



COLORADO

**Colorado Water
Conservation Board**

Department of Natural Resources

1313 Sherman Street
Denver, CO 80203

P (303) 866-3441
F (303) 866-4474

John Hickenlooper, Governor

Robert Randall, DNR Executive Director

Lauren Ris, CWCB Acting 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 17, 2017

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)

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 2016 meeting authorized a total of \$1,043,380 for FY17 as follows:

- 1) \$14,500 for the Arkansas River Basin
- 2) \$555,000 for the Colorado River Basin
- 3) \$119,200 for the Republican River Basin
- 4) \$354,680 for the Rio Grande Basin

Expenses for this fiscal year through March 2017 totaled \$381,677, and expenses for April to June 2016 are estimated at \$143,195, for a total FY17 expenditure of \$524,873. Unexpended funds for FY 17 will be "returned" to the litigation account and will only be expended based on future authorizations made by the Board. On July 1, 2016, the litigation account received \$600,000 in funds from the Construction Fund, pursuant to SB 15-253. In addition, pending passage of HB17-1248, the litigation account will receive \$1,300,000 on July 1, 2017. This will bring the balance of the litigation account to \$1,630,230. Authorizations for FY18 are expected to be \$1,052,000.00. Thus, the litigation account is appropriately funded to meet currently anticipated interstate litigation needs through June 30, 2018.

Attachments to this report include the following:

- 1) May 18, 2016 Board memo recommending the Board's authorization of litigation funds for FY17.
- 2) May 5, 2017 letter from the Attorney General requesting the use of litigation funds for FY17.
- 3) Excerpt from the minutes from the May 18-19, 2016 Board meeting when Board authorization occurred.





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John Hickenlooper, Governor

Robert W. Randall, DNR Interim Executive Director

James Eklund, CWCB Director

TO: Colorado Water Conservation Board Members

FROM: Andy Moore, Water Resources Engineer
Interstate, Federal and Water Information Section

DATE: May 18, 2016 Board Meeting

AGENDA ITEM: 19b. Litigation Account - Requests for Authorization

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 Coffman regarding the use of the litigation fund. The Attorney General requests a total of \$1,052,580 of new authorizations to adequately defend, in negotiations, litigation, and other processes, the State's apportionments under the Compacts for FY16 and FY17. The requested expenditures will be used for the interstate litigation activities associated with the Arkansas River, Colorado River, Republican River, and Rio Grande. Further information is included in the attached Attorney General's letter.

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 Recommendations

CWCB Staff recommends that the Board authorize the expenditure of a total of \$1,052,580 for litigation-related activities as follows:

- 1) Arkansas River Basin: \$14,500 for FY 17
- 2) Colorado River Basin: \$555,000 for FY 17
- 3) Republican River Basin: An additional \$9,200 for FY16, and \$119,200 for FY17
- 4) Rio Grande Basin: \$354,680 for FY 17

Staff also recommends that the Board:

- 1) Direct the CWCB Director and Staff to expend these funds consistent with the request by the Office of the Attorney General, and



- 2) 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**

May 5, 2016

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

**Office of the Attorney
General**

**Request for Expenditure from Litigation Fund for FY17
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 or 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 you to approve the expenditure of specific funds from your Litigation Fund for Fiscal Year 17 (FY17) 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 16 (FY16) will not be fully expended by June 30, 2016.

For accounting clarity we zero out the remaining FY16 authorizations and make new requests for each basin for the funds needed in FY17. Below is a discrete funding authorization request for each basin for FY17. Attached to this letter is a summary table of the basins which reflects the FY16 authorization, actual expenditures through April 30, 2016, *estimated* expenditures through June 30, 2016, and the funding request for FY17. As the table shows, the authorizations this letter seeks for FY17 do not exceed the unexpended funds authorized in FY15 for either the Arkansas River Basin. Moreover, the funding requests for the Republican, Rio Grande and Colorado River Basins are partially offset by the unexpended funds authorized for those basins in FY16.

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. The funds were specifically 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. Hydrology and legal disputes over operation of the Rule 10 plans delayed this work, prompting a new request in Fiscal Year 2016 of \$55,034.00 to complete this work. Contracting and implementation of this work is almost complete. As of April 15, 2016, approximately \$15,356.00 of the total \$55,034 authorization is estimated to remain as of June 30, 2016. I request the Board re-authorize \$14,500.00 for FY 17 to complete the work within the terms of the contract for services and goods in the Arkansas Basin.

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, Animas La-Plata discussions and negotiations, 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 2015, the Board approved \$325,000 for legal staff (2 FTE Attorneys and 1 FTE Paralegal) from the Department of Law ("DOL") and \$185,000 for expert consulting work to coordinate ongoing efforts on the Environmental Impact Statement for A 20 year reoperation of Glen Canyon Dam, and to inform ongoing legal positions regarding compact administration and interstate negotiations. Actual FY 16 expenditures for DOL legal staff from Litigation Fund expenditures are estimated to be approximately \$330,000¹ and operating costs and contract expenditures are estimated at to be closer to \$140,000.

For FY17, I anticipate added personnel and operating costs as set forth below. First, I anticipate the need for an additional ½ FTE to help analyze, evaluate and participate in Colorado River matters important to the state. Particularly the dedicated focus of two Full Time Assistant Attorneys General and the continued oversight (½ FTE) of the First AAG from the Federal & Interstate Water Unit is required to identify and vet creative solutions to ever increasingly complex questions regarding Colorado River water supply and demand, administration, and operation within the state, the Upper Colorado River Basin, and the Colorado River Basin as a whole. Moreover, operating costs for the Colorado River Subunit may increase to ongoing hardware and software

¹ Costs incurred that exceeded authorization request will be covered by funds internal to the Department of Law.

requirements to maintain the extensive Colorado River litigation databases within the Unit. I do not take these added expenditures lightly. However, given the complex matters implicated and multi-various interests to balance within the Colorado River Basin, I believe it necessary and prudent to ensure the Colorado River Subunit is fully staffed to support the Colorado Commissioner, CWCB and DNR's efforts in protecting the state's rights and interests in this basin. For these reasons, I estimate the need to expend \$395,000.00 for DOL legal staff and \$160,000.00 for operating costs, travel, and expert consulting/modeling work. I request the Board authorize the expenditure for this basin of \$555,000.00 for FY17.

Request for approval of expenditure for the Republican River Basin.

In May 2015, the Board approved requests for expenditure of \$85,000 from the Litigation Fund to "continue to defend Colorado's use and allocation of water under the Republican River Compact." These funds have paid for outside consultant fees, negotiation meetings, travel and other expenses related to 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. Some of the consultant work is expected to be fast-tracked in the last quarter of the fiscal year to address pressing modeling questions that will allow the interstate parties to continue negotiations. Consultant fees, therefore, are expected to exceed initial estimates for the year by approximately \$9,200.00

For FY17, continued case work and work of expert consultants in negotiations with Nebraska and Kansas will be necessary. Moreover, funds for additional consultant contracts and travel expenses over and above that contemplated for ongoing interstate discussions may be necessary in FY17 to the extent the State Engineer's Office pursues Compact Rulemaking in the Basin as part of intrastate administration and interstate compact compliance. To pay for these efforts, I request the Board authorize the expenditure for this basin of an additional \$9,200.00 for FY 16 as well as \$119,200.00 for FY 17.

Request for approval of expenditure for the Rio Grande Basin.

In May 2015, the Board approved a request for expenditure of \$310,500.00 for retaining expert consultants, funding a percentage of any Special Master fees, and providing for travel and operating expenses associated with Rio Grande litigation and settlement negotiation among Texas, New Mexico, Colorado and the United States. Progress on this original action has been slow as the Special Master takes time to research and review the compact and related materials. The parties still await a ruling on pending Motions to Dismiss and to Intervene following oral arguments in August. In the meantime, the Special Master has invoiced the parties approximately \$900,000.00 in costs and fees attributed to his (and his staff's) research, drafting, and coordinating status conferences and oral argument over the past year. Since Colorado has no claims asserted against it and is bringing no claims at this time, the state is responsible for a limited 5% of the Special Master fees. Concurrently, the litigation team has contracted with expert consultants in groundwater, hydrogeology, Rio Grande administration, and agricultural engineering to inform the claims at issue in the case. They have also been

actively involved in arranging and participating in potential settlement discussions, which involves negotiation preparation and travel.

For the upcoming year, I anticipate the need for travel/operating costs to prepare briefs and attend arguments before the Special Master and potentially the U.S. Supreme Court, provide a portion of the funding for the Special Master expenses, and participate in on-going settlement and litigation planning meetings among the parties. Moreover, Colorado will continue to retain the expert consultants pursuant to current contracts for the upcoming year. I estimate these costs to total up to \$272,180.00 for FY 17.

In September 2015, the State Engineer filed in Rules Governing the Withdrawal of Groundwater and Establishing Criteria for the Beginning and End of the Irrigation Season in Water Division No. 3 for All Irrigation Water Rights. Trial of the proposed rules is set for three months beginning on January 2, 2018. In FY 2017, I anticipate DOL's Federal & Interstate Water Unit working extensively in coordination with the Division of Water Resources to conduct settlement discussions and prepare for trial as appropriate, which will involve frequent travel to the San Luis Valley, contracts to retain expert consultants in groundwater and hydrogeology, and litigation and negotiation preparation. I estimate these costs to total up to \$82,500.00 for FY 2017.


Considering the interstate litigation and the groundwater rules litigation combined, I request the Board authorize a total FY17 expenditure for this basin of \$354,680.00.

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 FY17.

I further recommend that the CWCB's authorizations allow the funds to be used in FY18 if not expended in FY17, 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 Coffman
Colorado Attorney General

**Federal and Interstate Water Unit
Litigation Fund Expenditures
Current and Projected (FY16 & FY17)**

Project by Basin		Authorization FY16	Expenses Incurred Through 3/16	Estimated Expenses 4/16-6/16	Available Funds End FY16	Funding Needs FY17	Difference
Arkansas River	Irr Imp Plan Work	\$55,034.00	\$32,177.64	\$7,500.00	\$15,356.36	\$14,500.00	
Arkansas River Total		\$55,034.00	\$32,177.64	\$7,500.00	\$15,356.36	\$14,500.00	\$856.36
Colorado River	Personnel	\$325,000.00	\$219,885.69	\$113,015.00	-\$7,900.69	\$330,000.00	
	Add'l 1/2 FTE					\$65,000.00	
	Operating *	\$5,000.00	\$3,750.00	\$1,250.00	\$0.00	\$40,000.00	
	Travel	\$20,000.00	\$11,763.00	\$8,000.00	\$237.00	\$20,000.00	
	Contracting	\$160,000.00	\$68,017.00	\$47,318.80	\$44,664.20	\$100,000.00	
	DOL POTS **				\$8,000.00		
Colorado River Total		\$510,000.00	\$303,415.69	\$169,583.80	\$45,000.51	\$555,000.00	-\$509,999.49
Republican River	Interstate Compact						
	Operating	\$2,000.00	\$37.45	\$200.00	\$1,762.55	\$1,200.00	
	Travel	\$8,000.00	\$2,592.86	\$1,500.00	\$3,907.14	\$5,000.00	
	Contracting	\$75,000.00	\$62,800.00	\$27,000.00	-\$14,800.00	\$79,000.00	
	<i>Total</i>	<i>\$85,000.00</i>	<i>\$65,430.31</i>	<i>\$28,700.00</i>	<i>-\$9,130.31</i>	<i>\$85,200.00</i>	
	Intrastate Compact Rules						
	Operating					\$1,500.00	
	Travel					\$2,500.00	
	Contracting					\$30,000.00	
	<i>Total</i>					<i>\$34,000.00</i>	
Republican River Total		\$85,000.00	\$65,430.31	\$28,700.00	-\$9,130.31	\$119,200.00	-\$128,330.31
Rio Grande	TX v. NM and CO						
	Contracting	\$265,500.00	\$61,460.00	\$102,000.00	\$102,040.00	\$209,180.00	
	Operating	\$5,000.00	\$3,320.00	\$1,680.00	\$0.00	\$8,000.00	
	Travel	\$10,000.00	\$2,500.00	\$2,500.00	\$5,000.00	\$5,000.00	
	Special Master	\$30,000.00	\$9,773.08	\$25,000.00	-\$4,773.08	\$50,000.00	
	<i>Total</i>	<i>\$310,500.00</i>	<i>\$77,053.08</i>	<i>\$131,180.00</i>	<i>\$102,266.92</i>	<i>\$272,180.00</i>	
	Groundwater Rules						
	Contracting					\$75,000.00	
	Operating					\$5,000.00	
	Travel					\$2,500.00	
	<i>Total</i>					<i>\$82,500.00</i>	
Rio Grande Total		\$310,500.00	\$77,053.08	\$131,180.00	\$102,266.92	\$354,680.00	-\$252,413.08
TOTALS		\$960,534.00	\$478,076.72	\$336,963.80	\$153,493.48	\$1,043,380.00	\$889,886.52

* For FY 2017, may need to purchase database software to maintain databases.

** Dept. of Law POTS funds provides additional funds cover increases in personnel services charged to Colorado River.

Excerpt from May 18-19, 2016 Colorado Water Conservation Board Meeting Minutes

19. Litigation Account

Interstate, Federal and Water Information Section

a. Annual Report to the General Assembly

Action: Report by Karen Kwon, First Assistant Attorney General, Natural Resources Section, Federal and Interstate Water Unit. Agenda Item 19 was placed after Agenda Item 12.

Staff Recommendation: CWCB Staff recommends that the Board approve the attached report for submittal to the General Assembly.

b. Requests for Authorizations

Action: Report by Karen Kwon, First Assistant Attorney General, Natural Resources Section, Federal and Interstate Water Unit. A motion to approve the staff recommendation was made by Travis Smith, which was seconded by Patricia Wells. The motion was approved unanimously (9-0).

Staff Recommendation: CWCB Staff recommends that the Board authorize the expenditure of a total of \$1,052,580 for litigation-related activities as follows:

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Staff also recommends that the Board:

- 1) Direct the CWCB Director and Staff to expend these funds consistent with the request by the Office of the Attorney General, and
- 2) 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)