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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. **Republican River**

Colorado, Nebraska, and Kansas held a hearing before Special Master Kayatta in *Kansas v. Nebraska & Colorado*, Orig. No. 126 on August 15, 2013. The purpose of the hearing was to finally decide whether the Special Master should recommend to the U.S. Supreme Court that it adopt a change to the Republican River Groundwater Model. Colorado and Nebraska proposed the change last year during proceedings to quantify the extent to which Nebraska had violated the Republican River Compact. Closing briefs were submitted August 30, 2013. During the hearing, the Special Master indicated that he would file his final report during the fall of 2013.

In addition, the Colorado State Engineer submitted proposals to Nebraska and Kansas for Colorado's Compact Compliance Pipeline and Bonny Reservoir Accounting. Kansas rejected the proposals during a special meeting of the Republican River Compact Administration ("RRCA"). As a result, Colorado has invoked non-binding fast-track dispute resolution pursuant to the Final Settlement Agreement for the Republican River. Martha Pagel, who was the arbitrator for the non-binding arbitration that occurred in 2011, has been selected to arbitrate Colorado's proposed plans. This arbitration is expected to begin in October and a decision expected by late November.

Note, the arbitration process in place for considering and implementing the Compact Compliance Pipeline and Bonny Reservoir Accounting are in addition to the fast-track non-binding dispute resolution that Nebraska invoked regarding its Alternative Water Short Year Accounting Plan (the "Accounting Plan"), the Rock Creek Augmentation Plan ("the

Augmentation Plan”), and potentially the Cooperative Republican Platte Enhancement Augmentation Plan Proposal (“the N-CORPE Plan”). The parties arbitrated the Accounting Plan and Augmentation Plan in Denver during the last week of August. A decision is expected in late October. The N-CORPE Plan arbitration will occur in late November with a decision expected in early February.

2. 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 later in 2013.

The Rio Grande Decision Support System peer review team has intensified its efforts to improve the RGDSS groundwater model, meeting more frequently than in previous years and making major decisions at most meetings. 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. State Engineer Dick Wolfe is personally involved in the peer review process and has urged his staff to finalize the response functions and the groundwater use rules as soon as possible.

During the week of September 9 or September 16, the State Engineer plans to release to the public an estimate of the stream depletions for each stream system that the RGDSS groundwater model response functions will likely predict once finalized. This information will allow for the financial planning necessary for forming new subdistricts. The peer review team is considering the reliability of the results in the San Luis Creek and Saguache Creek response areas and may need to delay releasing preliminary results for these areas.

Dick Wolfe will also speak before the Water Resources Review Committee on September 26, 2013. Several residents of the San Luis Valley contacted the Committee to express their concerns about groundwater regulation in Water Division 3. Senator Gail Schwartz asked Dick Wolfe and Steve Vandiver (General Manager of the Rio Grande Water Conservation District) to attend the meeting. An Assistant Attorney General will attend as well.

3. 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 Colorado as a defendant due to its status as a compact signatory, it does not assert any claims against our State. 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 on the case. The Federal and Interstate Water Unit will continue to be actively involved in this case as it develops.

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 in diligence proceedings regarding water rights in 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 and counsel to CWCB regarding the 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. 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

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

Farmers Water Development Company filed its Notice of Appeal in the Colorado Supreme Court, Case No. 13SA173, appealing the Division 4 Water Court's rulings on the CWCB's CRCP 56(h) Motion for Determination of Question of Law and Farmers' Motion for Summary Judgment. Based on the expected briefing schedule under the Appellate Rules, briefing by the parties should be completed by January 8, 2014. Farmers framed the issues on appeal as follows:

- A. Whether the Division 4 Water Court erred in determining that the CWCB administrative process for appropriation of MISF water rights do not affect the rights and duties of specific individuals, but rather reflect an enactment of legislative policy;
- B. Whether the Division 4 Water Court erred in determining that statutory requirements for an informal public "notice and comment" procedure in the CWCB administrative process are determinative as to whether constitutional due process requirements for notice and an opportunity to be heard, including a formal adversarial hearing, are applicable;
- C. Whether the Division 4 Water Court erred in determining that the CWCB MISF appropriation "has a purely prospective application" that affects only the public at large, and not the rights of specific parties;
- D. Whether the Division 4 Water Court erred in determining that the CWCB administrative process for appropriation of MISF water rights is quasi-legislative in nature, not quasi-judicial; and,
- E. Whether the Division 4 Water Court erred in denying Farmers' claims for Summary Judgment based upon the determinations referenced above.

6. Colorado Springs and Aurora, 95CW272(B), Division No. 5

Last month, Applicants moved to dismiss this case. The court granted the unopposed motion during the last status conference. This case was the groundwater portion of revisions to the Homestake project in the Eagle river basin. The cities of Aurora and Colorado Springs had applied for several changes and additions to the Homestake Project: enlarge Homestake Reservoir, make changes in points of diversion to its collection system, add new reservoirs, and add a well field collection system and underground storage at the Camp Hale site in the upper Eagle river valley. Both the SEO and CWCB were able to reach a stipulated agreement on the surface water portions of the case. The surface and ground components were separated as part of the settlement efforts. Applicants and the state agencies had not been able to reach agreement on several technical issues in the groundwater case. After further evaluation, the Applicants decided to drop their efforts on adjudicating the groundwater portion and dismissed the case.