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**TO:** Colorado Water Conservation Board

**FROM:** John W. Suthers  
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Carol Angel  
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**RE:** Report of the Attorney General

**FEDERAL & INTERSTATE MATTERS**

**1. Southern Ute and Ute Mountain Ute Tribes' Settlement, Case Nos. 7-W-1603-76F & 76J, 02-CW-85 & 86; 01CW54**

The Citizens Progressive Alliance (CPA) has finally filed its opening brief in its appeal of the amended tribal reserved water rights decrees in the Animas and La Plata river basins. The State will coordinate on the answer brief as before with the United States, tribes, and other parties to the reserved rights settlement.

**2. Division 3 Confined Aquifer New Use Rules**

Under advisement at the Supreme Court.

**3. Black Canyon of the Gunnison National Park Reserved Rights Case, No. 01CW05 Water Division 4**

The parties continue to negotiate a possible settlement of the quantity for the Black Canyon National Park reserved water right. A status conference is scheduled for January 18th, at which time the current stay in litigation expires. The parties have agreed to continue mediation for another 90 days, with a continued stay in litigation during that time. The U.S. is expected to request another status conference for April 2008.

**4. Great Sand Dunes National Park 2004cw35 (3)**

Due to the United States mistakenly providing incorrect files as part of their expert disclosures, the trial has been reset to August 15.

**5. Kansas v. Colorado**

Colorado and Kansas finished the appendix containing the model documentation for the H-I model and both States filed comments on the Special Master's draft Fifth Report and answered his questions. The Special Master's Fifth Report is now being printed in three volumes and should be filed with the Court by the end of the month.

The Division Engineer has made public a first draft of proposed compact rules for Division 2, designed to prevent increases in the efficiency of surface water irrigation methods from causing depletions of Stateline flow in violation of the Compact. He is working closely with our office and SEO and CWCB to consider the feedback received so far and how to proceed.

**WATER RIGHTS MATTERS**

**6. Application for Water Rights of Copper Mountain, Inc., Case No. 01CW304**

Water Division 5: This case involved a change of Copper Mountain's conditional Tenmile Creek Pipeline water right from the recharging of lake wells for subsequent use for irrigation, snowmaking and other uses to direct use for irrigation of 24 acres of Copper Mountain's golf course. Copper sought to augment its out-of-priority depletions due to the golf course irrigation with releases from Clinton Gulch Reservoir. The primary issues involved: (1) whether the senior right decreed to the Clinton Gulch Reservoir was decreed for augmentation use and could be used as a replacement source; (2) whether the Tenmile Creek Pipeline was decreed solely for recharge purposes or included irrigation, snowmaking and other beneficial uses; and (3) whether Copper should be required to replace its depletions in real time through releases from Clinton Gulch Reservoir under that reservoir's junior water right. After prevailing on all of the legal issues decided by the Water Court, the Colorado Water Conservation Board and the State and Division Engineers were successful in negotiating a settlement with Copper Mountain and the Clinton Gulch Ditch & Reservoir Company. Only the junior water right decreed to the Clinton Gulch Reservoir will be used as an augmentation source, Copper agreed to abandon certain groundwater rights decreed to its lake wells, and Copper agreed to replace its depletions in real time when the CWCB places a call on Tenmile Creek unless Copper can make such replacements through a decreed exchange or substitution senior to the CWCB's water right. The trial set for last December was vacated and a final decree consistent with the settlement has now been entered by the Water Court.

**7. Concerning the Water Rights Application of Avon, Case No. 05CW258**

The CWCB and the Applicant have settled and agreed upon terms for the proposed RICD decree. The Board had issued its Findings and Recommendations to the Water Court



recommending approval of the application, and the proposed decree and stipulation are in accordance with those Findings and Recommendations. Although the stipulations have been signed between all the parties, the City of Minturn has stated that it cannot approve of the decree as agreed to by the CWCB and the Applicant because the decree included the term "presumptively valid" to describe the CWCB's Findings and Recommendations. The City of Minturn cannot legally force a change to the proposed decree because it is no less restrictive than earlier proposed decrees.

## **DEFENSE OF THE COLORADO RIVER SUBUNIT**

### **8. 7-State Proposal and NEPA Process**

The state of Colorado actively participated in negotiations with the other Colorado River Basin States to develop agreements and guidelines that govern Colorado River operations under shortage and low reservoir conditions. On April 23, 2007, after two years of detailed negotiations, the seven Basin States executed an agreement regarding Colorado River management and operations (the "Agreement"), and reached consensus on interim guidelines for the Secretary of the Interior to adopt and implement as operations for the Colorado River reservoirs and management of the Colorado River System (the "Guidelines"). Reclamation considered the Basin States' Agreement and the Guidelines in complying with the National Environmental Protection Act ("NEPA"). Reclamation's Final Environmental Impact Statement under NEPA included the Agreement and the Guidelines, with some modification, as part of the preferred alternative that the Secretary adopted in his Record of Decision, dated December 13, 2007.

The Colorado River Subunit provided the Colorado Water Conservation Board, the Governor of Colorado's Representative, and the Upper Colorado River Commission with legal counsel during both the Basin States negotiations and the Bureau of Reclamation's NEPA process. In addition, the Subunit drafted correspondence and memoranda on behalf of Colorado and the Upper Division States that preserve Colorado's positions concerning equalization operations of the Colorado River's reservoir system. The Subunit will continue to provide this assistance and legal counsel as necessary in interpreting the Record of Decision.

### **9. Mexico Shortage Sharing**

The Colorado River Subunit provides legal counsel to the Colorado Water Conservation Board and the Governor's Representative regarding whether and how Mexico should share in shortages of the Colorado River System. The Subunit has prepared research memoranda outlining legal and practical issues for Colorado and the Upper Division States to consider when negotiating with the Lower Division and Mexico regarding international shortage sharing in the Colorado River System. The Subunit is also participating in Basin States meetings with the International Boundary and Water Commission, the U.S. Department of State, and the Bureau of Reclamation in preparation for formal discussions with Mexico on



shortage sharing pursuant to the 1944 treaty. Finally, the Subunit participates in Basin States meetings with the International Boundary and Water Commission, the U.S. State Department, and the Bureau of Reclamation regarding formal shortage sharing discussions with Mexico. The Subunit provides legal counsel to the CWCB and Upper Colorado River Commission on matters related to informal meetings conducted among interested stakeholders in both the United States and Mexico.

#### **10. Central Arizona Project Diversion Rates**

Section 1521(a) of the Colorado River Basin Project Act ("Basin Project Act") limits the rate of diversion of Colorado River water through the Central Arizona Project ("CAP") to 2,500 cubic feet per second, except under certain limited conditions. Arizona has requested the Upper Basin States agree to lift this limit via a stipulated provision in the 7-States' Agreement to allow for augmentation of the Colorado River Supply. In the course of discussions over Arizona's request, Arizona also disclosed to the Upper Basin States that the Secretary of the Interior had already allowed Arizona to divert water through the CAP at a higher rate than that provided for by the Basin Project Act.

The Subunit researched the steps Colorado must take to preserve its ability to object to such excess diversions. Based in part on the Subunit's research of the legislative history of the Basin Project Act, the Upper Division States agreed to not stipulate to Arizona's request. Furthermore, upon researching the steps Colorado must take to preserve its ability to object to the Secretary authorizing such diversions, the Subunit drafted a letter on behalf of the Colorado Water Conservation Board to the Bureau requesting CAP diversion data to verify whether and to what extent CAP diversions are violating the Basin Project Act and causing injury to the Upper Basin.

#### **11. Preparation for Future Colorado River Compact Litigation**

One of the concerns underlying the creation of the Colorado River Subunit was the potential for interstate litigation regarding the Colorado River Compact. The Lower Division States appear to have invested much more time in preparing for such litigation than the Upper Division States. For example, Arizona has retained outside counsel to assist with litigation preparation. California has a State Board devoted to Colorado River issues. Nevada continues to threaten to force reconsideration of the Compact if its need for additional water supplies is not met. This concern is heightened by the knowledge that, due to the complexity of the factual and legal issues, the number of parties affected, and the sheer number of possibly relevant documents, adequately preparing for Colorado River Compact litigation will take several years.

In response to this concern, the Colorado River Subunit was charged to prepare Colorado for future Colorado River Compact litigation. This charge involves three elements.

First, the Subunit prepares legal memoranda researching issues that may arise in future Colorado River Compact litigation. These memoranda include those prepared in connection with the Basin States negotiations, described above, as well as the following topics:



- Upper Colorado River Commission Finding Authority
- 70R Surplus Strategy; and
- 602(a) Storage

Second, the Subunit actively develops and organizes an electronically searchable database of the State's Colorado River documents. This database is coded and organized so as to assist the State with respect to future Colorado River Compact litigation. Each document entered into the database is stored in word searchable format and coded so as to make the document searchable by such "objective" information as date, title, author, recipient, organization, type of document, and other similar information. Finally, every document entered into the database is reviewed by a member of the Subunit and then coded so as to make the document searchable pursuant to one of four "subjective" outlines. This "subjective" coding thus makes the document searchable by the issues addressed, the geographic location, the provisions within the Law of the River to which the document is relevant, and by the type of authority represented by the document.

The Subunit is in the process of subjectively coding the documents scanned into the Colorado River Database system. Were Colorado to become involved in any Colorado River Compact litigation, use of the database will dramatically reduce litigation preparation time. In addition, the database has already proven useful with respect to Colorado River negotiations and research. Documents in the database were relied upon in responding to issues that arose during the Basin States negotiations. The Subunit will continue to utilize the database in its research regarding compact curtailment rulemaking, negotiations with Mexico, and interpretation of the Law of the River.

Third, the Subunit is working with the Colorado Water Conservation Board, the Upper Division States, and the staff at the Upper Colorado River Commission to develop and organize an electronically searchable database of the Commission's Colorado River documents. This has entailed developing a Memorandum of Agreement among the Upper Division States to finance and authorize the "UCRC Imaging Project," preparing the Scope of Work for implementation and completion of the project, and drafting the contract with the contractor authorized to image the documents currently in the Commission's library.

## **12. Civil Litigation regarding the Colorado River**

The Colorado River Subunit represents the state of Colorado with respect to civil litigation regarding the Colorado River that implicates issues important to the State. Recent examples of such litigation include *Consejos de Desarrollo Economico de Mexicali ("CDEM") v. Norton*, Appeal Nos. 06-16345, 06-16618, 06-16664 (9<sup>th</sup> Cir. 2007) and *Center for Biological Diversity v. Bureau of Reclamation*, Case No. 3:06-CV-00494 (D. Ariz. 2006). The Colorado River Subunit anticipates representing the state of Colorado in *Grand Canyon Trust v. U.S. Bureau of Reclamation*, Case No. CV 07-8164-PCT-DGC, environmental

litigation recently filed by the Grand Canyon Trust in the U.S. District Court in Arizona that implicates the Bureau of Reclamation's operation of Glen Canyon Dam.

The Subunit also monitors federal case law that may create binding precedent regarding interpretation of the Colorado River Compact and the Upper Colorado River Basin Compact. Examples of such litigation are the interstate suits of *Montana v. Wyoming* and *South Carolina v. North Carolina* recently filed in the U.S. Supreme Court pursuant to its original jurisdiction.

### **13. Assistance with Colorado River Administration**

In addition to providing the state of Colorado with legal counsel regarding interstate issues related to the Colorado River and the Colorado River Compact, the Colorado River Subunit provides legal counsel to the State Engineer and the Department of Natural Resources with respect to intrastate administration of water rights. Specifically, the Subunit assists the State Engineer and the Department of Natural Resources in analyzing state and federal law as applied to proposed water supply projects that involve the waters of the Colorado River Basin.

### **14. Compact Curtailment Rulemaking Research**

The Subunit assists the State Engineer in addressing legal questions that may arise in the event Colorado must curtail use of Colorado River water pursuant to its compact obligations. Legal issues already addressed include:

- The State Engineer's legal authority to administer compact curtailment through promulgation of rules.
- The legal process that such compact curtailment rulemaking must follow.
- The general requirements of Colorado law on compact curtailment rules.
- Description of legal issues implicated by compact administration.

The multitude of legal issues still to be addressed fall generally under the following topics for analyses: the parameters and constraints imposed by Colorado law and the Law of the River on compact curtailment administration, possible legal claims and defenses for use in compact litigation brought by or against the Lower Division States, possible curtailment methods, and possible curtailment timing.