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TO: Colorado Water Conservation Board

FROM: John W. Suthers
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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 ("ARP"). Subdistrict No. 1 exceeded its replacement water obligations during the 2012 Plan Year. No party challenged the report within the 30 days allowed for challenges.

On April 10, the Division 3 Water Court issued its ruling on the challenges to Subdistrict No. 1's 2012 Annual Replacement Plan as approved by the State Engineer. The ruling was a complete win on all issues, including the use of Closed Basin Project water as a replacement source in the ARP and the methodologies used to develop the ARP. This ruling provides certainty going forward for Subdistrict No. 1 and future subdistricts.

On April 15, Subdistrict No. 1 submitted its 2013 ARP. The State Engineer approves the plan on April 30. The 2013 ARP Plan Year begins May 1, 2013.

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 Summer of 2013. The most challenging work remaining is deciding the extent to which individual water users must contribute to the sustainability of the aquifer from which they are diverting.

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.

The team plans to release to the public this summer 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. On the other hand, the preliminary estimates of replacement obligations will be very controversial if they are more onerous than Subdistrict No. 1's obligations, which is likely.

2. 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. NM initiated a lawsuit against the Bureau in 2011 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. To preserve the state's interest without provoking an interstate dispute, the CO 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 if decided based on compact interpretation in general and credit water under the Rio Grande Compact in particular. Thus, 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.

3. TX v. NM and CO

In January, TX filed with the U.S. Supreme Court a motion for leave to file complaint (and attached the complaint) concerning water rights and operations in the Rio Grande Basin. The Complaint alleges that NM is interfering with Rio Grande Project operations and that this amounts to a compact violation. Although the complaint names CO as a defendant due to its status as a compact signatory, it does not assert any claims against CO. The Court must grant the motion before Texas can proceed with its complaint. CO and NM filed responses in opposition. Several amici have also filed briefs on either side. CO's response points out that Texas has not clearly identified a compact violation. The Court has invited the Solicitor General to file a brief, but has not set any schedule for further action. The Federal and Interstate Water Unit will continue to be actively involved in this case as it develops.

4. Republican River

The Colorado State Engineer submitted to Nebraska and Kansas our proposals for the Compact Compliance Pipeline and Bonny Reservoir Accounting. The States will vote on the proposals during a special meeting of the Republican River Compact Administration (“RRCA”) on May 2, 2013. If the RRCA does not unanimously approve the proposals, Colorado will invoke non-binding fast-track dispute resolution. An arbitrator would be required to issue a written decision by November 28, 2013.

In short, these plans would bring Colorado into compliance with the Republican River Compact. The Pipeline Proposal would deliver water from the Ogallala Aquifer to the North Fork of the Republican River to offset over-consumption. Wells that were once used for irrigation will now be used to feed the pipeline. Each year, Colorado will calculate the amount of water it needs to deliver from the pipeline in order to offset over-consumption and comply with the Compact. The Bonny Reservoir Proposal would change the Republican River Compact Accounting so that Colorado is not charged for evaporation from the reservoir when, in fact, the reservoir is empty. Under the current accounting, we are automatically charged with consuming that amount of water that would evaporate from the reservoir if it were full. Often, that amount of water is the difference between compliance and non-compliance on the South Fork of the Republican River, where Bonny Reservoir is located.

This process for considering and implementing these plans is in addition to the ongoing interstate litigation regarding Nebraska’s compact compliance, and the fast-track non-binding dispute resolution that Nebraska recently invoked regarding its Alternative Water Short Year Accounting Plan (the “Accounting Plan”) and Rock Creek Augmentation Plan (“the Augmentation Plan”).

DEFENSE OF THE COLORADO RIVER SUBUNIT

5. Legal counsel regarding Colorado River matters

The Defense of the Colorado River Subunit continues to provide the Colorado Water Conservation Board, Division of Water Resources, Department of Natural Resources, and Upper Colorado River Commission legal research, counsel, and/or advice on topics such as:

- Coordination with the seven Colorado River Basin States, Bureau of Reclamation, International Boundary and Water Commission and NGOs on implementation of Minute 319 to the US/Mexico Treaty;
- Counsel regarding development of an operating protocol for the Animas-La Plata Project;
- Counsel regarding Indian water rights claims and settlements;
- Coordination with the seven Colorado River Basin States on next steps concerning the Colorado River Basin Study;

- Coordination with the Upper Colorado River Commission and implementation of the Upper Colorado River Basin Compact
- Colorado River Compact Compliance Study and the Colorado River Water Supply Availability Study;
- Coordination on the 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 and consultation on intrastate water rights administration within the Colorado River Basin; and
- Coordination and consultation with the Bureau of Reclamation and the seven Colorado River Basin states regarding Colorado River management under the Interim Guidelines.

6. Tarrant Regional Water District v. Herrmann

The U.S. Supreme Court heard oral arguments in this case on April 23, 2013. The State of Colorado authored an *amici* brief that was joined by six other states (Idaho, Indiana, Michigan, Nevada, New Mexico and Utah) in support of the Respondents, the Oklahoma Board of Water Resources.

In this case, Tarrant Regional Water District (a municipal water provider in Texas) claims that Oklahoma's water export laws violate the dormant Commerce Clause and the Red River Compact. The U.S. Solicitor General filed a brief agreeing with Tarrant's claim that Oklahoma's statutes conflict with the compact, and argued that this aspect of the case should be remanded to the district court for additional fact finding. The U.S. did not think the case raised a valid dormant Commerce Clause issue.

Colorado's nine interstate water compacts gave the State a significant interest in the outcome of this case. Colorado invited other states to join our brief through NAAG and our interstate contacts. The resulting seven State *amici* brief argues that the Tenth Circuit's decision is consistent with previous federal and state case law and should therefore be upheld. Our brief focused on several critical legal issues, such as:

- Silence in a compact, by itself, cannot be sufficient to grant permission for one state to cross another state's borders;
- Interstate water compacts should be interpreted with respect for state sovereignty and deference to state water laws. Specifically, compact provisions clarifying the signatory states' ongoing authority to control use and appropriation of water within their borders cannot be treated as mere "boilerplate," as argued by Tarrant.
- Interstate water compacts are intended to equitably apportion water in perpetuity. And interstate compacts, like other contracts, should provide certainty to the compact signatories.
- Finally, the Dormant Commerce Clause is not applicable to this dispute because the Red River is subject to a valid, congressionally adopted interstate compact.

WATER RIGHTS MATTERS

7. In re Application of GRE II, LLP, Case No. 11CW117, Water Division No. 5

The Applicant, a property owner, sought to claim a junior priority storage right and to change its share of the Red Mountain Extension Ditch, priority 205, from irrigation use to aesthetic, livestock, piscatorial, and recreation uses for a small pond on the property. The landowner had used its ditch shares in the pond pursuant to SWSPs in previous years. The Red Mountain Extension Ditch diverts from Hunter Creek, but return flows from irrigation with the Ditch historically accrued to a location within the reach of the CWCB's ISF on Woody Creek. Instream flows possibly affected by the Application included Hunter Creek, Woody Creek, and the Roaring Fork River. Other opposers included certain other ditch users and the Pitkin County Board of County Commissioners.

After nearly two years of negotiations between the Applicant, the CWCB, the Division Engineer's Office in Water Division No. 5, and the Applicant's engineering firm, the CWCB stipulated to a decree that the CWCB believes best protects its ISF water rights in the affected streams. Under the decree, the Applicant is required to curtail its uses when out of priority, and deliver water to a point on the dried-up land associated with return flows from historic irrigations in order to mimic the timing, amount, and location of return flows. The Applicant's decree allows it to operate its new uses while ensuring protection for the CWCB's ISF water rights.

8. In re Application of ACA Products, Inc., Case No. 11CW93, Water Division No. 2

The Applicant, a gravel pit mine operator, sought to appropriate an exchange priority and a plan for augmentation for summer mine operations. The mine operator leased Twin Lakes shares and applied for a decree to exchange them up the Arkansas River, up Halfmoon Creek, and into the Templeton Ditch which would fill two small washponds. The mine operator also sought a decreed plan for augmentation to operate a small-capacity well for domestic uses by mine employees.

After discussions between the State and Division Engineers, the CWCB's engineer, and the Applicant's engineering firm, the parties agreed that the well's depletions accrued to the Arkansas River instead of to Halfmoon Creek, where the CWCB holds an ISF water right. In response to the CWCB's concerns, the Applicant provided additional information, agreed to restore the Templeton Ditch headgate, and agreed to restrict operation of the Halfmoon Creek exchange when the CWCB's ISF water right is not being met. The CWCB stipulated to the entry of a decree on these terms because it protected the CWCB's ISF water right on Halfmoon Creek from injury. The State and Division Engineers remain parties to the case.

9. In re Application of Lizard Head Wilderness, LLC, Case No. 11CW48, Water Division No. 4

The Applicant, a large hobby ranch at the foot of Mount Wilson near Telluride, applied for a junior priority storage right for an existing small pond on a tributary drainage, and a change of a small part of its ownership in the Pleasant Valley Ditch, priority no. 166, for aesthetic,

recreational, livestock, and piscatorial uses in the pond. The Ditch diverts off of Big Bear Creek, a tributary to the San Miguel River. The CWCB opposed the application to protect its ISF water rights on Big Bear Creek and the San Miguel River.

After negotiations between the parties, the Applicant agreed to withdraw its claim for a junior priority storage right and agreed to continue diverting an amount attributable to historic irrigation return flows during the irrigation season. The Applicant will divert, measure, and return an amount of water attributable to historic return flows to a point on the dried-up parcel of land at which return flows most likely collected and returned to the stream. Based on these concessions, which should prevent injury to the CWCB's ISF water rights, and based on discussions with the Division Engineer's Office of Water Division No. 4, the CWCB stipulated to a decree that grants the change of water right.

10. In re the CWCB's Application for an Instream Flow Water Right on the San Miguel River, Case No. 11CW129, Water Division No. 4

Only one party – Farmers Water Development Company, remains opposed to the entry of a decree granting the CWCB's ISF water right on the San Miguel River. The CWCB's appropriation was the subject of a contested proceeding before the CWCB in September 2011. Other opposers to the CWCB's decree settled with the CWCB on terms that do not affect the CWCB's appropriation.

Trial on this matter is scheduled to begin June 3, in Montrose. However, Farmers Water Development Company has advised the court and the CWCB that its claims have been fully briefed in pretrial motions. Farmers does not intend to challenge the CWCB's record of its administrative proceeding and will not offer expert testimony challenging the ISF appropriation. The parties continue to wait for an order that may resolve several pretrial motions regarding legal issues related to the CWCB's administrative appropriations procedures and the constitutional due process rights of Farmers and other water users. The necessity of a trial in this matter will be determined by the judge's order(s) on those motions.

11. ISF Appropriations: Pole Creek, 12CW266, and Stuck Creek, 12CW267, Water Division No. 1

The Water Court of Water Division No. 1 entered a final ruling and decree for the CWCB's Stuck Creek ISF appropriation in late April 2013. The referee of Water Division No. 1 has entered a proposed ruling and decree for the CWCB's Stuck Creek ISF appropriation, and a final ruling and decree for Stuck Creek is expected shortly. No parties opposed either application.

12. Application of Eldorado Artesian Springs, 02CW292, Water Division 1

Eldorado Springs applied for a change of water rights and augmentation plan to supply water for domestic use in the Eldorado Springs subdivision, recreational use in the neighborhood swimming pool, and commercial water bottling. The Colorado Water Conservation Board filed a statement of opposition to protect its instream flow right on South Boulder Creek, and the State and Division Engineers filed a statement of opposition to ensure that the change of

water rights and augmentation plan would not injure other water rights. Applicant operated the plan for eleven years pursuant to the State and Division Engineer's approval of substitute water supply plans. Even after the plan was significantly revised, two concepts presented particularly difficult issues for the parties to resolve. The first issue was an "intra-ditch exchange" that would allow Applicant to use its replacement supplies during times of the year when these supplies would normally be unable to divert water from South Boulder Creek. After extensive negotiation and decree revision efforts, including a very specific description of the operation, measurement, and accounting, CWCB was able to get Applicant to agree to terms and conditions that would prevent injury to its instream flow right, and the State and Division Engineers agreed that it could administer the intra-ditch exchange without injury. The second issue was neighborhood's change from individual septic systems to a centralized wastewater treatment system. This change resulted in an alteration of the way that return flows from domestic use returned to the stream, which increased the depletion to the instream flow right in a certain reach of South Boulder Creek. Applicant had not presented a way to prevent this injury to CWCB's instream flow right, and the parties seemed to reach an impasse in the weeks prior to trial. However, on the eve of trial, Applicant agreed to seek an injury with mitigation approval from the Board of the CWCB. Until this proposal was approved by the Board, Applicant agreed to provide replacement water in a manner that would prevent injury to CWCB's instream flow right. Based on the resolution of these issues, Applicant was able to settle the case just prior to trial. Applicant and CWCB are working together to develop an injury with mitigation proposal that will allow Applicant to operate its wastewater treatment system, while at the same time providing some meaningful benefit to the South Boulder Creek fishery.

13. Applicant Busk-Ivanhoe, Inc., in Case No 09CW142

In March, the CWCB reached settlement with Applicant Busk-Ivanhoe, Inc., in Case No 09CW142. Busk-Ivanhoe agreed to include a term and condition in its decree which states that it seeks no appropriative rights of exchange in this change of a trans-basin diversion for municipal use by the City of Aurora.