

STATE OF COLORADO

Colorado Water Conservation Board Department of Natural Resources

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TO: Colorado Water Conservation Board Members

Bill Ritter, Jr.
Governor

FROM: Ted Kowalski

James Martin
DNR Executive Director

DATE: November 8, 2009

Jennifer L. Gimbel
CWCB Director

SUBJECT: **Agenda Item 20, November 17-18, 2009 Board Meeting**
Water Supply Protection Section-Request for
Expenditure from Litigation Fund

Dan McAuliffe
CWCB Deputy Director

Background

As you know, the unprecedented drought from 2000-2008 in the Colorado River Basin has lowered storage levels in Lake Powell and Lake Mead. While the runoff from several recent years has improved the situation, the existing drought may continue into the future. 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 recognize that there are decisions that we make today that will have consequences for Colorado in the future. 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 2007 negotiations were completed. However, that attempt failed in the General Assembly last year due to budgetary constraints. This year, the Attorney General has reduced the funding request for this subunit. The Attorney General's request is attached.

Staff Recommendation

The staff recommends that the Board:

- 1) authorize the expenditure of additional moneys, not to exceed \$265,000 for the costs associated with the defense 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, with the clarification that the funds are not limited to FY11; 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—there have been expenditures associated with South Platte River three state negotiations, the Kansas v. Colorado Arkansas River litigation, the Colorado River negotiations, and the Republican River litigation. Last year, the General Assembly refreshed the litigation fund up to the original \$4,000,000, with money from the Construction Fund.

The expenditures that have been used for the Colorado River issues have allowed the State to have competent 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 \$265,000 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

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November 17, 2009

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

Dear Board Members:

Section 37-60-121(2.5)(a)(III), C.R.S. (2009), authorizes the Colorado Water Conservation 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 by this letter, the expenditure of \$265,000 over the next fiscal year (FY11) from the Litigation Fund to support our continuing efforts to protect Colorado's allocations of the Colorado River under the Colorado River Compact and the Upper Colorado River Compact. I believe this expenditure is necessary to adequately defend, in negotiations and in litigation, the State's apportionments under the compacts.

The Department of Law, with the support of the Board's staff, proposes that you continue to fund these necessary efforts to assure that the water users within Colorado can make full beneficial use of the equitable apportionment of waters provided to the State of Colorado by the compacts.

In recognition of the existing budget constraints, we have spoken with Director Gimbel and agreed that, for the next fiscal year, the Office of the Attorney General will continue to protect Colorado's apportionment under the compacts with a reduced staff. Therefore, because of the fiscal restraints that affect us all, I am requesting reduced funding for only 2 attorneys (down from 3 attorneys) and 1 legal assistant, plus operating costs, calculated to total \$265,000 for FY11.

In keeping with our previous commitment to the Board to attempt to transition to General Fund support for the Colorado River Subunit, last year we requested the General Assembly to fund our work protecting our Colorado River allocation by formally combining the Subunit with the Federal and Interstate Water Unit in my office, and funding the consolidated unit as a single line item. Instead, the Joint Budget Committee accepted its staff proposal not to consolidate or fund our effort. As the General Assembly has not granted my request, I now am requesting your approval to expend \$265,000 from the Litigation Fund to continue our ongoing work to defend Colorado's equitable apportionment under the compacts and more specifically, 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 issues, studies and negotiations; (3) preparing the State of Colorado and the

Board for possible Colorado River Compact litigation and other litigation that may directly affect Colorado's ability to beneficially use its equitable apportionment; (4) finalizing and organizing an electronic database of documents and data relating to the compacts for State and Board use in connection with ongoing and future negotiations and possible litigation; and (5) assisting the State Engineer with respect to intrastate administration issues on the Colorado River and its tributaries, including identifying and analyzing the best strategies to avoid future curtailment due to compact obligations and for developing strategy to plan for possible future administration of water rights within Colorado to assure the State's continued compliance with the compacts.

These tasks are essential to allowing my office and the Board to prepare for and participate in ongoing and future negotiations and potential litigation with the goal to defend Colorado's equitable apportionment to the Colorado River, as provided by the compacts, now and into the future.

I therefore request and recommend that the Board authorize the expenditure of up to \$265,000 from the Litigation Fund to fund these necessary activities through the end of FY11. 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,

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

JOHN W. SUTHERS
Colorado Attorney General