



COLORADO

**Colorado Water
Conservation Board**

Department of Natural Resources

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TO: Colorado Water Conservation Board Members

FROM: Carlee Brown, Section Chief
Interstate, Federal and Water Information Section

DATE: May 17, 2017

AGENDA ITEM: 21b. Litigation Account: Requests for Authorization

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 Cynthia Coffman regarding the use of the litigation fund. The Attorney General requests a total of \$1,052,000 of new authorizations to adequately defend, in negotiations, litigation, and other processes, the State's apportionments under the Compacts for FY18. The requested expenditures will be used for the interstate litigation activities associated with the Colorado River, Republican River, and Rio Grande. Further information is included in the attached Attorney General's letter.

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, 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

CWCB Staff recommends that the Board authorize the expenditure of a total of \$1,052,000 for litigation-related activities as follows:

- 1) Colorado River Basin: \$535,000 for FY 18
- 2) Republican River Basin: \$132,000 for FY18
- 3) Rio Grande Basin: \$385,000 for FY 18



Staff also recommends that the Board:

- 1) Direct the CWCB Director and Staff to expend these funds consistent with the request by the Office of the Attorney General, and
- 2) 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).

Attachment



CYNTHIA H. COFFMAN
Attorney General

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**STATE OF COLORADO
DEPARTMENT OF LAW**

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Office of the Attorney General

May 4, 2017

**Request for Expenditure from Litigation Fund for FY18
for Federal and Interstate Water Unit Legal Expenses**

Dear Board Members:

Section 37-60-121(2.5)(a)(III), C.R.S., authorizes the Colorado Water Conservation Board (CWCB or 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 you to approve the expenditure of specific funds from your Litigation Fund for Fiscal Year 18 (FY18) to continue our efforts to effectively protect Colorado's interests in the Arkansas, Colorado, Republican and Rio Grande River Basins. I believe these expenditures, as itemized below, are necessary to participate fully in all processes, including negotiation and litigation, where Colorado's interests in these interstate rivers could be affected.

Previous years' funding requests for work to defend and protect Colorado's interests in these river basins were based on our then-current "best estimates" of the work required in the upcoming year. Because such work is heavily dependent on court decisions and case and project management practices beyond the control of the attorneys, it is difficult to accurately project the timing of litigation related costs for the entire year. As a result, certain funds authorized for expenditure in a basin in a given year are not always fully expended by the close of that year. This is the case for the Arkansas, Colorado, Republican, and Rio Grande River Basins this year as it is anticipated that the funds you authorized for Fiscal Year 17 (FY17) will not be fully expended by June 30, 2017.

For accounting clarity we zero out the remaining FY17 authorizations and make new requests for each basin for the funds needed in FY18. Below is a discrete funding authorization request for each basin for FY18. Attached to this letter is a summary table of the basins which reflects the FY17 authorization, actual expenditures through March 31, 2017, *estimated* expenditures through June 30, 2017, and the funding request for FY18. As the table shows, the FY 18 authorizations that this letter outlines are partially offset by the unexpended funds authorized for those basins in FY17.

Requests for approval of expenditure for the Arkansas River Basin.

In 2014, the Board approved a request for expenditure of \$90,000 from the Litigation Fund for Fiscal Year 15 to protect Colorado's surface water irrigation uses under the Arkansas River Compact. The funds were specifically directed to provide legal and technical assistance for Rule 10 Plans under the State Engineer's Compact Rules Governing Improvements to Surface Water Irrigation Systems in the Arkansas River Basin in Colorado. Hydrology and legal disputes over operation of the Rule 10 plans delayed this work, prompting new requests in Fiscal Years 2016 and 2017. The work is now completed. As such, no additional authorization requests for work regarding the Arkansas River Basin is needed at this time.

Request for approval of expenditure for the Colorado River Basin.

The Colorado River remains the only river basin originating in Colorado that is not over appropriated in some parts of the basin. Colorado continues to be embroiled in basin planning investigations, National Environmental Policy Act and Endangered Species Act processes, 7-State and federal negotiations for coordinated reservoir operations and drought contingency plans, international negotiations, Animas La-Plata litigations and negotiations, and generally defending the state's allocations of water in the Colorado River system. Such activities require sound legal analysis and detailed technical knowledge to inform decision making.

In May 2016, the Board approved \$395,000 for legal staff (2 1/2 FTE Attorneys and 1 FTE Paralegal) from the Department of Law ("DOL"). Additionally, the Board authorized expenditure of \$100,000 for expert consulting work to coordinate ongoing efforts on the Glen Canyon Dam Environmental Impact Statement for, and to inform ongoing legal positions regarding compact administration and interstate negotiations. Finally, the Board approved an additional \$60,000 for travel and operating expenses including the potential to purchase database software as needed to maintain consistency in managing the Colorado River databases. Actual FY 17 expenditures for DOL were influenced by changes in legal staff (departure of Tom George and Shanti Rosset, and subsequent hiring of Amy Ost diek and a new Assistant Attorney General in the near future), and limited expenditures for consultants and operating costs. FY 17 expenditures for DOL legal staff are estimated to be approximately \$282,700. Contract expenditures are estimated to be closer to \$40,000, and operating and travel costs are estimated to be approximately \$13,600.00.

For FY17, I anticipate maintaining a full staff of 2 1/2 FTE attorneys and 1 FTE paralegal throughout the year. Moreover, I anticipate continuing the contracting work associated with implementation of the Glen Canyon Dam EIS, compact administration considerations and evaluation of the 2007 Interim Guidelines and Drought Contingency Plans. It should be noted that additional funds may need to be requested at a later date to address next steps in compact compliance investigations depending on future direction from the Board. Finally, there is still a potential need to purchase the database software that was initially contemplated for FY 17 but delayed until further evaluations could be completed. For these reasons, I estimate the need to expend \$410,000.00 for DOL legal staff, \$50,000.00 for contract costs and \$75,000.00 for travel, and operating costs. I request the Board authorize the expenditure for this basin of \$535,000.00 for FY18.

Request for approval of expenditure for the Republican River Basin.

In May 2016, the Board approved requests for expenditure of \$119,200 from the Litigation Fund to “continue to defend Colorado’s use and allocation of water under the Republican River Compact.” These funds have paid for outside consultant fees, negotiation meetings, travel and other expenses related to compact meetings and ongoing settlement negotiations with Kansas and Nebraska regarding future operation of the Colorado Compliance Pipeline as well as administration of the South Fork consistent with the Compact. Additional funds were authorized to assist the State Engineer’s Office in developing compact compliance rules for the entire basin. The consultant work exceeded estimates for FY 17 but remains within the scope of funds authorized from the Board for the work in this Basin.

For FY18, continued case work and work of expert consultants in negotiations with Nebraska and Kansas will be necessary. Moreover, funds for additional consultant contracts and travel expenses over and above that contemplated for ongoing interstate discussions continue to be a potential in FY18 to assist and defend the State Engineer’s Office Compact Rulemaking efforts in the Basin. To pay for these efforts, I request the Board authorize the expenditure for this basin of \$132,000.00 for FY 17.

Request for approval of expenditure for the Rio Grande Basin.

In May 2016, the Board approved a request for expenditure of \$272,180.00 for retaining expert consultants, funding a percentage of any Special Master fees, and providing for travel and operating expenses associated with Rio Grande litigation and settlement negotiation among Texas, New Mexico, Colorado and the United States. Progress on this original action has been slow as the Special Master took time to research and review the compact and related materials. The parties only recently received an initial ruling on pending Motions to Dismiss and to Intervene following oral arguments in August of 2015. The Special Master has invoiced the parties for costs and fees thus far that approximate close to \$1 million. Since Colorado has no claims asserted against it and is bringing no claims at this time, the state is responsible for a limited 5% of the Special Master fees. Concurrently, the litigation team has contracted with expert consultants in groundwater, hydrogeology, Rio Grande administration, and agricultural engineering to inform the claims at issue in the case. They have begun initial investigations but did not expend as much time and effort as initially anticipated due to delays in deciding the pending motions. Overall expenses in FY 17 for interstate litigation work in the Rio Grande Basin is estimated to total approximately \$75,000 by June 30th.

For the upcoming year, I anticipate the need for travel/operating costs to prepare briefs and attend arguments before the Special Master and potentially the U.S. Supreme Court. I also anticipate the need to provide a portion of the funding for the Special Master expenses, and to participate in on-going settlement and litigation planning meetings among the parties. Moreover, Colorado will continue to retain the expert consultants pursuant to current contracts for the upcoming year. I estimate these costs to total up to \$377,000.00 for FY 18.

In September 2015, the State Engineer filed in Rules Governing the Withdrawal of Groundwater and Establishing Criteria for the Beginning and End of the Irrigation

Season in Water Division No. 3 for All Irrigation Water Rights. Trial of the proposed rules is set for three months beginning on January 2, 2018. For FY 2017, the Board authorized expenditure of \$82,500.00 for work in coordinating with the Division of Water Resources to conduct settlement discussions and prepare for trial as appropriate. Such expenditures proved unnecessary for the preliminary work during FY 17. The case no longer presents a need to contract with outside consultants. However, I continue to anticipate a growing need to expend travel and operating funds as settlement negotiations and trial preparation ramp up. I estimate these costs to total up to \$8,000.00 for FY 2018.

Considering the interstate litigation and the groundwater rules litigation combined, I request the Board authorize a total FY17 expenditure for this basin of \$385,000.00.

The efforts highlighted above are essential to support my office, the CWCB, the Division of Water Resources, the Department of Natural Resources, and Colorado's Compact Commissioners in ongoing negotiations, investigations and litigation to protect Colorado's rights to and interests in interstate streams and rivers. I, therefore, request and recommend that CWCB authorize the above-identified expenditures for FY18.

I further recommend that the CWCB's authorizations allow the funds to be used in FY19 if not expended in FY18, 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,

Cynthia Coffman
Colorado Attorney General

Federal and Interstate Water Unit
Litigation Fund Expenditures
Current and Projected (FY17 & FY18)

Project by Basin		Authorization FY17	Expenses Incurred Through 3/17	Estimated Expenses 4/17-6/17	Available Funds End FY17	Funding Needs FY18	Difference
Arkansas River							
	Irr Imp Plan Work	\$14,500.00	\$14,500.00	\$0.00	\$0.00	\$0.00	
	<i>Arkansas River Total</i>	\$14,500.00	\$14,500.00	\$0.00	\$0.00	\$0.00	<i>\$0.00</i>
Colorado River							
	Personnel	\$330,000.00	\$210,181.98	\$72,500.00	\$47,318.02	\$410,000.00	
	Add'l 1/2 FTE*	\$65,000.00			\$65,000.00	\$0.00	
	Operating **	\$40,000.00	\$4,021.83	\$1,340.61	\$34,637.56	\$55,000.00	
	Travel	\$20,000.00	\$3,263.78	\$5,000.00	\$11,736.22	\$20,000.00	
	Contracting***	\$100,000.00	\$33,268.00	\$7,555.00	\$59,177.00	\$50,000.00	
	<i>Colorado River Total</i>	<i>\$555,000.00</i>	<i>\$250,735.59</i>	<i>\$86,395.61</i>	<i>\$217,868.80</i>	<i>\$535,000.00</i>	<i>-\$317,131.20</i>
Republican River							
	Interstate Compact						
	Operating	\$1,200.00	\$5.00	\$100.00	\$1,095.00	\$1,000.00	
	Travel	\$5,000.00	\$2,616.00	\$800.00	\$1,584.00	\$4,000.00	
	Contracting	\$79,000.00	\$72,597.40	\$22,000.00	-\$15,597.40	\$95,000.00	
	<i>Total</i>	<i>\$85,200.00</i>	<i>\$75,218.40</i>	<i>\$22,900.00</i>	<i>-\$12,918.40</i>	<i>\$100,000.00</i>	
	Intrastate Compact Rules						
	Operating	\$1,500.00			\$1,500.00	\$35,000.00	
	Travel	\$2,500.00			\$2,500.00	\$2,000.00	
	Contracting	\$30,000.00			\$30,000.00	\$30,000.00	
	<i>Total</i>	<i>\$34,000.00</i>			<i>\$34,000.00</i>	<i>\$32,000.00</i>	
	<i>Republican River Total</i>	<i>\$119,200.00</i>	<i>\$75,218.40</i>	<i>\$22,900.00</i>	<i>\$21,081.60</i>	<i>\$132,000.00</i>	<i>-\$110,918.40</i>
Rio Grande							
	TX v. NM and CO						
	Contracting	\$209,180.00	\$39,236.60	\$13,000.00	\$156,943.40	\$320,000.00	
	Operating	\$8,000.00	\$75.54	\$1,300.00	\$6,624.46	\$2,000.00	
	Travel	\$5,000.00	\$1,911.26	\$2,500.00	\$588.74	\$5,000.00	
	Special Master****	\$50,000.00		\$17,100.00	\$32,900.00	\$50,000.00	
	<i>Total</i>	<i>\$272,180.00</i>	<i>\$41,223.40</i>	<i>\$33,900.00</i>	<i>\$197,056.60</i>	<i>\$377,000.00</i>	
	Groundwater Rules						
	Contracting	\$75,000.00			\$75,000.00		
	Operating	\$5,000.00			\$5,000.00	\$5,000.00	
	Travel	\$2,500.00			\$2,500.00	\$3,000.00	
	<i>Total</i>	<i>\$82,500.00</i>			<i>\$82,500.00</i>	<i>\$8,000.00</i>	
	<i>Rio Grande Total</i>	<i>\$354,680.00</i>	<i>\$41,223.40</i>	<i>\$33,900.00</i>	<i>\$279,556.60</i>	<i>\$385,000.00</i>	<i>-\$105,443.40</i>
	TOTALS	\$1,043,380.00	\$381,677.39	\$143,195.61	\$518,507.00	\$1,052,000.00	\$533,493.00

* The additional 1/2 FTE has now been added to personnel line item going forward.

** For FY 2018, the Unit may need to purchase database software to maintain the Colorado River databases.

*** The Unit may need to request additional funds for Compact Compliance Study depending on future direction from the Board.

**** This expense will be incurred if the US Supreme Court grants the Motion for Special Master fees.