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March 7, 2013

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. Water Division 3 Subdistricts

On February 28, Subdistrict No. 1 filed in the Division 3 Water Court a report on the operation of its 2012 Annual Replacement Plan. Subdistrict No. 1 exceeded its replacement water obligations during the 2012 Plan Year. Subdistrict No. 1 is currently developing its 2013 Annual Replacement Plan, which it must submit to the State Engineer for his review by April 15.

The parties continue to wait for the court's ruling following trial on the challenges to Subdistrict No. 1's 2012 Annual Replacement Plan as approved by the State Engineer. Trial was limited to addressing use of Closed Basin Project water as a replacement source in the ARP and inclusion of wells with augmentation plans in the ARP.

2. Water Division 3 Groundwater Use Rules

The State Engineer and the Attorney General's Office have resumed developing groundwater use rules for Water Division 3 and will likely present a final draft of the rules to the San Luis Valley Rules Advisory Committee in the Spring of 2013.

The Rio Grande Decision Support System peer review team has resumed its work on the RGDSS groundwater model. The team has finalized a map of response areas covering the San Luis Valley, but the team has not finalized the response functions for each area. Finalizing these response functions is a prerequisite to promulgating groundwater use rules and forming new subdistricts because the response functions will be used to determine the replacement water obligations for groundwater users. If finalizing the response functions requires more time than anticipated, the team has decided to release to the public in April the finalized map of response

areas, the streams that are depleted by groundwater pumping occurring in each response area, and preliminary estimates of the magnitude of those depletions. This information will allow for the financial planning necessary for forming new subdistricts.

In November the State Engineer published a draft policy aimed at more effectively holding ground water users to the volumetric limits of their well permits to reduce draft on the aquifers. The State Engineer will likely finalize and release the policy in March, 2013, with an effective date of January 1, 2014.

3. Rio Grande Compact Accounting Dispute and Litigation

The Rio Grande Compact Commission did not approve an annual delivery accounting at its March 21, 2012 meeting. 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.

In August 2011, NM sued the Bureau over the release of credit water and related issues. NM has filed a motion for summary judgment on grounds that the Rio Grande Compact precludes Reclamation for exercising discretion to make releases from Elephant Butte contrary to recommendations made by the Commission. In an effort to preserve the state's interest without provoking an interstate dispute, the AG's office filed a one-page amicus notice (instead of motion to intervene), noting that decisions in this case could implicate Colorado's interest in compact interpretation in general and credit water under the Rio Grande Compact in particular, and to the extent the Court decides the matter based on the Compact, we support the arguments asserted by New Mexico. The Court has not yet indicated whether it will accept Colorado's amicus information.

4. TX v. NM and CO

At the beginning of the year, Texas filed an original action in the U.S. Supreme Court asserting that New Mexico has violated the Rio Grande Compact and the Rio Grande Project Authorization Act. Texas claims in very general terms that New Mexico's post-compact surface water diversions and groundwater withdrawals interfere with availability of water intended for use in Texas. Texas further claims that its state adjudication of water rights assumes that New Mexico will comply with the Rio Grande Compact, and its failure to do so demonstrates an unwillingness to give full faith and credit to judicial findings in Texas. Finally, Texas asserts that New Mexico is making novel claims about compact interpretation in other forums that need to be addressed. Colorado has met with New Mexico and Texas officials.

The AG's office and the State Engineer's office have decided to file a response opposing Texas' motion for leave to file a complaint. Colorado's response will assert that, in an original action in the U.S. Supreme Court concerning a compact that apportions the waters of an interstate stream, the proper inquiry is whether the defendant State has violated one or more specific provisions of the compact. Colorado's response will state that it is unclear which specific provisions of the

Rio Grande Compact Texas alleges that New Mexico has violated, and therefore Colorado cannot support the litigation.

5. Republican River

Nebraska has invoked fast-track non-binding dispute resolution regarding its Alternative Water Short Year Accounting Plan (the “Accounting Plan”). The Accounting Plan extends the period for determining Nebraska’s compliance with the Republican River Compact. Compliance is determined by measuring Nebraska’s consumptive use of water. Without the Accounting Plan, during certain dry periods defined in the FSS, Nebraska’s compliance is determined using a two-year running average. Under the Accounting Plan, during those dry periods Nebraska would take extra steps to reduce its consumptive use in exchange for using a three-year running average to determine its compliance with the Compact. This type of alternative plan is allowed under the FSS.

Last fall, Nebraska submitted the Accounting Plan for approval by the Republican River Compact Administration. There, Colorado voted to approve the Accounting Plan. Kansas voted against the Accounting Plan. Now the states must select an arbitrator and schedule arbitration proceedings. According to the Final Settlement Stipulation (the “FSS”) entered in *Kansas v. Nebraska & Colorado*, Orig. No. 126, the States must conclude arbitration hearings by July 9, 2013. The Arbitrator must issue a decision on the Accounting Plan by September 10, 2013. If any state disagrees with the arbitrator’s decision, it may petition the Supreme Court of the United States to hear its case.

Nebraska has also submitted to the RRCA for approval its Rock Creek Augmentation Plan (the “Augmentation Plan”). Under the Augmentation Plan, Nebraska would retire lands and wells from irrigation, drill new wells, and deliver to the Republican River water pumped from those wells. Those deliveries would be used to offset depletions caused by well-pumping in other areas of the state. The RRCA will hold a special meeting to vote on the plan during the first week in March. If the RRCA does not approve the plan unanimously, Nebraska will again invoke fast-track non-binding dispute resolution. In this case, the States must complete arbitration hearings by August 21, 2013. The Arbitrator must issue a decision by October 23, 2013.

6. Animas La Plata Project

Several meetings with the Ute Tribes and United States have occurred since the last report. The association of A-LP Participants (including CWCB) met with the SEO and SWCD on December 18, 2012 to discuss the draft Administrative Protocol for the Project. Modifications were agreed to and a revised draft is underway. The Moving Parties met on January 21 to scope issues for a stipulation to file in the Tribal Decree cases allowing retained jurisdiction to end. The State circulated its draft on February 12 and the Tribes and U.S. responded with revisions on February 22, and requested that no Project operations be mentioned or covered by the Stipulation. We then hosted four-sovereign (State, two Tribes, U.S.) negotiation in this office on Feb 27. The Tribes and U.S. sent further revisions on March 1. Next, the State will draft an MOU that addresses the terms needed regarding Project Operations, to be signed simultaneous with or

before the Stipulation is filed. The State will meet internally over the next few weeks to discuss further changes to the draft Stipulation and to craft protective terms for the CWCB to propose for the MOU. The deadline is August 30. The next scheduled meeting is another Protocol discussion in Ignacio on March 26.

7. Kansas v. Colorado

Kansas agreed at the latest Arkansas River Compact Administration meeting to devote significant staff time to addressing Kansas's list of complaints about the LAWMA decree. We sent Kansas a proposed decree in 10cw85 (a related LAWMA change case) in January. Kansas has requested to delay talks until it sends written comments on that proposed decree, which it committed to do by March 22. The State informed the water court that it will wait for Kansas' input before finalizing its consent to that decree. Several other objectors have also not stipulated, and the water court set trial for April, 2014.

8. Scherrer Ditch Abandonment Protests

This senior 3 cfs surface water right on the South Fork of the Republican is the subject of four protest cases in Division 1. The State has proposed a "global settlement" with the four parties. The Lengel and Homm families and the Engineers have authorized the general settlement outline. The Homms must now approach the Republican River Water Conservation District with their request for funds for new infrastructure, a prerequisite they have presented to the withdrawal of their protest.

DEFENSE OF THE COLORADO RIVER SUBUNIT

9. 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 regarding the Aspinall Unit Operations FEIS and operation of Redlands Fish Ladder;
- 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 Studies for Water Bank Feasibility and Blue Mesa Water Banking;
- Coordination with the Basin States to prepare 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 Colorado River management under the Interim Guidelines; and

- Coordination and consultation with the Bureau of Reclamation and the seven Colorado River Basin states on implementing Minute 319 to the Mexico Treaty.

10. Tarrant Regional Water District v. Herrmann

On January 4, 2013, the U.S. Supreme Court granted certiorari, involving the Red River Compact between Texas, Oklahoma, Louisiana and Arkansas. The water district in Texas claims that Oklahoma's state laws governing export of water beyond its borders violates the dormant commerce clause and the Red River Compact. Both the district court and 10th Circuit Court of Appeals denied Tarrant's claims and affirmed Herrmann's (Oklahoma's) authority to administer water within its boundaries consistent with the terms of the Compact. The Court asked the Solicitor General to opine on the petition for certiorari. In response, the Solicitor indicated that the case did not have to be decided on the Dormant Commerce Clause and that Oklahoma's statutes conflicted with the Compact. As such, the Court should hear the case and reverse the 10th Circuit's decision.

As a headwaters state, Colorado relies on nine interstate water compacts to provide security and certainty in the availability and administration of water within its borders. How the Supreme Court decides application of the Dormant Commerce Clause to state water laws and applies compact law to interpret the Red River Compact, Colorado's interest in interstate water compact could be directly implicated. Colorado, through the Defense of the Colorado River Unit, plans to file an Amicus in this case on March 28, 2013.

WATER RIGHTS MATTERS

11. Application of the Colorado Water Conservation Board for an Instream Flow Water Right on the San Miguel River, Case No. 11CW129, Water Division No. 4

After nearly a month of intensive negotiations between the two parties, the Colorado Water Conservation Board ("CWCB") and the Board of County Commissioners of Montrose County signed a stipulation that resulted in Montrose County's agreement to the CWCB's instream flow water right on the San Miguel River in the amounts, times, and stream segments as appropriated. Montrose County had opposed the CWCB's water right since well before the CWCB appropriated its water right in 2011, had contested the appropriation during the CWCB's internal administrative process, and had opposed the CWCB's application for water rights in Water Court. As part of the stipulation, Montrose County agreed to purchase the Johnson Ditch water rights and other groundwater rights from the CWCB after those water rights are transferred to the CWCB pursuant to the Uravan Trust Agreement, which was a condition imposed as part of a reclamation project. Montrose County also agreed to deliver water to the CWCB's instream flow water right on the San Miguel River in the event Montrose County makes absolute its conditional water rights for instream piscatorial uses. Based upon the settlement of the Johnson Ditch water rights, Tri-State Generation and Transmission, Inc., and Western Fuels-Colorado, LLC, also agreed to sign a stipulation to withdraw its opposition to the instream flow application. Only one party, Farmers Water Development Company, remains actively opposed to the CWCB's application for an instream flow water right on the San Miguel River. The

CWCB anticipates proceeding to trial against Farmers, but the CWCB's preparation for trial has been simplified and the issues narrowed significantly.