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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. **Rio Grande Basin:**

Groundwater Use Rules: Pressure on the State Engineer to finalize Groundwater Use Rules and complete the remaining groundwater modeling for Water Division 3 remains intense. State Engineer, Dick Wolfe, and members of his staff met with the San Luis Valley Advisory Committee for Groundwater Use Rules in Alamosa on December 12, 2013. More than 100 people attended the meeting in which Dick and his staff explained the most recent draft of the Water Division 3 Groundwater Use Rules and received comments from attendees. Dick has publicly stated that he will file Rules in the Division 3 Water Court before the end of April, 2014. Although the major water user groups will support the Rules, it is very likely that lengthy, complex litigation will follow.

Texas v. New Mexico and Colorado, No. 141 Original, United States Supreme Court: At the request of the United States Supreme Court, the United States filed a friend of the court brief in this litigation. The U.S. brief urged the Supreme Court to accept the complaint filed by Texas against New Mexico regarding Rio Grande water received from Elephant Butte Reservoir. The U.S. also recommended that the Court keep the case to resolve threshold legal issues before referring it to a Special Master and allow New Mexico to file a motion to dismiss. At the invitation of the Court, Colorado filed a supplemental brief maintaining that Texas has not alleged violation of any Rio Grande Compact terms. Instead, the U.S.'s brief highlighted a number of Bureau of Reclamation issues about the operation of Elephant Butte Reservoir that are not directly tied to the Compact. Colorado did agree that if the Court accepted the case, it should initially dispose of threshold legal issues and requested the ability to participate in any motion to dismiss.

Silvery Minnow: The Bureau of Reclamation is trying to work with the Rio Grande Compact Engineer Advisors for Colorado, New Mexico, and Texas to explore ways to promote spawning conditions for the Silvery Minnow, an endangered species. These talks are in the preliminary stages and the Colorado representatives are focused on trying to identify ways to help the Silvery Minnow without impacting Compact rights and obligations.

Yellow Billed Cuckoo: On October 3, 2013, the Fish and Wildlife Service proposed to list as Threatened the western yellow-billed cuckoo in the western United States as well as Canada and Mexico. In the U.S., the western yellow-billed cuckoo is known to occur in Arizona, California, **Colorado**, Idaho, Nevada, New Mexico, Texas, Utah, Wyoming, Montana, Oregon, and Washington. Although the initial public comment period for the proposal ended on December 2, 2013, the Service re-opened the comment period to until February 24, 2014 to “ensure the public has adequate opportunity to submit comments on this proposal.” These public comments are intended to help ensure that any final decision made by the U.S. Fish and Wildlife Service reflects all of the best science and information available. The Federal & Interstate Water Unit will coordinate with the Division of Water Resources, Colorado Water Conservation Board, Division of Parks and Wildlife and Department of Natural Resources to provide relevant comments on the listing of the species and designation of critical habitat in the Rio Grande basin.

2. *Republican River:*

Kansas v. Nebraska & Colorado, Orig. No. 126: Special Master Kayatta issued his Report in *Kansas v. Nebraska & Colorado*, Orig. No. 126, which found Nebraska violated the Republican River Compact in 2005 and 2006 by consuming more water than it is allowed under the Compact. The Report awards Kansas \$3.7 million for damages it suffered as a result of Nebraska’s overuse. It also awards to Kansas an additional \$1.8 million, which the Special Master says “represents a disgorgement of the amount by which Nebraska’s gain exceeds Kansas’ loss.” The Report, however, includes no calculation of Nebraska’s actual gain. In addition to these findings regarding Nebraska’s violation of the Compact, the Report approves a change to the Republican River Groundwater Model. Colorado and Nebraska proposed the change to correct a problem with the existing Model that resulted in Nebraska being charged with consuming water imported from the South Platte River, as if it were water from the Republican River.

On January 13, 2014, the U.S. Supreme Court invited the parties to file Special Exceptions to the Report of the Special Master. Exceptions are due February 27. Replies are due March 28. Sur-replies are due April 28. The Federal & Interstate Water Unit will prepare exceptions to the damages calculations as set forth in the Report to the extent necessary to protect Colorado’s interests in the Republican River Basin as a headwater state in general.

Non-Binding Arbitration Before Martha O. Pagel, Pursuant to the Final Settlement Stipulation in *Kansas v. Nebraska & Colorado*, Orig. No. 126: Arbitrator Martha Pagel issued her decisions in non-binding arbitration regarding Colorado’s Compact Compliance

Pipeline Proposal and Bonny Reservoir Accounting Proposal. Colorado submitted both proposals for approval in early 2013. Nebraska approved both; Kansas did not. Colorado then initiated non-binding arbitration under the terms of the Final Settlement Stipulation (“FSS”) previously entered in *Kansas v. Nebraska & Colorado*, Orig. No. 126. In her written decisions, Martha Pagel found that both Proposals meet the requirements of the FSS and the Republican River Compact. However, she found that Kansas’ objections to the Proposals were not unreasonable and that it was not required to approve them. In determining that Kansas’ objections were reasonable, Ms. Pagel did not analyze whether the objections were consistent with the Compact or FSS. Colorado has notified the other States that it accepts the portions of her decision that found the Proposals were consistent with and met the requirements of the FSS. Colorado, however, rejected those portions of her decision that found Kansas’ objections were not unreasonable. Nebraska has taken a position similar to Colorado’s. Kansas has taken the opposite position. This concludes the mandatory dispute resolution process. Colorado may now petition the U.S. Supreme Court to hear its case.

Non-Binding Arbitration Before Jeffrey C. Fereday, Pursuant to the Final Settlement Stipulation in *Kansas v. Nebraska & Colorado*, Orig. No. 126: Arbitrator Jeff Fereday issued his decision in non-binding arbitration regarding Nebraska’s Rock Creek Augmentation Plan Proposal and Alternative Water-Short Year Accounting Proposal. Nebraska submitted both proposals for approval in early 2013. Colorado approved both; Kansas did not. Nebraska then initiated non-binding arbitration under the terms of the Final Settlement Stipulation (“FSS”) previously entered in *Kansas v. Nebraska & Colorado*, Orig. No. 126. In his written decision, Mr. Fereday found that both Proposals meet the requirements of the FSS and the Republican River Compact. He declined to determine whether Kansas’ objections to the Proposals were reasonable, finding instead that since Nebraska’s proposals complied with the FSS and Compact, they should be approved. Nebraska has notified the other States that it accepts Mr. Fereday’s entire decisions. Colorado has accepted those portions of his decisions finding Nebraska’s proposals are consistent with and meet the minimum requirements of the FSS. Kansas has rejected his decisions. This concludes the mandatory dispute resolution process. Colorado may now petition the U.S. Supreme Court to hear its case.

3. Colorado River:

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 in diligence proceedings regarding water rights in the Animas-La Plata Project;
- Coordination with the seven Colorado River Basin States on next steps concerning the the Colorado River Basin Study;
- Colorado River Compact Compliance Study and the Colorado River Water Supply Availability Study;
- 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.

Animas-La Plata Protocol: The Department of Law continues to work with Southwestern Water Conservation District and the State of New Mexico as to how water from the Animas-La Plata Project should be administered to New Mexico. The State Engineer has identified an administrative mechanism in the recently approved Protocol, but both SWCD and New Mexico entities assert the mechanism is problematic for different reasons. Although the State Engineer's Office and the Federal & Interstate Water Unit believe the mechanism identified in the Protocol is reasonable and supported by the record, we have indicated a willingness to meet with both parties and consider a different path going forward if it is mutually agreeable and supported by law. These efforts have recently been complicated by the San Juan Water Commission and La Plata Conservancy District of New Mexico filing a Statement of Opposition in the Diligence Proceeding on the Southwestern Water Conservation District's water right for the Animas – La Plata Project.

SWCD Diligence Proceeding: Because the San Juan Water Commission and La Plata Conservancy District in New Mexico have filed a Statement of Opposition regarding the water rights that are intended to supply the Animas – La Plata Project, the Unit recently moved to intervene on behalf of the CWCB to protect its interests in project water allocation and application of interstate compact law. The case has been re-referred to the Water Court and a case management schedule has been set. The Unit will continue to coordinate with CWCB as the case progresses.

Minute 319: This year the 7-States and federal governments in the U.S. and Mexico have worked to implement Minute 319, which was signed a year ago as a short-term collaborative agreement to share risks and benefits on the River. The primary implementation element for this year has been preparing the Delivery Plan for the Environmental Pulse Flow. The Federal & Interstate Water Unit worked with the 7-State principals, including Colorado's Commissioner to the Upper Colorado River Commission, to ensure the 7-States could

support the Delivery Plan as developed and declare its support for implementation of the Plan to the International Boundary and Water Commission, consistent with the framework of Minute 319 and the 1944 Water Treaty. The Plan was recently submitted to the IBWC Commissioners by the 7-States representatives to the Consultative Council consistent with the terms of Minute 319.

Navajo Nation Litigation: The Federal & Interstate Water Unit's motion to intervene in this case is still pending. No party has objected to Colorado intervening in the case. Originally filed in 2003 and stayed pending settlement discussions, the case became active again in June 2013 when the parties could not reach a settlement. In June 2013, the Navajo amended the Complaint to include challenges to the 2007 Interim Guidelines for Lower Basin Shortage and Coordinated Operation of Lake Powell and Lake Mead. Colorado, as well as other Upper Basin States, rely on these Guidelines to provide clarity and much needed certainty in the availability of water in the Colorado River basin from year to year. The Federal Defendants and the Lower Basin Intervenors moved to dismiss on September 9 and 23rd respectively. Colorado joined these motions concurrently with the Motion to Intervene.

San Juan and Tres Rios Land and Resource Management Plan: The BLM and Forest Service recently issued a Final LRMP and EIS in Water Division 7 that raises potential concerns for the State regarding indirect bypass flows as well as suitability determinations under the Wild & Scenic Rivers Act. The Federal & Interstate Unit coordinated with the CWCB and Department of Natural Resources to file a protest to the final plan, and an appeal with the Forest Service. Concurrently, the team is talking to BLM and the Forest Service to try to identify mutually agreeable solutions.

WATER RIGHTS MATTERS

4. Application of City and County of Denver, Grand County Board of Commissioners, and CWCB, Case No. 5-11CW152

CWCB, Denver Water and Grand County filed this water court application in on November 23, 2011 and amended it in May 2013. Among other things, the water court application seeks to adjudicate the instream flow acquisition that CWCB accepted at its November 2011 Board meeting. On November 23, 2011, Denver Water, Grand County and CWCB entered into a Water Delivery and Stream Flow Improvement Agreement. Under that agreement, Denver Water will provide up to 1,000 acre-feet to Grand County and CWCB for instream flow use in the Fraser and Williams Fork River basins. The Agreement and water court application will help to effectuate the terms of the Colorado River Cooperative Agreement ("CRCA"). The parties have agreed to mediate the issues prior to trial. Mediation will begin on January 16, 2014, with additional dates to be determined.

5. Applications for ISFs on Alamosa River, Case Nos. 13CW3013 and 13CW3014, Water Division No. 3

The CWCB and co-applicant the Alamosa Riverkeeper (“ARK”) filed two applications for changes of water rights on the Alamosa River in Division 3 on December 27, 2013. ARK is undertaking the Alamosa River Instream Flow Project to restore flows and replace natural resources damaged by mining operations at the Summitville Mine in the upper Alamosa River watershed. To this end, ARK and the CWCB obtained the right to store up to 2000 acre feet of water in Terrace Reservoir on the upper Alamosa River. ARK also purchased, and conveyed to the CWCB, 0.5 cfs of the 14 cfs decreed to the Valdez Ditch, and 2.5 cfs of the 16 cfs decreed to the Gabino Gallegos Ditch. The applications in Case Nos. 13CW3013 and 13CW3014 seek to change these water rights from irrigation to instream flow purposes. The water rights will no longer be diverted at the existing headgates, but rather will be either (a) exchanged upstream and stored in Terrace Reservoir for subsequent release for instream flow purposes, or (b) left in the river for instream flow purposes within two instream flow reaches on the Alamosa River.

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

In this Colorado Supreme Court appeal of the Division 4 Water Court’s ruling in favor of the CWCB’s instream flow appropriation on the San Miguel River, Farmers Water Development Company filed its Opening Brief on November 8, 2013. Counsel for the CWCB is actively working on drafting the CWCB’s Answer Brief, which is due January 27, 2014.

7. Application of Encana Oil & Gas (USA), Inc., 11CW185, Division No. 5.

In this application for new surface diversions on Roan Creek (where the CWCB and the BLM hold small ISF rights to preserve the natural environment, including a genetically ‘pure’ native trout species), the BLM proposed to use various movable points of diversion to supply its expanding oil and gas drilling operations on the Roan Plateau and elsewhere in NW Colorado. The CWCB and BLM were concerned because, although the diversions would be junior to the ISFs on Roan Creek, no stream gauging station was available to ensure that Encana would not take water out of priority and dry up the stream. However, in the midst of negotiations between the parties, Encana announced a corporate reorganization, which resulted in a dramatic change of Encana’s exploratory focus away from the Roan Plateau. Thus, Encana withdrew its water rights application in Case No. 11CW185 with prejudice.