

# STATE OF COLORADO

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## Colorado Water Conservation Board

### Department of Natural Resources

1313 Sherman Street, Room 721  
Denver, Colorado 80203  
Phone: (303) 866-3441  
Fax: (303) 866-4474  
www.cwcb.state.co.us



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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: July 3, 2012

SUBJECT: **Agenda Item 9a, July 17-18, 2012 Board Meeting**  
Interstate, Federal, and Water Information Section: Request for Utilization of  
Litigation Account – Rio Grande 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 \$150,000 to “defend Colorado’s allocation of water under the Rio Grande Compact of 1938.” Recent litigation filed against the State Engineer stems from Colorado’s effort to regulate groundwater and surface water in Division 3. As stated by the Attorney General, “a major purpose of this effort is to prevent groundwater diversions from interfering with Colorado’s ability to fulfill its obligations under the Rio Grande Compact.” The Attorney General requests the funds for trial preparation and costs incurred by litigation, as follows: experts and consultants in hydrogeology, agriculture, and groundwater modeling; expenses incurred in trial preparation such as depositions, transcripts, court costs and fees; and attorney and consultant travel, room, and board. 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 Rio Grande 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 \$150,000 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

June 29, 2012

Request for Expenditure from Litigation Fund  
for Litigation on Annual Replacement Plan Implementation in the Rio Grande Basin

Dear Board Members:

By this letter, I request expenditure of \$150,000 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 litigation Colorado's interests in the Rio Grande.

These funds continue to be necessary to defend Colorado's allocation of water under the Rio Grande Compact of 1938. The litigation filed against the State Engineer in Water Division 3 in May 2012 is the most recent dispute in line of cases concerning Colorado's effort to integrate groundwater and surface water regulation in Water Division 3. A major purpose of this effort is to prevent groundwater diversions from interfering with Colorado's ability to fulfill its obligations under the Rio Grande Compact. *See, eg. Simpson v. Cotton Creek Circles, LLC*, 181 P.3d 252, 259-260, 261-262 (Colo. 2008).

In 2004, the General Assembly passed Senate Bill 04-222, which allows the creation of subdistricts of the Rio Grande Water Conservation District. These subdistricts may adopt plans of water management designed to restore the aquifers underlying the subdistricts by fallowing land, reducing well pumping, and replacing injurious stream depletions caused by well pumping in the subdistricts. If a subdistrict operates its plan of water management such that it meets those goals, subdistrict wells are immune to curtailment by the Division Engineer when rules allowing for such curtailment are in place. SB 04-222 set into motion a novel approach to groundwater regulation wherein local control of groundwater use achieves sustainability of the aquifers, prevents interference with compact compliance, and protects senior surface water rights.

Subdistrict No. 1 was formed in Case No. 06CV64. The water court approved Subdistrict No. 1's plan of water management in the same case, and the court upheld the State Engineer's approval of the plan in Case No. 07CW52. The plan of water management requires Subdistrict No. 1 to produce each year an Annual Replacement Plan (ARP) that implements much of the plan of water management on a year-to-year basis.

On May 1, 2012, the State Engineer approved the ARP for Subdistrict No. 1 pursuant to the framework established by the Water Court. Although approval of the ARP was predicated on


terms and conditions to further ensure pumping in Subdistrict 1 would not cause injury, three parties filed suit on May 15, 2012 challenging the State Engineer's decision. At issue are, among other things, whether the ARP may operate before challenges are resolved, whether certain replacement water sources may be used, and whether the ARP comports with Subdistrict No. 1's plan of water management. Trial was recently set for 5 days to begin on October 29, 2012. All parties, however, expect the trial may go longer given that the two prior trials on the plan of water management lasted approximately two weeks each.

Given these circumstances, the requested funds are necessary to provide adequate trial preparation and participation. First, funds are necessary to retain experts and consultants in hydrogeology (1 expert at \$50,000), agriculture (2 experts at a total of \$35,000) and complex groundwater modeling (2 experts at a total of \$30,000). Second, both trial preparation and participation will also require the Department of Law to incur expenses for depositions, transcripts, copying, court costs and fees, and attorney and consultant travel, room and board (estimated at \$35,000).

These efforts are essential to support my office in litigation to allow the State Engineer to effectively administer waters within the Rio Grande Basin, and in so doing protect Colorado's rights to the Rio Grande, now and in the future. I, therefore, request and recommend that CWCB authorize the expenditure of \$150,000, to retain consultants, pay litigation costs, and provide funds for travel and other expenses. 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