismiss. Farmers filed a Motion to Convert the Motion to Dismiss into a Motion for Summary Judgment. Farmers also amended its Complaint. The CWCB responded that a Motion for Summary Judgment was inappropriate because the water court had the appropriate jurisdiction. The CWCB also provided to the district court the documents from the San Miguel case to show that the issue of whether the CWCB violated the procedural due process rights of the parties was at issue in water court.