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TO: Colorado Water Conservation Board

FROM: John W. Suthers
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Peter Ampe
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First Assistant Attorneys General

RE: Report of the Attorney General

FEDERAL & INTERSTATE MATTERS

1. Kansas v. Colorado and Nebraska

In October 2010 the United States Supreme Court requested the United States Solicitor file a brief with the Court addressing whether the Court should accept jurisdiction of Kansas' complaint against Nebraska. The Solicitor has not yet filed that brief.

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. Pending these results, the Nov. 9 SAC meeting in Alamosa will be pushed back to allow time to complete the updating and model runs.

DEFENSE OF THE COLORADO RIVER SUBUNIT

3. 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 counsel on the following topics:

- US and Basin State negotiations with Mexico on potential efficiency, augmentation, and shortage sharing projects, and domestic coordination of legal authority and compliance to accomplish bi-national agreements;

- Coordination and collaboration with the seven Colorado River Basin states regarding Colorado River management under shortage conditions;
- Legal questions regarding the Colorado River Compact Compliance Study;
- Inquiries on compact administration consistent with the Upper Colorado River Basin Compact;
- Planning and implementation of the Colorado River Basin Water Supply and Demand Study as part of the Bureau of Reclamation's Water Conservation Initiative;
- Development of the High Flow Experimental Protocol and non-native fish control programs to improve the environment downstream of Glen Canyon Dam;
- Providing comments to the Aspinall Unit EIS; and
- Consultations with Secretary Salazar, Assistant Secretary Castle, and Commissioner Connor regarding coordination and collaboration among and between the 7-States and the Department of the Interior.

Interstate Litigation with respect to Colorado River matters:

4. Grand Canyon Trust v. Bureau of Reclamation, et. al. – After the Federal Defendants issued a November 2010 biological opinion to address cancellation of non-native fish removal for 2010 in light of tribal objections, the Plaintiff moved to withdraw its remaining claims concerning the validity of the incidental take statement related to the 2009 Supplemental Biological Opinion for Glen Canyon Operations, and requested that the Court vacate portions of its previous orders on grounds that the facts underlying those decisions had changed. Specifically, Plaintiff asserts the 2010 Biological Opinion regarding non-native fish removal superseded and thereby mooted the claims regarding the 2009 Opinion. Furthermore, asserting the Court predicated its decision to uphold the validity of the 2009 Supplemental Biological Opinion on, among other things, non-native fish removal activities, Plaintiff argued the effect of cancelling non-native fish removal indefinitely negates the validity of the court's order. In their response, the Federal Defendants and Defendant Intervenors opposed Plaintiff's request to vacate portions of the existing orders. In so doing, we fully rejected the Plaintiff's characterization of facts and events, explained the temporary nature of the 2010 opinion to cancel non-native fish removal, and demonstrated the ongoing applicability of the 2009 Supplemental Biological Opinion. In an order issued at the beginning of January, the Court granted Plaintiff's motion to withdraw pending claims, and claimed it would wait full briefing of the matter regarding partial vacature of previous orders. Plaintiff just recently filed its reply and the matter is now pending before the Court.

5. Quantified Settlement Agreement (QSA) Verification Proceedings JC4353 – Briefing on the Appellants claims in the California Court of Appeals regarding the verification proceedings for the QSA was completed the week of January 10, 2011. Cross Appellants have until January 27, 2011 to file Replies in support of their cross claims. The Subunit is coordinating with the 7-

States to determine whether to file amicus or other pleadings in the case by the end of February 2011.

During the pendency of the appeal, the Imperial Irrigation District has made the decision to apply some of its Colorado River water to satisfy its obligation to mitigate impacts to the Salton Sea. The Bureau of Reclamation has rejected this decision on grounds that it violates the terms of the Colorado River Water Delivery Agreement, which was a key component to implementation of the QSA. Reclamation is currently working with the signatories to the agreement to identify whether and to what extent a mutually agreeable solution can be reached regarding use of IID's Colorado River water and impacts to the Salton Sea. Reclamation, however, has put IID' on notice that if no solution can be reached, it may be required to repay to the Colorado River system the volume of Colorado River water it decided to apply to the Salton Sea. The Subunit continues to monitor these developments and advise their clients on appropriate actions to protect Colorado's interests in the Colorado River system.

6. Personnel: Effective January 11, 2011, James Eklund resigned from the Subunit to join Governor Hickenlooper's office as Deputy Legal Counsel. Although his efforts regarding and dedication to Colorado River issues as a member of the Attorney General's Office will be missed, James has promised to remain available to provide the Subunit and CWCB staff his perspective on Colorado River issues to the Subunit and CWCB staff. We wish him well in his new endeavors.

WATER RIGHTS MATTERS

7. Concerning the Application for Water Rights for Town of Breckenridge, Case No. 08CW73, Water Division 5

In 2000, the Applicant filed an application seeking conditional recreational in-channel diversion water rights (RICD) on the Blue River. The CWCB and the SEO ("State") objected to the application and the case went to trial. The Water Court limited the RICD water right to flow amounts of 100 cfs to 500 cfs. Nevertheless, in 2009, the Applicant filed an application to make its conditional rights absolute for flows under 100 cfs. The CWCB filed a Motion for Determination of Question of Law, arguing that the applicant's water rights should be limited to flows above 100 cfs because the trial judge found that beneficial uses only occurred above those flows. The Applicant argued that it should be allowed to call for water to create 100 cfs in the months where flows below 100 cfs were claimed because of some last-minute language it had added to the decree. In May of 2009, the water referee agreed with the Applicant, and the State requested reconsideration of the Referee's Order. In August of 2009, the Referee reversed her Order. Finally, in November of 2010, the Water Court agreed with the State and limited the application to flows above 100 cfs.

8. Concerning the Application for Water Rights for Vail Associates, Inc., Case No. 07CW210, Water Division 5

After the Water Referee indicated in conferences that she did not believe that the CWCB had the authority to allow injury with mitigation cases (IWM), the CWCB filed a Motion for

Determination of Question of Law, arguing that the CWCB's statutory authority gave it broad discretion to enter into enforcement agreements, such as IWM agreements, as long as the CWCB determines that such agreements will enable the CWCB to continue to preserve the natural environment to a reasonable degree. The legislative history of Senate Bill 96-64 demonstrated a repeated and clear intent to allow the CWCB to enter into such agreements. Nevertheless, the Referee ruled that IWM was in violation of the Aspen Wilderness Workshop case that imposed a fiduciary duty on the CWCB to protect instream flows. The CWCB protested the Referee's Ruling. On November 15, 2010, the Water Court agreed with the CWCB and allowed it to continue to enter into IWM agreements as long as no other water user would be injured.