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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. General: *The Aransas Project v. Shaw et. al.*, 2014 U.S. App. LEXIS 12356 (5th Cir.) (June 30, 2014).

The 5th Circuit Court of Appeals reversed the District Court for the Southern District of Texas' decision to enjoin five separate individuals in their capacities as officials for the Texas Commission for Environmental Quality from permitting surface water rights that allegedly affected critical habitat for endangered whooping cranes. The decision is relevant to Colorado because it informs (as persuasive authority) the strength of claims that have been or could be asserted against agency officials within Colorado for exercising the authorities granted and obligations required under Colorado law. The Unit is currently evaluating the specifics of this decision to incorporate it into future strategies and legal considerations.

2. United States Forest Service - *Proposed Directive on Groundwater Resource Management*, *Forest Service Manual 2560* (79 FR 25815, May 6, 2014).

In May 2014, the Forest Service proposed to amend its internal Agency directives for Watershed and Air Management to establish direction for management of groundwater resources on National Forest System (NFS) lands as an integral component of watershed management. According to the Fed. Reg. Notice, "the proposed amendment would provide direction on the consideration of groundwater resources in agency activities, approvals, and authorizations; encourage source water protection and water conservation; establish procedures for reviewing new proposals for groundwater withdrawals on NFS lands; require the evaluation of potential impacts from groundwater withdrawals on NFS resources; and provide for measurement and reporting for some larger groundwater withdrawals. Comments

are due by August 4, 2014. The Unit is evaluating the proposed directive and coordinating with DNR agencies as well as the Association of Western Governors to identify and provide comments that express and protect the States' interests and authorities in regulation and use of groundwater resources.

3. Rio Grande: WildEarth Guardians

WildEarth Guardians has still not acted on its notice of intent to sue to the Department of Natural Resources and the State Engineer's Office 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 allege a right for an amount of water above Colorado's compact delivery obligations or for a different timing of deliveries of Compact water that would coincide with the Minnow's spawning season. It was recently reported to the Unit that WEG planned to soon file suit following notices of intent to sue against the Bureau of Reclamation, and Army Corps of Engineers. It would also soon file notices of intent to sue the State of New Mexico and the Middle Rio Grande Water Conservation District in northern New Mexico. The Unit continues to coordinate legal strategies in the event a suit is filed against Colorado and/or to protect state interests related to general application of the Endangered Species Act against other entities as it relates to water

4. Texas v. New Mexico and Colorado, No. 141 Original.

As of June 30, 2014, New Mexico's Motion to Dismiss Texas' Complaint and the United States' Complaint in Intervention has been fully briefed and is pending before the U.S. Supreme Court. As a very general summary, New Mexico asserts the case should be dismissed because neither Texas nor the United States can point to a specific compact provision that New Mexico has violated. Moreover, to the extent any party actually means to assert New Mexico is either interfering with contract allocations from the Rio Grande Project or violating the Rio Grande Project Act, the U.S. Supreme Court is not the appropriate venue and the compact is not the appropriate document from which to allege legal claims. Texas and the United States filed responsive pleadings identifying what they think constitute the compact violations are ripe for adjudication before the Supreme Court.

Neither Texas nor the United States assert claims against Colorado. However, litigating the terms of the Compact and identifying the rights of the parties thereunder implicate Colorado interests in the Rio Grande specifically and in application of compact law in general. Throughout this case, Colorado has tried to position itself to work with all parties to resolve the issues and/or at least narrow the scope of issues to be litigated. During the briefing period for the Motion to Dismiss, the Unit coordinated with Colorado's Compact Commissioner, Dick Wolfe, members of his staff, and attorneys representing water users in the San Luis Valley to determine whether Colorado should weigh in on any of the issues. Based on these discussions, Colorado decided not to weigh in on whether to dismiss the case at this time. Instead, the Unit will preserve any argument that we may have regarding

positions taken by the parties if and when it is deemed necessary through progression of the case.

5. Groundwater Rules.

On July 1, 2014, the State Engineer, Dick Wolfe, and his staff met again with the San Luis Valley Groundwater Rules Advisory Committee. In addition, the Rio Grande Decision Support System (RGDSS) Peer Review team 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 litigation to ensue in 2015.

Final rule promulgation thus far has been delayed due to the complexities of groundwater modeling for some parts of the San Luis Valley to demonstrate accurate stream depletion and sustainability numbers. To avoid delaying rules for the entire basin based on a few small areas within the Valley, the State Engineer has decided to instead delay full implementation of some of the statutory sustainability requirements, which call for maintenance of the confined aquifer system at the levels that occurred between 1978-2000. Rather, the State Engineer and water users will implement a monitoring well program that will facilitate further refinement of the RGDSS groundwater model so that it can be used to accurately represent confined aquifer water levels during the period 1978-2000. *Preston Hartman x6260*

6. Arkansas River:

The Unit continues to work in direct coordination with the Division of Water Resources to enforce rules to assure ongoing compliance with the Arkansas River compact. Along these same lines, the Unit has also advised DWR on positions and/or strategies concerning potential rulemaking for management of groundwater wells that post-date 1985, and the DWR's role in enforcing use of surface or groundwater to irrigate marijuana grow facilities. No specific matters are of hot topic concern at this time.

7. Republican River - *Kansas v. Nebraska & Colorado*, Orig. No. 126

The U.S. Supreme Court notified the parties that it wants oral argument regarding the States' exceptions to the Report of the Special Master to be scheduled. The Unit anticipates this argument to be scheduled during the Court's Fall Session, although the order merely notes that it will be set to occur "in due course." In consultation with the Unit, Dan Domenico, Colorado's Solicitor General, has substituted Scott Steinbrecher as counsel of record for the State of Colorado. Since then, Dan has been working with the Court Clerk, as well as counsel for the other states and the United States to coordinate the schedule for oral argument. Colorado and the United States have each expressed their interest in presenting 10 minutes of argument. At this point, Kansas and Nebraska appear to disagree about where the time should come from or if the Court should allow additional time for Colorado and the United States.

8. Colorado's Compact Compliance Pipeline (CCP) and Bonny Reservoir Disputes.

During the past month settlement discussions with Kansas to approve Colorado's CCP and Bonny Reservoir proposals continued. Although Colorado provided revised proposals in early May, we have not yet received a substantive response from Kansas. David Barfield, Kansas' representative, was going to meet with water users on the South Fork in Kansas to discuss the proposals and receive their feedback so that Colorado and Kansas could continue their negotiations. Early reports of the meeting are not favorable. We are trying to set up meeting with Kansas to see whether they will have any response to our proposals. If it appears no progress has been made, the Unit will consult and strategize on next considering whether to petition the United States Supreme Court to hear our case.

9. Nebraska Cooperative Republican-Platte Enhancement (N-CORPE) arbitration.

In this arbitration under the Final Settlement Stipulation, Nebraska seeks approval of another augmentation plan. On May 19, 2014, the Arbitrator issued his final decision approving the plan. This plan relies on groundwater wells in the Sandhills region to deliver water into the Medicine Creek surface stream. The deliveries will offset other consumptive use in the Republican River Basin in Nebraska. Nebraska and Colorado accepted the Arbitrator's decision approving the plan; Kansas rejected it. Nebraska and Kansas have scheduled a meeting for the end of July to begin trying to negotiate approval of Nebraska's augmentation plans.

10. Colorado River - Aspinall Unit

Since the Bureau of Reclamation announced its decision to operate the Unit under a moderate wet year hydrology for WY 2014, the CWCB, DWR and the Unit have participated in status updates and discussions with counsel and leadership to express our significant concerns with the justifications for Reclamation's decision to store and release a substantial amount of water from Aspinall that significantly affects hydropower production and recreation, risks ignoring compliance with state water administration, and potentially risks impacts to annual storage and flooding at Delta and Grand Junction. Although the operations are ongoing, it appears that actually hydrology and operational limitations due to potential flooding downstream constrained the magnitude of the peak releases as well as the duration of the half bankfull releases as originally contemplated. As part of the impromptu consultations that have occurred throughout the month, both Reclamation and the State have agreed to meet to discuss the meaning of the terms of the ROD to avoid, to the extent possible, confusion and disagreement over future operations and to clarify the basis of decision for operating the Unit in WY2014.

11. Contingency Planning

The Upper Colorado River Basin continues to coordinate on contingency planning to shore up reservoir storage at Lake Powell above minimum power pool if needed. Both technical

and legal committees are exploring options for: (1) expanding weather modification operations; (2) extending operation at reservoirs authorized by the Colorado River Storage Project Act; and (3) implementing a demand management pilot project to conserve water for the benefit of the system. Each of these options has technical and legal obstacles to overcome, but are considered worth the effort to assure ongoing compliance with the Colorado River Compact and to better assure a stabilization of the Colorado River System. During its recent summer work meeting, the UCRC directed the legal and technical advisors to continue working toward having a draft plan ready by the end of the year, but noting no such plan would or could be implemented before drought contingency measures are agreed to and implemented in the Lower Basin. The governors' representatives from all of the Colorado River Basin States will meet with Secretary to Jewell and/or her representative on July 25, 2014 to discuss progress made thus far and ways that the federal government can support the effort.

12. Long-Term Experimental Management Plan EIS

The Department of the Interior continues to work to finalizing a draft Environmental Impact Statement for reoperating Glen Canyon Dam based on science and experience gained in operating the system since the last EIS was finalized in 1995. The Colorado River Basin States continue to be actively involved in proposing alternatives to be considered and modeled, evaluating modeling designs and results, and critiquing analysis approaches and results. A primary reason for active state involvement in this process is to assure, to the extent possible, that DOI selects a preferred alternative that helps resources downstream of the dam in a fashion that protects the States' respective interests in the water resource. As part of this effort, the Unit coordinates with the CWCB and our contractors to attend meetings, develop strategy documents, and communicate concerns and options with DOI representatives. The Unit will continue these efforts and prepare to develop comments to the Draft EIS for client consideration when it is issued (estimated currently to be Fall 2014).

13. Southwestern Water Conservation District, 13CW3011, Water Div. 3

Southwestern has applied to the Water Court for a decree confirming that a portion of its water rights have been made absolute and a finding of reasonable diligence on the remaining water rights. This application involves rights to be used to operate the Animas La-Plata Project (Project). As such, it is no simple diligence and / or water rights proceeding. Rather, it involves claims and opinions from two entities from New Mexico, three separate Indian Tribes, and the CWCB (as Project participants) as well as the State Engineer (as administrator of water rights). Because some of the Project participants do not agree that Southwestern should obtain a finding of reasonable diligence on the remaining water right, they have opposed the diligence application. The CWCB intervened in the case when the New Mexico objectors suggested the potential for compact compliance matters to be at issue, and because the CWCB is also a project participant whose interests could be implicated by the outcome of the case. The SEO has participated in the case from the beginning to protect, among other things, its ability to administer rights consistently throughout the state. Trial has been set for 14 days beginning on November 2, 2015. In May, the attorneys for each

party met to discuss the issues in the case and attempt to resolve some issues prior to trial. The attorneys are meeting again on July 14 to discuss the potential for further progress toward settlement.

WATER RIGHTS MATTERS

14. Application of John S. Hendricks and Western Sky Investments, LLC in Case No. 2010CW207, Division 4

This was an application for groundwater rights, storage rights, alternate points of diversion, new uses of current diversions, a plan for augmentation, and junior exchanges to serve a private development at the confluence of the Dolores River and West Creek, on which the CWCB has an instream flow water right. The CWCB signed a stipulation in this case in May, the Referee entered a ruling in June, and we expect a final decree in the next 30 days.

15. Application of the Town of Alma, Case No. 12CW195, Division 1

This was an application for a new junior storage right, a plan for augmentation, and exchanges to allow diversion of the Town of Alma's existing water rights when they would otherwise be out-of-priority. The application involved water rights on Buckskin Creek, Dolly Varden Creek, and the Middle Fork of the South Platte River that could have impacted CWCB instream flow water rights on each of these waters, though some diversions were made pursuant to section 37-92-102(3)(b), C.R.S. (2013). The CWCB signed a stipulation in this case in June, the Referee entered a ruling in June, and we expect a final decree in the next 30 days.

16. SWSPs to Operate Pursuant to Applications of the CWCB and the Alamosa Riverkeeper in Case Nos. 13CW3013 and 13CW3014

In June, the CWCB received approval for two Substitute Water Supply Plans ("SWSPs") for instream flow water rights operated directly and by exchange on the Alamosa River in Division 3. The CWCB has applied together with the Alamosa Riverkeeper to change irrigation water rights historically diverted through the Gabino Gallegos Ditch and the Valdez Ditch in Case Nos. 13CW3013 and 13CW3014, respectively, for instream flow purposes in the Alamosa River. The instream flow water may be left in the river, or stored by exchange in the upstream Terrace Reservoir and released later in the season for instream flow purposes. The CWCB and Alamosa Riverkeeper applied to the State and Division Engineers for SWSPs this spring, so that they could exercise the instream flow water use pending resolution of the water court cases. A party of opposers to the Gabino Gallegos change submitted comments opposing operation of the SWSP, but the State and Division Engineers granted the SWSPs with terms and conditions to ensure there will be no injury to other water users, including a volumetric charge against the water rights representing historical ditch losses. Almost immediately after the SWSPs were issued, the CWCB and Alamosa Riverkeeper began storing water in Terrace Reservoir, which will be released at the end of the irrigation season to sustain flows in the Alamosa River.