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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. **Kansas v. Colorado and Nebraska**

Kansas v. Nebraska and Colorado, No. 126 Original: Discovery is continuing among the States, primarily between Nebraska and Kansas. So far the States have worked together to resolve disputes. Nebraska has served discovery on Colorado and Colorado has served Nebraska. Written discovery was completed by November 1, and then exchange of Expert Reports and Responsive reports will begin, with opening expert reports due November 18 and responsive reports due in March 2012. There will not be any rebuttal reports. 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)**

All Briefs have been filed. Oral argument before the Supreme Court was held on September 28, 2011.

4. **Arkansas River Compact**

This year's meeting has been rescheduled to December 6-7, 2011.

## DEFENSE OF THE COLORADO RIVER SUBUNIT

### 5. 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 and consultation with the Bureau of Reclamation and the seven Colorado River Basin states regarding Colorado River management under the Interim Guidelines;
- Evaluation of Bureau of Reclamation's Draft Non-native Fish Control EA;
- Terms and Conditions for continuing Tamarisk/Russian Olive Work through a second amendment to the existing Memorandum of Understanding among the Basin States;
- Terms and Conditions for continuing the Weather Modification Program through the upcoming annual amendment to Base Contract with the Lower Basin States.
- Coordination on the Colorado River Compact Compliance Study;
- Coordination with the Water Bank Working Group;
- Coordination with the Basin States on participation in the Long-Term Experimental Management Program EIS process;
- Coordination with the Upper Colorado River Commission on concepts for implementing the Upper Colorado River Basin Compact;
- Comments on the Aspinall Unit Preliminary FEIS; and
- Comments on the critical habitat designation for the Southwestern Willow Flycatcher.

### Interstate Litigation with respect to Colorado River matters:

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

On October 18, 2011, the 9<sup>th</sup> Circuit Court of Appeals denied Appellant (Grand Canyon Trust's) Motion for Injunction Pending Appeal. That same day, the Trust filed its Opening Brief. In its brief, the Trust asserts:

- 1) The Fish and Wildlife Service's 2009 Supplemental Biological Opinion for operation of the Glen Canyon Dam according to the 5-Year Experimental Program is unlawful because the "Modified Low Fluctuating Flow" component of the experiment destroys critical habitat;
- 2) The Bureau of Reclamation's operation of Glen Canyon Dam according to the 5-Year Experimental Program causes jeopardy and adverse modification of habitat in violation of the ESA;
- 3) The District Court has jurisdiction to review the 2009 Draft Recovery Goals for the Humpback Chub;
- 4) Fish and Wildlife Service's Incidental Take Statement is unlawful because it relies on non-native fish control which is not being implemented and fails to specify measureable limits for taking young chub;

- 5) Reclamation is violating the ESA because its operation of the Dam takes humpback chub without a valid Incidental Take Statement; and
- 6) Reclamation is violating ESA and NEPA consultation requirements in issuance of the Annual Operating Plan.

Both the Federal Government and Intervenor Opposition Briefs are currently due November 17, 2011. However, the Federal Defendants plan to request for an extension of time to December 19, 2011 to file its brief. The Intervenor will likely request an extension to track with that of the Federal Defendants. In the mean time, the Subunit is coordinating the Intervenor Group to develop a Brief asserting our position(s) in a manner that compliments, to the extent practicable, any brief filed by the Federal Government.

### WATER RIGHTS MATTERS

#### 7. Donala Water and Sanitation District (09CW73-2)

After the CWCB and the State and Division Engineers (the State)'s victory in this Division 2 water court case, the Applicant and the State have had several meetings and much correspondence to settle the issues to the satisfaction of the State. The litigated issue was whether water users can change their water rights to future uses without having to replace return flows even if they do not put the water to use and whether a prolonged period of non-use must be accounted for in the historical consumptive use analysis. The Court held that any change requires immediate replacement of return flows. As of the date of this Report, the Applicant has agreed to all the terms and conditions required by the CWCB and the State and Division Engineers, including immediate release of return flows to prevent injury to the instream flow. A one-day hearing for additional testimony has been set for November 20, 2011, but is likely to be vacated once the final decree and stipulation are signed.

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

Farmers Water Development Company ("Farmers") filed a Complaint for a Declaratory Judgment, arguing that its procedural due process rights were violated during the Board's contested hearing for the proposed instream flow on the San Miguel River. The Plaintiff alleges that the CWCB's contested hearing process is a quasi-judicial action and requires full due process protection, such as cross-examination and notice by water court resume or publication in a newspaper of general circulation.

The Attorney General's Office argued that the Court lacks subject matter jurisdiction because the Water court has the exclusive jurisdiction to review the CWCB's procedural and substantive actions in appropriating the instream flow. The attorneys also argued that the Court also lacks subject matter jurisdiction because Plaintiff failed to exhaust its administrative remedies when it failed to appear at the hearing to request cross-examination. The attorneys argued, in the alternative, that the Complaint should be dismissed for failure to state a claim upon which relief should be granted because the hearing before the CWCB was not quasi-judicial and the Plaintiff's property rights were not affected. Finally, the relevant statutes require neither cross-

examination nor notice by newspaper publication or water court resume, although they are specifically required for other CWCB proceedings.