

# STATE OF COLORADO

## Colorado Water Conservation Board Department of Natural Resources

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**TO:** Colorado Water Conservation Board

**FROM:** Steve Miller, Water Supply Protection Section

**DATE:** January 13, 2010

**RE:** **Agenda Item 20.b January 26-27, 2010, Board Meeting**  
Water Supply Protection Section – Litigation Account Request –  
Division 2 Irrigation Improvement Rules case

Bill Ritter, Jr.  
Governor

James Martin  
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 up to \$50,000 from the Board's Litigation Fund for litigation support expenses, including expert witness fees, during promulgation and adoption of the Irrigation Improvement Rules in Div. 2 Water Court. The Attorney General request is contained in his attached letter dated January 15, 2010.

### Discussion:

The Board, using its Litigation Fund, has made significant investments in studies to refine 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, four years of irrigation monitoring studies, 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 \$1,290,000 for these projects. In addition the Board's Construction Fund is providing \$250,000 of technical support services to the Lower Arkansas Valley WCD, as authorized in the 2009 Projects Bill, related to the SEO's proposed Division 2 Irrigation Improvement Rules. The pending request is for authorization of an additional \$50,000 to be used as may be necessary for litigation expenses, including expert witness fees, in connection with a hearing on protests to the rules in Water Court. A full hearing on the rules is scheduled for November 2010.

The Division 2 Irrigation Improvement Rules are needed to prevent material depletions to usable Stateline flows that might otherwise be caused by improvements or modernization of surface water irrigation systems, such as the installation of sprinkler systems to replace flood and furrow irrigation methods or lining of canals. Such depletions are prohibited by Article IV.D. of the Arkansas River Compact, which states:

This compact is not intended to impede or prevent future beneficial development of the Arkansas river basin in Colorado and Kansas by federal or state agencies, by private enterprise, or by combinations thereof, which may involve construction of dams, reservoirs and other works for the purposes of water utilization and control, as well as the **improved or prolonged functioning of existing works**: Provided, that the waters of the Arkansas river, as defined in article III, **shall not be materially depleted in usable quantity or availability for use to the water users** in Colorado and Kansas under this compact by such future development or construction. (emphasis added).

Therefore this use of the Litigation Account, as requested by Attorney General Suthers to prevent future potential Compact violations, is consistent with the intended purposes of the Litigation Account: "... to defend and protect Colorado's allocations of water in interstate streams and rivers ..." CRS, Section 37-60-121(2.5).

### Recommendation:

Staff recommends that pursuant to the Attorney General request contained in his letter dated January 15, 2010, the Board approve the expenditure of up to \$50,000 from the Litigation Fund, an account within the Board's Construction Fund, to be used for litigation support expenses, in particular expert witness fees, during promulgation and adoption of the Division 2 Irrigation Improvement Rules.



**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  
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January 15, 2010

Colorado Water Conservation Board

Re: Request for Expenditure from Litigation Fund for Continued Arkansas River  
Compact Compliance

Dear Board Members:

By this letter, I am requesting the expenditure of up to \$50,000 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.

The requested funds will be used for litigation costs related to the State Engineer's proposed Compact Rules Governing Improvements to Surface Water Irrigation Systems in the Arkansas River Basin in Colorado, also known as the Irrigation Improvement Rules. These rules are necessary to ensure Colorado's continued compliance with the Arkansas River Compact. Article IV-D of the Compact provides in part that improved or prolonged functioning of existing works in the Arkansas Basin in Colorado may not cause a material depletion to usable Stateline flows. The Irrigation Improvement Rules will enable the State Engineer's Office to ensure that improvements to the efficiency of surface water irrigation systems in that basin do not violate Article IV-D by increasing consumption and reducing return flows. By statute, the Rules must be approved by the Water Court for Division 2 after protests are judicially resolved. C.R.S. § 37-92-501 and 37-92-304. The Rules are currently before the Water Court in Case No. 09CW110. The funds requested herein will be used for costs incurred by my office in that case, including expert witness fees.

This use of the Litigation Fund will help ensure Colorado's continued compliance with the Arkansas River Compact, which is essential to defending and protecting Colorado's allocation of the river under that Compact. It is thus a necessary and appropriate use of the CWCB's Litigation Fund. Thank you for your consideration.

Sincerely,

**JOHN W. SUTHERS**  
Colorado Attorney General