

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: May 3, 2013

SUBJECT: **Agenda Item 7a, May 14-15, 2013 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.

The Attorney General requests a total of \$500,000 to “adequately defend, in negotiations, litigation, and other processes the State’s apportionments under the Compacts for FY14”. The requested expenditure is divided between \$300,000 for legal staff from the Department of Law and \$200,000 for expert technical outside consulting work to protect the State’s equitable allocations of the Colorado River under the Colorado River Compact and the Upper Colorado River Compact. Further information is included in the Attorney General’s letter, attached.

The request also outlines a new accounting procedure by which any unexpended funds from the previous fiscal year will be reverted back to the litigation fund, beginning each year with a clean slate. Under this new procedure, \$40,000 previously requested for DOL legal work and \$201,000 for technical work that were unexpended will be returned to the fund.

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 on the Colorado River, as provided by the compacts.

This request also provides 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) Authorize reversion to the Litigation Fund of the FY13 unexpended \$40,000 for DOL legal work and \$201,000 for technical work to be made available for future authorizations.
- 2) Approve the expenditure of a total of \$500,000 to support the CWCB, State Engineer, and Attorney General in these important tasks.
- 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

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

May 1, 2013

FY14 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 from the Litigation Fund of \$300,000 for legal staff from the Department of Law ("DOL") and \$200,000 for expert technical outside consulting work to protect the State's equitable allocations of the Colorado River under the Colorado River Compact and the Upper Colorado River Compact over the next fiscal year (FY14). The CWCB's staff and I believe that this expenditure is necessary to continue to adequately defend, in negotiations, litigation, and other processes the State's apportionments under the Compacts for FY14.

The Colorado River remains the only river basin originating in Colorado that is not over-appropriated in some parts of the basin. Colorado is involved in negotiations, processes under the National Environmental Policy Act and Endangered Species Act, basin investigations, and litigation to defend and protect its allocations of water in the Colorado River system. Such negotiations, processes and litigation 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 these ongoing activities requires sound legal analysis and detailed technical information to inform our decision-making.

For FY13, the CWCB approved \$300,000 for DOL legal work and \$251,000 for expert technical work. Actual FY13 expenditures total \$260,000 for legal work and \$50,000 for technical work. The difference between the authorization and the expenditure for technical work in FY13 is attributed to changes in timing and the decision to perform pre-modeling work.

The accounting teams at both DOL and CWCB have requested that we begin to revise the manner in which we track expenditures from the Litigation Fund so that each fiscal year we start with a clean slate by reverting back to the Litigation Fund any

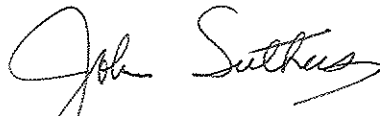
unexpended funds from the previous fiscal year. Therefore for FY14, I request the CWCB: (1) authorize reversion to the Litigation Fund of the FY13 unexpended \$40,000 for DOL legal work and \$201,000 for technical work to be made available for future authorizations; and (2) authorize expenditure from the Litigation Fund for FY14 \$300,000 for DOL legal work and \$200,000 for technical work (see attachment for details).

These tasks are essential to allowing my office and the CWCB to prepare for and participate in ongoing and future negotiations and 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 revert to the Litigation Fund FY13 unexpended funds for legal and technical work of \$241,000. I further request and recommend the CWCB authorize the expenditure of \$500,000 from the Litigation Fund to fund \$300,000 in legal work and \$200,000 in technical work for FY14. Finally, I recommend that the CWCB's authorization for FY14 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,

A handwritten signature in black ink, appearing to read "John Suthers", with a stylized flourish at the end.

JOHN W. SUTHERS
Colorado Attorney General



John W. Suthers
Attorney General

Cynthia H. Coffman
Chief Deputy Attorney General

Daniel D. Domenico
Solicitor General

STATE OF COLORADO
DEPARTMENT OF LAW

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Attachment A

Colorado River Contract Work for FY14
Expert Technical Consultant Projects

The areas where DOL expects to require contract assistance in anticipation or support of litigation are as follows:

- 1) The Department of the Interior is in the process of preparing an Environmental Impact Statement 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. Interior is currently developing alternatives and modeling options for development of a Draft EIS during FY14. 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, DOL has contracted technical consulting work to, 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 future litigation. DOL will need to continue this work throughout FY14.
- 2) In anticipation of ongoing negotiations regarding settlement of Navajo and other Indian water rights within the Colorado River Basin, and in preparation of potential litigation, the State may require technical experts in Colorado River and Native American water rights matters. Such technical expertise will

prepare the State to participate, to the extent necessary, in either future negotiation or litigation of such matters.

- 3) 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.

- 4) Finally, in the event that staffing and timing permit, and 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).