



**COLORADO**

**Colorado Water  
Conservation Board**

Department of Natural Resources

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Denver, CO 80203

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John Hickenlooper, Governor

Robert W. Randall, DNR Interim Executive Director

James Eklund, CWCB Director

**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:** May 18, 2016

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

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### **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 (l) 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 (with attachments) serves as this year's annual report.

### **Status of the Litigation Fund**

Within the last year, there has been one request from the Attorney General's office containing expenditure requests for litigation-related activities associated with the Arkansas River, the Colorado River, the Republican River, and the Rio Grande. In response to the CWCB staff recommendation, the Board at their May 2015 meeting authorized a total of \$950,534 for FY16 as follows:

- 1) \$55,034 for the Arkansas River Basin
- 2) \$500,000 for the Colorado River Basin
- 3) \$85,000 for the Republican River Basin
- 4) \$310,500 for the Rio Grande Basin



Expenses for this fiscal year through March 2016 totaled \$478,077, and expenses for April to June 2016 are estimated at \$336,964, for a total FY16 expenditure of \$815,041. On July 1, 2015, the litigation account received \$200,000 in funds from the Construction Fund, pursuant to SB 15-253. In addition, pending passage of SB16-174, the litigation account will receive \$600,000 on July 1, 2016. This will bring the balance of the litigation account to \$1,630,230. Authorizations for FY17 are expected to be \$1,052,580. Thus, the litigation account is appropriately funded to meet currently anticipated interstate litigation needs through June 30, 2017.

Attachments to this report include the following:

- 1) May 21, 2015 Board memo recommending the Board's authorization of litigation funds for FY16
- 2) May 6, 2015 letter from the Attorney General requesting the use of litigation funds for FY16
- 3) Excerpt from the minutes from the May 20-21, 2015 Board meeting when Board authorization occurred



**COLORADO**

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Conservation Board**

Department of Natural Resources

1313 Sherman Street, Room 721  
Denver, CO 80203

**TO:** Colorado Water Conservation Board Members

**FROM:** Ted Kowalski  
Meg Dickey-Griffith

**DATE:** May 21, 2015

**SUBJECT:** Agenda Item 22b, Interstate, Federal & Water Information Section  
Litigation Account, Requests for Authorization

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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 a total of \$1,000,534 of new authorizations to adequately defend, in negotiations, litigation, and other processes the State's apportionments under the Compacts for FY16. The requested expenditures will be used for the interstate litigation activities associated with the Republican River litigation, the Rio Grande litigation, the Arkansas River litigation, and the Defense of the Colorado River work. 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, 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 expenditure of \$55,034 for FY 16 for the Arkansas River Basin,
- 2) Authorize expenditures of \$500,000 for FY 16 for Colorado River Basin,
- 3) Authorize expenditure of \$85,000 for FY16 for litigation work related to the Republican River litigation.
- 4) Authorize \$310,500 for FY 16 for litigation work related to the Rio Grande River and \$50,000 related to the potential suit from WildEarth Guardians,
- 5) Direct the CWCB Director and Staff to expend these funds consistent with the request by the Office of the Attorney General, and;
- 6) 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.



**CYNTHIA H. COFFMAN**  
Attorney General

**DAVID C. BLAKE**  
Chief Deputy Attorney General

**MELANIE J. SNYDER**  
Chief of Staff

**FREDERICK R. YARGER**  
Solicitor General



**STATE OF COLORADO**  
**DEPARTMENT OF LAW**

**RALPH L. CARR**  
**COLORADO JUDICIAL CENTER**  
1300 Broadway, 10th Floor  
Denver, Colorado 80203  
Phone (720) 508-6000

**Office of the Attorney General**

May 6, 2015

Request for Expenditure from Litigation Fund for FY16  
for Federal and Interstate Water Unit Legal Expenses

Dear Board Members:

Section 37-60-121(2.5)(a)(III), C.R.S., authorizes the Colorado Water Conservation Board (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. Pursuant to that authorization, I request you to approve the expenditure of specific funds from your Litigation Fund for Fiscal Year 16 (FY16) to continue our efforts to effectively protect Colorado's interests in the Arkansas, Colorado, Republican and Rio Grande River Basins. I believe these expenditures, as itemized below, are necessary to participate fully in all processes, including negotiation and litigation, where Colorado's interests in these interstate rivers could be affected.

Previous years' funding requests for work to defend and protect Colorado's interests in these river basins were based on our then-current "best estimates" of the work required in the upcoming year. Because such work is heavily dependent on court decisions and case and project management practices beyond the control of the attorneys, it is difficult to accurately project the timing of litigation related costs for the entire year. As a result, certain funds authorized for expenditure in a basin in a given year are not always fully expended by the close of that year. This is the case for the Arkansas, Colorado, Republican, and Rio Grande River Basins this year as it is anticipated that the funds you authorized for Fiscal Year 15 (FY15) will not be fully expended by June 30, 2016.

For accounting clarity we zero out the remaining FY15 authorizations and make new requests for each basin for the funds needed in FY16. Below is a discrete funding authorization request for each basin for FY16. Attached to this letter is a summary table of the basins which reflects the FY15 authorization, actual expenditures through March 31, 2015, *estimated* expenditures through June 30, 2015, and the funding request for FY16. As the table shows, the authorizations this letter seeks for FY16 do not exceed the unexpended funds authorized in FY15 for either the Arkansas or Republican River Basins. Moreover, the funding requests for the Rio Grande and Colorado River Basins are partially offset by the unexpended funds authorized for those basins in FY15.

**Request for approval of expenditure for the Arkansas River Basin.**

In 2014, the Board approved a request for expenditure of \$90,000 from the Litigation Fund for Fiscal Year 15 to protect Colorado's surface water irrigation uses under the Arkansas River Compact. Specifically, the funds were directed to provide legal and 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. Although hydrology and legal disputes over operation of the Rule 10 plans delayed this work, it is now under contract and in the process of being implemented. I request the Board authorize the expenditure for this basin of \$55,034.00 for FY 16 to complete this work.

**Request for approval of expenditure for the Colorado River Basin.**

The Colorado River remains the only river basin originating in Colorado that is not over appropriated in some parts of the basin. Colorado continues to be embroiled in basin planning investigations, processes under the National Environmental Policy Act and Endangered Species Act, 7-State and federal negotiations for coordinated reservoir operations, international discussions, and litigation to defend and protect its allocations of water in the Colorado River system. Such investigations, 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 to minimize costly litigation. These ongoing activities require sound legal analysis and detailed technical knowledge to inform decision making.

In May 2014, the Board approved \$300,000 for legal staff from the Department of Law ("DOL") and \$200,000 for expert consulting work to coordinate ongoing efforts on the Environmental Impact Statement for 20 year reoperation of Glen Canyon Dam, and to inform ongoing legal positions regarding compact administration and interstate negotiations. Actual expenditures for DOL legal staff are estimated to be approximately \$315,000 and operating costs and contract expenditures are estimated at to be closer to \$115,000. For FY15, I estimate the need to expend \$325,000 for DOL legal staff and \$175,000 for operating costs, expert consulting/modeling work, and the State's portion of mediation costs in the Animas-La Plata proceedings. I request the Board authorize the expenditure for this basin of \$510,000 for FY16.

**Request for approval of expenditure for the Republican River Basin.**

In May 2014, the Board approved requests for expenditure of \$145,000 from the Litigation Fund to "continue to defend Colorado's use and allocation of water under the Republican River Compact." These funds paid for outside consultant fees, briefing costs, negotiation meetings, travel and other expenses related to preparing for and participating in U.S. Supreme Court arguments, compact meetings, and ongoing settlement negotiations with Kansas and Nebraska regarding future operation of, among other things, the Colorado Compliance Pipeline as well as administration of the South Fork consistent with the Compact.

For FY16, continued case work and work of expert consultants in negotiations with Nebraska and Kansas will be necessary. Moreover, funds for additional travel expenses over and above that contemplated for ongoing interstate discussions may

also be necessary in FY16 depending on whether the *Hutton Trust Foundation v. Wolfe, et. al, 15CW3018* proves to implicate the State's interests in management and administration of the Republican River Basin. To pay for these efforts, I request the Board authorize the expenditure for this basin of \$85,000 for FY 16.

**Request for approval of expenditure for the Rio Grande Basin.**

In May 2014, the Board approved a request for expenditure of \$140,000 for retaining expert consultants, funding a percentage of any Special Master fees, and providing for travel and operating expenses associated with Rio Grande litigation among Texas, New Mexico, Colorado and the United States. Although progress on this original action was delayed while the Court appointed a Special Master, work on the case is expected to increase now that oral arguments on pending motions have been scheduled and litigation preparation is starting to get in full swing. For the upcoming year, I anticipate the need for travel/operating costs to prepare briefs and attend arguments before the Special Master, provide a portion of the funding for the Special Master expenses, and participate in any settlement negotiations among the parties. Moreover, to be prepared, Colorado has entered into contracts with certain expert consultants and anticipates more in the upcoming year to retain expertise in groundwater, hydrogeology, Rio Grande administration, and agricultural engineering. I estimate these costs to total \$310,500 for FY 16.

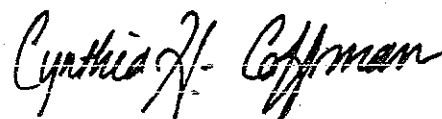
The Board also authorized expenditure of \$50,000 to defend the State and its officials against potential suit from WildEarth Guardians. Despite filing a notice of intent, WEG did not file suit against the Executive Director of the Department of Natural Resources or the State Engineer for allegedly violating the Endangered Species Act in their administration of the Rio Grande Basin. Therefore, I do not anticipate the need to authorize expenditure of funds for this matter at this time.

The efforts highlighted above are essential to support my office, the CWCB, the Department of Natural Resources, and Colorado's Compact Commissioners in ongoing negotiations, investigations and litigation to protect Colorado's rights to and interests in interstate streams and rivers. I, therefore, request and recommend that CWCB authorize the above-identified expenditures for FY16.

I further recommend that the CWCB's authorizations allow the funds to be used in FY17 if not expended in FY16, 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,



CYNTHIA H. COFFMAN  
Colorado Attorney General

**Federal and Interstate Water Unit  
Litigation Fund Expenditures  
Current and Projected (FY15 & FY16)**

| <b>Project by Basin</b>       | <b>Authorization<br/>FY14</b> | <b>Expenses Incurred<br/>Through 04/15</b> | <b>Estimated Expenses<br/>04/15-06/15</b> | <b>Available Funds<br/>End FY15</b> | <b>Funding Needs<br/>FY165</b> | <b>Difference</b>    |
|-------------------------------|-------------------------------|--------------------------------------------|-------------------------------------------|-------------------------------------|--------------------------------|----------------------|
| <b>Arkansas River</b>         |                               |                                            |                                           |                                     |                                |                      |
| Contracting                   | \$15,000.00                   |                                            |                                           | \$15,000.00                         |                                |                      |
| Irr Imp Plan Work             | \$75,000.00                   | \$13,466.00                                | \$6,500.00                                | \$55,034.00                         | \$55,034.00                    |                      |
| <i>Arkansas River Total</i>   | <i>\$90,000.00</i>            | <i>\$13,466.00</i>                         | <i>\$6,500.00</i>                         | <i>\$70,034.00</i>                  | <i>\$55,034.00</i>             | <i>\$15,000.00</i>   |
| <b>Colorado River</b>         |                               |                                            |                                           |                                     |                                |                      |
| Personnel                     | \$300,000.00                  | \$242,584.54                               | \$68,050.00                               | -\$10,634.54                        | \$325,000.00                   |                      |
| Operating                     | \$5,000.00                    | \$3,179.43                                 | \$1,060.00                                | \$760.57                            | \$5,000.00                     |                      |
| Travel                        | \$20,000.00                   | \$10,907.34                                | \$5,000.00                                | \$4,092.66                          | \$20,000.00                    |                      |
| Contracting                   | \$175,000.00                  | \$48,047.83                                | \$59,500.00                               | \$67,452.17                         | \$160,000.00                   |                      |
| <i>Colorado River Total</i>   | <i>\$500,000.00</i>           | <i>\$304,719.14</i>                        | <i>\$133,610.00</i>                       | <i>\$61,670.86</i>                  | <i>\$510,000.00</i>            | <i>-\$448,329.14</i> |
| <b>Republican River</b>       |                               |                                            |                                           |                                     |                                |                      |
| Operating                     | \$15,000.00                   | \$526.78                                   | \$175.59                                  | \$14,297.63                         | \$2,000.00                     |                      |
| Travel                        | \$10,000.00                   | \$3,881.50                                 | \$1,000.00                                | \$5,118.50                          | \$8,000.00                     |                      |
| Contracting                   | \$120,000.00                  | \$30,260.29                                | \$24,739.71                               | \$65,000.00                         | \$75,000.00                    |                      |
| <i>Republican River Total</i> | <i>\$145,000.00</i>           | <i>\$34,668.57</i>                         | <i>\$25,915.30</i>                        | <i>\$84,416.13</i>                  | <i>\$85,000.00</i>             | <i>-\$583.87</i>     |
| <b>Rio Grande</b>             |                               |                                            |                                           |                                     |                                |                      |
| TX v. NM and CO               |                               |                                            |                                           |                                     |                                |                      |
| Contracting                   | \$70,000.00                   | \$0.00                                     | \$10,000                                  | \$60,000.00                         | \$265,500.00                   |                      |
| Operating                     | \$8,000.00                    | \$0.00                                     | \$0                                       | \$8,000.00                          | \$5,000.00                     |                      |
| Travel                        | \$12,000.00                   | \$0.00                                     | \$0                                       | \$12,000.00                         | \$10,000.00                    |                      |
| Special Master                | \$50,000.00                   | \$0.00                                     | \$0                                       | \$50,000.00                         | \$30,000.00                    |                      |
| WildEarth Guardians           | \$50,000.00                   | \$0.00                                     | \$0                                       | \$50,000.00                         |                                |                      |
| <i>Rio Grande Total</i>       | <i>\$190,000.00</i>           | <i>\$0.00</i>                              | <i>\$10,000.00</i>                        | <i>\$180,000.00</i>                 | <i>\$310,500.00</i>            | <i>-\$130,500.00</i> |
| <b>TOTALS</b>                 |                               |                                            |                                           | <b>\$396,120.99</b>                 | <b>\$960,534.00</b>            | <b>\$564,413.01</b>  |

## Excerpt from May 20-21, 2015 Board Meeting Minutes

### 22. Litigation Account

#### *Interstate, Federal, & Water Information Section*

##### a. Annual Report to the General Assembly

**Action:** Report by CWCB staff Ted Kowalski. A motion to approve the staff recommendation was made by Ty Wattenberg, which was seconded by Travis Smith. The motion was approved unanimously (7-0).

**Staff recommendation:** The Staff recommends that the Board approve the attached report for submittal to the General Assembly.

##### b. Requests for authorizations

**Action:** Report by CWCB staff member Ted Kowalski. Karen Kwon, Office of the Colorado Attorney General, addressed the Board. A motion to approve the staff recommendation was made by Russell George, which was seconded by Ty Wattenberg. The motion was approved unanimously (7-0).

**Staff Recommendation:** The Staff recommends that the Board:

- 1) Authorize expenditure of \$55,034 for FY 16 for the Arkansas River Basin,
- 2) Authorize expenditures of \$500,000 for FY 16 for Colorado River Basin,
- 3) Authorize expenditure of \$85,000 for FY16 for litigation work related to the Republican River litigation.
- 4) Authorize \$310,500 for FY 16 for litigation work related to the Rio Grande River and ~~\$50,000 related to the potential suit from WildEarth Guardians~~ (removed from staff recommendation),
- 5) Direct the CWCB Director and Staff to expend these funds consistent with the request by the Office of the Attorney General, and;
- 6) 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).