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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 will meet with the San Luis Valley Advisory Committee for Groundwater Use Rules in Alamosa on March 12 to explain the most recent draft of the Water Division 3 Groundwater Use Rules and hear comments from attendees. This meeting may be the last meeting before the SEO promulgates the final rules. *Preston Hartman x6260*

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

The U.S. Supreme Court accepted Texas's complaint regarding alleged violations of the Rio Grande Compact, and invited New Mexico to file a motion to dismiss in the nature of F.R.C.P. 12(b)(6). At the end of February, the United States moved to intervene, which is now pending before the Court. Texas alleges that New Mexico's administration of water below Elephant Butte Reservoir interferes with Texas' rights to the Rio Grande. Texas has made no claims against Colorado. However, Colorado remains concerned that the Court took the case based on potential compact claims when Texas has not alleged a violation of any terms of the compact. Texas' claims rely on the theory that the compact regulates actions by implication, rather than through its express provisions. Without clarity as to what compact violations are being alleged, Colorado is left guessing what may be considered a compulsory counterclaim that it must bring or forever lose. For this reason, we are

considering filing a motion for more definite statement to narrow the scope of the litigation. Any motion is due in late March.

***Wildearth Guardians*** - In January, Wildearth Guardians sent a notice of intent to sue to the Department of Natural Resources and State Engineer's Offices under the citizen suit provision of the Endangered Species Act. The notice alleges that Colorado's administration of water in the San Luis Valley causes harm to the Rio Grande Silvery Minnow and Southwest Willow Flycatcher in New Mexico. Colorado is in compliance with the Rio Grande Compact, so the notice appears to ask for an amount of water above Colorado's compact delivery obligations. Wildearth Guardians has also sent notices of intent to the Bureau of Reclamation, U.S. Fish and Wildlife Service, and Army Corps of Engineers. The Federal & Interstate Water Unit is coordinating with DNR to determine appropriate strategies in the event a suit is filed.

***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 coordinated 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.

At the request of Special Master Kayatta, the Federal & Interstate Water Unit filed exceptions to Special Master Report on February 27, 2014. The only matter Colorado took

issue with was the Special Master's award of \$1.8 million to Kansas for disgorgement of the amount by which Nebraska's gain exceeds Kansas' loss. The Report includes no calculation of Nebraska's actual gain and finds that Nebraska's violation of the compact was unintentional. For those reasons, and based on existing case law, Colorado maintains that it is inappropriate to set the precedent of award disgorgement of gains in this compact case. The other parties have also filed exceptions to the report. The Unit is currently reviewing those exceptions and will prepare a response by the end of the month. At this time, the states are speculating that any oral argument of the Exceptions to the Special Master's Report would be scheduled for fall of this year.

**Non-Binding Arbitration:** The remaining non-binding arbitration action involves a Nebraska augmentation plan. Hearing for this arbitration is the week of March 3, 2014. This arbitration, along with the others that have occurred over the past year will set the stage for future litigation on Republican River matters if the states decide to take issue with any of the arbitrators' decisions. Colorado is evaluating whether it is appropriate and necessary to pursue litigation following Martha Pagel's decision regarding Colorado's Compact Compliance Pipeline Proposal and Bonny Reservoir Accounting Proposal. Colorado submitted both proposals for approval in early 2013. 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. In the meantime, however, Kansas and Colorado are in negotiations concerning actual operation of the Compact Compliance Pipeline. Depending on how the negotiations proceed, the scope of any case filed with the U.S. Supreme Court may be limited. .

### 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 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.
- Contingency planning to address water supply shortages in the event of continued dry hydrology throughout the Colorado River Basin.

***Minute 319:*** In furtherance of this agreement, signed in November of 2012, the 7-States, non-governmental organizations, and federal governments in the U.S. and Mexico have worked design, approve and implement the Delivery Plan for the Environmental Pulse Flow a one-time pulse flow to the Colorado River Delta. 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.

#### 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

Briefing was completed in February 2014 for 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. Oral argument has been scheduled for April 29, 2014, at 10:30am.

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.

8. W/J Metropolitan District in Case No. 2013CW3108, Division 5

The CWCB filed a statement of opposition to the application of W/J Metropolitan District in Case No. 2013CW3108, Division 5. This is an application for two appropriative rights of exchange, the substitution of 13.5 acre-feet of Ruedi Reservoir contract water, and the addition of a supplemental source of augmentation water to an existing plan for augmentation. The CWCB holds three instream flow water rights on the Roaring Fork River that could be injured by this application.

9. Application of K2 Family Property, LLC and K2 Family Property Deux, LLC in Case No. 2013CW3105, Division 5.

The CWCB filed a statement of opposition to the application of K2 Family Property, LLC and K2 Family Property Deux, LLC in Case No. 2013CW3105, Division 5. This is an application for new storage rights, new underground water rights, and a plan for augmentation including exchange. The CWCB holds three instream flow water rights on the Roaring Fork River and one instream flow water right on Maroon Creek that could be injured by this application.

10. Application of Huerfano County Water Conservancy District in Case No. 2013CW3062, Division 2

The CWCB filed a statement of opposition to the application of Huerfano County Water Conservancy District in Case No. 2013CW3062, Division 2. This is an application for the change of an irrigation water right to several new uses, including augmentation and storage for augmentation of new structures in an umbrella augmentation plan, as well as alternate points of diversion to wells. The CWCB holds instream flow water rights on Huerfano Creek, the South Fork of the Huerfano River, the Huerfano River, Deep Creek, Strawberry Creek, Cascade Creek, South Apache Creek, Chaparral Creek, White Creek, Dodgeton Creek, and Cucharas Creek that could be injured by this application.