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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. Rio Grande Basin

Groundwater management: 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 or fall 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.

The team plans to release to the public this summer/fall 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.

2. Texas v. New Mexico and Colorado, No. 141 Original, United States Supreme Court

Texas' Motion for Leave to File a Complaint is still pending before the U.S. Supreme Court. 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. Because the Court asked the U.S. Solicitor General to provide the United States' opinion, a team of Colorado representatives met on June 18, 2013 with the Solicitor General representatives to discuss our perspectives of the case. The Federal and Interstate Water Unit will continue to be actively involved in this case as it develops.

3. Republican River

Nebraska has submitted another proposal (this is the 3rd) to the Republican River Compact Administration (the "RRCA"). Under the Cooperative Republican Platte Enhancement (N-CORPE) Augmentation Plan Proposal (the "Proposal"), Nebraska would retire lands from irrigation and deliver to the Republican and South Platte Rivers water pumped from those wells that were formerly used for irrigation. Water delivered to the Republican River would be used to offset depletions caused by well-pumping in other parts of the state. Water delivered to the South Platte River would be used to enhance stream flow in the Platte River Basin. The RRCA will hold an informal workshop to discuss the proposal on June 27th. The RRCA will vote on the Plan on or before July 10, 2013. If the RRCA does not approve the plan unanimously, Nebraska will invoke fast-track non-binding dispute resolution. In this case, the States must complete arbitration hearings by December 4, 2013. The Arbitrator must issue a decision by February 2, 2014.

Colorado, Nebraska, and Kansas are preparing to arbitrate two other plans that Nebraska submitted to the RRCA during 2013. The first plan is Nebraska's Alternative Water Short Year Accounting Plan (the "Accounting Plan"). The Second is Nebraska's Rock Creek Augmentation Plan (the "Augmentation Plan"). Both plans are being arbitrated in non-binding fast-track dispute-resolution under the Final Settlement Stipulation (the "FSS") entered in *Kansas v. Nebraska & Colorado*, Orig. No. 126. The states have begun filing expert reports and deposing each other's experts in anticipation of the arbitration hearing to be held during the end of August, 2013. The Arbitrator must issue decisions in those cases by November 30, 2013.

DEFENSE OF THE COLORADO RIVER SUBUNIT

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:

- 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;
- Coordination with the Upper Colorado River Commission and implementation of the Upper Colorado River Basin Compact;
- 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;
- 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.

4. Litigation - Tarrant Regional Water District v. Herrmann

On June 13, 2013, the U.S. Supreme Court issued a unanimous opinion upholding the 10th Circuit's decision in *Tarrant Regional Water District v. Herrmann*. The Court's decision is consistent with the positions that Colorado, through the Defense of the Colorado River Unit, presented in the Colorado's amicus brief, joined by six other States, filed on March 28, 2013. Specifically, Colorado argued, and the Court agreed, that a compacting State's internal water laws are not pre-empted by an interstate compact, unless pre-emption is expressly stated in the compact. Further, Colorado argued, and the Court agreed, that the dormant Commerce Clause is inapplicable in disputes involving interstate streams subject to interstate compacts.

5. Navajo Nation v. United States Department of Interior, et. al.

On June 3, 2013, the Navajo Nation filed a Motion for Leave to File Amended Complaint against the Department of the Interior, et. al. In the proposed amended motion, the Navajo claim that the federal government has failed to protect and pursue the rights of the Navajo to the Lower Colorado River in implementing and the 2001 Interim Surplus Guidelines, 2007 Interim Guidelines for Lower Basin Shortages and Coordinated Management of the Lake Powell and Lake Mead, Interstate Water Banking, Inadvertent Overrun Payback Policy, and contract with Arizona for release of Colorado River water. Responses to the motion have not yet been filed, and the motion is not yet at issue. The Subunit will actively monitor this action and move to intervene as appropriate.

WATER RIGHTS MATTERS

6. Application for ISF Water Right on San Miguel River, Case No. 11CW129, Water Division No. 4

On April 30, 2013, the Court ruled in the CWCB's favor on its C.R.C.P. 56(h) Motion, and against the remaining opposer, Farmers Water Development Company, on its C.R.C.P. 56(h) and Summary Judgment Cross-Motions. The CWCB requested the Court to determine that its ISF appropriation proceedings, conducted under the CWCB's ISF Rules for contested proceedings, constitute quasi-legislative actions. Farmers sought a determination that the

CWCB's ISF appropriation procedures constitute quasi-judicial actions and sought summary judgment against the CWCB for failing to provide full adjudicatory, constitutional due process rights during ISF appropriation proceedings.

In its Order, the Court held that the CWCB acts in a quasi-legislative capacity when it appropriates water rights on behalf of the people of the state of Colorado to preserve the natural environment to a reasonable degree, for the following reasons: (1) the CWCB's hearings on a contested ISF appropriation are not designed to determine the rights or duties of specific individuals, (2) per statute, CWCB is directed to provide for "public notice and comment" when it seeks to appropriate ISF water rights; and (3) an ISF appropriation is purely prospective in nature and affects the public at large rather than specific individuals. Because administrative agencies acting in a quasi-legislative action are not required to provide full adjudicatory procedures during its action, including public notice and a hearing that includes a right to cross-examine witnesses, the Court denied Farmers' Motion for Summary Judgment on its counterclaims.

Shortly after the issuance of this order, Farmers stipulated to the entry of a decree. After nearly three years of discussions and negotiations, a contested proceeding, and two district court cases raising constitutional challenges to the CWCB's instream flow appropriation process, the CWCB's instream flow water right on the San Miguel River was decreed by the Division 4 Water Court on May 21, 2013. The CWCB's water right to preserve the natural environment of the San Miguel River claims a flow range of 80 cfs (fall-winter) to 325 cfs (spring).

7. Johnson Creek instream flow water rights

In June, the Division 1 Water Court entered final decrees for three instream flow water rights on Johnson Creek in the Laramie River Watershed, Case Nos. 12CW274, 12CW275, and 12CW276.

8. Freemont Pass water rights

The CWCB also stipulated to a proposed decree in the applications of Fremont Pass Ditch Company, Case Nos. 09CW187 and 09CW188. These are applications that will: (1) change the use of a transbasin diversion from Division 5 that was historically used for supplemental irrigation in the Arkansas River Basin of Division 2 to municipal use by the City of Aurora in Division 1 and mining use by Climax Molybdenum Company in Divisions 2 and 5; and (2) add a junior diversion for the new municipal and mining uses. The CWCB stipulated to a proposed decree which sets a 1.5 c.f.s. bypass for the new junior diversion to protect the CWCB's instream flow water rights in the Eagle River Basin in Division 5.