

STATE OF COLORADO

Colorado Water Conservation Board

Department of Natural Resources

1313 Sherman Street, Room 721
Denver, Colorado 80203
Phone: (303) 866-3441
Fax: (303) 866-4474
www.cwcb.state.co.us



TO: Colorado Water Conservation Board Members

FROM: Ted Kowalski

SUBJECT: **Agenda 25a, January 27-28, 2009 Board Meeting**
Water Supply Protection Section - Litigation Account
Annual Report to General Assembly

Bill Ritter, Jr.
Governor

Harris D. Sherman
DNR Executive Director

Jennifer L. Gimbel
CWCB Director

Dan McAuliffe
CWCB Deputy Director

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 authorized 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 the senate agriculture, natural resources, and energy committee and the house of representatives agriculture, livestock, and natural resources committee on any litigation that involves the use of any moneys from the litigation fund created in paragraph (a) of this subsection (2.5)." A draft of this year's annual report is attached.

At the beginning of this year, the fund had approximately \$2.091 million, of which \$641,000 has been authorized to be spent by a letter from the Attorney General and an action by this Board. Within the last calendar year, the Board authorized the expenditure of: 1) \$300,000 for expenses associated with a three year alfalfa crop consumptive use study associated with the Kansas v. Colorado litigation; 2) \$150,000 for expenses associated with data collection and the preparation of a comprehensive concluding report summarizing and analyzing all irrigation study data collected related to the Kansas v. Colorado litigation; and, 3) \$191,000 associated with the Defense of the Colorado River Unit work. Thus, the fund currently has \$1.45 million that remains.

Staff Recommendation

The Staff and the Department of Natural Resources recommend that the CWCB authorize the Staff to forward the attached report to the appropriate committees.

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TO: Colorado Water Conservation Board

FROM: Steve Miller, Water Supply Protection Section

DATE: January 14, 2008

RE: **Agenda Item 19.b January 22-23, 2008 Board Meeting**
Water Supply Protection Section –
CWCB Litigation Account – Lysimeter Studies

Bill Ritter, Jr.
Governor

Harris D. Sherman
DNR Executive Director

Jennifer L. Gimbel
CWCB Director

Dan McAuliffe
CWCB Deputy Director

Introduction:

This item is to seek the Board's approval of a request from Attorney General Suthers to use \$300,000 from the Board's Litigation Fund to finance a three year study of alfalfa crop consumptive use, to be conducted by the Colorado Water Resources Research Institute ("CWRRI"), utilizing the two lysimeters installed at the Rocky Ford Experiment Station with previous expenditures from that fund. The Attorney General request is contained in his attached letter dated January 11, 2008.

Discussion:

As set out in Attorney General Suthers' letter the Board, using its Litigation Fund, has made a significant investment in the installation of two weighing lysimeters at the CSU Experiment Station in Rocky Ford so researchers could conduct crop irrigation water consumptive use studies to aid in the Kansas v Colorado litigation. Based on statements made in 2004 and 2007 the Board's expectation was that operation of these lysimeters for the necessary studies would be funded by some other entity. Those sources have not been found, but the studies are still essential to an accurate determination of Colorado water user obligations to offset post-compact depletions. In September 2007 the Board concurred in a staff recommendation that an application from Colorado State University to use \$50,000 of WSRA funds to operate the lysimeter for an additional year did not contain sufficient detail or certainty of result to merit an award of funds. Subsequent to that decision staff has been working with CSU and the CWRRI to enhance that application and in the course of these discussions it became apparent that a larger sum of funds from a more flexible source was needed to conduct the studies needed to accurately determine crop consumptive use coefficients. Due to Colorado's ongoing compliance obligations and the limited retained jurisdiction of the US Supreme Court in this case use of the Litigation Fund to complete the needed studies is appropriate. A \$300,000 budget for three years of operation and publication of study results has been developed in consultation with the CWRRI and the Experiment Station. If the Board authorizes this funding request that preliminary proposal and budget will be used to negotiate a final contract with CWRRI which can be reviewed with the Board at a subsequent meeting.

Recommendation:

Staff recommends that the Board approve the expenditure of up to \$300,000 from the Litigation Fund, an account within the Board's Construction Fund, to fund a three year alfalfa crop consumptive use study to be conducted by the CWRRI pursuant to the Attorney General request contained in his letter dated January 11, 2008.



ATTORNEY GENERAL OF COLORADO

John W. Suthers

January 11, 2008

Request for Expenditure from Litigation Fund
for Protection of Colorado's Allocations in the Arkansas River

Dear Board Members:

By this letter, I am requesting the expenditure of \$300,000 from the Board's Litigation Fund under section 37-60-121(2.5)(a)(III), C.R.S. That section authorizes the Board to expend money from the 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. I believe this expenditure is necessary to adequately defend, in negotiations or litigation, Colorado's allocations of the Arkansas River and to provide support in implementation of the expected decree in Kansas v. Colorado.

The Board gave approval in 2004 to expend \$750,000 to "implement findings in the Fourth Report of Special Master Arthur Littleworth . . . including future compliance issues pursuant to the Court's retained jurisdiction" and "to defend and protect Colorado's allocations of water in interstate streams and rivers." The construction and maintenance of two lysimeters was one of the activities identified by the State Engineer as crucial to accomplishing this task. In March 2007, based on new information from the State Engineer, and again at my request, the Board authorized an additional \$90,000 expenditure to complete construction of the second lysimeter at Rocky Ford. At that time, it was expected that funding of lysimeter operation would be provided by the USDA or some other entity with an interest in crop evapotranspiration (ET) research. Unfortunately, despite efforts by the State Engineer and Colorado State University, as of yet such funding has not been found.

I am now writing to indicate my agreement with the request of the State Engineer for \$300,000 in funds from the Litigation Fund to support the operation of the two lysimeters at the Rocky Ford Experiment Station for a 3 year period. This operation will be for the purpose of conducting a Colorado Water Resources Research Institute study of alfalfa crop consumptive use to determine the appropriate crop coefficients for use with the Penman-Montieth ET calculation as implemented in the H-I Model.

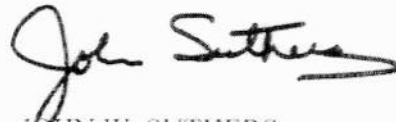
Colorado's experts believe that using the ASCE standardized Penman-Montieth equation without locally determined crop coefficients will overestimate crop consumptive use, and therefore overestimate the consumption of pumped ground water. This results in an overstatement of Stateline depletions and requires Colorado well users to overcompensate Kansas. Thus, establishing the appropriate reference crop coefficient is essential to preventing an overstatement of Colorado's obligations under the decree in Kansas v. Colorado, and is a necessary and appropriate use of the Fund. Separate subsequent research may be undertaken to determine appropriate crop coefficients for the other major crops in the Arkansas valley.

which may take another 10 to 15 years. During the three years covered by the funding requested herein, efforts will be made to obtain separate funding for that additional research, which should be funded by other interested entities.

Of note, this expenditure may also assist in defending and protecting Colorado's allocations of water in other interstate streams and rivers. Many of Colorado's other interstate water compacts are based on allocations of beneficial consumptive use, and the use of the Penman-Monteith equation and crop coefficients is becoming a widely recognized method to determine consumptive use. Therefore, this lysimeter research will also be useful in determining whether adjustment or additional research is needed in other river basins.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "John Suthers". The signature is fluid and cursive, with a long horizontal stroke at the end.

JOHN W. SUTHERS
Colorado Attorney General

STATE OF COLORADO

Colorado Water Conservation Board

Department of Natural Resources

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DRAFT SUMMARY MINUTES AND RECORD OF DECISIONS

JANUARY 22-23, 2008*

A regular meeting of the Colorado Water Conservation Board (CWCB) was convened at The Hyatt Regency Tech Center, 7800 E. Tufts Ave., Denver, CO 80237. The meeting was called to order by Chair, Travis Smith. Nine voting members were present at the call to order, so a quorum was present (at least 6 required). Voting members present were Chair Travis Smith, Vice Chair Don Schwindt, Barbara Biggs, Keith Catlin, Harold Miskel, John Redifer, Carl Trick, Eric Wilkinson, and Geoff Blakeslee. Harris Sherman arrived following the call to order. Non-voting, *Ex-Officio* members present or represented were CWCB Director Jennifer Gimbel, CWCB Deputy Director Dan McAuliffe, State Engineer Dick Wolfe, Division of Wildlife Director Tom Remington, Attorney General John Suthers, Colorado Agriculture Commissioner John Stulp, and Executive Director of Water Resource and Power Development Authority, Dan Law. Also present was Assistant Director of Water, Alex Davis, Jim Miller, representing the Ag Commissioner's office, Deputy Attorney General Casey Shpall, and First Assistant Attorney General Susan Schneider.

Bill Ritter, Jr.
Governor

Harris D. Sherman
DNR Executive Director

Jennifer L. Gimbel
CWCB Director

Dan McAuliffe
CWCB Deputy Director

Note: While the Board's consideration of agenda items does not always follow the sequence indicated by the agenda numbers, these minutes are listed in agenda item order for easier reference.

Due to mechanical failure, the first day of the Board Meeting, Tuesday, January 22, 2008, was not recorded.

Tuesday, January 22, 2008
Call to Order 8:00 a.m.

1. Review and Approval of Agenda

Action: A motion was made by Carl Trick and seconded by Keith Catlin to approve the January 22-23, 2008 Agenda. Harris Sherman was not present for this motion. The motion was approved unanimously (9-0).

2a. Review and Approval of Meeting Minutes – November 14-15, 2007 Minutes

Action: A motion was made by Carl Trick and seconded by Don Schwindt to approve the November 14-15, 2007 minutes, with the following changes: Item 2b needs the date changed in the Actions paragraph to match the actual date; 18d, 18g - take out the last

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promote the development of a common technical platform. Harris Sherman was not available for this motion. The motion was approved (7-2).

Intrastate Water Management & Development Section – Water Supply Reserve Account Grant Applications – Moffat County – Agricultural Water Needs

Tape 1, Track 1 01:01:50 – 01:05:59

Action: A motion was made by Carl Trick and seconded by Don Schwindt to approve Staff recommendation that the Board approve up to \$201,410 from the Yampa/White/Green Basin Account to complete the Agricultural Water Needs Assessment study contingent on resolution of the items in the issues/additional needs section of the Board memo. Harris Sherman was not present for this motion. The motion was approved unanimously (9-0).

19a. Water Supply Protection Section – CWCB Litigation Account – Status Report

Tape 1, Track 1 01:29:09 – 01:30:56

Action: A motion was made by Don Schwindt and seconded by Barbara Biggs to approve Staff recommendation that the Board authorize the CWCB Staff to forward the draft report, in final, to the appropriate committees. Harris Sherman was not present for this motion. The motion was approved unanimously (9-0).

19b. Water Supply Protection Section – CWCB Litigation Account – Lysimeter Studies

Tape 1, Track 1 01:30:57 – 01:40:50

Action: A motion was made by Keith Catlin and seconded by Harold Miskel to approve Staff recommendation that the Board approve expenditure of up to \$300,000 from the Litigation fund, an account within the Board's Construction Fund, to fund a three year alfalfa crop consumptive use study to be conducted by the CWRRI, pursuant to the Attorney General request contained in his letter dated January 11, 2008. Harris Sherman and Barbara Biggs were not present for this motion. The motion was approved unanimously (8-0).

20a/b. Water Supply Protection Section – Colorado River Record of Decision Operations Overview – and Mexican Treaty Update

Tape 1, Track 1 00:00:00 – 00:15:11

Action: Informational item only. No action taken.

20c. Water Supply Protection Section – 7-Basin States MOU & Amendment Regarding Joint Tamarisk Control Efforts

Tape 1, Track 1 00:15:12 – 00:18:07

Action: A motion was made by Eric Wilkinson and seconded by John Redifer to approve Staff recommendation that the Board authorize the Director to execute the two agreements, referenced in the memo, when finalized, provided they do not change in substantive content from the drafts reviewed with the Board on January 23, 2007, and further provided that:

- (1) No state funds are obligated, and
- (2) Attorney General and/or controller approve or waive review

The motion was approved unanimously (10-0).

21. Intrastate Water Management & Development Section – Alternative Agricultural Water Transfer Methods Grant Program – Adoption of Criteria Guidelines

Tape 1, Track 1 01:10:14 – 01:29:09

Action: A motion was made by Carl Trick and seconded by John Redifer to approve Staff recommendation that the Board adopt the Criteria and Guidelines established. Staff also requests that the Board authorize Staff to develop a grant application form. Harris Sherman was not present for this motion. The motion was approved unanimously (9-0).

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TO: Colorado Water Conservation Board

FROM: Steve Miller, Water Supply Protection Section

DATE: May 12, 2008

RE: **Agenda Item 25 May 20-21, 2008 Board Meeting**
Water Supply Protection Section – Litigation Account Request –
Kansas v. Colorado – Continued Irrigation Studies

Bill Ritter, Jr.
Governor

Harris D. Sherman
DNR Executive Director

Jennifer L. Gimbel
CWCB Director

Dan McAuliffe
CWCB Deputy Director

Introduction:

This item is to seek the Board's approval of a request from Attorney General Suthers to use \$150,000 from the Board's Litigation Fund to finance an additional year of irrigation study in the lower Arkansas Basin by Colorado State University and preparation of a concluding report by the Colorado Water Institute ("CWI") (formerly Colorado Water Resources Research Institute "CWRRI"). The Attorney General request is contained in his attached letter dated May 8, 2008.

Discussion:

The Board, using its Litigation Fund, has made a significant investment in studies of irrigation water use in the Arkansas basin to refine determination of our obligations under the Arkansas River Compact and the decree in the current Kansas v Colorado litigation. Activities funded to date include: improvement of the CoAgMet weather station network, 3 prior years of irrigation study, preparation of expert witness reports on modeling issues, and installation and operation of two weighing lysimeters at the CSU Experiment Station in Rocky Ford. To date the Board has authorized \$1,140,000 for these projects. The additional funds sought in this request will be used to collect additional irrigation data during the period July 1, 2008 – October 2008 in what is anticipated to be an average to above average water supply year. In addition, this year's data effort will provide data specific to improved irrigation efficiency practices, which have become the focus of the SEO's proposed surface water consumption rules. The Div. of Water Resources is providing additional funding for two months of data collection in May and June of 2008. Finally, a comprehensive report displaying and analyzing all data collected since 2004 and drawing conclusions as to the appropriate irrigation parameters to use in future modeling efforts will be prepared. This work will be useful both in adjusting groundwater use augmentation requirements as determined with the HI Model and to formulate new surface water use rules to meet Stateline flow obligations. A \$150,000 budget for this work has been developed in consultation with the CWI and CSU. If the Board authorizes this funding request that preliminary proposal and budget will be used by staff from the CWCB and Attorney General's office to negotiate the final contracts.

Recommendation:

Staff recommends that pursuant to the Attorney General request contained in his letter dated May 8, 2008, the Board approve the expenditure of up to \$150,000 from the Litigation Fund, an account within the Board's Construction Fund, to fund an additional year of data collection and preparation of a comprehensive concluding report summarizing and analyzing all irrigation study data collected.



JOHN W. SUTHERS
Attorney General

CYNTHIA H. COFFMAN
Chief Deputy Attorney General

DANIEL D. DOMENICO
Solicitor General

STATE OF COLORADO
DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

STATE SERVICES BUILDING
1525 Sherman Street - 7th Floor
Denver, Colorado 80203
Phone (303) 866-4500

May 8, 2008

Request for Expenditure from Litigation Fund
for Protection of Colorado's Allocations in the Arkansas River

Dear Board Members:

By this letter, I am requesting the expenditure of up to \$150,000 from the Board's Litigation Fund under section 37-60-121(2.5)(a)(III), C.R.S. That section authorizes the Board to expend money from the 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. I believe this expenditure is necessary to adequately defend, in negotiations or litigation, Colorado's allocations of the Arkansas River and to provide support in implementation of the expected decree in Kansas v. Colorado (No. 105, Original).

The requested funds would be used in two contracts to be negotiated by CWCB staff with input from the Attorney General's office. Both contracts shall include terms regarding timeline and supervisory personnel that anticipate the possibility that the data and analysis will be offered into evidence in future Compact litigation.

First, up to \$100,000 would fund a contract with Colorado State University, led by Tim Gates and Luis Garcia, to continue monitoring conventional and improved irrigation technologies in the Lower Arkansas River Valley. This project began in 2004, funded by the CWCB, and was continued during the first part of the current irrigation season under funding from the DWR. The request herein would provide for data collection starting July 1, 2008 through the remainder of the current irrigation season. CSU will monitor irrigation timing, total water applied, crop evapotranspiration (ET), surface runoff, deep percolation, movement and accumulation of dissolved salts on irrigated fields, general soil characteristics, ground water table characteristics, crop yields, and more. The data will be used to assess the portion of irrigation diversions from the river consumed for beneficial use, as compared to the portion that returns to the river system via surface and ground water flows, as well as the portion that is non-beneficially consumed. This information will be used to analyze the varying efficiencies of existing irrigation application practices in the Lower Arkansas River Valley, and to understand how to mitigate impacts on flows within the Arkansas River so as to insure compliance with the Arkansas River Compact.


The second proposed contract is with the Colorado Water Institute for up to \$50,000 to draft a comprehensive Report on the data described above. The Institute would analyze the data collected by CSU from 2004 through the end of the current irrigation season, from both

conventional and improved irrigation systems, using both surface water and ground water, derived from real measurements and modeled estimates. The Institute would calculate the baseline and varying efficiencies of the studied systems and their effects on river flows, and provide the data, analysis, and conclusions in a comprehensive report.

The funds requested herein will assist with ensuring Colorado's continued Compact compliance under the proposed decree in Kansas v. Colorado, and are a necessary and appropriate use of the CWCB's Litigation Fund.

Thank you for your consideration.

Sincerely,



JOHN W. SUTHERS
Colorado Attorney General

STATE OF COLORADO

Colorado Water Conservation Board Department of Natural Resources

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DRAFT SUMMARY MINUTES AND RECORD OF DECISIONS May 20-21 2008*

Bill Ritter, Jr.
Governor

Harris D. Sherman
DNR Executive Director

Jennifer L. Gimbel
CWCB Director

Dan McAuliffe
CWCB Deputy Director

A regular meeting of the Colorado Water Conservation Board (CWCB) was convened at The Hotel Colorado, 526 Pine Street, Glenwood Springs, CO 81601. The meeting was called to order by Chair, Travis Smith. Ten voting members were present at the call to order, so a quorum was present (at least 6 required). Voting members present were Chair Travis Smith, Bruce Whitehead, Harris Sherman, Barbara Biggs, Keith Catlin, John Redifer, Carl Trick, Eric Wilkinson, and Geoff Blakeslee, and Reed Dils. Non-voting, *Ex-Officio* members present or represented were CWCB Director Jennifer Gimbel, State Engineer Dick Wolfe, Deputy Attorney General Casey Shpall, and Jim Miller representing the Agriculture Commissioner.

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Tuesday, May 20, 2008
Call to Order 10:29 a.m.

1. Election of Officers and Swear in New and Returning Board Members

Tape 1, Track 1 00:00:00 – 00:05:40

Action: Jennifer Gimbel swore in new Board Members Bruce Whitehead and Reed Dils. A motion was made by Eric Wilkinson and seconded by Keith Catlin to re-elect Travis Smith as Board Chair. The motion was approved unanimously (10-0). A motion was made by John Redifer and seconded by Eric Wilkinson to elect Geoff Blakeslee as Vice Chair. The motion was approved unanimously (10-0).

2. Review and Approval of Agenda

Tape 1, Track 1 00:07:09 – 00:07:34

Action: A motion was made by Barbara Biggs and seconded by Geoff Blakeslee to approve the May 2008 Agenda. The motion was approved unanimously (10-0).

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- Action: A motion was made by Carl Trick and seconded by Eric Wilkinson to approve Staff recommendation that the Board 1) make a preliminary determination that the natural environment of Two Elk Creek could be preserved to a reasonable degree with the proposed injury if Vail Associates provides the proposed mitigation, and 2) Provide comments to staff on the proposal and identify any issues that the applicant and staff should address before bringing the proposal to the Board for final approval. The Board modified the motion to include the Boards ability to monitor and compare actual outcomes or impacts to the flows with the projected flows as shown in the Board memo, and the Board will have some negotiated response if these projections don't meet our needs. The motion was approved unanimously (9-0).
25. Water Supply Protection Section – Litigation Account Request – Kansas v. Colorado – Continued Irrigation Studies
Tape 1, Track 2 03:39:16 – 03:47:25
Action: A motion was made by Reed Dils and seconded by Keith Catlin to approve staff recommendation that the Board approve the expenditure of up to \$150,000 from the Litigation Fund, an account within the Board's Construction Fund, to fund an additional year of data collection and preparation of a comprehensive concluding report summarizing and analyzing all irrigation study data collected. The motion was approved unanimously (9-0).
26. Office of Water Conservation & Drought Planning Section – Presentation on the 2008 Statewide Water Education Task Force Report
Tape 1, Track 2 03:09:51 – 03:39:15
Action: Informational item only. No action required.
27. Water Supply Protection Section – Upper Basin Recovery Implementation Program – 10825 Brief
Tape 1, Track 3 00:00:00 – 00:22:48
Action: Informational item only. No action required.
28. Intrastate Water Management & Development Section – Statewide Water Supply Initiative 2 Overview and Colorado's Water Supply Future
Tape 1, Track 1 02:03:43 – 03:03:13
Action: Informational item only. No action required.
29. Intrastate Water Management & Development Section – Alternative Agricultural Water Transfer Methods – Arkansas and South Platte Basins Competitive Grant Program – Lower Arkansas Valley Water Conservancy – Lower Arkansas Valley Super Ditch Company
Tape 1, Track 3 00:22:49 – 01:48:50
Action: A motion was made by Barbara Biggs and seconded by Carl Trick to amend staff recommendations as follows:
1) The Board will hold \$500,000 until November 2008. At this time, the application process will be open to everyone who wishes to apply for a grant.
2) To deny funding to the University of Colorado, the High Line Canal Company, and Parker Water and Sanitation District at this time, but all three applicants may re-apply for their current grant requests at the July 2008 Board meeting, and,
3) To approve funding of up to \$320,000 (not \$480,371 as requested) from FUNDING SOURCE ? to the Lower Arkansas Valley Water Conservancy, for the Lower Arkansas Valley Super Ditch Company. They may re-apply at the November 2008 Board meeting for the remainder (\$160,371) of their original grant request amount.
The motion was approved unanimously (9-0).

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TO: Board Members

FROM: Randy Seaholm and Ted Kowalski

DATE: November 6, 2008

SUBJECT: **Agenda Item 16, November 18-19, 2008 Board Meeting
Water Supply Protection Section-Litigation Account
Expenditure Authorization**

Bill Ritter, Jr.
Governor

Harris D. Sherman
DNR Executive Director

Jennifer L. Gimbel
CWCB Director

Dan McAuliffe
CWCB Deputy Director

Background

As you know, the unprecedented drought from 2000-2007 in the Colorado River Basin has lowered storage levels in Lake Powell and Lake Mead. While the runoff from last year has improved the situation, it may have been an anomalous year in a longer period of drought. Section 37-60-121(2.5), quoted below, allows the Board to authorize the expenditure of litigation account funds if requested by the Attorney General. In 2004, to assist the CWCB with negotiations and to prepare for potential litigation the Attorney General requested, and this Board authorized, the use of litigation account funds to establish the Defense of the Colorado River Unit. Although the Colorado River Basin States and the federal government were able to reach a historic agreement in December 2007, Colorado needs to be prepared for the likelihood that it will need to engage in litigation, if not in the immediate future at least in the next decade or two. Moreover, currently there are significant negotiations and lawsuits that are occurring that could affect Colorado's interests in the Colorado River. As described in the attached request from the Attorney General's Office, the Attorney General had committed to transition this special unit to general funding support after the recent negotiations were completed. Thus, the Attorney General is requesting that this Board fund approximately one-half of the funds necessary to keep the Defense of the Colorado River Unit functioning. The Attorney General's request is attached.

Staff Recommendation

The request from the Office of the Attorney General falls within the scope of Section 37-60-121(2.5), C.R.S. Thus, the staff recommends that the Board:

- 1) authorize the expenditure of additional moneys, not to exceed \$191,000 for the costs of litigation associated with the defense and protection of Colorado's allocation of water in the Colorado River;
- 2) direct the CWCB Director and Staff to expend these funds in a manner consistent with the request by the Office of the Attorney General; and,

3) 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).

Discussion

Section 37-60-121(2.5)(a), C.R.S. provides:

The 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 four million dollars from the litigation fund, which is hereby created, for the purpose of engaging in litigation: ... (III) To defend and protect Colorado's allocations of water in interstate streams and rivers; and (IV) To ensure the maximum beneficial use of water for present and future generations by addressing important questions of federal law."

Section (b) of subsection (2.5) states:

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 the 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).

Section (c) of subsection 2.5 provides: "Any interest earned on the moneys in the litigation fund shall be credited on an annual basis to the litigation fund created in paragraph (a) of this subsection (2.5).

To date, this Board has authorized several expenditures from the litigation fund. Approximately \$1 million has been expended in connection with the Kansas v. Colorado litigation. Over the past several years there have been expenditures associated with South Platte River three state negotiations, the Colorado River negotiations, and the Republican River litigation. The fund currently has approximately \$1,800,000.00 in it but there is a request that the Construction Fund bill should request replenishment of the litigation fund up to the original \$4,000,000, and this request will be discussed at this November 2008 Board meeting.

The expenditures that have been used for the Colorado River issues have allowed the State to have substantial legal counsel during the development of the Shortage Criteria. This money has also funded the organization of a litigation database related to the law of the river. Moreover, this money has allowed Colorado to participate in litigation brought by environmental organizations, such as the recent Grand Canyon Trust litigation. With regard to the \$207,329 request from the Attorney General's Office, the Staff is of the opinion that this amount is justified. Approval of this request would allow the State to continue to adequately defend its interests in the Colorado River basin through various negotiations and litigation.

Attachment



JOHN W. SUTHERS
Attorney General

CYNTHIA H. COFFMAN
Chief Deputy Attorney
General

DANIEL D. DOMENICO
Solicitor General

**STATE OF COLORADO
DEPARTMENT OF LAW**

OFFICE OF THE ATTORNEY GENERAL

**STATE SERVICES
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Phone (303) 866-4500

November 18, 2008

Request for Expenditure from Litigation Fund
to Protect Colorado's Allocations in the Colorado River

Dear Board Members:


I request by this letter the expenditure of \$191,000, over the next fiscal year (FY10) from the Colorado Water Conservation Board's Litigation Fund to partially fund our continuing efforts to protect Colorado's allocations of the Colorado River. Section 37-60-121(2.5)(a)(III), C.R.S., authorizes the Board to expend money from the 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. I believe this expenditure is necessary to adequately defend, in negotiations and litigation, the State's Colorado River Compact entitlement.

The Department of Law, with the support of the Board's staff, proposes that you continue to assist funding these efforts which are calculated to total \$398,329 for FY10. In keeping with our previous commitment to the Board to transition to general funding support, we are asking the Legislature to fund \$207,329 of the total amount required for the next fiscal year. We hope to transition to full funding from the General Fund over the next two years. Thus, I am requesting your approval to expend \$191,000 to continue our work on the following tasks: (1) representing the State of Colorado and the Board in potential Colorado River litigation; (2) providing the State of Colorado and the Board with legal advice and counsel with respect to Colorado River negotiations; (3) preparing the State of Colorado and the Board for possible Colorado River Compact litigation; (4) finalizing and organizing a Colorado River database for Colorado and Board use in connection with Colorado River negotiations and possible litigation; and (5) assisting the State Engineer with respect to intrastate Colorado River administration issues, including identifying and analyzing the best strategies for avoiding curtailment and for developing compact administration rules.

These tasks are essential to preparing my office and the Board for future negotiations and potential litigation to defend Colorado's rights to the Colorado River, now and in the future. I therefore request and recommend that the Board authorize the expenditure of up to \$191,000 from the Litigation Fund to fund these activities through the end of FY10. I further recommend that the Board's authorization 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,


JOHN W. SUTHERS
Colorado Attorney General

STATE OF COLORADO

Colorado Water Conservation Board Department of Natural Resources

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DRAFT SUMMARY MINUTES AND RECORD OF DECISIONS November 18-19, 2008*

Bill Ritter, Jr.
Governor

Harris D. Sherman
DNR Executive
Director

Jennifer L. Gimbel
CWCB Director

Dan McAuliffe
CWCB Deputy Director

A regular meeting of the Colorado Water Conservation Board (CWCB) was convened at the Timbers Hotel, 4411 Peoria Street, Denver, CO. The meeting was called to order by Chair, Travis Smith. Seven voting members were present at the call to order, so a quorum was present (at least 6 required). Voting members present were Chair Travis Smith, Vice Chair Geoff Blakeslee, Carl Trick, Bruce Whitehead, Keith Catlin, Eric Wilkinson, and Reed Dils. Non-voting, *Ex-Officio* members present or represented were CWCB Director Jennifer Gimbel, Deputy Attorney General Casey Shpall, State Engineer Dick Wolfe, Alex Davis, representing the Executive Director of Natural Resources, and Tom Remington, Director of the Division of Wildlife. Barbara Biggs, Harris Sherman, and Attorney General John Suthers arrived after the call to order.

Note: While the Board's consideration of agenda items does not always follow the sequence indicated by the agenda numbers, these minutes are listed in agenda item order for easier reference.

Tuesday, November 18, 2008 Call to Order 8:15 a.m.

1. Review and Approval of Agenda

Tape 1, Track 1 00:01:41 – 00:05:59

Action: A motion was made by Geoff Blakeslee and seconded by Keith Catlin to approve the November 2008 Agenda with the following amendments: a) delete items # 14e, f, and h from Executive Session because these items have been settled; b) remove items #18 and #19 because these items have been settled; and c) add an agenda item regarding the Rio Grand Initiative to be discussed after agenda item #7. The motion was approved unanimously (7-0).

*A complete record of the meeting has been made in electronic form using an MP2 format. The recording and the associated written materials are the only legal record of the meeting. These written summaries are intended only as an aid to research and a guide to the tapes. The motions described herein may not represent a verbatim transcription. Agenda items are presented in numerical order, according to the Agenda for the meeting. Disk numbers and approximate locations are identified for the beginning and end of each agenda item. The complete record of this meeting is available at the CWCB during regular office hours. Arrangements to make copies of the tapes or written transcripts of specific agenda items may be produced at the requestor's expense. Notes from the meeting for identification of times and tapes for specific agenda items can also be reviewed at the CWCB offices. Voting tallies are based on members present for voting. Members recusing themselves are identified. Board members occasionally leave the meeting, but the original meeting notes typically indicate whether or not a particular Board Member was present during a specific agenda item.

h. Case No. 4-99CW267 and 4-99CW268; Applications of the United States of America

i. Case No. 5-06CW77; Application of the Town of Carbondale

Tape 1, Track 1 05:41:40 – 05:42:33

Action: A motion was made by Geoff Blakeslee and seconded by Keith Catlin to go into Executive Session to discuss Agenda Items 14a, 14b, 14c, 14d, 14g, and 14i. Agenda Items #14 e, 14f, and 14h were deleted because these cases have been settled. The motion was approved unanimously (7-0). Barbara Biggs was not available for this motion.

Action: Based upon the recommendation from Casey Shpall, Deputy Attorney General, the discussion of Agenda Items 14a, 14b, 14c, 14d, 14g, and 14i were not recorded pursuant to C.R.S. Section 24-6-402(2)(d.5)(I)(B) because those portions of the Executive Session constituted privileged attorney-client communications.

CWCB Attorney

The portion of the Executive Session on Agenda Items 14a, 14b, 14c, 14d, 14g, and 14i that were not recorded were confined to the topics authorized for discussion in an Executive Session under C.R.S. section 24-6-403(3)(a)(II)

CWCB Chair

A motion was made by Barbara Biggs and seconded by Keith Catlin to adjourn from Executive Session. The motion was approved unanimously (8-0).

15. Report from Executive Session

Tape 1, Track 1 05:42:33– 05:42:59

Action: Casey Shpall, Deputy Attorney General, reported that Agenda Item 14a, 14b, 14c, 14d, 14g, and 14i were discussed in Executive Session and the discussion was limited to litigation strategy.

16. Water Supply Protection Section – Litigation Account Expenditure Authorization

Tape 1, Track 1 05:45:01 – 05:56:05

Action: A motion was made by Bruce Whitehead and seconded by Eric Wilkinson to approve staff recommendation that the Board, 1) authorize the expenditure of additional moneys, not to exceed \$191,000 for the costs of litigation associated with the defense and protection of Colorado's allocation of water in the Colorado River; 2) direct the CWCB Director and staff to expend these funds in a manner consistent with the request by the Office of the Attorney General; and, 3) direct the CWCB Director, 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). The motion was approved unanimously (8-0).

17. Stream and Lake Protection Section – Authorization to Proceed to Trial – Case No. 1
07CW123; Application of Colorado Mountain Properties, Inc.

Tape 1, Track 1 05:43:35 – 05:44:12

Action: A motion was made by Eric Wilkinson and seconded by Barbara Biggs to approve staff recommendation that the Board authorize CWCB staff to proceed to trial, to protect the Board's instream flow water rights, in the event that CWCB staff and the Attorney General's Office are unable to reach a settlement with the applicants. The motion was approved unanimously (8-0).

18. Stream and Lake Protection Section – Authorization to Proceed to Trial – Case #7-
06CW102; Application of Durango Commercial Development, LLC

Action: This agenda item was deleted as this case has settled. No action was required by the Board.

19. Stream and Lake Protection Section – Authorization to Proceed to Trial – Case No. 6-
06CW52; Application of D & S Development Group, LLC

Action: This agenda item was deleted as this case has settled. No action was required by the Board.

20. Stream and Lake Protection Section – Authorization to Proceed to Trial – Case No. 6-
03CW53; Application of Upper Yampa Water Conservancy District

Tape 1, Track 1 05:44:13 – 05:44:54

Action: A motion was made by Eric Wilkinson and seconded by Barbara Biggs to approve staff recommendation that the Board ratify the Motion to Intervene with accompanying Statement of Opposition. Staff further recommends that the Board authorize staff to proceed to trial to protect the Board's instream flow water rights in the event that staff and the Attorney General's Office are unable to reach a settlement with the applicant. The motion was approved unanimously (8-0).

RECESSED 4:28 p.m.

Wednesday, September 17, 2008
Call to Order 8:00 a.m.

A regular meeting of the Colorado Water Conservation Board (CWCB) was convened at the Timbers Hotel, 4411 Peoria Street, Denver, CO. The meeting was called to order by Chair, Travis Smith. Eight voting members were present at the call to order, so a quorum was present (at least 6 required). Voting members present were Chair Travis Smith, Vice Chair Geoff Blakeslee, Carl Trick, Bruce Whitehead, Keith Catlin, Eric Wilkinson, Reed Dils, and Harris Sherman. Barbara Biggs was not present at the call to order, but arrived shortly thereafter. Non-voting, *Ex-Officio* members present or represented were CWCB Director Jennifer Gimbel, Deputy Attorney General Casey Shpall, State Engineer Dick Wolfe, Alex Davis, and Grady McNeil representing Tom Remington, Director of Wildlife.

21. Water Supply Planning and Finance Section – Financial Matters – Construction Fund and
Severance Tax Trust Fund Perpetual Base Account – Annual Financial Statements

Tape 2, Track 1 00:00:00 – 00:52:00

Action: Informational item only, no action required.