

# 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: May 3, 2013

SUBJECT: **Agenda Item 7b, May 14-15, 2013 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 two letters from Attorney General Suthers, attached, regarding the use of the litigation fund.

The Attorney General requests \$420,000 to “adequately defend, in negotiations and in litigation, Colorado’s interests in the Republican River”. The requested expenditure will be used for outside consultant fees, discovery expenses, and the arbitrator’s fees related to arbitration of Colorado’s two plans for compact compliance, as well as for costs related to Nebraska’s two plans for compact compliance. Further information is included in the Attorney General’s letter, attached.

In the second letter, the Attorney General requests an additional expenditure of \$49,265.61 during FY13 for costs incurred by the Special Master in the ongoing Supreme Court case. Due to the Special Master’s appointment to the United States Court of Appeals for the First Circuit, payment is being sought for services rendered prior to taking the bench. Ordinarily this amount would have been due in FY14.

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 Republican 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) Approve the expenditure of a total of \$469,265.61 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

May 1, 2013

**Request for Expenditure from Litigation Fund  
for Republican River Compact Litigation for FY14**

Dear Board Members:

By this letter, I request expenditure of \$420,000 over the next fiscal year (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 in litigation, Colorado's interests in the Republican River.

The requested funds are necessary to continue to defend Colorado's use and allocation of water under the Republican River Compact. These funds will be used for outside consultant fees, discovery expenses, and the arbitrator's fees related to arbitration of Colorado's two plans for compact compliance. Colorado will invoke non-binding fast-track arbitration to be completed in Fiscal Year 2014 for both its Compact Compliance Pipeline Proposal and Bonny Reservoir Accounting Proposal. If approved, those plans would promote Colorado's approach to compact compliance while continuing to allow beneficial use of water within the basin.

The funds will also be used for outside consultant fees, discovery expenses, arbitrator's fees relating to Nebraska's two plans for compact compliance: the Alternative Water Short Accounting Proposal and the Rock Creek Augmentation Proposal. Nebraska has invoked non-binding fast-track arbitration for both of its plans.

The Special Master, William J. Kayatta, Jr., appointed by the United States Supreme Court to hear Kansas' current petition, will hold another hearing in Portland, Maine during August, 2013. Trial preparation and participation will require the Department of Law to incur expert and consultant fees and other litigation-related expenses such as attorney and consultant travel. Colorado will also be required to pay a portion of the costs for publishing the Special Master's final report. However, since Mr. Kayatta has been appointed to the United States

Court of Appeals for the First Circuit, he will no longer charge the State for his work as Special Master.

Finally, Kansas, Nebraska, and Colorado may file Special Exceptions to the Special Master's final report. It is difficult to anticipate exactly what expenses will result or when, but it is likely that we will incur production expenses during briefing before the United States Supreme Court, as well as attorney travel for oral arguments.

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 a total \$420,000, including funds that are rolled forward from FY13 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 FY15 if not expended in FY14, 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

## REPUBLICAN RIVER COMPACT LITIGATION REQUEST FOR FY 2014

EXPENDITURES	FY 2014 REQUEST
OPERATING EXPENSES	\$40,000.00
CONTRACT EXPENSES PRINCIPIA MATHEMATICA	\$130,000.00
ARBITRATION FEES (2-4 SEPARATE ARBITRATORS)	\$230,000.00
TRAVEL EXPENSES	\$20,000.00
<b>TOTAL</b>	<b>\$420,000.00</b>



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

May 1, 2013

Request for Expenditure from Litigation Fund  
for Republican River Compact Litigation for FY13

Dear Board Members:

By this letter, I request an additional expenditure of \$49,265.61 during this fiscal year (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.

At the March 2012 Board Meeting, the CWCB approved \$220,000 to hire consultants, pay Supreme Court litigation costs and fees, and for travel and other litigation-related expenses. Since then, the Department of Law has calculated that there will be unanticipated expenses during this Fiscal Year as a result of protracted Supreme Court litigation and the Special Master's appointment to the United States Court of Appeals for the First Circuit.

First, litigation before the Special Master, William J. Kayatta, Jr., extended beyond what we anticipated in March 2012. We expected the litigation to be completed in six months; however, the Special Master held additional hearings to consider supplemental issues.

Second, the Special Master has billed us \$49,265.61 for his services during FY13, rather than FY14. In ordinary course, the Special Master would have waited until FY14 to bill the states for his fees and costs. However, the President appointed him to the United States Court of Appeals for the First Circuit and he has sought payment for services rendered prior to taking the bench. Any further work Judge Kayatta performs after taking the bench will not result in further fees to the states as it will be part of his regular judicial caseload.

These efforts are essential to support my office and the CWCB in ongoing 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 a total \$49,265.61 to pay the Special Master's fees.

Thank you for your consideration.

Sincerely,

A handwritten signature in blue ink, reading "John W. Suthers". The signature is fluid and cursive, with the first name "John" being more prominent and the last name "Suthers" following in a similar style.

JOHN W. SUTHERS  
Colorado Attorney General