



COLORADO

Colorado Water
Conservation Board

Department of Natural Resources

1313 Sherman Street, Room 721
Denver, CO 80203

DATE: August 1, 2014

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

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)

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 2013, the fund had approximately \$1,680,000 available for new expenditures. Since that time, the Attorney General requested, and the Board approved, the following total and new expenditures: 1) \$250,000 for the Rio Grande



litigation (of which only \$120,000 was a new expenditure); 2) \$700,000 for defense work associate with the Colorado River (\$500,000 in May 2013 of which \$259,000 was for new spending authority), and \$200,000 in January 2014 (of which all \$200,000 was new spending authority); and, 3) \$469,265.61 (two separate requests in May 2013 for \$420,000 and \$49,265.61) for Republican River litigation. Therefore, currently there is approximately \$631,734 available for expenditure. However, the General Assembly refreshed the litigation account this year through the Construction Fund bill, by adding an additional \$1,200,000 to the litigation account. Thus, the current uncommitted available funds from the litigation account will be approximately \$1,831,735. Another refresh of the litigation fund may be appropriate next year. Copies of the board memos, the letters from the Attorney General, and the minutes from the Board meetings where authorizations occurred are attached to this report.

Attachments.



STATE OF COLORADO

Colorado Water Conservation Board Department of Natural Resources

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TO: Colorado Water Conservation Board Members

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

DATE: January 28, 2013

SUBJECT: **Agenda Item 8b, January 28-29, 2013 Board Meeting**
Interstate, Federal, and Water Information Section: Request for Utilization of
Litigation Account – Rio Grande River

John W. Hickenlooper
Governor

Mike King
DNR Executive Director

Jennifer L. Gimbel
CWCB Director

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 a letter from Attorney General Suthers, attached, regarding the use of the litigation fund.

The Attorney General requests a total of \$250,000 to “adequately defend, in negotiations and in litigation, Colorado’s interests in the Rio Grande.” The funds are anticipated to be used to retain expert consultants relating to hydrogeology, hydrology, administration and operation of the Rio Grande. Also, as a named party to Texas’ current petition, Colorado may be responsible for a portion of the U.S. Supreme Court or its appointed Special Master’s expenses and fees. Furthermore, trial preparation and participation will require travel and related expenses. A portion of the funds requested can be redirected from a prior Board authorization for expenditure from the Litigation Fund to defend the State Engineer in an in-state litigation concerning Colorado’s effort to integrate groundwater and surface water regulation in Water Division No. 3. Further information is included in the Attorney General’s letter, attached.

The tasks outlined above are essential to allowing the Office of the Attorney General, State Engineer, and CWCB to prepare for and participate in ongoing and future negotiations and litigation with the goal to defend Colorado’s rights in the Rio Grande, as provided by the compacts.

This request also provides that the CWCB authorize these funds to be used in Fiscal Year 2014 if not expended in Fiscal Year 2013, and that the CWCB Director, in consultation with the State Engineer, and the staff of the Department of Law, “allocate these funds between the activities based on actual costs and litigation necessities.”

Staff Recommendation

The Staff recommends that the Board:

- 1) Approve the expenditure of a total of \$250,000 to support the CWCB, State Engineer, and Attorney General in these important tasks.
- 2) Direct the CWCB Director and Staff to expend these funds 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

Ralph L. Carr
Colorado Judicial Center
1300 Broadway, 10th Floor
Denver, Colorado 80203
Phone (720) 508-6000

January 16, 2013

**Request to Modify Existing Approval for Expenditure from Litigation Fund and Additional
Request for Expenditure from Litigation Fund for Litigation in the Rio Grande Basin**

Dear Board Members:

By this letter, I request the Board modify its approval for expenditure of \$150,000 to defend the State Engineer in litigation filed in Water Division No. 3, and further authorize expenditure of an additional \$120,000 for FY13 and FY14 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 CWCB 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. I believe this expenditure is necessary to adequately defend, in negotiations and litigation, Colorado's interests in the Rio Grande.

In July 2012, the Board approved a request for expenditure of \$150,000 for FY13 from the Litigation Fund to adequately defend the State Engineer in an in-state concerning Colorado's effort to integrate groundwater and surface water regulation in Water Division No. 3. *See, Suthers Letter dated June 29, 2012.* At the time of this request, trial was expected to last up to 10 days, and the Department of Law anticipated the need to retain a number of experts familiar with groundwater modeling, hydrogeology and evapotranspiration in the Rio Grande Basin to support the case in chief. Subsequently, due, in part, to the plaintiffs' inability to produce experts, the issues to be litigated were narrowed considerably, thereby leaving \$130,000 of the requested funds unspent.

At the beginning of 2013, Texas filed an original action with the U.S. Supreme Court concerning the Rio Grande Compact. In its complaint, Texas claims surface water diversions and groundwater pumping in New Mexico improperly deplete water to which Texas is entitled under the Compact and Rio Grande Project Act. Although no claims are asserted directly against Colorado, our state is a named defendant and will be implicated by the arguments and interpretations promoted throughout this litigation. The funds requested, therefore, are necessary to defend Colorado's allocation of water under the Rio Grande Compact of 1938.

As this case is only in its beginning stages, it is impossible to accurately estimate these expenses. However, based on experience in other interstate compact litigation involving parties with engrained disagreements, the Department of Law estimates that funds will be necessary to:

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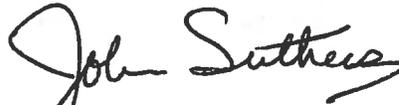
- (a) Retain outside consultants with expertise in, among other things, groundwater, hydrogeology, hydrology and administration within the Rio Grande basin.
- (b) Pay for a portion of the Court or its appointed Special Master's expenses and fees.
- (c) Provide for travel and other expenses associated with trial preparation and participation.

These efforts will be essential to support my office, the State Engineer, and the CWCB in ongoing negotiations and litigation to protect Colorado's rights to the Rio Grande, now and in the future. I, therefore, request and recommend that CWCB authorize the expenditure of a total \$250,000, including funds previously authorized in July 2012 for other Rio Grande purposes.

I further recommend that the CWCB's authorization allow the funds to be used in FY14 if not expended in FY13, 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,



JOHN W. SUTHERS
Colorado Attorney General

1. South Metro Water Supply Authority – WISE Partnership
 - a. Cottonwood Water and Sanitation District
 - b. Castle Pines North Metropolitan District
 - c. Dominion Water and Sanitation District
 - d. Pinery Water and Sanitation District
 - e. Rangeview Metropolitan District
 - f. Stonegate Village Metropolitan District
2. Rio Grande Water Conservation District – Atkins Ranch Water Right Purchase
3. Rio Grande Water Conservation District – Treasure Pass Transmountain Diversion Water Rights Purchase
4. San Luis Valley Water Conservancy District – Anaconda Water Rights Purchase

Amendment to Staff Recommendation: Staff recommendation was amended to update both of the Rio Grande Water Conservation District projects (Atkins Ranch Water Right Purchase and Treasure Pass Transmountain Diversion Diversion Water Rights Purchase) to read ‘acre-feet TBD’ on the average annual diversion, rather than ‘26,000 acre-feet’.

6. Interstate, Federal, and Water Information Section

- a. Annual Litigation Account Report

Action: Presentation by Ted Kowalski. A motion was made by Alan Hamel to approve staff recommendation, which was seconded by Diane Hoppe. The motion was approved unanimously (9-0).

Staff Recommendation: Staff and the Department of Natural Resources recommend that the CWCB authorize Staff to forward the proposed report to the appropriate committees.

- b. Request for Utilization of Litigation Account – Rio Grande Basin

Action: Presentation by Ted Kowalski. A motion was made by Travis Smith to approve staff recommendation, which was seconded by Barbara Biggs. The motion was approved unanimously (10-0).

Staff Recommendation: Staff recommends that the Board:

- 1) Approve the expenditure of a total of \$250,000 to support the CWCB, State Engineer, and Attorney General in these important tasks.
- 2) Direct the CWCB Director and Staff to expend these funds 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).

STATE OF COLORADO

Colorado Water Conservation Board

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TO: Colorado Water Conservation Board Members

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

DATE: May 3, 2013

SUBJECT: **Agenda Item 7a, May 14-15, 2013 Board Meeting**
Interstate, Federal, and Water Information Section: Request for Utilization of Litigation Account – Colorado River

John W. Hickenlooper
 Governor

Mike King
 DNR Executive Director

Jennifer L. Gimbel
 CWCB Director

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 a letter from Attorney General Suthers, attached, regarding the use of the litigation fund.

The Attorney General requests a total of \$500,000 to “adequately defend, in negotiations, litigation, and other processes the State’s apportionments under the Compacts for FY14”. The requested expenditure is divided between \$300,000 for legal staff from the Department of Law and \$200,000 for expert technical outside consulting work to protect the State’s equitable allocations of the Colorado River under the Colorado River Compact and the Upper Colorado River Compact. Further information is included in the Attorney General’s letter, attached.

The request also outlines a new accounting procedure by which any unexpended funds from the previous fiscal year will be reverted back to the litigation fund, beginning each year with a clean slate. Under this new procedure, \$40,000 previously requested for DOL legal work and \$201,000 for technical work that were unexpended will be returned to the fund.

The tasks outlined above are essential to allowing the Office of the Attorney General, State Engineer, and CWCB to prepare for and participate in ongoing and future negotiations and

litigation with the goal to defend Colorado's rights on the Colorado River, as provided by the compacts.

This request also provides that the CWCB Director, in consultation with the State Engineer, and the staff of the Department of Law, "allocate these funds between the activities based on actual costs and litigation necessities."

Staff Recommendation

The Staff recommends that the Board:

- 1) Authorize reversion to the Litigation Fund of the FY13 unexpended \$40,000 for DOL legal work and \$201,000 for technical work to be made available for future authorizations.
- 2) Approve the expenditure of a total of \$500,000 to support the CWCB, State Engineer, and Attorney General in these important tasks.
- 3) Direct the CWCB Director and Staff to expend these funds consistent with the request by the Office of the Attorney General, and;
- 4) 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

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May 1, 2013

FY14 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 from the Litigation Fund of \$300,000 for legal staff from the Department of Law ("DOL") and \$200,000 for expert technical outside consulting work to protect the State's equitable allocations of the Colorado River under the Colorado River Compact and the Upper Colorado River Compact over the next fiscal year (FY14). The CWCB's staff and I believe that this expenditure is necessary to continue to adequately defend, in negotiations, litigation, and other processes the State's apportionments under the Compacts for FY14.

The Colorado River remains the only river basin originating in Colorado that is not over-appropriated in some parts of the basin. Colorado is involved in negotiations, processes under the National Environmental Policy Act and Endangered Species Act, basin investigations, and litigation to defend and protect its allocations of water in the Colorado River system. Such negotiations, processes and litigation have been, and remain, critical to allowing Colorado to achieve the optimum use of this resource for present and future generations and minimize costly litigation. Furtherance of these ongoing activities requires sound legal analysis and detailed technical information to inform our decision-making.

For FY13, the CWCB approved \$300,000 for DOL legal work and \$251,000 for expert technical work. Actual FY13 expenditures total \$260,000 for legal work and \$50,000 for technical work. The difference between the authorization and the expenditure for technical work in FY13 is attributed to changes in timing and the decision to perform pre-modeling work.

The accounting teams at both DOL and CWCB have requested that we begin to revise the manner in which we track expenditures from the Litigation Fund so that each fiscal year we start with a clean slate by reverting back to the Litigation Fund any

Page 2

unexpended funds from the previous fiscal year. Therefore for FY14, I request the CWCB: (1) authorize reversion to the Litigation Fund of the FY13 unexpended \$40,000 for DOL legal work and \$201,000 for technical work to be made available for future authorizations; and (2) authorize expenditure from the Litigation Fund for FY14 \$300,000 for DOL legal work and \$200,000 for technical work (see attachment for details).

These tasks are essential to allowing my office and the CWCB to prepare for and participate in ongoing and future negotiations and 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 revert to the Litigation Fund FY13 unexpended funds for legal and technical work of \$241,000. I further request and recommend the CWCB authorize the expenditure of \$500,000 from the Litigation Fund to fund \$300,000 in legal work and \$200,000 in technical work for FY14. Finally, I recommend that the CWCB's authorization for FY14 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,



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
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Attachment A

Colorado River Contract Work for FY14
Expert Technical Consultant Projects

The areas where DOL expects to require contract assistance in anticipation or support of litigation are as follows:

- 1) The Department of the Interior is in the process of preparing an Environmental Impact Statement on adoption of a Long-Term Experimental and Management Plan (LTEMP) for the operation of Glen Canyon Dam (76 Fed. Reg. 64104). The stated purpose of the LTEMP is to inform the Department's decisions on operation of Glen Canyon Dam in such a manner as to improve and protect downstream resources while maintaining compliance with relevant laws, including the Grand Canyon Protection Act, the Endangered Species Act and the Law of the River. Interior is currently developing alternatives and modeling options for development of a Draft EIS during FY14. Results of the LTEMP EIS will directly impact whether and to what extent Colorado and the other Upper Colorado River Division States can assure the Lower Basin receives its compact share of the Colorado River without impairing development of consumptive uses in the Upper Basin. It will also implicate how Glen Canyon Dam provides for hydroelectric power generation, the sale of which repays the cost of the storage features and funds the Upper Colorado River Basin Fund ("Basin Fund") to finance irrigation projects and environmental programs, including the Upper Colorado and San Juan Recovery Implementation Programs and the Glen Canyon Dam Adaptive Management Program. To balance these interests and protect Colorado's allocation of the Colorado River system, DOL has contracted technical consulting work to, among other things, evaluate preferred alternatives to dam operations, compare and contrast adaptive management options, review the science supporting the EIS process, and develop the technical experience to provide expert testimony in any future litigation. DOL will need to continue this work throughout FY14.
- 2) In anticipation of ongoing negotiations regarding settlement of Navajo and other Indian water rights within the Colorado River Basin, and in preparation of potential litigation, the State may require technical experts in Colorado River and Native American water rights matters. Such technical expertise will

prepare the State to participate, to the extent necessary, in either future negotiation or litigation of such matters.

- 3) 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 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.

These efforts have and will continue to 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 avoid curtailment or implement compact compliance among all of the Upper Division States. This work will be related to modeling different compact compliance scenarios that will have different assumptions related to overuse, pre-compact 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.

- 4) Finally, in the event that staffing and timing permit, and in anticipation of ongoing negotiations regarding reservoir operations under the 2007 Interim Guidelines for Lower Basin Shortages and Coordinated Operation of Lake Powell and Lake Mead, and in preparation of litigation on the Colorado River, the State requires a comprehensive model on Colorado River operations throughout the Basin. The technical and engineering work needed to develop and run this model will allow the State to evaluate, compare and contrast, and rebut, if necessary, modeling assumptions made and results provided by the Bureau of Reclamation and its use of the CRSS (Big River model).

Action: Presentation by Ted Kowalski. This was an informational item only. No Board action was required.

7. Interstate, Federal, and Water Information Section – Litigation Account Request

Action: Presentation by Ted Kowalski. A motion to approve the staff recommendation was made by John McCLOW, which was seconded by Diane Hoppe. The motion was approved unanimously (8-0).

Staff Recommendation: The Staff recommends that the Board: 1) approve the expenditure of \$200,000 from the Litigation Fund; 2) direct the CWCB Director and Staff to expend these funds 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).

8. Attorney General’s Report, Legal Briefing and Executive Session

Action: Presentation by Casey Shpall. This was an informational item only. No Board action was required.

9. Executive Session

Action: Under the Colorado Open Meetings Act, C.R.S. Section 24-6-402(3)(a)(II), a motion was made by Ty Wattenberg for the Board to go into executive session for the discussion of agenda items 9.a. through 9.d. The motion was seconded by April Montgomery. The motion was approved unanimously (8-0).

- a. Legal Issues concerning Loans for Boxelder Basin Regional Stormwater Authority
- b. Colorado River Issues
- c. Rio Grande River Litigation
- d. Republican River Litigation

Ty Wattenberg made a motion for the Board to leave executive session, which was seconded by April Montgomery. The motion was approved unanimously (8-0).

10. Report from Executive Session

Action: Deputy Attorney General Casey Shpall reported that the Board went into Executive Session, pursuant to C.R.S. Section 24-6-402(3)(a)(II) for discussion of agenda items 9.a. through 9.d., and that the discussion was limited to those items only, with no action taken.

11. Interstate, Federal, and Water Information Section – Species Conservation Trust Fund

Action: Presentation by Ted Kowalski and by Linda Bassi. Jeff Ver Steeg addressed the Board. A motion to approve the staff recommendation was made by Travis Smith, which was seconded by Patricia Wells. The motion was approved unanimously (8-0).

Staff Recommendation: Staff recommends, contingent upon appropriations, that the Board: 1) concur with the DNR Executive Director’s proposed recommendations to the General Assembly

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Colorado Water Conservation Board

Department of Natural Resources

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TO: Colorado Water Conservation Board Members

John W. Hickenlooper
 Governor

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

Mike King
 DNR Executive Director

Jennifer L. Gimbel
 CWCB Director

DATE: May 3, 2013

SUBJECT: **Agenda Item 7b, May 14-15, 2013 Board Meeting**
Interstate, Federal, and Water Information Section: Request for Utilization of
Litigation Account – Republican River

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.

The Attorney General requests \$420,000 to “adequately defend, in negotiations and in litigation, Colorado’s interests in the Republican River”. The requested expenditure will be used for outside consultant fees, discovery expenses, and the arbitrator’s fees related to arbitration of Colorado’s two plans for compact compliance, as well as for costs related to Nebraska’s two plans for compact compliance. Further information is included in the Attorney General’s letter, attached.

In the second letter, the Attorney General requests an additional expenditure of \$49,265.61 during FY13 for costs incurred by the Special Master in the ongoing Supreme Court case. Due to the Special Master’s appointment to the United States Court of Appeals for the First Circuit, payment is being sought for services rendered prior to taking the bench. Ordinarily this amount would have been due in FY14.

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

This request also provides that the CWCB Director, in consultation with the State Engineer, and the staff of the Department of Law, "allocate these funds between the activities based on actual costs and litigation necessities."

Staff Recommendation

The Staff recommends that the Board:

- 1) Approve the expenditure of a total of \$469,265.61 to support the CWCB, State Engineer, and Attorney General in these important tasks.
- 2) Direct the CWCB Director and Staff to expend these funds 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

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Phone (720) 508-6000

May 1, 2013

**Request for Expenditure from Litigation Fund
for Republican River Compact Litigation for FY14**

Dear Board Members:

By this letter, I request expenditure of \$420,000 over the next fiscal year (FY14) 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 CWCB 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. I believe this expenditure is necessary to adequately defend, in negotiations and in litigation, Colorado's interests in the Republican River.

The requested funds are necessary to continue to defend Colorado's use and allocation of water under the Republican River Compact. These funds will be used for outside consultant fees, discovery expenses, and the arbitrator's fees related to arbitration of Colorado's two plans for compact compliance. Colorado will invoke non-binding fast-track arbitration to be completed in Fiscal Year 2014 for both its Compact Compliance Pipeline Proposal and Bonny Reservoir Accounting Proposal. If approved, those plans would promote Colorado's approach to compact compliance while continuing to allow beneficial use of water within the basin.

The funds will also be used for outside consultant fees, discovery expenses, arbitrator's fees relating to Nebraska's two plans for compact compliance: the Alternative Water Short Accounting Proposal and the Rock Creek Augmentation Proposal. Nebraska has invoked non-binding fast-track arbitration for both of its plans.

The Special Master, William J. Kayatta, Jr., appointed by the United States Supreme Court to hear Kansas' current petition, will hold another hearing in Portland, Maine during August, 2013. Trial preparation and participation will require the Department of Law to incur expert and consultant fees and other litigation-related expenses such as attorney and consultant travel. Colorado will also be required to pay a portion of the costs for publishing the Special Master's final report. However, since Mr. Kayatta has been appointed to the United States

Page 2

Court of Appeals for the First Circuit, he will no longer charge the State for his work as Special Master.

Finally, Kansas, Nebraska, and Colorado may file Special Exceptions to the Special Master's final report. It is difficult to anticipate exactly what expenses will result or when, but it is likely that we will incur production expenses during briefing before the United States Supreme Court, as well as attorney travel for oral arguments.

These efforts are essential to support my office and the CWCB in ongoing negotiations and litigation to protect Colorado's rights to the Republican River, now and in the future. I, therefore, request and recommend that CWCB authorize the expenditure of a total \$420,000, including funds that are rolled forward from FY13 to retain consultants, pay arbitration fees, pay Supreme Court litigation costs and fees and provide funds for travel and other expenses.

I further recommend that the CWCB's authorization allow the funds to be used in FY15 if not expended in FY14, 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,



JOHN W. SUTHERS
Colorado Attorney General

REPUBLICAN RIVER COMPACT LITIGATION REQUEST FOR FY 2014

EXPENDITURES	FY 2014 REQUEST
OPERATING EXPENSES	\$40,000.00
CONTRACT EXPENSES PRINCIPIA MATHEMATICA	\$130,000.00
ARBITRATION FEES (2-4 SEPARATE ARBITRATORS)	\$230,000.00
TRAVEL EXPENSES	\$20,000.00
TOTAL	\$420,000.00



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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May 1, 2013

**Request for Expenditure from Litigation Fund
for Republican River Compact Litigation for FY13**

Dear Board Members:

By this letter, I request an additional expenditure of \$49,265.61 during this fiscal year (FY13) 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 CWCB 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.

At the March 2012 Board Meeting, the CWCB approved \$220,000 to hire consultants, pay Supreme Court litigation costs and fees, and for travel and other litigation-related expenses. Since then, the Department of Law has calculated that there will be unanticipated expenses during this Fiscal Year as a result of protracted Supreme Court litigation and the Special Master's appointment to the United States Court of Appeals for the First Circuit.

First, litigation before the Special Master, William J. Kayatta, Jr., extended beyond what we anticipated in March 2012. We expected the litigation to be completed in six months; however, the Special Master held additional hearings to consider supplemental issues.

Second, the Special Master has billed us \$49,265.61 for his services during FY13, rather than FY14. In ordinary course, the Special Master would have waited until FY14 to bill the states for his fees and costs. However, the President appointed him to the United States Court of Appeals for the First Circuit and he has sought payment for services rendered prior to taking the bench. Any further work Judge Kayatta performs after taking the bench will not result in further fees to the states as it will be part of his regular judicial caseload.

These efforts are essential to support my office and the CWCB in ongoing litigation to protect Colorado's rights to the Republican River, now and in the future. I,

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therefore, request and recommend that CWCB authorize the expenditure of a total \$49,265.61 to pay the Special Master's fees.

Thank you for your consideration.

Sincerely,



JOHN W. SUTHERS
Colorado Attorney General

STATE OF COLORADO

Colorado Water Conservation Board Department of Natural Resources

1313 Sherman Street, Room 721
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TO: Colorado Water Conservation Board Members

FROM: Ted Kowalski

DATE: January 16, 2014

SUBJECT: **Agenda Item 7, January 27-28, 2014 Board Meeting
Interstate, Federal and Water Information Section – Litigation Account
Request**

John W. Hickenlooper
Governor

Mike King
DNR Executive Director

James Eklund
CWCB Director

Introduction

The 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 a letter from Attorney General Suthers, attached, regarding the use of the litigation fund. The Attorney General requests that \$200,000 be authorized for legal and technical work associated with additional modeling related to Colorado River operations. These tasks are outlined in greater detail in the letter from Attorney General Suthers. These tasks are essential to allowing the Office of the Attorney General and CWCB to prepare for, and participate in, ongoing and future negotiations and potential litigation with the goal to defend Colorado’s rights related to the Colorado River, as provided by the compacts and the law of the river. These requests also provide that the CWCB authorize these funds to be used in Fiscal Year 2015 if not expended in Fiscal Year 2014, and that the CWCB Director, in consultation with the staff of the Department of Law, “allocate these funds between the activities based on actual costs and litigation necessities.”

Staff Recommendation

The Staff recommends that the Board:

- 1) approve the expenditure of \$200,000 from the Litigation Fund;
- 2) direct the CWCB Director and Staff to expend these funds 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).

Attachment (Letter from Attorney General Suthers).

Interstate Compact Compliance • Watershed Protection • Flood Planning & Mitigation • Stream & Lake Protection
Water Project Loans & Grants • Water Modeling • Conservation & Drought Planning • Water Supply Planning

1. South Metro Water Supply Authority – WISE Partnership
 - a. Cottonwood Water and Sanitation District
 - b. Castle Pines North Metropolitan District
 - c. Dominion Water and Sanitation District
 - d. Pinery Water and Sanitation District
 - e. Rangeview Metropolitan District
 - f. Stonegate Village Metropolitan District
2. Rio Grande Water Conservation District – Atkins Ranch Water Right Purchase
3. Rio Grande Water Conservation District – Treasure Pass Transmountain Diversion Water Rights Purchase
4. San Luis Valley Water Conservancy District – Anaconda Water Rights Purchase

Amendment to Staff Recommendation: Staff recommendation was amended to update both of the Rio Grande Water Conservation District projects (Atkins Ranch Water Right Purchase and Treasure Pass Transmountain Diversion Diversion Water Rights Purchase) to read ‘acre-feet TBD’ on the average annual diversion, rather than ‘26,000 acre-feet’.

6. Interstate, Federal, and Water Information Section

- a. Annual Litigation Account Report

Action: Presentation by Ted Kowalski. A motion was made by Alan Hamel to approve staff recommendation, which was seconded by Diane Hoppe. The motion was approved unanimously (9-0).

Staff Recommendation: Staff and the Department of Natural Resources recommend that the CWCB authorize Staff to forward the proposed report to the appropriate committees.

- b. Request for Utilization of Litigation Account – Rio Grande Basin

Action: Presentation by Ted Kowalski. A motion was made by Travis Smith to approve staff recommendation, which was seconded by Barbara Biggs. The motion was approved unanimously (10-0).

Staff Recommendation: Staff recommends that the Board:

- 1) Approve the expenditure of a total of \$250,000 to support the CWCB, State Engineer, and Attorney General in these important tasks.
- 2) Direct the CWCB Director and Staff to expend these funds 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

Ralph L. Carr
Colorado Judicial Center
1300 Broadway, 10th Floor
Denver, Colorado 80203
Phone (720) 508-6000

January 17, 2014

**Additional FY14 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 from the Litigation Fund of \$200,000 to protect the State's equitable allocations of the Colorado River under the Colorado River Compact and the Upper Colorado River Compact over the next fiscal year. The CWCB's staff and I believe that this expenditure is necessary in FY14 to continue to adequately defend the State's apportionments under the Compacts.

The Colorado River remains the only river basin originating in Colorado that is not over-appropriated in some parts of the basin. Colorado is involved in negotiations, processes under the National Environmental Policy Act and Endangered Species Act, basin investigations, and litigation to defend and protect its water allocations in the Colorado River system. These activities have been, and remain, critical to allowing Colorado to achieve the optimum use of this resource for present and future generations and minimize costly litigation. Furtherance of these ongoing activities requires sound legal analysis and detailed technical information to inform our decision-making.

The CWCB originally approved \$300,000 for DOL legal work and \$200,000 for expert technical work on Colorado River matters for FY 14. Since that time, work in addition to that initially contemplated has proven necessary. The requested \$200,000 will cover this additional work by the DOL legal staff and technical experts. Specifically, planning among the 7-Basin States regarding contingency operations in the Colorado River Basin and extra efforts to collaborate with the Department of the Interior on the Environmental Impact Statement for the Long-Term Experimental Management Plan and concurrently prepare for litigation depending on the positions of other stakeholders or the Federal Government has required additional travel and work hours of DOL legal staff to satisfy all of the meeting requirements and to perform the substantive legal analyses necessary to protect Colorado's interests. Second, DOL requires additional

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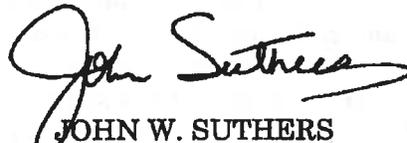
expert modeling and analysis that will inform legal and technical positions on how the State should best position itself to obtain benefits and fulfill obligations consistent with the Colorado River Compact and Law of the River.

These tasks are essential to allowing my office and the CWCB to continue to prepare for and participate in ongoing and future negotiations and 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 of \$200,000 from the Litigation Fund to fund \$50,000 in additional legal work and \$150,000 in additional expert technical work for FY14. Finally, I recommend that the CWCB's authorization for this FY14 request 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,



JOHN W. SUTHERS
Colorado Attorney General

6. Directors' Reports

a. DNR Executive Director

Action: Report by Mike King. This was an informational item only. No Board action was required.

b. IBCC Director

Action: Report by John Stulp. This was an informational item only. No Board action was required.

c. Agriculture Commissioner

Action: Report by Cindy Lair, State Conservation Program Manager, Colorado Department of Agriculture. This was an informational item only. No Board action was required.

d. CWCB Director

Action: Report by Jennifer Gimbel. This was an informational item only. No Board action was required.

e. State Engineer

Action: Report by Dick Wolfe. This was an informational item only. No Board action was required.

f. Division of Parks and Wildlife

Action: Report by Chad Bishop, Mammals Research Section Leader, Colorado Parks and Wildlife. This was an informational item only. No Board action was required.

~~g. Water Resource and Power Development Authority~~

Action: Representatives were not in attendance to present on this item.

7. Interstate, Federal, and Water Information Section – Litigation Account

a. Request for Utilization of Litigation Account – Colorado River

Action: Presentation by Ted Kowalski. A motion was made by John McClow to approve staff recommendation, which was seconded by Russell George. The motion was approved unanimously (9-0).

Staff Recommendation: The Staff recommends that the Board:

1. Authorize reversion to the Litigation Fund of the FY13 unexpended \$40,000 for DOL legal work and \$201,000 for technical work to be made available for future authorizations.
2. Approve the expenditure of a total of \$500,000 to support the CWCB, State Engineer, and Attorney General in these important tasks.
3. Direct the CWCB Director and Staff to expend these funds consistent with the request by the Office of the Attorney General, and;
4. 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).

b. Request for Utilization of Litigation Account – Republican River

Action: Introduction by Ted Kowalski, with presentation by Scott Steinbrecher, Assistant Attorney General, Colorado Attorney General’s Office. A motion was made by Diane Hoppe to approve staff recommendation, which was seconded by Travis Smith. The motion was approved unanimously (9-0).

Staff Recommendation: The Staff recommends that the Board:

1. Approve the expenditure of a total of \$469,265.61 to support the CWCB, State Engineer, and Attorney General in these important tasks.
2. Direct the CWCB Director and Staff to expend these funds 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).

8. Interstate, Federal, and Water Information Section – Colorado River Demand Depletion Projections

Action: Presentation by Ted Kowalski. This was an informational item only. No Board action was required.

9. Finance/Interstate & Federal Section – Animas-La Plata (A-LP) Update

Action: Presentation by Tim Feehan. This was an informational item only. No Board action was required.

10. Stream and Lake Protection Section – 2013 New Instream Flow Appropriations

actions on each of the appropriations identified in the table referenced in the