

STATE OF COLORADO

Colorado Water Conservation Board

Department of Natural Resources

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TO: Colorado Water Conservation Board Members

FROM: Jennifer Gimbel, CWCB Director
Ted Kowalski, Chief, Interstate, Federal, and Water
Information Section
Brent Newman, Interstate, Federal, and Water Information
Section

DATE: March 20, 2012

SUBJECT: **Agenda Item 24b, March 20-21, 2012 Board Meeting**
Interstate, Federal, and Water Information Section: Request for Utilization of
Litigation Account – Colorado River

John W. Hickenlooper
Governor

Mike King
DNR Executive Director

Jennifer L. Gimbel
CWCB Director

Background

Section 37-60-121(2.5) of the Colorado Revised Statutes 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 waters; and to ensure the maximum beneficial use of water for present and future generations by addressing important questions of federal law...” The CWCB has received a letter from Attorney General Suthers, attached, regarding the use of the litigation fund.

At the May 2011 Board Meeting, the CWCB approved \$350,000 for outside technical work to “protect our state’s allocations of the Colorado River under the Colorado River Compact and the Upper Colorado River Compact.” The Board approved these funds to be used in Fiscal Year 2013 if not used in Fiscal Year 2012. The Attorney General requests that this approval of litigation fund money be applied to costs for technical work relating to the Colorado River Basin Supply and Demand Study, and also to other future expert technical consulting work.

First, the Attorney General requests that \$99,000 of this amount be applied to the State and Federal cost sharing required for continued participation in the Colorado River Basin Supply and Demand Study process. An update on the Study will be presented to the Board during the March 2012 meeting. This Study was one of the areas mentioned for technical funding in the May 2011 request, “specifically the technical and legal implications of each of the possible strategies developed by the Study.”

The Attorney General also requests that \$251,000, the remainder of the May 2011 approval, be utilized to fund contract work in Fiscal Year 2013. The Department of Law expects to require contract assistance in support of litigation involving the following: 1) ongoing efforts by the Upper Colorado River Commission (UCRC) to develop policies and procedures involving administration of the Colorado River compact; 2) the Long Term Experimental and Management Plan (LTEMP) for operation of Glen Canyon Dam; and 3) technical and engineering work for a comprehensive model of Colorado River operations. These tasks are outlined in greater detail in the memo from Attorney General Suthers.

Finally, the Attorney General requests \$300,000 from the litigation fund to fully fund the Defense of the Colorado River subunit. This money serves as funding for staff maintenance and operating costs of this subunit within the Office of the Attorney General. The funding requested for legal staff at the DOL will maintain a staff of two attorneys, one legal assistant, plus operating costs for Fiscal Year 2013.

The tasks outlined above are essential to allowing the Office of the Attorney General and CWCB to prepare for and participate in ongoing and future negotiations and potential litigation with the goal to defend Colorado's rights in the Colorado River, as provided by the compacts.

These requests also provide that the CWCB authorize these funds to be used in Fiscal Year 2014 if not expended in Fiscal Year 2013, and that the CWCB Director, in consultation with the State Engineer, and the staff of the Department of Law, "allocate these funds between the activities based on actual costs and litigation necessities."

Staff Recommendation

The Staff recommends that the Board:

- 1) Reauthorize the expenditure of \$350,000 from the May 2011 previously approved funds, of which \$99,000 will be expended within this fiscal year and 251,000 will be expended by the end of next fiscal year to provide appropriate engineering, modeling, and technical support to the CWCB and the Attorney General in these important tasks;
- 2) approve the expenditure of \$300,000 from the Litigation Fund, to complete the necessary amount for support of the Defense of the Colorado River subunit;
- 3) direct the CWCB Director and Staff to expend these funds consistent with the request by the Office of the Attorney General, and;
- 4) 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).



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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March 9, 2012

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., 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 \$300,000 for legal staff from Department of Law ("DOL") to protect our state's allocations of the Colorado River under the Colorado River Compact and the Upper Colorado River Compact. In recognition of the continued budget constraints, DOL again requests funding for a reduced staff of only two attorneys (down from three) and one legal assistant, plus operating costs, calculated to total \$300,000 for FY13. The CWCB's staff and I believe that this expenditure is necessary to adequately defend, in negotiations and in litigation, the State's apportionments under these Compacts.

The Colorado River Basin is very important to Colorado's water future. It is the only remaining river basin originating in Colorado that is not over-appropriated in some parts of the basin. Colorado is involved in numerous negotiations, and processes under the National Environmental Policy Act and Endangered Species Act, to defend and protect its allocations of water in the Colorado River system. Such negotiations and processes have been and remain critical to allowing Colorado to achieve the optimum use of this resource for present and future generations and minimize costly litigation. Furtherance of the ongoing negotiations and processes requires sound legal analysis and detailed technical information to inform our conversations and decision-making and potential litigation strategies.

In addition, at the May 2011 Board Meeting, the CWCB approved \$350,000 for outside technical work to protect the State's Colorado River allocations. The Board approved these funds to be used in Fiscal Year 2013 if not used in Fiscal Year 2012. I am now requesting that CWCB extend that authorization to FY14. Expenditures for FY12 include \$99,000 for technical work relating to the Colorado River Basin Study. (See attached memorandum.) A delay in additional authorized expenditures is attributable to protracted negotiations between the United States and Mexico and to the decision to perform pre-modeling and proof of concept work to inform the detailed development and implementation of the technical work that was originally contemplated. Expecting this work to be necessary in FY13-14, I request the CWCB authorize the \$250,000 remaining from FY12 be available for expenditure through FY14.

DOL expects to contract for technical assistance in support of litigation as follows:

- 1) The Upper Colorado River Commission (UCRC) in December 2010 adopted a resolution wherein the Commission stated its intent to: develop policies and procedures that might be needed to implement articles III through VI of the compact in furtherance of: (a) the Commission performing its responsibilities, pursuant to article VIII of the compact, as necessary to administer the provisions of the compact; (b) implementation of article IV of the compact; (c) the comprehensive development of the water resources of the Upper Basin; (d) the Resolutions

adopted by the Commission addressing Upper Basin yield; and, (e) work with the Upper Division states' representatives to develop options for administering the Upper Colorado River Basin Compact and provide a recommendation for consideration by the Commission as soon as practicable but, in no event, later than December 31, 2013.

These efforts have and will continue to take a great deal of technical resources to explore the different compact implementation possibilities, and the impacts to Colorado. Unlike the internal studies conducted by the CWCB regarding intrastate compact compliance, the proposed UCRC work is intended to explore options to avoid curtailment or implement compact compliance among all of the Upper Division States. This work will be related to modeling different compact compliance scenarios that will have different assumptions related to overuse, pre-compact rights, and determining consumptive uses. This work will primarily rely on models (the Colorado River Simulation System (CRSS) and Riverware). The modeling will focus on how the different assumptions could affect Colorado's water resources. It is imperative that this work remain confidential as it relates to legal negotiations and litigation that is likely to occur at some time in the future among the Colorado River basin states.

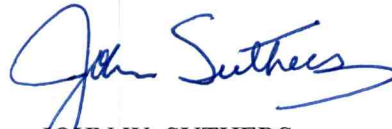
- 2) The Department of the Interior in July 2011 announced its intent to prepare an Environmental Impact Statement and conduct public scoping on adoption of a Long-Term Experimental and Management Plan (LTEMP) for the operation of Glen Canyon Dam (76 Fed. Reg. 64104). The stated purpose of the LTEMP is to inform the Department's decisions on operation of Glen Canyon Dam in such a manner as to improve and protect downstream resources while maintaining compliance with relevant laws, including the Grand Canyon Protection Act, the Endangered Species Act and the Law of the River. Results of the LTEMP EIS will directly impact whether and to what extent Colorado and the other Upper Colorado River Division States can assure the Lower Basin receives its compact share of the Colorado River without impairing development of consumptive uses in the Upper Basin. It will also implicate how Glen Canyon Dam provides for hydroelectric power generation, the sale of which repays the cost of the storage features and funds the Upper Colorado River Basin Fund ("Basin Fund") to finance irrigation projects and environmental programs, including the Upper Colorado and San Juan Recovery Implementation Programs and the Glen Canyon Dam Adaptive Management Program. To balance these interests and protect Colorado's allocation of the Colorado River system, the technical consulting work will, among other things, evaluate preferred alternatives to dam operations, compare and contrast adaptive management options, review the science supporting the EIS process, and develop the technical experience to provide expert testimony in any litigation.
- 3) In anticipation of ongoing negotiations regarding reservoir operations under the 2007 Interim Guidelines for Lower Basin Shortages and Coordinated Operation of Lake Powell and Lake Mead, and in preparation of litigation on the Colorado River, the State requires a comprehensive model on Colorado River operations throughout the Basin. The technical and engineering work needed to develop and run this model will allow the State to evaluate, compare and contrast, and rebut, if necessary, modeling assumptions made and results provided by the Bureau of Reclamation and its use of the CRSS (Big River model).

These tasks are essential to allowing my office and the CWCB 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 CWCB authorize the expenditure from the Litigation Fund of \$300,000 to fund DOL legal staff in FY13 and to allow the expenditure of the authorized \$250,000 in contract funds to be extended through FY14. I further recommend that the CWCB'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

February 24, 2012

MEMORANDUM

TO: Cynthia Coffman
Chief Deputy Attorney General

THRU: Casey Shpall
Deputy Attorney General
Natural Resources and Environment Section

FROM: Shanti Rosset O'Donovan
Assistant Attorney General
Natural Resources & Environment

RE: Contract for Colorado River Basin Study funding

This memo provides the justification for and description of the consulting services that will be developed in the Colorado River Basin Study ("Basin Study"). The Basin Study will be a joint effort of the U.S. Bureau of Reclamation, the State of Colorado and the six other Colorado River Basin States, and will provide essential engineering data and analysis for the litigation, negotiations and other projects in which the State of Colorado is involved with respect to the State's interests in the Colorado River, as described below.

The Defense of the Colorado River Unit ("Unit") represents the Department of Natural Resources, the Colorado Water Conservation Board ("CWCB") and the Colorado Commissioner to the Upper Colorado River Commission in federal, interstate, intra-state and compact matters concerning the Colorado River, billing alpha LW NR IAFDE. The State of Colorado is currently involved in complex interstate and intra-state negotiations, litigation and projects on a number of fronts that affect Colorado's rights and authorities under the body of law governing the use and operation of the Colorado River, known as "the Law of River." For example, the Unit is currently advising the State in negotiations regarding operation of Glen Canyon Dam, which involve balancing the Law of the River, the Grand Canyon Protection Act, and the Endangered Species Act, and in the negotiation of comprehensive water management strategies with the 7-Basin States, the Federal Government and Mexico. The State is also involved in complex litigation in the Ninth Circuit Court of Appeals regarding operation of Glen Canyon Dam. These matters require extensive and accurate engineering data regarding the Colorado River to assist the associated engineers, attorneys and policy makers in representing the State of Colorado's interest.

The Basin Study will analyze water supply and demand in the Colorado River basin through 2060, will assess options and develop recommendations to address current and projected supply and demand imbalances, will assess potential impacts of climate variability on water supplies and demands, and will create a large amount of high-quality data and models for assessing

current and future demands and water supplies, and will provide a framework for the quantitative assessment of consequences of the potential imbalances.

The estimated total cost of the Basin Study is \$5,100,000. The Non-Federal Cost Share Partners plan to contribute \$160,000 each, to be used to fund costs of the Basin Study that exceed \$2,000,000. The contribution from the Litigation Fund to Protect Colorado's Allocation in the Colorado River will be \$99,000. The purchase order for \$99,000 would be paid upfront to the U.S. Bureau of Reclamation as a single lump sum payment. The Basin Study funding agreement expires September 30, 2012.

The Unit's ability to develop coherent legal positions, responses and strategies depends heavily on technical data and analysis of how the Colorado River system works and is operated. As such, the Basin Study is considered to be in anticipation of complex negotiation and litigation. The CWCB approved use of money from its litigation fund to be used by the Department of Law, through the Unit, to contract with expert consultants to prepare technical analysis that will support negotiations and potential litigation, and the CWCB has authorized Attorney General Suthers, through the Unit, to contract for engineering work specifically associated with the Basin Study.¹ The CWCB's staff, and the attorneys in the Unit, believe that this expenditure is necessary to adequately defend, in negotiations and in litigation, the State's apportionments under the Colorado River Compact and Upper Colorado River Basin Compact. Therefore, the expert engineering information that will result from the Basin Study is essential to the successful representation of the State of Colorado and protection the State's interests in the Colorado River.

I would be happy to provide any additional information regarding the decision to contribute money to Basin Study so that we may represent our clients in complex, technical negotiations and litigations affecting the State's interests in the Colorado River.

cc: Peter Ampe, First Assistant Attorney General, Federal & Interstate Water Unit
Karen Kwon, Assistant Attorney General

¹ Attorney General Suthers included the Basin Study among the items listed in the Request for Expenditure from Litigation Fund to Protect Colorado's Allocations in the Colorado River to the CWCB board, dated May 17, 2011. The CWCB board subsequently approved this request.