



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)

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 2023 annual report.



Status of the Litigation Fund

The Attorney General's office requested funds for litigation-related activities associated with the Colorado River, Republican River, South Platte River, Rio Grande, and Arkansas River. At their May 2022 meeting, the Colorado Water Conservation Board authorized a total of \$1,955,000 for FY23 as shown in the table below.

Expenses for the 2023 fiscal year to April 2023 totaled \$695,869.33, and expenses for April to June 2023 were estimated at \$278,173.31, for a total FY23 expenditure of \$974,042.64. Unexpended funds for FY23 were returned to the litigation account and are only expended based on future authorizations made by the Board.

Basin	Board Authorization	FY23 Expenses	Estimated Expenses for May-June 2023	Total FY23 Anticipated Expenditures
Colorado River	\$1,020,000.00	\$599,670.52	\$222,673.31	\$822,343.83
Republican River	\$105,000.00	\$12,530.55	\$5,500.00	\$18,030.55
South Platte River	\$205,000.00	\$0.00	\$0.00	\$0.00
Rio Grande	\$590,000.00	\$82,528.26	\$48,000.00	\$130,528.26
Arkansas River	\$35,000.00	\$1,140.00	\$2,000.00	\$3,140.00
TOTAL	\$1,955,000.00	\$695,869.33	\$278,173.31	\$974,042.64

On July 1, 2022, the litigation account received up to \$2,000,000.00 in funds from the Construction Fund pursuant to HB22-1316. In addition, the 2023 Projects Bill (SB23-177) directed the state treasurer to transfer up to \$2,000,000 to the litigation fund on July 1, 2023. The Board's authorizations for FY24 are expected to be \$1,970,000. Thus, the litigation account is appropriately funded to meet currently anticipated interstate litigation needs through June 30, 2024.

Attachments to this report include the following:

- 1) May 17, 2022 Board memo recommending the Board's authorization of litigation funds for FY23.
- 2) May 11, 2022 letter from the Attorney General requesting the use of litigation funds for FY23.
- 3) Excerpt from the minutes from the May 17 & 18, 2022 Board meeting when Board authorization occurred.





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Jared Polis, Governor

Dan Gibbs, DNR Executive Director

Rebecca Mitchell, CWCB Director

TO: Colorado Water Conservation Board Members
FROM: Amy Ostdiek
DATE: May 17, 2022
SUBJECT: Agenda Item 21: Litigation Fund Request

Staff Recommendation:

CWCB Staff recommends that the Board authorize the expenditure of a total of \$1,955,000 for litigation-related activities in FY 2022-23 as follows:

- 1) Colorado River Basin: \$1,020,000
- 2) Republican River Basin: \$105,000
- 3) South Platte River Basin: \$205,000
- 4) Rio Grande Basin: \$590,000
- 5) Arkansas River Basin: \$35,000

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.

****2022 letter from the Attorney General requesting the use of litigation funds for FY22 is attached hereto.**



PHIL WEISER
Attorney General

NATALIE HANLON LEH
Chief Deputy Attorney General

ERIC MEYER
Chief Operating Officer

ERIC R. OLSON
Solicitor General



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COLORADO JUDICIAL CENTER
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STATE OF COLORADO
DEPARTMENT OF LAW

May 11, 2022

Request for Expenditure from Litigation Fund for Fiscal Year 2023
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 2023 (“FY23”) 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. 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 are implicated.

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 funds authorized for the Rio Grande River 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 funds authorized for the Colorado and South Platte River Basins this year. However, despite these increased litigation related costs in the Colorado and South Platte River Basins, it is anticipated that the funds you authorized for Fiscal Year 2022 (“FY22”) will not be fully expended by June 30, 2022.

To reconcile separate accounting by the Department of Natural Resources and Department of Law (“DOL”), we “zero out” the remaining FY22 authorizations and make new requests for each basin for the funds needed in FY23. Below is the estimated reconciliation between funding authorizations and actual expenditures

for each basin for FY22, and a discrete funding authorization request for each basin for FY23. Attached to this letter is a summary table of the basins which reflects the FY22 authorization, actual expenditures through April 8, 2022, for personnel, operating, and contractor expenses in each of the basins. The Table also includes *estimated* expenditures through June 30, 2022, and a separate summary of the funding request for FY23. As the table shows, the FY23 authorizations as outlined in this letter are partially offset by the unexpended funds authorized and carried forward from FY22.

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. To protect Colorado's interests in this basin, Colorado continues to be involved in proactive 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 2022, the Board approved \$480,000 to support legal staff (2 1/2 FTE Attorneys and 1 FTE Paralegal) at the DOL. Additionally, the Board authorized an expenditure of \$380,000 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 \$80,000 for travel and operating expenses, including the ongoing licensing and installation of database software as needed to maintain consistency in managing the Colorado River Basin databases. Actual FY22 expenditures for DOL were influenced by COVID-19 reductions in general fund allocations and increased demands on staff time to address rapidly worsening drought conditions occurring in the Colorado River Basin. FY22 expenditures for DOL legal staff are estimated to be approximately \$597,939.70. Contract expenditures are estimated to be approximately \$178,388.81.

For FY23, defending Colorado's allocation of water requires that we remain 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 drought response operations and 2022 Plan, 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 significant work requires funds to accommodate possible increases in state benefit requirements and salaries. We also anticipate continuing the contracting work associated with implementation of the Glen Canyon Dam LTEMP and Upper Basin Drought Contingency Plans, consideration of drought response operations and 2022 Plan, 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, \$450,000 for contract costs, and \$90,000 for travel and operating costs. **To pay for these efforts, we request the Board authorize the expenditure of \$1,020,000 for FY23 for the Colorado River Basin.**

Request for approval of expenditure for the Republican River Basin

In May 2021, the Board approved requests for expenditure of \$105,000 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 was not as extensive as originally anticipated, some funds were not expended. However, a trial was held in January 2022 and pre-trial activities were on-going throughout 2021. Contract expenditures for Republican River Basin work for FY22 are estimated to be approximately \$27,496.62 and operating costs are estimated to be approximately \$661.01, for a total of \$28,157.63.

For FY23, continued case work and the work of expert consultants to implement the accounting consistent with settlements and court decisions will be necessary. Moreover, after receiving a favorable ruling from the Water Court in

Division No. 1 adopting the compact compliance rules, the DOL will require funds for on-going expert consultant contracts and travel expenses to now implement the compact compliance rules. **To pay for these efforts, we request the Board authorize the expenditure of \$105,000 for FY23 for the Republican River Basin.**

Request for approval of expenditure for the South Platte River Basin

While we made no request for expenditures for the South Platte Basin in May of 2021, due to changed circumstances, the Unit provided legal services on matters impacting the South Platte River Compact and the Platte River Recovery Implementation Plan in FY 22. The need for these legal services is expected to continue through FY 23. For FY 23, we anticipate the need for legal services and expert consultants, travel, and operating expenses. **To pay for these efforts, we request the Board authorize the expenditure of \$205,000 for FY23 for the South Platte River Basin.**

Request for approval of expenditure for the Rio Grande River Basin

In May 2021, the Board approved a request for expenditure of \$475,000 for retaining expert consultants, providing for travel and operating expenses associated with Rio Grande River Basin litigation and settlement negotiation among Texas, New Mexico, Colorado and the United States for FY22. Progress on this original action accelerated as the first phase of trial began September 2021. 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. Additionally, the litigation team has contracted with expert consultants in ground water, hydrogeology, Rio Grande River water administration, and agricultural engineering to inform the claims at issue in the case. The consultants conducted initial investigations and reviewed other parties' expert reports. Overall expenses in FY22 for interstate litigation work in the Rio Grande Basin is estimated to total approximately \$111,560.62 for contract consulting work, and \$20,814.73 for operating and travel expenses. for a total estimated FY22 expenditure of \$132,375.35.

While we experienced reduced expenditures for FY22 due to an abbreviated trial held remotely and mediation efforts in lieu of trial, for FY23, the anticipated phase two of the trial is currently set for eight weeks beginning in October 2022 to be held in-person, out of state. Trial preparation and participation and concurrent mediation will be necessary during FY23. We anticipate travel and operating costs to be approximately \$230,000.00 and estimate expert consultant costs to be \$360,000.00. **To pay for these efforts, we request the Board authorize the expenditure of \$590,000 for FY 23 for the Rio Grande River Basin.**

Request for approval of expenditure for the Arkansas River Basin

In May of 2021, we made no request for expenditures for the Arkansas River Basin. However, due to recent changed circumstances, the Unit anticipates expenditures for travel and operating expenses and expert consultants on matters that impact the Arkansas River Basin in FY 23. **To pay for these efforts, we request the Board authorize the expenditure of \$35,000 for FY 23 for the Arkansas River Basin.**

Conclusion

The funding needs set out above are necessary to accomplish our essential work 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 interests in interstate streams and rivers. We therefore request and recommend that CWCB authorize the above-identified expenditures for FY23.

We further recommend that the CWCB's authorizations extend the use of appropriated funds to FY24 if not expended in FY23, 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

FINAL

Summary Minutes and Record of Decisions

May 17 & 18, 2022 Board Meeting

EXCERPT:

21 FY 23 Litigation Fund Request

Action: Report by CWCB staff member Amy Ostdiek. A motion to approve the staff recommendation was made by Steve Anderson, which was seconded by Robert Sakata. The motion was approved unanimously (7-0).

Staff Recommendation: CWCB Staff recommends that the Board authorize the expenditure of a total of \$1,955,000 for litigation-related activities in FY 2022-23 as follows: 1) Colorado River Basin: \$1,020,000 2) Republican River Basin: \$105,000 3) South Platte River Basin: \$205,000 4) Rio Grande Basin: \$590,000 5) Arkansas River Basin: \$35,000 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).