

STATE OF COLORADO

Colorado Water Conservation Board

Department of Natural Resources

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



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: January 28, 2013

SUBJECT: **Agenda Item 8b, January 28-29, 2013 Board Meeting**
Interstate, Federal, and Water Information Section: Request for Utilization of
Litigation Account – Rio Grande 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.

The Attorney General requests a total of \$250,000 to “adequately defend, in negotiations and in litigation, Colorado’s interests in the Rio Grande.” The funds are anticipated to be used to retain expert consultants relating to hydrogeology, hydrology, administration and operation of the Rio Grande. Also, as a named party to Texas’ current petition, Colorado may be responsible for a portion of the U.S. Supreme Court or its appointed Special Master’s expenses and fees. Furthermore, trial preparation and participation will require travel and related expenses. A portion of the funds requested can be redirected from a prior Board authorization for expenditure from the Litigation Fund to defend the State Engineer in an in-state litigation concerning Colorado’s effort to integrate groundwater and surface water regulation in Water Division No. 3. 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, State Engineer, and CWCB to prepare for and participate in ongoing and future negotiations and litigation with the goal to defend Colorado’s rights in the Rio Grande, as provided by the compacts.

This request also provides 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 a total of \$250,000 to support the CWCB, State Engineer, 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

Ralph L. Carr
Colorado Judicial Center
1300 Broadway, 10th Floor
Denver, Colorado 80203
Phone (720) 508-6000

January 16, 2013

**Request to Modify Existing Approval for Expenditure from Litigation Fund and Additional
Request for Expenditure from Litigation Fund for Litigation in the Rio Grande Basin**

Dear Board Members:

By this letter, I request the Board modify its approval for expenditure of \$150,000 to defend the State Engineer in litigation filed in Water Division No. 3, and further authorize expenditure of an additional \$120,000 for FY13 and FY14 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 litigation, Colorado's interests in the Rio Grande.

In July 2012, the Board approved a request for expenditure of \$150,000 for FY13 from the Litigation Fund to adequately defend the State Engineer in an in-state concerning Colorado's effort to integrate groundwater and surface water regulation in Water Division No. 3. *See, Suthers Letter dated June 29, 2012.* At the time of this request, trial was expected to last up to 10 days, and the Department of Law anticipated the need to retain a number of experts familiar with groundwater modeling, hydrogeology and evapotranspiration in the Rio Grande Basin to support the case in chief. Subsequently, due, in part, to the plaintiffs' inability to produce experts, the issues to be litigated were narrowed considerably, thereby leaving \$130,000 of the requested funds unspent.

At the beginning of 2013, Texas filed an original action with the U.S. Supreme Court concerning the Rio Grande Compact. In its complaint, Texas claims surface water diversions and groundwater pumping in New Mexico improperly deplete water to which Texas is entitled under the Compact and Rio Grande Project Act. Although no claims are asserted directly against Colorado, our state is a named defendant and will be implicated by the arguments and interpretations promoted throughout this litigation. The funds requested, therefore, are necessary to defend Colorado's allocation of water under the Rio Grande Compact of 1938.

As this case is only in its beginning stages, it is impossible to accurately estimate these expenses. However, based on experience in other interstate compact litigation involving parties with engrained disagreements, the Department of Law estimates that funds will be necessary to:

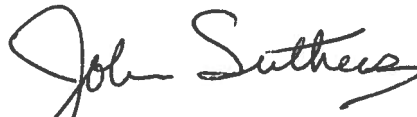
- (a) Retain outside consultants with expertise in, among other things, groundwater, hydrogeology, hydrology and administration within the Rio Grande basin.
- (b) Pay for a portion of the Court or its appointed Special Master's expenses and fees.
- (c) Provide for travel and other expenses associated with trial preparation and participation.

These efforts will be essential to support my office, the State Engineer, and the CWCB in ongoing negotiations and litigation to protect Colorado's rights to the Rio Grande, now and in the future. I, therefore, request and recommend that CWCB authorize the expenditure of a total \$250,000, including funds previously authorized in July 2012 for other Rio Grande purposes.

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 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

STATE OF COLORADO

Colorado Water Conservation Board

Department of Natural Resources

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Denver, Colorado 80203
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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

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