



COLORADO

**Colorado Water
Conservation Board**

Department of Natural Resources

1313 Sherman Street, Room 718
Denver, CO 80203

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Jared Polis, Governor

Dan Gibbs, DNR Executive Director

Lauren Ris, Acting CWCB Director

TO: Senate Agriculture, Natural Resources, and Energy Committee
House of Representatives Agriculture, Livestock, and Water Committee

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

DATE: August 3, 2023

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 (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 (with attachments) serves as the 2020 annual report.



Status of the Litigation Fund

The Attorney General’s office requested funds for litigation-related activities associated with the Colorado River, the Republican River, and the Rio Grande. At their May 2019 meeting, the Colorado Water Conservation Board authorized a total of \$1,452,700 for FY20 as shown in the table below.

Expenses for the 2020 fiscal year through March 2020 totaled \$652,654.62, and expenses for April to June 2020 were estimated at \$188,550.00, for a total FY20 expenditure of \$841,204.62. Unexpended funds for FY20 were returned to the litigation account and are only expended based on future authorizations made by the Board.

Basin	Board Authorization	FY20 Expenses	Estimated Expenses for May-June 2020	Total FY20 Anticipated Expenditures
Colorado River Basin	\$695,000.00	\$390,377.27	\$128,950.00	\$519,327.27
Republican River Basin	\$110,000.00	\$33,628.00	\$25,100.00	\$58,728.00
Rio Grande Basin	\$647,700.00	\$228,649.35	\$34,500.00	\$263,149.35
TOTAL	\$1,452,700.00	\$652,654.62	\$188,550.00	\$841,204.62

On July 1, 2019, the litigation account received up to \$2,000,000.00 in funds from the Construction Fund pursuant to SB19-221. In addition, the 2020 Projects Bill (HB20-1403) directed the state treasurer to transfer up to \$2,000,000 to the litigation fund on July 1, 2020. The Board’s authorizations for FY21 are expected to be \$1,516,090. Thus, the litigation account is appropriately funded to meet currently anticipated interstate litigation needs through June 30, 2021.

Attachments to this report include the following:

- 1) May 15, 2019 Board memo recommending the Board’s authorization of litigation funds for FY20.
- 2) May 15, 2019 letter from the Attorney General requesting the use of litigation funds for FY20.
- 3) Excerpt from the minutes from the May 15-16, 2019 Board meeting when Board authorization occurred.





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Dan Gibbs, DNR Executive Director

Rebecca Mitchell, CWCB Director

TO: Colorado Water Conservation Board Members

FROM: Andrew Rickert, Interstate, Federal and Water Information Section

DATE: May 15, 2019

AGENDA ITEM: 24b. Litigation Fund: 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 ... 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 Attorney General issues an annual request to the Board for litigation fund authorizations. Adequate funding for the litigation fund is 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 in order to defend Colorado's rights and apportionments as provided by the compacts.

****2019 letter from Attorney General requesting the use of litigation funds for FY20 Attached****

Staff recommendation

CWCB Staff recommends that the Board authorize the expenditure of a total of \$1,452,700 for litigation-related activities in FY2019-20 as follows:

- | | |
|----------------------------|-----------|
| 1) Colorado River Basin: | \$695,000 |
| 2) Republican River Basin: | \$110,000 |
| 3) Rio Grande Basin: | \$647,700 |

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).



PHIL WEISER
Attorney General
NATALIE HANLON LEH
Chief Deputy Attorney General
JUNE TAYLOR
Chief Operating Officer
ERIC R. OLSON
Solicitor General



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**STATE OF COLORADO
DEPARTMENT OF LAW**

May 15, 2019

**Request for Expenditure from Litigation Fund for FY20
Federal and Interstate Water Unit Legal Expenses**

Dear Colorado Water Conservation 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 approve the expenditure of specific funds from the Litigation Fund for Fiscal Year 20 (“FY20”) to continue our efforts to effectively protect Colorado’s interests in the Colorado, Republican, Rio Grande, and Arkansas River Basins in the upcoming year. 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 Colorado, Republican, and Rio Grande Basins this year, as it is anticipated that the funds you authorized for Fiscal Year 19 (“FY19”) will not be fully expended by June 30, 2019.

In an attempt to provide some clarity between accounting divisions at the Department of Natural Resources and Department of Law, we “zero out” the remaining FY19 authorizations and make new requests for each basin for the funds needed in FY20. Below is the estimated reconciliation between funding authorizations and actual expenditures for each basin for FY19, and a discrete funding authorization request for each basin for FY20. Attached to this letter is a summary table of the basins which reflects the FY19 authorization, actual expenditures through March 31, 2019 for personnel expenses on the Colorado River, and for operating, travel and contractor expenses in each of the basins. The Table also includes *estimated* expenditures through June 30, 2019, and a separate

summary of the funding request for FY20. As the table shows, the FY20 authorizations as outlined in this letter are partially offset by the unexpended funds authorized for FY19.

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 involved in basin planning investigations, National Environmental Policy Act and Endangered Species Act processes, 7-State and federal negotiations for coordinated reservoir operations, drought contingency plans, demand management, international negotiations, Animas La-Plata negotiations, and generally defending the state's allocations of water in the Colorado River system. Such activities require sound legal analysis and detailed technical knowledge to inform decision making.

In May 2018, the Board approved \$428,000 to support legal staff (2 1/2 FTE Attorneys and 1 FTE Paralegal) at the Department of Law ("DOL"). Additionally, the Board authorized an expenditure of \$150,000 for expert consulting work to coordinate ongoing efforts on the Glen Canyon Dam Long Term Experimental and Management Plan (LTEMP), and to inform ongoing legal positions regarding reservoir guideline negotiations, compact compliance investigations, and interstate negotiations. Finally, the Board approved an additional \$65,000 for travel and operating expenses, including the potential to purchase database software as needed to maintain consistency in managing the Colorado River databases. Actual FY19 expenditures for DOL were influenced by limited expenditures for consultants and operating costs. FY19 expenditures for DOL legal staff are estimated to be approximately \$417,367. Contract expenditures are estimated to be closer to \$36,000 due to pauses in studies as the seven Colorado River Basin States worked to finalize the Drought Contingency Plan. Operating and travel costs are estimated to be approximately \$26,025.

For FY20, we anticipate maintaining a full staff of 2 1/2 FTE attorneys and 1 FTE paralegal to address the issues arising in the Colorado River basin, including but not limited to: (1) participating in intra- and inter-state demand management investigations; (2) implementing the Upper Basin and Lower Basin Drought Contingency Plans; (3) preparing for Renegotiating the 2007 Interim Guidelines; (4) implementing the Glen Canyon Dam Long Term Experimental Plan; (5) operating of the Aspinall Unit consistent with the 2012 Record of Decision; (6) operating the Animas-La Plata Project; (5) Endangered Species Act and Salinity Control Act considerations; (7) implementing the Upper Colorado River Basin Fund MOA; (8) serving as legal members of the Upper Colorado River Commission legal committee; (9) water rights administration throughout the basin as it relates to the compacts; and (10) any ongoing or upcoming litigation that could implicate Colorado's interests in the Colorado River system. This is a significant amount of work and thus will entail an increase in funds to accommodate possible increases in state

benefit requirements and salaries. Moreover, we anticipate continuing the contracting work associated with implementation of the Glen Canyon Dam LTEMP and Upper Basin Drought Contingency Plans, consideration of demand management and compact compliance matters within Colorado, and preparation for renegotiation of the 2007 Interim Guidelines. Finally, DOL remains in the process of evaluating whether it needs to secure additional software to manage the Colorado River Database. As such, the request for operating expenses again includes consideration for software, if needed. For these reasons, we estimate the need to expend \$450,000 for DOL legal staff, \$180,000 for contract costs, and \$65,000 for travel and operating costs. **We request the Board authorize the expenditure of \$695,000 for FY20 for the Colorado River Basin.**

Request for approval of expenditure for the Republican River Basin

In May 2018, the Board approved requests for expenditure of \$104,500 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 negotiation meetings, travel, and other expenses related to compact administration among Nebraska, Kansas, and Colorado. They have also paid for consultant fees that were less than anticipated as compact administration modeling becomes more routine following resolution of key issues among the compacting states.

The Board authorized an additional \$38,500 to assist the State Engineer’s Office in developing, evaluating, and defending compact compliance rules for the entire basin. Because such rules did not come to fruition until midway through FY19, the majority of those funds were left unexpended. Contract expenditures for Republican River Basin work for FY19 are estimated to be approximately \$47,000.00, and operating and travel costs are estimated to be approximately \$1,700.00, for a maximum total of \$48,700.

For FY20, continued case work and work of expert consultants to implement the accounting consistent with settlements and court decisions will be necessary. Moreover, the DOL will require funds for additional consultant contracts and travel expenses over and above that contemplated for ongoing interstate discussions continue to defend the proposed compact compliance rules as they make their way through the water court process for consideration and approval. **To pay for these efforts, we request the Board authorize the expenditure of \$110,000 for FY20 for the Republican River Basin.**

Request for approval of expenditure for the Rio Grande Basin

In May 2018, the Board approved a request for expenditure of \$533,300 for retaining expert consultants, 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 was initially slow, but has accelerated as the case has been set for trial and is currently in the middle

of the discovery process. The litigation team has contracted with expert consultants in ground water, hydrogeology, Rio Grande administration, and agricultural engineering to inform the claims at issue in the case. They have begun initial investigations but did not expend as much time and effort as initially anticipated due to delays in deciding the outcome from pending briefings and oral arguments. Overall expenses in FY19 for interstate litigation work in the Rio Grande Basin is estimated to total approximately \$115,200 for contract consulting work, and \$19,150.00 for operating and travel expenses, for a total estimated FY19 expenditure of almost \$135,000.

Also in May 2018, the Board authorized expenditure of \$140,000 related to modeling the Upper Rio Grande. The Rio Grande Basin requires modeling updates to evaluate and improve the state's general understanding of ground water flow in the Upper Rio Grande between Del Norte and South Fork, and to further assure compliance with the pending rules. At that time, the Rules Governing the Withdrawal of Ground Water in the Rio Grande Basin were pending before the Division 3 Water Court. These rules were necessitated in part to promote effective and efficient compliance with the Rio Grande Compact and state water law. Due to initial delays in contracting and commencing the modeling work, not all requested funds have been expended in FY19. Expenses in FY19 are estimated to total approximately \$45,000.

For FY20, we expect the interstate litigation to continue at a faster pace in time and activity. Trial is set for the fall of 2020, with briefings and motions practice likely to be a significant activity throughout. Additionally, the parties are in the middle of discovery processes, and are expected to review and evaluate various models by the end of the calendar year. We therefore anticipate the need for travel/operating costs to manage documents, conduct discovery, prepare briefs, and attend arguments before the Special Master and potentially the U.S. Supreme Court. We also anticipate the need to provide a portion of the funding for the Special Master costs (unrelated to fees), and to 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. **We estimate Rio Grande litigation and settlement negotiation costs to total up to \$569,500 for FY20.**

For FY20, we also estimate the Upper Rio Grande Ground Water flow work to continue for both hydrogeological and ground water modeling expertise with a cost of approximately \$78,200.

Considering the interstate litigation and the depletion modeling, we request the Board authorize a total FY20 expenditure for the Rio Grande Basin of \$647,700.

No Request for the Arkansas River Basin

At this time, we do not anticipate any need for litigation fund expenditures for the Arkansas River Basin.

Conclusion

The efforts highlighted above are essential to accomplish the work at DOL in support of the CWCB, the Division of Water Resources, 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. We therefore request and recommend that CWCB authorize the above-identified expenditures for FY20.

We further recommend that the CWCB's authorizations allow the funds to be used in FY20 if not expended in FY19, and allow the Board Director, in consultation with the State Engineer and DOL staff, to allocate funds between these activities based on actual costs and litigation necessities.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Phil Weiser", with a long horizontal flourish extending to the right.

Phil Weiser
Colorado Attorney General



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FINAL
Summary Minutes and Record of Decisions
May 15 -16, 2019 Board Meeting

EXCERPT:

24. Litigation Fund

Interstate, Federal, and Water Information Section

a) Annual Report

Action: Report by CWCB staff member Andrew Rickert. A motion to approve the staff recommendation was made by Celene Hawkins, which was seconded by Jim Yahn. The motion was approved unanimously (10-0).

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

b) Litigation Fund Request

Action: Report by CWCB staff member Andrew Rickert. A motion to approve the staff recommendation was made by Jack Goble, which was seconded by Jessica Brody. The motion was approved unanimously (10-0).

Staff recommendation: Staff recommends that the Board authorize the expenditure of a total of \$1,452,700 for litigation-related activities in FY2019-20 as follows:

- 1) Colorado River Basin: \$695,000
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