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TO: Colorado Water Conservation Board

FROM: John W. Suthers, Attorney General
Karen Kwon and Susan Schneider, First Assistant Attorneys General

RE: Report of the Attorney General

FEDERAL & INTERSTATE MATTERS

1. Rio Grande Basin

Groundwater Use Rules: The Unit has been heavily involved in advising the Rio Grande Decision Support System (RGDSS) Peer Review team as it continues to work on modeling to identify final stream depletion and sustainability numbers that are necessary to inform the State Engineer Dick Wolfe's ground water rule making for the San Luis Valley. The hope is to present final rules for consideration this summer. Following rule promulgation the Unit expects any potential litigation over the rules to ensue in 2015.

Rio Grande Subdistrict No. 1: In April, State Engineer, Dick Wolfe, approved Subdistrict No. 1's 2014 Annual Replacement Plan (ARP) without incident. Subdistrict No. 1 is the first subdistrict in the San Luis Valley to develop plans that will provide for continued groundwater pumping without injuring surface water users or compact requirements. This is the third ARP the State Engineer has approved since implementation of Groundwater Management Plans in the basin. In the next few years, more Subdistricts are expected to come online and review will commence of their Groundwater Management Plans and ARPs.

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

On April 30, 2014, New Mexico filed a Motion to Dismiss Texas' Complaint and the U.S.'s Complaint in Intervention. The Parties have 45 days to file a response. The Unit is coordinating with Colorado's Rio Grande Commissioner to prepare a measured response aimed at protecting our State's interests in the Rio Grande Compact in particular and in interstate water compacts as a whole. In the event the Court denies New Mexico's Motion to Dismiss, Colorado has approached all parties about stipulating to a narrowing of the issues to management and tracking of releases made from Elephant Butte Reservoir. If unsuccessful in these efforts, the Unit will file a Motion for More Definite Statement at the appropriate time to highlight the need to pinpoint the issues to be litigated in this matter.

WildEarth Guardian: WildEarth Guardians has yet to act on its notice of intent to sue to the Executive Director of the Department of Natural Resources and the State Engineer 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. Because Colorado continually satisfies its compact delivery obligations under the Rio Grande Compact, the notice of intent to sue appears to ask for an amount of water above Colorado's compact delivery obligations or for a different timing of deliveries of Compact water to coincide with the Minnow's spawning season. WildEarth Guardians has also sent notices of intent to the Bureau of Reclamation, Fish and Wildlife Service, and Army Corps of Engineers. The Unit continues to coordinate legal 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 on two separate occasions to extend the deadline to April 25, 2014. The purpose of these extensions was 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 Fish and Wildlife Service reflects all of the best science and information available. The 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: The Unit has been busy preparing the States' exceptions to the Report of the Special Master. First the Unit filed a reply to Kansas' exceptions in which Kansas' objected to (1) the Special Master's recommendation that the accounting procedures be changed to incorporate the 5-Run Solution; and (2) the Special Master's recommendation that the Court disgorge only \$1.8 million of Nebraska's gains. In Colorado's reply brief, the Unit supported the Special Master's recommendation to adopt the 5-Run Solution, and argued that no disgorgement is appropriate. Second, the Unit filed a sur-reply in support of Colorado's exception to the Special Master's Report. The Unit previously took exception to the Special Master's recommendation to award \$1.8 million in disgorgement. Kansas and the United States responded that disgorgement was justified for a number reasons—for Nebraska's past violations, to deter future violations, and because Nebraska owes a fiduciary duty to Kansas. The Unit's sur-reply sets forth why the Court should reject Kansas' and the United States' assertions outright.

Colorado Compliance Pipeline (CCP) and Bonny Reservoir Disputes: Colorado and Kansas have renewed settlement discussions to approve Colorado's CCP and Bonny Reservoir proposals. As part of this process, the Unit and Compact representatives also met with the Republican River Water Conservation District to inform them of the progress on settlement discussions with Kansas and to receive input and suggestions that could be included in a

settlement offer. Together with the District, the Unit is drafting a settlement proposal to provide to Kansas in early May. The States will meet to discuss the proposal on later this month.

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 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;
- 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;
- Coordination and consultation with the Bureau of Reclamation and the seven Colorado River Basin states on Colorado River management under the Interim Guidelines; and,
- Contingency planning to address water supply shortages in the event of continued dry hydrology throughout the Colorado River Basin.

WATER RIGHTS MATTERS

4. Application for ISF on San Miguel River, Case No. 11CW129, Water Div. 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 was held on April 29, 2014, and Susan did a great job.

5. Application of the Board of County Commissioners of Pitkin County in Case No. 10CW305, Division 5

This is an application for a recreational in-channel diversion by Pitkin County. The Board held a public deliberation on January 27, 2014. The applicant has reached stipulations with all parties on a decree that is substantially similar to the decree that the Board considered in making its findings of fact concerning the RICD at the January Meeting. The CWCB signed a stipulation in this case in April. The applicant has provided the final decree to the water court for entry as the decree of the court along with a motion to vacate the trial currently set in November. We expect the water court to enter the decree in the next 30 days.