

# STATE OF COLORADO

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## 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: January 28, 2013

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)**

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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 \$2.45 million available for expenditure, of which \$770,000 was authorized to be spent by letters from the Attorney General and actions taken by the Colorado Water Conservation Board. This amount was apportioned as follows: \$300,000 of new expenditures for the Colorado River; \$100,000 for the Arkansas River; \$220,000 for the Republican River; and \$150,000 for the Rio Grande River. These expenditures were the subject of the memos entitled “Request for Utilization of Litigation Account” from the March and July 2012 Board meetings, enclosed.

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

# STATE OF COLORADO

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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:** March 20, 2012

**SUBJECT:** **Agenda Item 24b, March 20-21, 2012 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

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### 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.

At the May 2011 Board Meeting, the CWCB approved \$350,000 for outside technical work to “protect our state’s allocations of the Colorado River under the Colorado River Compact and the Upper Colorado River Compact.” The Board approved these funds to be used in Fiscal Year 2013 if not used in Fiscal Year 2012. The Attorney General requests that this approval of litigation fund money be applied to costs for technical work relating to the Colorado River Basin Supply and Demand Study, and also to other future expert technical consulting work.

First, the Attorney General requests that \$99,000 of this amount be applied to the State and Federal cost sharing required for continued participation in the Colorado River Basin Supply and Demand Study process. An update on the Study will be presented to the Board during the March 2012 meeting. This Study was one of the areas mentioned for technical funding in the May 2011 request, “specifically the technical and legal implications of each of the possible strategies developed by the Study.”

The Attorney General also requests that \$251,000, the remainder of the May 2011 approval, be utilized to fund contract work in Fiscal Year 2013. The Department of Law expects to require contract assistance in support of litigation involving the following: 1) ongoing efforts by the Upper Colorado River Commission (UCRC) to develop policies and procedures involving administration of the Colorado River compact; 2) the Long Term Experimental and Management Plan (LTEMP) for operation of Glen Canyon Dam; and 3) technical and engineering work for a comprehensive model of Colorado River operations. These tasks are outlined in greater detail in the memo from Attorney General Suthers.

Finally, the Attorney General requests \$300,000 from the litigation fund to fully fund the Defense of the Colorado River subunit. This money serves as funding for staff maintenance and operating costs of this subunit within the Office of the Attorney General. 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 2013.

The tasks outlined above 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 in the Colorado River, as provided by the compacts.

These requests also provide 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) Reauthorize the expenditure of \$350,000 from the May 2011 previously approved funds, of which \$99,000 will be expended within this fiscal year and 251,000 will be expended by the end of next fiscal year to provide appropriate engineering, modeling, and technical support to the CWCB and the Attorney General in these important tasks;
- 2) approve the expenditure of \$300,000 from the Litigation Fund, to complete the necessary amount for support of the Defense of the Colorado River subunit;
- 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**

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

March 9, 2012

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 \$300,000 for legal staff from Department of Law ("DOL") to protect our state's allocations of the Colorado River under the Colorado River Compact and the Upper Colorado River Compact. 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 \$300,000 for FY13. 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 these 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, and processes under the National Environmental Policy Act and Endangered Species Act, to defend and protect its allocations of water in the Colorado River system. Such negotiations and processes 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 the ongoing negotiations and processes requires sound legal analysis and detailed technical information to inform our conversations and decision-making and potential litigation strategies.

In addition, at the May 2011 Board Meeting, the CWCB approved \$350,000 for outside technical work to protect the State's Colorado River allocations. The Board approved these funds to be used in Fiscal Year 2013 if not used in Fiscal Year 2012. I am now requesting that CWCB extend that authorization to FY14. Expenditures for FY12 include \$99,000 for technical work relating to the Colorado River Basin Study. (See attached memorandum.) A delay in additional authorized expenditures is attributable to protracted negotiations between the United States and Mexico and to the decision to perform pre-modeling and proof of concept work to inform the detailed development and implementation of the technical work that was originally contemplated. Expecting this work to be necessary in FY13-14, I request the CWCB authorize the \$250,000 remaining from FY12 be available for expenditure through FY14.

DOL expects to contract for technical assistance in support of litigation 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 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.


- 2) The Department of the Interior in July 2011 announced its intent to prepare an Environmental Impact Statement and conduct public scoping 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. 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, the technical consulting work will, 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 litigation.
- 3) 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).

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 \$300,000 to fund DOL legal staff in FY13 and to allow the expenditure of the authorized \$250,000 in contract funds to be extended through FY14. I further recommend that the CWCB's authorization 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

February 24, 2012

## MEMORANDUM

**TO:** Cynthia Coffman  
Chief Deputy Attorney General

**THRU:** Casey Shpall  
Deputy Attorney General  
Natural Resources and Environment Section

**FROM:** Shanti Rosset O'Donovan  
Assistant Attorney General  
Natural Resources & Environment

**RE:** Contract for Colorado River Basin Study funding

This memo provides the justification for and description of the consulting services that will be developed in the Colorado River Basin Study ("Basin Study"). The Basin Study will be a joint effort of the U.S. Bureau of Reclamation, the State of Colorado and the six other Colorado River Basin States, and will provide essential engineering data and analysis for the litigation, negotiations and other projects in which the State of Colorado is involved with respect to the State's interests in the Colorado River, as described below.

The Defense of the Colorado River Unit ("Unit") represents the Department of Natural Resources, the Colorado Water Conservation Board ("CWCB") and the Colorado Commissioner to the Upper Colorado River Commission in federal, interstate, intra-state and compact matters concerning the Colorado River, billing alpha LW NR IAFDE. The State of Colorado is currently involved in complex interstate and intra-state negotiations, litigation and projects on a number of fronts that affect Colorado's rights and authorities under the body of law governing the use and operation of the Colorado River, known as "the Law of River." For example, the Unit is currently advising the State in negotiations regarding operation of Glen Canyon Dam, which involve balancing the Law of the River, the Grand Canyon Protection Act, and the Endangered Species Act, and in the negotiation of comprehensive water management strategies with the 7-Basin States, the Federal Government and Mexico. The State is also involved in complex litigation in the Ninth Circuit Court of Appeals regarding operation of Glen Canyon Dam. These matters require extensive and accurate engineering data regarding the Colorado River to assist the associated engineers, attorneys and policy makers in representing the State of Colorado's interest.

The Basin Study will analyze water supply and demand in the Colorado River basin through 2060, will assess options and develop recommendations to address current and projected supply and demand imbalances, will assess potential impacts of climate variability on water supplies and demands, and will create a large amount of high-quality data and models for assessing

current and future demands and water supplies, and will provide a framework for the quantitative assessment of consequences of the potential imbalances.

The estimated total cost of the Basin Study is \$5,100,000. The Non-Federal Cost Share Partners plan to contribute \$160,000 each, to be used to fund costs of the Basin Study that exceed \$2,000,000. The contribution from the Litigation Fund to Protect Colorado's Allocation in the Colorado River will be \$99,000. The purchase order for \$99,000 would be paid upfront to the U.S. Bureau of Reclamation as a single lump sum payment. The Basin Study funding agreement expires September 30, 2012.

The Unit's ability to develop coherent legal positions, responses and strategies depends heavily on technical data and analysis of how the Colorado River system works and is operated. As such, the Basin Study is considered to be in anticipation of complex negotiation and litigation. The CWCB approved use of money from its litigation fund to be used by the Department of Law, through the Unit, to contract with expert consultants to prepare technical analysis that will support negotiations and potential litigation, and the CWCB has authorized Attorney General Suthers, through the Unit, to contract for engineering work specifically associated with the Basin Study.<sup>1</sup> The CWCB's staff, and the attorneys in the Unit, believe that this expenditure is necessary to adequately defend, in negotiations and in litigation, the State's apportionments under the Colorado River Compact and Upper Colorado River Basin Compact. Therefore, the expert engineering information that will result from the Basin Study is essential to the successful representation of the State of Colorado and protection the State's interests in the Colorado River.

I would be happy to provide any additional information regarding the decision to contribute money to Basin Study so that we may represent our clients in complex, technical negotiations and litigations affecting the State's interests in the Colorado River.

cc: Peter Ampe, First Assistant Attorney General, Federal & Interstate Water Unit  
Karen Kwon, Assistant Attorney General

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<sup>1</sup> Attorney General Suthers included the Basin Study among the items listed in the Request for Expenditure from Litigation Fund to Protect Colorado's Allocations in the Colorado River to the CWCB board, dated May 17, 2011. The CWCB board subsequently approved this request.

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## 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  
Steve Miller, Interstate, Federal, and Water Information  
Section

John W. Hickenlooper  
Governor

Mike King  
DNR Executive Director

Jennifer L. Gimbel  
CWCB Director

DATE: March 20, 2012

SUBJECT: **Agenda Item 24c, March 20-21, 2012 Board Meeting**  
Interstate, Federal, and Water Information Section: Request for Utilization of  
Litigation Account – Arkansas River

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### Introduction

In a letter dated March 9, 2012, copy attached, Attorney General John Suthers has requested the use of up to \$100,000 from the Board's Litigation Account to provide technical assistance to improve implementation of the State Engineer's Compact Rules Governing Improvement to Surface Water Irrigation Systems in the Arkansas River Basin in Colorado ("Irrigation Improvement Rules").

### Staff Recommendation

The Staff recommends that the Board:

- 1) Approve the expenditure of up to \$100,000 from the Litigation Account to provide technical support for implementation of the Irrigation Improvement Rules; and
- 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).

### 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 Irrigation Improvement Rules are required to prevent material depletions to usable Stateline flows that might otherwise be caused by improvements or modernization of surface water irrigation systems, such as the installation of sprinkler systems to replace flood and furrow irrigation methods or lining of canals. Such depletions are prohibited by Article IV.D. of the Arkansas River Compact, which states:

This compact is not intended to impede or prevent future beneficial development of the Arkansas river basin in Colorado and Kansas by federal or state agencies, by private enterprise, or by combinations thereof, which may involve construction of dams, reservoirs and other works for the purposes of water utilization and control, as well as the **improved or prolonged functioning of existing works**: Provided, that the waters of the Arkansas river, as defined in Article III, **shall not be materially depleted in usable quantity or availability for use to the water users** in Colorado and Kansas under this compact by such future development or construction. (emphasis added).

Previously, the Board's Construction Fund provided \$250,000 of technical support services to the Lower Arkansas Valley Water Conservancy District through the 2009 Projects Bill to facilitate their development and operation of a Rule 10 Compliance Plan under the Improvement Rules. Those funds were utilized for legal and technical consultant services to file and operate a plan for the initial year of the rules in 2011 and have been fully expended. Based on the experience gained in 2011 and certain operational difficulties during that extremely dry year, it has been determined that refinement and enhancement of the administrative tools and models used to calculate and account for depletions are needed. The funds sought by the Attorney General will be used by the CWCB, in consultation with the Div. 2 Engineer, the Attorney General's Office, and the LAVWCD to develop those tools. The CWCB will in particular rely on the expertise of our staff currently developing the Arkansas Decision Support System in conducting this work.



**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

March 9, 2012

Request for Expenditure from Litigation Fund  
for Protection of Colorado's Allocations in the Arkansas River

Dear Board Members:

By this letter, I am requesting the expenditure of up to \$100,000 from the Board's Litigation Fund under 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. This request is for protection of Colorado's surface water irrigation uses under the Arkansas River Compact ("Compact"). It will fund technical assistance for Rule 10 Plans under the State Engineer's Compact Rules Governing Improvements to Surface Water Irrigation Systems in the Arkansas River Basin in Colorado ("Irrigation Improvement Rules").

The Irrigation Improvement Rules became effective January 1, 2011. Rule 10 authorizes Compact Compliance Plans (hereafter "Rule 10 Plans"), under which irrigators may operate sprinklers and other irrigation system improvements that have potential to reduce historical return flows and seepage in a group plan that assures compliance with Article IV-D of the Compact. The Lower Arkansas Valley Water Conservancy District ("LAVWCD") designed and operated the first Rule 10 Plan in 2011-12. During that time, the LAVWCD and Colorado Division of Water Resources ("DWR") identified needs for further technical development for future years' plans. These needs include creating automated data uploading capability for the monthly accounting spreadsheets; interfacing with existing State tools for user-supplied data; accounting for use of additional sources of maintenance flows, including the subject surface water rights; and providing further detail regarding the time, amount and location of maintenance flow releases and deliveries.


The estimated cost of developing these tools in cooperation with the DWR Division 2 Office is \$100,000. The CWCB plans to amend an existing grant contract for related work to add these tasks, using the funds requested herein, for expenditure in FY 13. I further recommend that the CWCB's authorization allow the funds to be used in FY14 if not expended in FY13.

The requested funds will assist with ensuring Colorado's continued Compact compliance while maximizing the State's use of its allocation, and are a necessary and appropriate use of the CWCB's Litigation Fund.

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Thank you for your consideration.

Sincerely,



JOHN W. SUTHERS  
Colorado Attorney General

# STATE OF COLORADO

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## 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: March 20, 2012

SUBJECT: **Agenda Item 24d, March 20-21, 2012 Board Meeting**  
Interstate, Federal, and Water Information Section: Request for Utilization of  
Litigation Account – Republican River

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John W. Hickenlooper  
Governor

Mike King  
DNR Executive Director

Jennifer L. Gimbel  
CWCB Director

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### 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 \$220,000 to “adequately defend, in negotiations and in litigation, Colorado’s interests in the Republican River.” The funds will be used for continued outside consultant fees relating to the Compact Compliance Pipeline and Nebraska’s proposed changes to the Republican River Compact Administration Accounting Procedures. The construction of the operation of the pipeline requires outside consultants in the negotiation process with Kansas, and without Kansas’ assent to the proposal, consultants may be necessary in the non-binding arbitration process. Also, as a named party to the Kansas’ current petition, Colorado is responsible for a portion of the Special Master’s expenses and fees. Trial preparation and participation will require expert and consultant fees. 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 and CWCB to prepare for and participate in ongoing and future negotiations and potential litigation with the goal to defend Colorado’s rights in the Republican River, as provided by the compacts.

These requests also provide 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 \$220,000 to support the CWCB 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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Denver, Colorado 80203  
Phone (303) 866-4500

March 9, 2012

Request for Expenditure from Litigation Fund  
for Republican River Compact Litigation

Dear Board Members:

By this letter, I request expenditure of \$220,000 for 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. I believe this expenditure is necessary to adequately defend, in negotiations and in litigation, Colorado's interests in the Republican River.

These funds continue to be 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 and Nebraska's proposed changes to the Republican River Compact Administration Accounting Procedures. We continue to negotiate with Kansas on construction and operation of the pipeline, which requires outside consultants to assist in the process. If Kansas will not agree to the proposal, non-binding arbitration will likely be invoked in FY13 on the revised proposal, which will again require outside consultants fees and arbitration fees.

In addition, the United States Supreme Court has appointed a Special Master to hear Kansas' current petition. Colorado is a named party to this interstate suit and is responsible for a portion of the Special Master's expenses and fees. As trial has not yet been set, it is not possible to accurately estimate those expenses. However, all indications are that trial will be set at a location convenient to the Special Master in the fall of this calendar year. Trial preparation and participation will require the Department of Law to incur expert and consultant fees and other expenses such as attorney and consultant travel.

Finally, Kansas may also pursue a determination of Colorado's compact compliance and the validity of the Compact Compliance Pipeline in future Supreme Court litigation. Although a petition filed by Kansas may be stayed pending non-binding arbitration, the question of any damages may still proceed to trial. Whether and to what extent these events take place in the near future will depend on the Special Master and the willingness of the respective parties to negotiate.

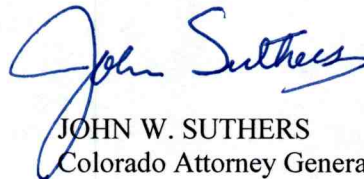
These efforts are essential to support my office and the CWCB in ongoing negotiations and litigation to protect Colorado's rights to the Republican River, now and in the future. I, therefore, request and recommend that CWCB authorize the expenditure of \$220,000, to retain consultants, pay arbitration 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 FY14 if not expended in FY13, and allow the Board Director, in consultation with the State

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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 blue ink that reads "John Suthers". The signature is fluid and cursive, with the first name "John" and last name "Suthers" clearly legible.

JOHN W. SUTHERS  
Colorado Attorney General

# STATE OF COLORADO

## Colorado Water Conservation Board

### Department of Natural Resources

1313 Sherman Street, Room 721

Denver, Colorado 80203

Phone: (303) 866-3441

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www.cwcb.state.co.us



## SUMMARY MINUTES AND RECORD OF DECISIONS

March 20 -21, 2012

Final and Approved May 15, 2012

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 the Colorado Water and Power Development Authority offices located 1580 Logan Street, Denver CO, 80203. The meeting was called to order by Vice Chair John McClow. Nine voting members were present at the call to order, so a quorum was present (at least 6 required). Voting members present were John McClow, Geoff Blakeslee, Barbara Biggs, Alan Hamel, Travis Smith, Russ George, April Montgomery Ty Wattenberg, and Diane Hoppe. Non-voting *ex officio* members present or represented were CWCB Director Jennifer Gimbel; Attorney General, John Suthers; Casey Shpall, Deputy Attorney General; Kevin Rein of the Division of Water Resources, and Grady McNeill of Colorado Parks and Wildlife. Ginny Brannon, Assistant Director for Water and Energy, Colorado Department of Natural Resources, and John Stulp, Special Policy Advisor to the Governor on Water, and Chair of the Interbasin Compact Committee, John Salazar the Commissioner for Department of Agriculture, and Mike Brod with the Colorado Water and Power Development Authority were also in attendance.

On the second day, the meeting was called to order by Chair John McClow. Ten 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 John McClow, Geoff Blakeslee, Alan Hamel, Russ George, Travis Smith, April Montgomery, Ty Wattenberg, Barbara Biggs, Diane Hoppe and Mike King. Non-voting *ex officio* members present or represented were Grady McNeill of Colorado Parks and Wildlife, John Stulp, Special Policy Advisor to the Governor on Water, and Casey Shpall, Deputy Attorney General. Ginny Brannon, Assistant Director for Water and Energy, Colorado Department of Natural Resources was also in attendance. Prior to the discussion of agenda item 25 Travis Smith made a motion that “the Board directs the Executive Director and CWCB staff to develop the appropriate letter of support, to the appropriate congressional members, in regards to the hydro development for Colorado,” which was seconded by Alan Hamel. This item was not on the agenda and therefore does not have a corresponding agenda number. The motion was approved unanimously (9-0).

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.

**24. Interstate, Federal, and Water Information Section – Litigation Account**

- a. Litigation Account Draft Report to General Assembly*
- b. Request for Utilization of Litigation Account – Colorado River*
- c. Request for Utilization of Litigation Account – Arkansas River*
- d. Request for Utilization of Litigation Account –Republican River*

**Track 1                    01:56:42 – 02:10:33**

**Action:** Presentation by Ted Kowalski, Attorney General John Suthers and Casey Shpall Assistant Attorney General. Geoff Blakeslee made a motion to approve the staff recommendations a-d, as stated in the board memo, which was seconded by Russ George. The motion was approved unanimously (9-0).

**25. Stream and Lake Protection Section – New Appropriation Recommendations in Water Division 1**

**Track 3                    01:33:24 – 01:57:56**

**Action:** Presentation by Jeff Baessler. Mr. Baessler informed the Board that staff was withdrawing the recommendation on North Clear Creek pending further discussions by local stakeholders. Geoff Blakeslee made a motion to approve the staff recommendation, “pursuant to ISF Rule 5d, the Board declare its intent to appropriate an ISF water right on each stream segment listed on the Tabulation of Instream Flow and Natural Lake Level Recommendations, and direct Staff to publicly notice the Board’s declaration of intent to appropriate,” which was seconded by April Montgomery. The motion was approved (9-1). Ty Wattenberg voted against the motion. This Board action did not include the recommendation on North Clear Creek.

**26. Stream and Lake Protection Section – 2012 New Instream Flow Appropriations**

**Track 3                    01:57:56 – 02:01:50**

**Action:** Presentation by Jeff Baessler. This was an informational item only. No Board action was required.

**27. Stream and Lake Protection Section – Instream Flow Appropriation Recommendations for 2013**

**Track 3                    02:01:50 – 02:07:47**

**Action:** Presentation by Jeff Baessler and Linda Bassi. This was an informational item only. No Board action was required.

**28. Water Infrastructure Network (WIN Colorado) Update**

**Track 3                    02:07:47 – 02:41:00**

**Action:** Presentation Ken Smith, Executive Director of the Water Infrastructure Network (WIN) and Anne Terry the President of WIN Colorado. This was an informational item only. No Board action was required.

**29. Watershed and Flood Protection Section – Community Assistance Program Functions**

**Track 3                    02:41:00 – 02:54:10**

**Action:** Presentation by Kevin Houck and Jamie Prochno. This was an informational item only. No action was required from the Board.

# STATE OF COLORADO

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## Colorado Water Conservation Board Department of Natural Resources

1313 Sherman Street, Room 721  
Denver, Colorado 80203  
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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:** July 3, 2012

**SUBJECT:** **Agenda Item 9a, July 17-18, 2012 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

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### 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 \$150,000 to “defend Colorado’s allocation of water under the Rio Grande Compact of 1938.” Recent litigation filed against the State Engineer stems from Colorado’s effort to regulate groundwater and surface water in Division 3. As stated by the Attorney General, “a major purpose of this effort is to prevent groundwater diversions from interfering with Colorado’s ability to fulfill its obligations under the Rio Grande Compact.” The Attorney General requests the funds for trial preparation and costs incurred by litigation, as follows: experts and consultants in hydrogeology, agriculture, and groundwater modeling; expenses incurred in trial preparation such as depositions, transcripts, court costs and fees; and attorney and consultant travel, room, and board. 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 and CWCB to prepare for and participate in ongoing and future negotiations and potential litigation with the goal to defend Colorado’s rights in the Rio Grande River, as provided by the compacts.

These requests also provide 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 \$150,000 to support the CWCB 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

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

June 29, 2012

Request for Expenditure from Litigation Fund  
for Litigation on Annual Replacement Plan Implementation in the Rio Grande Basin

Dear Board Members:

By this letter, I request expenditure of \$150,000 for 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. I believe this expenditure is necessary to adequately defend in litigation Colorado's interests in the Rio Grande.

These funds continue to be necessary to defend Colorado's allocation of water under the Rio Grande Compact of 1938. The litigation filed against the State Engineer in Water Division 3 in May 2012 is the most recent dispute in line of cases concerning Colorado's effort to integrate groundwater and surface water regulation in Water Division 3. A major purpose of this effort is to prevent groundwater diversions from interfering with Colorado's ability to fulfill its obligations under the Rio Grande Compact. *See, eg. Simpson v. Cotton Creek Circles, LLC*, 181 P.3d 252, 259-260, 261-262 (Colo. 2008).

In 2004, the General Assembly passed Senate Bill 04-222, which allows the creation of subdistricts of the Rio Grande Water Conservation District. These subdistricts may adopt plans of water management designed to restore the aquifers underlying the subdistricts by fallowing land, reducing well pumping, and replacing injurious stream depletions caused by well pumping in the subdistricts. If a subdistrict operates its plan of water management such that it meets those goals, subdistrict wells are immune to curtailment by the Division Engineer when rules allowing for such curtailment are in place. SB 04-222 set into motion a novel approach to groundwater regulation wherein local control of groundwater use achieves sustainability of the aquifers, prevents interference with compact compliance, and protects senior surface water rights.

Subdistrict No. 1 was formed in Case No. 06CV64. The water court approved Subdistrict No. 1's plan of water management in the same case, and the court upheld the State Engineer's approval of the plan in Case No. 07CW52. The plan of water management requires Subdistrict No. 1 to produce each year an Annual Replacement Plan (ARP) that implements much of the plan of water management on a year-to-year basis.

On May 1, 2012, the State Engineer approved the ARP for Subdistrict No. 1 pursuant to the framework established by the Water Court. Although approval of the ARP was predicated on


terms and conditions to further ensure pumping in Subdistrict 1 would not cause injury, three parties filed suit on May 15, 2012 challenging the State Engineer's decision. At issue are, among other things, whether the ARP may operate before challenges are resolved, whether certain replacement water sources may be used, and whether the ARP comports with Subdistrict No. 1's plan of water management. Trial was recently set for 5 days to begin on October 29, 2012. All parties, however, expect the trial may go longer given that the two prior trials on the plan of water management lasted approximately two weeks each.

Given these circumstances, the requested funds are necessary to provide adequate trial preparation and participation. First, funds are necessary to retain experts and consultants in hydrogeology (1 expert at \$50,000), agriculture (2 experts at a total of \$35,000) and complex groundwater modeling (2 experts at a total of \$30,000). Second, both trial preparation and participation will also require the Department of Law to incur expenses for depositions, transcripts, copying, court costs and fees, and attorney and consultant travel, room and board (estimated at \$35,000).

These efforts are essential to support my office in litigation to allow the State Engineer to effectively administer waters within the Rio Grande Basin, and in so doing protect Colorado's rights to the Rio Grande, now and in the future. I, therefore, request and recommend that CWCB authorize the expenditure of \$150,000, to retain consultants, pay litigation costs, and provide funds for travel and other expenses. I further recommend that the CWCB's authorization 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

# STATE OF COLORADO

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## Colorado Water Conservation Board

### Department of Natural Resources

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### FINAL AND APPROVED SUMMARY MINUTES AND RECORD OF DECISIONS JULY 17-18, 2012

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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 the College Center Ballroom, Western State College of Colorado, located at 600 North Adams Street, Gunnison, Colorado, 81231.

The meeting was called to order by Chair John McClow. Eight voting members were present at the call to order, so a quorum was present (at least 6 required). Voting members present were John McClow, Russ George, Geoff Blakeslee, Alan Hamel, Travis Smith, April Montgomery, Ty Wattenberg, and Diane Hoppe. Non-voting *ex officio* members present or represented were: Dick Wolfe, State Engineer; Rick Cables, Director, Colorado Parks and Wildlife; Pat Kowaleski, Office of the Attorney General; John Stulp, Special Policy Advisor to the Governor for Water; and Jennifer Gimbel, CWCB Director. Department of Natural Resources Executive Director Mike King arrived during the lunch break.

On the second day, the meeting was called to order by Chair John McClow. 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 John McClow, Russ George, Geoff Blakeslee, Alan Hamel, Travis Smith, April Montgomery, Ty Wattenberg, Diane Hoppe, and Department of Natural Resources Executive Director Mike King. Non-voting *ex officio* members present or represented were: Dick Wolfe, State Engineer; Rick Cables, Director, Colorado Parks and Wildlife; Pat Kowaleski, Office of the Attorney General; John Stulp, Special Policy Advisor to the Governor for Water; and Jennifer Gimbel, CWCB Director.

**Due to technical difficulties, the recording for this meeting was unable to begin until the Director's Reports.**

*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.*

## **7. Executive Session**

**Track 1**                    **06:45 – 07:40**

### **Track EXEC**

**Action:** Ty Wattenberg made a motion for the Board to go into executive session for discussion of agenda items 7a-7h, which was seconded by Diane Hoppe. The motion was approved unanimously (8-0).

- a. Ruedi Reservoir issues associated with specific legal questions
- b. Colorado River Issues associated with specific legal questions
- c. Animas-La Plata associated with specific legal questions
- d. Case No. 5-07CW210: Application of Vail Associates
- e. Consolidated Case Nos. 4-10CW164, 165, 166, 167, and 169: Applications of the Board of Commissioners of Montrose County, Town of Nucla and Town of Naturita
- f. Temporary Leases/Loans of Water for Instream Flow Use
- g. Potential Water Right Acquisition for Instream Flow Use
- h. Case No. 4-10CW180: Application of CWCB

Geoff Blakeslee made a motion for the Board to leave executive session, which was seconded by Travis Smith. The motion was approved unanimously (8-0).

## **8. Report from Executive Session**

**Track 2**                    **02:05:00 – 02:07:30**

**Action:** Assistant Attorney General Pat Kowaleski 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 7a-7h, and that the discussion was limited to those items only.

- a. Diane Hoppe made a motion that the Board approve the proposed resolution in support of the Chatfield Reservoir Reallocation Project, which was seconded by Travis Smith. The motion was approved unanimously (9-0).

## **9. Interstate, Federal, and Water Information Section – Litigation Account**

**Track2**                    **02:15:27 – 02:20:09**

**Action:** Presentation by Brent Newman with Karen Kwon and Casey Shpall via telephone.

Travis Smith made a motion that the Board approve staff recommendation, which was seconded by Alan Hamel. The motion was approved unanimously (9-0).

### **Staff Recommendation:**

The Staff recommends that the Board:

- 1) Approve the expenditure of \$150,000 to support the CWCB 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).