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**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. Tamarack Ranch State Wildlife Area, Case Nos. 96CW1063 and 98CW463, Water Div.

Settled: This case involved for a plan for seventeen wells and associated recharge ponds on a state wildlife area (SWA) near Crook, Colorado. The uses by the Colorado Division of Parks and Wildlife (CPW) are for wildlife habitat on the SWA using up to 20,000 acre feet of water pumped from the alluvium of the South Platte River. The water will be used on the SWA and the recharge from the ponds flowing back to the river at a later time will offset the well depletions during the irrigation season. Excess flows will be available for lease to help defray operating costs. In addition, the retiming of flows in the river will unavoidably help meet the endangered species mitigation requirements under the Platte River Recovery Implementation Plan (PRRIP). In this way this project will allow coverage under PRRIP for municipalities, industry, and agriculture that would otherwise be required to find their own mitigation water, at a considerably higher cost. The last opposing party (Harmony Ditch Co.) settled and the Court entered a final decree confirming these water rights in July of 2012.

2. Platte River Recovery Implementation Program – J-2 Re-regulation Reservoir

The state continues to discuss options for the construction and operation of a re-regulation reservoir in Nebraska. Colorado, Nebraska, Wyoming, and the U.S. Bureau of Reclamation are working through the Nebraska Community Foundation in talks with Central Nebraska Public Power and Irrigation District. The objective of the project is to operate a reservoir as a reliable source of water to meet target flows as part of the mitigation needed to address endangered species requirements in the Platte River basin. Colorado intends to help fund the project as part of its contribution to the mitigation program.

3. Kansas v. Nebraska and Colorado, No. 126, Original (Republican River)

In this original action, Kansas asserts that Nebraska has willfully violated the Republican River Compact, and requests the Court to compel compliance and impose sanctions/damages. Trial for this interstate water case was held at the federal courthouse in Portland, Maine between August 13th and 18th. The Special Master heard testimony from twenty witnesses. Most of that testimony related to Nebraska's past and future efforts to comply with the Compact and the proper measure of Kansas' primary and secondary damages resulting from Nebraska's overuse of water during 2005 and 2006. Although the claims asserted are against Nebraska, Colorado participated as a party to this action as a signatory to the Compact, and because the outcome of this case will likely influence both Kansas and Nebraska's efforts to pursue claims against Colorado in the future. The Special Master has required the parties to submit post-trial briefs on September 24<sup>th</sup> and responses to each other's briefs on October 15<sup>th</sup>. Topics to be included in the briefs include, but may not be limited to: (1) Adopting changes to the Republican River Compact Accounting Model to prevent Nebraska and Colorado from being charged for consuming imported water; (2) disputing Kansas' claims for damages against Nebraska based on contempt and Nebraska's gains; (3) disputing Kansas' claims for preset sanctions for future violations; and (4) disputing Kansas' request for a River Master to enforce the Compact. Additionally, Kansas has agreed to pursue negotiations with Colorado regarding the Compact Compliance Pipeline and how it results in compliance of the Republican River Compact. The parties are currently scheduling dates for negotiations.

4. Animas La Plata Project

The Division 7 water court's retained jurisdiction over the water court decrees confirming the two Ute Tribes' allocations of water from the A-LP Project ends on December 31, 2012. The Tribes have not begun using water from the Project. In April, the State asked the United States, Ute Tribes, and Southwestern Water Conservation District to support a motion to extend the water court's retained jurisdiction. The matter is still being discussed by the several sovereigns involved, most recently in meetings on August 20 and September 4. The next discussion is set for October 1, 2012.

5. Water Division 3 Subdistricts

Subdistrict No. 1 has been replacing injurious stream depletions pursuant to its first Annual Replacement Plan (ARP) since May 1. Objectors filed challenges to the ARP and to the State Engineer's approval of the ARP in the Division 3 Water Court on May 15. Trial is set for two weeks starting October 29. The supporters of the ARP moved to dismiss portions of the challenges, and the court granted the motion in part, eliminating certain claims and narrowing the focus of the proceeding. The Supporters of the ARP submitted their initial expert witness disclosures on July 20. The Objectors have not retained an expert. The Objectors have filed three motions for summary judgment. The court denied the first motion, and the other two are still pending. The Objectors are also pursuing a request for disclosure of a very large set of Supporters' emails. The AG's coordinated a team effort to gather and sort all relevant communication and created a privilege log. Efforts are now again focused on trial preparation.

6. Rio Grande Compact Accounting Dispute

The Rio Grande Compact Commission did not approve an annual delivery accounting at its March 21 meeting but directed the Engineer Advisors for each state to meet and again attempt to agree. At issue is about 30,000 acre feet of NM and CO credit water (CO share is 2,000 acre feet) that the U.S. Bureau of Reclamation released to TX farmers from Elephant Butte Reservoir during the 2011 irrigation season and replaced with inflows later in the year, without the permission of NM and CO. TX is insisting on an accounting that does not recognize that credit water was released and that, in NM and CO's view, violates the terms of the Compact. The Engineer Advisors for each state met as the Commission directed, but were again unable to agree on an accounting. The Engineer Advisors expect to call a special meeting of the Commission to attempt to resolve this issue.

In August 2011, NM sued the Bureau over the release and related issues. In a recent Motion for Summary Judgment, NM explains how Reclamation's actions interfere with and violates the Rio Grande Compact. Colorado is assessing options and opportunities to intervene to protect our compact interests and rights to credit water.

DEFENSE OF THE COLORADO RIVER SUBUNIT

7. Legal counsel regarding Colorado River matters

The Subunit continues to provide the Colorado Water Conservation Board, Division of Water Resources, 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 Aspinall Unit Operations FEIS;
- Legal and policy implications of the benchmarks that were made part of the CA Quantified Settlement Agreement, Interim Surplus Guidelines, and Interim Guidelines;
- Coordination with Colorado's Advisors to the Colorado Commissioner to the Upper Colorado River Commission;
- Coordination on the Colorado River Compact Compliance Study;
- Coordination on the Water Bank Feasibility Study and the Aspinall/Blue Mesa water banking study;
- Coordination with the Basin States and Department of Interior on developing an alternative for 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 development of the Colorado River Basin Study;

- Coordination and consultation with the Bureau of Reclamation and the seven Colorado River Basin states regarding Colorado River management under the Interim Guidelines; and

Litigation with respect to Colorado River matters:

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

Court Victory: The Subunit participated in oral argument before the 9<sup>th</sup> Circuit Court of Appeals on June 11. On August 13, the 9<sup>th</sup> Circuit affirmed the District Court's finding that Annual Operating Plans for the Colorado River Basin are not subject to NEPA and/or ESA review. It further deemed as moot the Grand Canyon Trusts' remaining claims in light of promulgation of a new Biological Opinion and Incidental Take Statement associated with operation of Glen Canyon Dam.

WATER RIGHTS MATTERS

9. Applications for Water Rights of Montrose County (Consolidated Case Nos. 10CW164, 165, 166, 167, and 169)

The CWCB sought and was granted intervention in these water rights cases over the objections of the Applicants. The CWCB intervened because the Applicants sought conditional water rights for storage that would include recreation and piscatorial uses both within the reservoir and below the reservoir to an unidentified point. The Applicants also supported their claim for up to 3,200 acre-feet of potential demand for the conditional rights by citing the CWCB instream flow ("ISF").

The CWCB argued that the Applicants cannot prevent appropriations or exchanges of water from within the stream channel after that water is released from storage unless they have: (1) a recreational in-channel diversion ("RICD"); (2) an agreement with the CWCB to release to an ISF; or (3) an identified legal downstream beneficial use that would be injured thereby. The CWCB also argued that the definition of "beneficial use" allows water to be used recreationally either by "impoundment" in the reservoir or by a RICD in the channel, but once water is released from storage, it is in the natural channel of the stream and must be put to a statutorily-defined beneficial use or it is subject to appropriation by the next water user in priority.

The Colorado Supreme Court has recognized the Legislature's authority to sanction in-channel uses as a statutory, not constitutional, exception to the traditional diversion requirement. The Legislature has granted only two narrow exceptions to allow in-channel uses for recreational and piscatorial purposes. Senate Bill 97 granted the CWCB the exclusive authority to appropriate a "minimum stream flow" necessary to preserve the environment to "a reasonable degree." Senate Bill 216 ("SB 216") imposed restrictions on RICDs in reaction to the court-created exception to the diversion requirement that came out of *City of Thornton v. Fort Collins*, 830 P.2d 915 (Colo. 1992) ("*Fort Collins*").

The Applicants based the argument that water can be protected for piscatorial and recreational in-channel uses after release from storage without a RICD or ISF primarily on the 1992 holdings in *Board of County Comm's of the County of Arapahoe v. Upper Gunnison River Water Conservancy District*, 838 P.2d 840 (1992), which relied on the *Fort Collins* case. Because the holding in *Fort Collins* was superseded by statute and case law, the Applicants have no legal support for their argument that they can protect water rights in the channel without complying with the RICD statutes or having CWCB ISF protection. The plain language of the statutes, the legislative history and the case law concerning RICDs shows that once water is released into the natural channel of the stream, it is subject to appropriation unless it can be protected by a CWCB instream flow or by a RICD water right.

10. Application for Water Rights of the CWCB on Washington Gulch and the Slate River  
(10CW180)

This matter is a case in which the CWCB has acquired a water right historically used for irrigation and is now in the process of changing the water right to allow for instream flow use. The application has a number of objectors who seem vehemently opposed to the change case. The CWCB recently applied for and was granted by the State Engineer's Office a Substitute Water Supply Plan which would allow the CWCB temporary use of the water for one year while the change case is pending in court. For the purpose of the SWSP, the CWCB claimed flow rates much lower than those claimed in the court application in an effort to avoid opposition to the temporary plan and to increase the likelihood the plan would be granted. The State Engineer's Office did approve the SWSP application, however certain objectors to the court case have appealed the approval to district court.