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March 6, 2012

TO: Colorado Water Conservation Board

FROM: John W. Suthers
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Karen Kwon
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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. 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 conducted approximately 15 depositions over the last six weeks. Colorado will be filing expert reports related to Nebraska's proposal to change the RRCA Accounting Procedures in March. An additional two weeks of depositions are tentatively scheduled for the first two weeks in April. Oral arguments on a privilege dispute as well as a setting for trial will be conducted March 23rd. Additional briefing on legal matters will take place in May.

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 been fully updated with more recent data and is recalibrated based on that new data.

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

The Subdistrict is now working on its first annual replacement plan to replace injurious depletions caused by Subdistrict Well pumping. The Subdistrict must submit the plan to the SEO by April 15.

The Subdistrict and DNR/DWR are pursuing USDA approval of a Conservation Reserve Enhancement Program that to aid the Subdistrict's land fallowing efforts.

4. H-I Model for Arkansas River Compact Compliance under *Kansas v. Colorado*

A second adjustment to increase the accuracy and reliability of the H-I Model is underway since the Court's entry of the final decree in March, 2009. Kansas invoked the dispute resolution procedure in 2010 to request a change to reflect increased irrigation efficiencies for groundwater uses, which was resolved just before the December 2011 ARCA meeting in an agreement between the Colorado State Engineer and Kansas Chief Engineer. This January, Colorado proposed using field-specific GIS layers for the H-I Model's crop distribution data in place of the statewide statistics the model currently relies on. Kansas' experts are taking it under consideration. Colorado is proceeding with the more-accurate data in March 2012 model runs for 2011, in the expectation that Kansas will agree.

5. Arkansas River Irrigation Improvement Rules

The Rules became effective on January 1, 2011, and the first year of implementation was successful, albeit with plans for improvement. All maintenance flow releases that are currently required under the 2011 Rule 10 Plan has been made and the year-end accounting is underway. The Lower Ark District is preparing its application for the 2012 Plan. The "plan year" may need to be shifted to begin later in the Spring.

6. Platte River Recovery Implementation Program

Colorado, Nebraska, Wyoming, U.S. Department of Interior, and Central Nebraska Power and Irrigation continue to negotiate terms regarding a reservoir project in Nebraska. This reservoir project is anticipated to help retine water flows in the Platte River in Nebraska for habitat mitigation for several endangered and threatened species. Colorado is aiming to have its participation credited to its obligations under the Endangered Species Act and cover the current and future impacts of water development in the state. Because of budgeting and contracting concerns, the parties are trying to finalize an agreement this year.

DEFENSE OF THE COLORADO RIVER SUBUNIT

7. 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 (a/k/a Minute 319);
- Legal and policy implications regarding the FEIS and ROD for Aspinall Unit Operations;

- Coordination with Colorado's Advisors to the Colorado Commissioner to the Upper Colorado River Commission;
- Coordination on the Colorado River Compact Compliance Study;
- Coordination with the Water Bank Working Group;
- Coordination with the Basin States on scoping and preparing an alternative for 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 on intrastate water rights administration within the Colorado River Basin;
- Coordination and consultation with the Bureau of Reclamation and the seven Colorado River Basin states regarding Colorado River management under the Interim Guidelines; 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

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

All parties have filed Opening Brief. The 9th Circuit Court of Appeals denied the Grand Canyon Trust's Motion to stay briefing as a result of the Suggestion of Mootness. On February 27, 2012, the Trust filed a Response in Opposition to the Suggestion of Mootness. The Federal Government and the Intervenor have until March 5 to file a Reply. The case has been referred to the 9th Circuit Panel.

WATER RIGHTS MATTERS

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

The Denver District Court dismissed Farmers Water Development Company ("Farmers") Complaint for a Declaratory Judgment. The Denver District Court agreed with the CWCB's Response holding that alleged procedural deficiencies in the methods used by CWCB, even if they have constitutional implications, fall under the Water Court's jurisdiction. The Court noted that it was persuaded by the CWCB's submission of two decisions from other water courts that considered similar issues, and made similar findings in those cases.

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

Following dismissal of its Complaint from Denver District Court, Farmers Water Development Company ("Farmers") amended its statement of opposition in Water Court to include several counterclaims for declaratory judgment. Farmers alleges the statute authorizing the Board to appropriate instream flow rights, as well as the Board's Rules, and the procedures followed in this case violated Farmers' statutory and constitutional rights. Farmers alleges the Board's decision to appropriate an instream flow right is a quasi-judicial matter requiring full due process, including published notice in the water court resume and

direct and cross examination of witnesses during the Board's public deliberation. The CWCB filed a motion to dismiss several of Farmers' claims because Farmers failed to attend the Board's public deliberation, failed to request cross-examination, and failed to request additional notice. Farmers filed its response claiming it raised those issues in its rebuttal statement to the Board, but that the Board did not have authority to resolve those issues. The CWCB filed its reply on March 9.