

# STATE OF COLORADO

## Colorado Water Conservation Board Department of Natural Resources

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TO: Colorado Water Conservation Board

FROM: Randy Seaholm  
Ted Kowalski

DATE: January 15, 2009

SUBJECT: **Agenda Item 25.b, January 27-28, 2009 Board Meeting**  
**Water Supply Protection Section-Litigation Account**  
**Republican River Compact Litigation**

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 multi-year drought and increasing interstate and intrastate demands on the Republican River have dramatically affected irrigation within the basin. As described in the attached request from the Attorney General's Office, the State has been involved in extensive and contentious negotiations with Kansas and Nebraska regarding enforcement of the Republican River Compact and the settlement signed in 2003. In November 2007, the Attorney General requested, and this Board authorized, the appropriation of \$240,000 in order to prepare for the expected forthcoming litigation. While these efforts are ongoing, and the State has already expended significant resources towards this effort, we need to be prepared for additional non-binding arbitration regarding the proposed Republican River pipeline and for the possibility that the non-binding arbitration efforts (and any related negotiations) may fail. Therefore, the Attorney General is request the Board to approve an expenditure of \$110,000 from the Litigation Fund for the Republican River Compact litigation.

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 [the balance of 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).

The original authorization for the Republican River litigation was \$240,000. These funds were allocated towards the arbitrator's costs, modeling expenses, and travel and operating costs for the Attorney General's Office.

Attached hereto is an addition request for \$110,000 from the litigation account to assist with the non-binding arbitration work. A more detailed description of the work that will be accomplished, and the resources needed to accomplish this work, is attached to the letter from the Office of the Attorney General.

Currently, the litigation fund has approximately \$1.45 million of restricted funds available for litigation costs that comport with the statutory language cited above. If this \$110,000 expenditure is approved, the litigation fund will be reduced to approximately \$1.35 million, but this year's construction fund requests to the General Assembly will seek to restore some of the fund balance.

#### **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 \$110,000 for the costs of litigation associated with the defense and protection of Colorado's allocation of water in the Republican River basin;
- 2) direct the CWCB Director and Staff to authorize and manage the expenditure of these funds in a manner consistent with this approval and the request by the Office of the Attorney General;
- 3) direct the Office of the Attorney General to consult with the CWCB Director and Staff regularly with regard to the expenditures of these funds; and,
- 4) direct the CWCB Director, CWCB Staff, and Office of the Attorney General to provide the annual report to the General Assembly required and specifically provided for in Section 37-60-121(2.5).

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 BUILDING**  
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January 27, 2009

**Request for Expenditure from Litigation Fund  
for Republican River Compact Litigation**

Dear Board Members:

By this letter, I request the expenditure of \$110,000 over the current and next fiscal years (FY09 and FY10) from the Water Conservation Board Litigation Fund (Board) pursuant to 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 and litigation, Colorado's interests in the Republican River.

The recent multi-year drought and increasing interstate and intrastate demands on the Republican River have had a dramatic effect on irrigation within the basin. In 2003, a settlement decree was entered into to resolve the interstate litigation on the Republican River, *Kansas v. Nebraska and Colorado, No. 126 Original*. As a result, Colorado has retired thousands of acres of irrigated land and taken additional actions such as the partial draining of Bonny Reservoir. Also, Colorado is developing enforcement rules and exploring additional actions that we will need to undertake to comply with the settlement decree. Recently, the Kansas Attorney General indicated that the States of Nebraska and Colorado are not doing enough to comport with the settlement decree, and that Kansas intends to initiate litigation against those States to enforce the decree. The State of Colorado must be prepared to curtail its uses, seek to augment stream flows and also defend the State's interest in the litigation that is looming.

We currently involved in non-binding arbitration with Kansas and Nebraska on various issues, some of which may adversely affect Colorado's ability to comply with the Compact. Further, we anticipate additional non-binding arbitration regarding Colorado's attempts to build an augmentation pipeline to the North Fork of the Republican River to assist in Compact compliance. Non-binding arbitration is required before any state may file an original action with the United States Supreme Court. We also anticipate claims against Colorado that we have consumed more water in the Republican River basin than allowed by the Compact. Similar claims have been made against Nebraska. Additionally Nebraska will

likely file cross-claims alleging that Colorado's over consumption of water injured Nebraska or contributed to Nebraska's over use. These requested funds will be used to pay for arbitration and litigation expenses, including experts to bolster Colorado's position in the case.

Thus, I am requesting the expenditure of \$110,000 to fund the hiring of consultants with expertise in modeling, engineering and agricultural economics and to fund the required non-binding arbitration. The request also includes funds for travel and other expenses.

This effort is essential to allow my office and the Board to participate in ongoing negotiations and prepare for litigation to protect Colorado's rights to the Republican River, now and in the future. I therefore request and recommend that the Board authorize the expenditure of up to \$110,000 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 my staff and the State Engineer, to allocate funds between these activities based on actual costs and litigation necessities.

Thank you for your consideration.

Sincerely,

A handwritten signature in dark ink, appearing to read "John Suthers", with a stylized flourish at the end.

JOHN W. SUTHERS  
Colorado Attorney General