



**COLORADO**

**Colorado Water  
Conservation Board**

Department of Natural Resources

1313 Sherman Street, Room 718  
Denver, CO 80203

P (303) 866-3441  
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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)

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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 (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 2022 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 2021 meeting, the Colorado Water Conservation Board authorized a total of \$1,520,000 for FY22 as shown in the table below.

Expenses for the 2022 fiscal year to April 2022 totaled \$662,490.22, and expenses for April to June 2022 were estimated at \$295,944.22, for a total FY22 expenditure of \$958,434.44. Unexpended funds for FY22 were returned to the litigation account and are only expended based on future authorizations made by the Board.

Basin	Board Authorization	FY22 Expenses	Estimated Expenses for May-June 2022	Total FY22 Anticipated Expenditures
Colorado River Basin	\$940,000.00	\$547,939.46	\$249,962.00	\$797,901.46
Republican River Basin	\$105,000.00	\$17,657.63	\$10,500.00	\$28,157.63
Rio Grande Basin	\$475,000.00	\$96,893.13	\$35,482.22	\$132,375.35
<b>TOTAL</b>	<b>\$1,520,000.00</b>	<b>\$662,490.22</b>	<b>\$295,944.22</b>	<b>\$958,434.44</b>

On July 1, 2021, the litigation account received up to \$2,000,000.00 in funds from the Construction Fund pursuant to SB21-189. In addition, the 2022 Projects Bill (HB22-1316) directed the state treasurer to transfer up to \$2,000,000 to the litigation fund on July 1, 2022. The Board's authorizations for FY23 are expected to be \$1,955,000. Thus, the litigation account is appropriately funded to meet currently anticipated interstate litigation needs through June 30, 2023.

Attachments to this report include the following:

- 1) May 19, 2021 Board memo recommending the Board's authorization of litigation funds for FY22.
- 2) May 4, 2021 letter from the Attorney General requesting the use of litigation funds for FY22.
- 3) Excerpt from the minutes from the May 19 & 20, 2021 Board meeting when Board authorization occurred.





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Rebecca Mitchell, CWCB Director

**TO:** Colorado Water Conservation Board Members  
**FROM:** Amy Ostdiek  
**DATE:** May 19, 2021  
**SUBJECT:** Agenda Item 15: Colorado River Litigation Fund

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### Staff Recommendation:

CWCB Staff recommends that the Board authorize the expenditure of a total of \$1,520,000 for litigation-related activities in FY2021-22 as follows:

- 1) Colorado River Basin: \$940,000
- 2) Republican River Basin: \$105,000
- 3) Rio Grande Basin: \$475,000

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).

### 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.

\*\*2021 letter from Attorney General requesting the use of litigation funds for FY22 Attached



**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 4, 2021

Request for Expenditure from Litigation Fund for Fiscal Year 2022  
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 2022 (“FY22”) to continue our efforts to effectively protect Colorado’s interests in the Colorado, Republican, Rio Grande, South Platte 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 Basin this year. Other funds authorized for expenditure may have been subject to costs that exceeded the estimated amounts due to increased litigation related costs. This is the case for the Republican, and Rio Grande Basins this year. However, despite these increased litigation related costs in the Republican and Rio Grande Basins, it is anticipated that the funds you authorized for Fiscal Year 2021 (“FY21”) will not be fully expended by June 30, 2021.

To provide some clarity between accounting divisions at the Department of Natural Resources and Department of Law, we “zero out” the remaining FY21 authorizations and make new requests for each basin for the funds needed in FY22. Below is the estimated reconciliation between funding authorizations and actual expenditures for each basin for FY21, and a discrete funding authorization request

for each basin for FY22. Attached to this letter is a summary table of the basins which reflects the FY21 authorization, actual expenditures through April 8, 2021 for personnel operating, and contractor expenses in each of the basins. The Table also includes *estimated* expenditures through June 30, 2021, and a separate summary of the funding request for FY22. As the table shows, the FY22 authorizations as outlined in this letter are partially offset by the unexpended funds authorized for FY21.

### **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, demand management, drought response operations, compact compliance investigations, Animas La-Plata negotiations, Upper Basin Fund Memorandum of Agreement implementation, intrastate and multi-state litigations 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 2021, the Board approved \$466,000 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 \$382,090 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 \$40,000 for travel and operating expenses, including the potential to purchase database software as needed to maintain consistency in managing the Colorado River databases. Actual FY21 expenditures for DOL were influenced by COVID-19 travel and work from home restrictions and limited expenditures for consultants and travel costs. However, the new database software was acquired which did not leave any remaining operating funds. FY21 expenditures for DOL legal staff are estimated to be approximately \$462,468.62. Contract expenditures are estimated to be approximately \$165,399.25.

For FY22, we anticipate remaining fully staffed with 2 1/2 FTE attorneys and 1 FTE paralegal to address the on-going issues 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) representing Colorado's Commissioner in the post-2026 river operations negotiation; (4) participating in litigation related to the Glen Canyon

Dam Long Term Experimental Plan (“LTEMP”) and implementation of the LTEMP; (5) operating of the Aspinall Unit consistent with state law and the 2012 Record of Decision; (6) operating and managing the Animas-La Plata Project; (5) Endangered Species Act and Salinity Control Act considerations; (7) implementing the Upper Colorado River Basin Fund MOA 2; (8) serving as legal members of the Upper Colorado River Commission legal committee; (9) advising on demand management investigations, compact compliance strategies, and 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 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 new contracts with expert consultants to assist in representation in the post-2026 river operations negotiation. For these reasons, we estimate the need to expend \$480,000 for DOL legal staff, \$380,000 for contract costs, and \$80,000 for travel and operating costs. **We request the Board authorize the expenditure of \$940,000 for FY22 for the Colorado River Basin.**

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

In May 2020, the Board approved requests for expenditure of \$103,000 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 negotiation meetings and other expenses related to compact administration among Nebraska, Kansas, and Colorado. They have also paid for expert consultant fees that were more than anticipated in preparation for the Republican River basin rules trial in Water Court for Water Division No. 1.

Included in the approved expenditure were funds to assist the State Engineer’s Office in developing, evaluating, and defending compact compliance rules for the entire basin. Because litigation of such rules has not progressed as quickly as first anticipated, some funds were not expended. However, trial is set for 2021 and pre-trial activities have been on-going throughout 2021. Contract expenditures for Republican River Basin work for FY21 are estimated to be approximately \$125,000 and operating costs are estimated to be approximately \$1,292.92, for a total of \$126,292.92.

For FY22, 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 on-going expert consultant contracts and travel expenses over and above that contemplated for ongoing interstate

discussions, to 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 \$105,000 for FY22 for the Republican River Basin.**

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

In May 2020, the Board approved a request for expenditure of \$525,000 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 for FY21. Progress on this original action was initially slow but has accelerated as the case has been set for trial to begin September 2021 and preparation for trial is actively underway. As part of this process, the Special Master ordered Colorado to pay 10% of costs associated with data storage, which continues to be a significant operating cost for the FY. Additionally, 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. The consultants have conducted initial investigations and provided review of other parties' expert reports. Depositions were completed in FY 21. Overall expenses in FY21 for interstate litigation work in the Rio Grande Basin is estimated to total approximately \$287,537 for contract consulting work, and \$152,238 for operating and travel expenses. Also, in May 2020, the Board authorized the expenditure of \$150,000 for 1 FTE in order to address reductions to the General Fund for FY 21 for a total estimated FY21 expenditure of \$589,775.00.

For FY22, we expect the interstate litigation to increase significantly in time and activity. Trial is set for four months beginning in September 2021, with trial preparation and participation to be a significant activity for much of FY 22. Additionally, the parties are in the middle of mediation. We anticipate the need to continue to fund an existing 1 FTE (estimated cost \$135,000 for salary and benefits). We also anticipate travel and operating costs, to manage documents, conduct discovery, prepare briefs, and attend arguments before the Special Master and potentially the U.S. Supreme Court and to provide a portion of the funding for data management and related operating costs (estimated at \$200,000) Moreover, Colorado will continue to retain the expert consultants pursuant to current contracts for the upcoming year (estimated at \$275,000). **We estimate Rio Grande litigation and settlement negotiation costs to total up to \$475,000 for FY21.**

### **No Request for the South Platte River Basin**

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

**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.

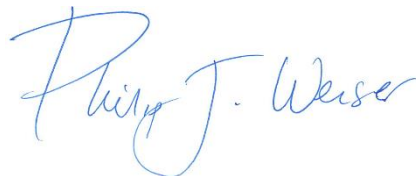
**Conclusion**

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 FY22.

We further recommend that the CWCB's authorizations allow the funds to be used in FY23 if not expended in FY22, 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,



Phil Weiser  
Colorado Attorney General





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Governor

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## Summary Minutes and Record of Decisions May 19 & 20, 2021 Board Meeting

### EXCERPT:

#### 15 **Colorado River Litigation Fund**

*Interstate, Federal, and Water Information Section*

**Action:** Report by CWCB staff member Amy Ostdiek. A motion to approve the staff recommendation was made by Gail Schwartz, which was seconded by Jaclyn Brown. The motion was approved unanimously (9-0).

**Staff Recommendation:** CWCB Staff recommends that the Board authorize the expenditure of a total of \$1,520,000 for litigation-related activities in FY2021-22 as follows:

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- 2) Republican River Basin: \$105,000
- 3) Rio Grande Basin: \$475,000

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