

# STATE OF COLORADO

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## 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 24d, March 20-21, 2012 Board Meeting**  
Interstate, Federal, and Water Information Section: Request for Utilization of  
Litigation Account – Republican River

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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.

The Attorney General requests \$220,000 to “adequately defend, in negotiations and in litigation, Colorado’s interests in the Republican River.” The funds will be used for continued outside consultant fees relating to the Compact Compliance Pipeline and Nebraska’s proposed changes to the Republican River Compact Administration Accounting Procedures. The construction of the operation of the pipeline requires outside consultants in the negotiation process with Kansas, and without Kansas’ assent to the proposal, consultants may be necessary in the non-binding arbitration process. Also, as a named party to the Kansas’ current petition, Colorado is responsible for a portion of the Special Master’s expenses and fees. Trial preparation and participation will require expert and consultant fees. Further information is included in the Attorney General’s letter, attached.

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 Republican 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) Approve the expenditure of \$220,000 to support the CWCB and Attorney General in these important tasks.
- 2) direct the CWCB Director and Staff to expend these funds 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).



**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

March 9, 2012

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

Dear Board Members:

By this letter, I request expenditure of \$220,000 for FY13 from the Colorado Water Conservation Board Litigation Fund pursuant to Section 37-60-121(2.5)(a)(III), C.R.S. That section authorizes the CWCB 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. I believe this expenditure is necessary to adequately defend, in negotiations and in litigation, Colorado's interests in the Republican River.

These funds continue to be necessary to defend Colorado's allocation of water under the Republican River Compact. First, funds are necessary for continued outside consultant fees relating to the Compact Compliance Pipeline and Nebraska's proposed changes to the Republican River Compact Administration Accounting Procedures. We continue to negotiate with Kansas on construction and operation of the pipeline, which requires outside consultants to assist in the process. If Kansas will not agree to the proposal, non-binding arbitration will likely be invoked in FY13 on the revised proposal, which will again require outside consultants fees and arbitration fees.

In addition, the United States Supreme Court has appointed a Special Master to hear Kansas' current petition. Colorado is a named party to this interstate suit and is responsible for a portion of the Special Master's expenses and fees. As trial has not yet been set, it is not possible to accurately estimate those expenses. However, all indications are that trial will be set at a location convenient to the Special Master in the fall of this calendar year. Trial preparation and participation will require the Department of Law to incur expert and consultant fees and other expenses such as attorney and consultant travel.

Finally, Kansas may also pursue a determination of Colorado's compact compliance and the validity of the Compact Compliance Pipeline in future Supreme Court litigation. Although a petition filed by Kansas may be stayed pending non-binding arbitration, the question of any damages may still proceed to trial. Whether and to what extent these events take place in the near future will depend on the Special Master and the willingness of the respective parties to negotiate.

These efforts are essential to support my office and the CWCB in ongoing negotiations and litigation to protect Colorado's rights to the Republican River, now and in the future. I, therefore, request and recommend that CWCB authorize the expenditure of \$220,000, to retain consultants, pay arbitration fees, pay Supreme Court litigation costs and fees and provide funds for travel and other expenses. I further recommend that the CWCB's authorization allow the funds to be used in FY14 if not expended in FY13, and allow the Board Director, in consultation with the State

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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 blue ink, appearing to read "John Suthers". The signature is fluid and cursive, with the first name "John" and last name "Suthers" clearly distinguishable.

JOHN W. SUTHERS  
Colorado Attorney General