

STATE OF COLORADO

Colorado Water Conservation Board Department of Natural Resources

1313 Sherman Street, Room 721
Denver, Colorado 80203
Phone: (303) 866-3441
Fax: (303) 866-4474
www.cwcb.state.co.us



TO: Senate Agriculture, Natural Resources, and Energy
Committee

House of Representatives Agriculture, Livestock, and
Natural Resources Committee

FROM: Colorado Water Conservation Board in consultation with the
Office of the Attorney General

DATE: March 23, 2012

SUBJECT: **Annual Report on any litigation that involved the use of moneys from the
litigation fund created pursuant to Sec. 37-161-121(2.5)**

John W. Hickenlooper
Governor

Mike King
DNR Executive Director

Jennifer L. Gimbel
CWCB Director

Background

Section 37-60-121(2.5) provides that the Colorado Water Conservation Board is authorized “to expend, pursuant to continuous appropriation and subject to the requirements of paragraph (b) of this subsection (2.5), a total sum not to exceed the balance of the litigation fund, which is created, for the purpose of engaging in litigation...to defend and protect Colorado’s allocations of water in interstate streams and rivers...” Paragraph (b) of section 121(2.5) provides: “pursuant to the spending authority set forth in paragraph (a) of this subsection (2.5), moneys may be expended from the litigation fund at the discretion of the board if (I) with respect to litigation, the Colorado Attorney General requests that the Board authorize the expenditure of moneys in a specified amount not to exceed the balance of the fund for the costs of litigation associated with one or more specifically identified lawsuits meeting the criteria set forth in paragraph (a) of this subsection (2.5).” In addition, Section 121(2.5) states “the Board, in conjunction with the attorney general, shall report annually to senate agriculture, natural resources, and energy committee and the house of representatives agriculture, natural resources, and energy committee on any litigation that involves the use of moneys from the litigation fund created in paragraph (a) of this subsection (2.5).” This document serves as this year’s annual report.

Status of the Litigation Fund

At the beginning of calendar year 2011, the fund had approximately \$3.2 million, of which \$750,000 has been authorized to be spent by letters from the Attorney General and actions taken by the Colorado Water Conservation Board. These expenditures were the subject of the memo entitled “Utilization of CWCB Litigation Account” from the May 17-18, 2011 Board meeting, enclosed. Pursuant to House Bill 11-1274, \$700,000 was transferred from the construction fund to restore the litigation fund cash balance.

Copies of the letters from the Attorney General requesting authorization to spend money from the litigation fund, the Staff memos regarding the same, and Board minutes from the meetings where the Board acted on the requests within the last calendar year are attached.

If you would like additional information, or a more detailed presentation on this matter, please do not hesitate to contact Jennifer Gimbel, the Director of the CWCB, or Casey Shpall, the Deputy of the Natural Resources Section of the Attorney General's Office.

Attachments

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TO: Colorado Water Conservation Board Members

John W. Hickenlooper
Governor

FROM: Jennifer Gimbel, Director
Ted Kowalski, Chief, Interstate and Federal Section
Brent Newman, Interstate and Federal Section

Mike King
DNR Executive Director

Jennifer L. Gimbel
CWCB Director

DATE: May 6, 2011

SUBJECT: **Consent Agenda Item 2, May 17-18, 2011 Board Meeting**
Interstate and Federal Section: Utilization of CWCB Litigation Account

Background

Section 37-60-121(2.5) of the Colorado Revised Statutes provides that the Colorado Water Conservation Board is authorized "to expend, pursuant to continuous appropriation and subject to the requirements of paragraph (b) of this subsection (2.5), a total sum not to exceed the balance of the litigation fund, which is created, for the purpose of engaging in litigation ... to defend and protect Colorado's allocations of water in interstate streams and waters; and to ensure the maximum beneficial use of water for present and future generations by addressing important questions of federal law ... " The CWCB has received two letters from Attorney General Suthers, attached, regarding the use of the litigation fund.

First, the AG requests the expenditure of \$110,000 over the next fiscal year to "adequately defend, in negotiations and litigation, Colorado's interests in the Republican River." These funds will specifically be used for Colorado's continued negotiation with Kansas, seeking approval of the Compact Compliance Pipeline, including payment of fees to outside consultants. If no agreement is reached, in 2012 the funds will be used for the outside consultants and arbitration fees associated with the required non-binding dispute resolution process. Also, Colorado is a necessary party to Kansas' petition against Nebraska, and expenses will be incurred by the progression of this suit in the United States Supreme Court.

In a second letter, the Attorney General requests \$290,000 for legal staff from the Department of Law, and \$350,000 for outside expert technical work to "protect our State's allocations of the Colorado River under the Colorado River Compact and the Upper Colorado River Compact." The funding requested for legal staff at the DOL will maintain a staff of two attorneys, one legal assistant, plus operating costs for Fiscal Year 2012. The funding for outside expert work will be utilized for technical analysis to "support negotiations and prepare for potential litigation." The three areas in which such advanced technical support will be necessary are as follows: the Upper Colorado River Commission (UCRC) resolution to develop policies and procedures for implementation of the compact; bi-national negotiations between the United States and Mexico

in implementation of the 1944 Water Treaty and Minutes appurtenant; and finally the Colorado River Basin Water Supply and Demand Study, specifically the technical and legal implications of each of the possible strategies developed by the Study.

The tasks outlined above are essential to allowing the Office of the Attorney General and the CWCB to prepare for and participate in ongoing and future negotiations and potential litigation with the goal to defend Colorado's equitable apportionment and rights to the Republican and Colorado Rivers, as provided by the compacts.

These requests also provide that the CWCB authorize these funds to be used in Fiscal Year 2013 if not expended in Fiscal Year 2012, and that the CWCB Director, in consultation with the State Engineer and the staff of the Department of Law, "allocate these funds between these activities based on actual costs and litigation necessities."

Staff Recommendation

The Staff recommends that the Board:

- 1) approve the expenditure of \$750,000 from the Litigation Fund, to support the Attorney General in these important tasks;
- 2) direct the CWCB Director and Staff to expend these funds in a manner consistent with the request by the Office of the Attorney General, and;
- 3) direct the CWCB Director, CWCB Staff, and Office of the Attorney General to comply with the annual reporting requirements as specifically provided for in Section 37-60-121(2.5).



JOHN W. SUTHERS
Attorney General

CYNTHIA H. COFFMAN
Chief Deputy Attorney General

DANIEL D. DOMENICO
Solicitor General

STATE OF COLORADO
DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

STATE SERVICES BUILDING
1525 Sherman Street - 7th Floor
Denver, Colorado 80203
Phone (303) 866-4500

May 17, 2011

Request for Expenditure from Litigation Fund
for Republican River Compact Litigation

Dear Board Members:

By this letter, I request the expenditure of \$110,000 over the next fiscal year (FY 12) from the Colorado Water Conservation Board Litigation Fund pursuant to section 37-60-121(2.5)(a)(III), C.R.S. That section authorizes the Board to expend money from the Litigation Fund at the request of the Attorney General for the costs to defend and protect Colorado's allocations of water in interstate streams and rivers. I believe this expenditure is necessary to adequately defend, in negotiations and litigation, Colorado's interests in the Republican River.

The funds are necessary to defend Colorado's allocation of water under the Republican River Compact. First, funds are necessary for continued outside consultant fees relating to the Compact Compliance Pipeline. We continue to negotiate with Kansas seeking approval of the pipeline which requires outside consultants to assist with that process. If Kansas will not agree to the proposal, in FY 12 Colorado will invoke the required non-binding dispute resolution process on the revised proposal which will again require outside consultants fees as well as arbitration fees.

Additionally, the United States Supreme Court has accepted Kansas' petition against Nebraska. Colorado is a necessary party to this interstate suit and will incur expenses. As it is very early in the litigation, it is not possible to accurately estimate those expenses. However, it is very likely Colorado will be responsible for at least some portion of the expenses and fees of the Supreme Court appointed Special Master, some costs, expert and consultant fees, and other expenses such as attorney travel. It is likely we will be forced to come back to request additional funds to meet Colorado's obligations over FY 12, however we will wait until we are able to provide a better estimate of potential costs to make that request.

This effort is essential to prepare my office and the CWCB for imminent negotiations and potential litigation to protect Colorado's rights to the Republican River, now and in the future. I therefore request and recommend that the CWCB authorize the expenditure of \$110,000 to hire consultants, pay arbitration fees, and pay Supreme Court litigation costs and fees. The request also includes funds for travel and other expenses.

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I further recommend that the CWCB's authorization allow the funds to be used in FY 13 if not expended in FY 12, and allow the Board Director, in consultation with the State Engineer and my staff, to allocate funds between these activities based on actual costs and litigation necessities.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink that reads "John W. Suthers". The signature is written in a cursive style with a long, sweeping underline.

JOHN W. SUTHERS
Colorado Attorney General



JOHN W. SUTHERS
Attorney General

CYNTHIA H. COFFMAN
Chief Deputy Attorney General

DANIEL D. DOMENICO
Solicitor General

STATE OF COLORADO
DEPARTMENT OF LAW
OFFICE OF THE ATTORNEY GENERAL

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1525 Sherman Street - 7th Floor
Denver, Colorado 80203
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May 17, 2011

Request for Expenditure from Litigation Fund
to Protect Colorado's Allocations in the Colorado River

Dear Board Members:

Section 37-60-121(2.5)(a)(III), C.R.S., authorizes the Colorado Water Conservation Board to expend money from its Litigation Fund, at the request of the Attorney General, for the costs to defend and protect Colorado's allocations of water in interstate streams and rivers. Pursuant to that authorization I request by this letter the expenditure of \$290,000 for legal staff from the Department of Law and \$350,000 for expert technical outside consulting work over the next fiscal year (FY12) from the Litigation Fund to support our continuing efforts to protect our State's allocations of the Colorado River under the Colorado River Compact and the Upper Colorado River Compact. The CWCB's staff and I believe that this expenditure is necessary to adequately defend, in negotiations and in litigation, the State's apportionments under the compacts.

The Colorado River Basin is very important to Colorado's water future. It is the only remaining river basin originating in Colorado that is not over-appropriated in some parts of the basin. Colorado is involved in numerous negotiations to defend and protect its allocations of water in the Colorado River system. Such negotiations have been and remain critical to allowing Colorado to achieve the optimum use of this resource for present and future generations. In the absence of these negotiations, costly litigation is likely to ensue. Furtherance of the ongoing negotiations requires sound legal analysis and detailed technical information to inform our conversations and decision-making strategies.

The legal analysis is done by attorneys in the special Colorado River Unit at the Department of Law. In recognition of the continued budget constraints, DOL again requests funding for a reduced staff of only two attorneys (down from three) and one legal assistant, plus operating costs, calculated to total \$290,000 for FY12.

In the next few years, there are three critical negotiations that will occur regarding our interests in the Colorado River. In order to achieve the best result for the State we request \$350,000 to hire outside expert consultants to prepare technical analysis to support negotiations and prepare for potential litigation. The areas where we require contract assistance in support of litigation are as follows:

- 1) The Upper Colorado River Commission (UCRC) in December 2010, adopted a resolution wherein the Commission stated its intent to: develop policies and procedures that might be needed to implement articles III through VI of the compact in furtherance of: (a) the Commission performing its responsibilities, pursuant to article VIII of the compact, as necessary to administer the provisions of the compact; (b) implementation of article IV of the compact; (c) the comprehensive development of the water resources of the Upper Basin; (d) the Resolutions adopted by the Commission addressing Upper Basin yield; and, (e) work with the Upper Division states' representatives to develop options for administering articles III through VI of the Upper Colorado River Basin Compact and provide a recommendation for consideration by the Commission as soon as practicable, but in no event later than December 31, 2013.

This effort will take a great deal of technical resources to explore the different compact implementation possibilities, and the impacts to Colorado. Unlike the internal studies conducted by the CWCB regarding intrastate compact compliance, the proposed UCRC work is intended to explore options to implement compact compliance among all of the Upper Division States. This work will likely be related to modeling different compact compliance scenarios that will have different assumptions related to overuse, pre-1922 rights, and determining consumptive uses. This work will primarily rely on models (the Colorado River Simulation System (CRSS) and Riverware). The modeling will focus on how the different assumptions could affect Colorado's water resources. It is imperative that this work remain confidential as it relates to legal negotiations and litigation that is likely to occur at some time in the future among the Colorado River basin states.

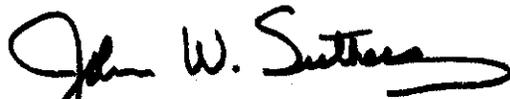
- 2) The U.S. and Mexico have signed three Minutes to the United States-Mexico Water Treaty of 1944 within the last year. The "Minute" is a technical term specific to the 1944 Water Treaty that is an agreement that is incorporated into the Treaty. These Minutes contemplate a comprehensive framework for additional Minutes to the 1944 Treaty that allow the U.S. and Mexico to explore creative and new ways to manage water related to: a) water augmentation opportunities; b) conservation projects; c) innovative water management strategies; and, d) environmental priorities. In implementing these Minutes, the proposed work will explore how the Treaty could be interpreted, and how it could directly and negatively impact Colorado's ability to fully develop its water resources under the Colorado River Compact of 1922 and the Law of the River. The technical consulting work will be related to how these different negotiated Minutes will or could affect Colorado's ability to fully use our compact entitlements.
- 3) The seven basin states are engaged in a basin study that explores different water supply and water demand opportunities. This study will include the possibility of using plans for augmentation to meet water demands. To this end, there will be contract engineering work needed to understand the technical and legal implications of each of the possible strategies that may be pursued once this study has developed various alternatives to include in the report, and, after the report is completed, to assure that Colorado's water resources are not negatively affected.

These tasks are essential to allowing my office and the CWCB to prepare for and participate in ongoing and future negotiations and potential litigation with the goal to defend Colorado's equitable apportionment to the Colorado River, as provided by the compacts, now and into the future.

I therefore request and recommend that the CWCB authorize the expenditure from the Litigation Fund of \$290,000 to fund legal staff at the DOL and \$350,000 to fund contract work for FY 12. I further recommend that the CWCB's authorization allow the funds to be used in FY 13 if not expended in FY 12, and allow the Board Director, in consultation with the State Engineer and my staff, to allocate funds between these activities based on actual costs and litigation necessities.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink that reads "John W. Suthers". The signature is written in a cursive style with a long, sweeping underline.

JOHN W. SUTHERS
Colorado Attorney General

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SUMMARY MINUTES AND RECORD OF DECISIONS

May 17-18, 2011

Final and Approved July 12, 2011

John W. Hickenlooper
Governor

Mike King
DNR Executive Director

Jennifer L. Gimbel
CWCB Director

A regular meeting of the Colorado Water Conservation Board (CWCB) was convened at Fort Lewis College in Durango Colorado, located at 1000 Rim Drive, Durango, CO 81301. The meeting was called to order by Chair Eric Wilkinson. Nine voting members were present at the call to order, so a quorum was present (at least 6 required). Voting members present were Chair Geoff Blakeslee, Barbara Biggs, John McClow, Alan Hamel, Travis Smith, Carl Trick, Russell George, Mike King, and Eric Wilkinson. Non-voting *ex officio* members present or represented were CWCB Director Jennifer Gimbel; Casey Shpall, Deputy Attorney General; and Dick Wolfe, State Engineer. Alexandra Davis, Assistant Director for Water, Colorado Department of Natural Resources was also in attendance. John Stulp, Special Policy Advisor to the Governor on Water, and Chair of the Interbasin Compact Committee was in attendance the first day but left after lunch on the second day.

On the second day the meeting was called to order by Chair Eric Wilkinson. Nine voting members were present at the call to order, so a quorum was present (at least 6 required). Voting members present on the second day were Chair Eric Wilkinson, Geoff Blakeslee, Barbara Biggs, John McClow, Alan Hamel, Russell George, Mike King, Travis Smith, and Carl Trick. Non-voting *ex officio* members present or represented were Dick Wolfe, Director of the Division of Water Resources and Casey Shpall, Deputy Attorney General. Alexandra Davis, Assistant Director for Water, Colorado Department of Natural Resources was also in attendance.

Note: While the Board's consideration of agenda items does not always follow the sequence indicated by the agenda numbers, these minutes are listed in agenda item order for easier reference.

Monday, May 17, 2011

Colorado River Workshop – 8:00 AM – 9:45 AM

Monday, May 17, 2011

Call to Order 10:04 AM

1. Review and Approval of Agenda

Track 1 00:03:59 – 00:07:13

Action: Eric Wilkinson requested that consent agenda item number 4 be removed as it is not yet ready for board consideration. Eric Wilkinson asked that an item be added to agenda item 6, 6e – Colorado River legal issues. Eric asked that agenda item 18 be removed. Eric asked that item 25 be moved to after agenda item 12. Eric Wilkinson asked that item 28 be moved to after item 9. Geoff Blakeslee made a motion to accept the agenda with noted changes and seconded by Carl Trick. The motion was approved unanimously (9-0).

2. Review and Approval of Meeting Minutes – May 17 – 18, 2011

Track 1 00:07:13 – 00:10:15

Action: Carl Trick requested that the votes for the failed motion on item 20 be added to the official final minutes. (failed motion - 5/2). Eric Wilkinson requested a change to the first paragraph fourth line from the bottom of Director Wolfe's title from "Director to the Department of Water Resources" to the "Director of the Division of Water Resources". Eric Wilkinson asked that the final adjournment motion be added. John McClow made a motion to approve the March 17 – 18, 2011 minutes with the specified revisions, which was seconded by Alan Hamel. The motion was approved unanimously (9-0).

3. Approve and/or Remove Items from Consent Agenda

Track 1 00:10:15 – 00:29:57

Action: Travis Smith requested that consent agenda items 2, 5, and 6 be removed from the consent agenda to be addressed by the board following agenda item 29. Jennifer Gimbel clarified consent agenda item 1 will have to be addressed at the next board meeting. Eric Wilkinson requested on behalf of Casey Shpall that consent agenda item 2 be covered in agenda item 5 during the Attorney General's report. Travis Smith made a motion to accept the staff recommendation on the remaining item on the consent agenda (item 3, Stream and Lake Protection Section – Statements of Opposition), which was seconded by Russell George. The motion was approved unanimously (9-0).

Consent Agenda Item 1 - Watershed & Flood Protection Section - "Flood Hazard Area Delineation, East Toll Gate Creek (Upper)", by J3 Engineering Consultants, dated December, 2010.

Action: This item was postponed until the July Board Meeting.

Consent Agenda Item 2 - Interstate and Federal Section - Litigation Account Request.

Track 2 00:32:10 – 00:42:27

Action: Russell George made a motion to approve staff recommendation, which was seconded by Barbara Biggs. The motion was approved unanimously (9-0).

Consent Agenda Item 3 - Finance Section – Stream and Lake Protection Section – Statements of Opposition.

Track 1 00:10:15 – 00:29:57

Action: Travis Smith made the motion to approve the staff recommendation, which was seconded by Russell George. The motion was approved unanimously (9-0).