



COLORADO

**Colorado Water
Conservation Board**

Department of Natural Resources

1313 Sherman Street
Denver, CO 80203

P (303) 866-3441
F (303) 866-4474

Jared Polis, Governor

Dan Gibbs, DNR Executive Director

Rebecca Mitchell, CWCB Director

TO: Colorado Water Conservation Board Members

FROM: Andrew Rickert, Interstate, Federal and Water Information
Section

DATE: May 15, 2019

AGENDA ITEM: 24a. Litigation Fund: Annual Report to the General Assembly

Background

Section 37-60-121(2.5) 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 rivers..."

Paragraph (b) of section 121(2.5) provides: "pursuant to the spending authority set forth in paragraph (a) of this subsection (2.5), moneys may be expended from the litigation fund at the discretion of the board if (l) with respect to litigation, the Colorado Attorney General requests that the Board authorize the expenditure of moneys in a specified amount not to exceed the balance of the fund for the costs of litigation associated with one or more specifically identified lawsuits meeting the criteria set forth in paragraph (a) of this subsection (2.5)."

In addition, Section 121(2.5) states "the Board, in conjunction with the attorney general, shall report annually to senate agriculture, natural resources, and energy committee and the house of representatives agriculture, natural resources, and energy committee on any litigation that involves the use of moneys from the litigation fund created in paragraph (a) of this subsection (2.5)."

Staff Recommendation

CWCB Staff recommends that the Board approve the attached report for submittal to the General Assembly.





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TO: Senate Agriculture, Natural Resources, and Energy Committee
House of Representatives Agriculture, Livestock, and Natural Resources
Committee

FROM: Colorado Water Conservation Board
in consultation with the Office of the Attorney General

DATE: May 15, 2019

SUBJECT: Annual Report on any litigation-related activities that involved the use of
moneys from the litigation fund created pursuant to Sec. 37-161-121(2.5)

Background

Section 37-60-121(2.5) 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 rivers..."

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In addition, Section 121(2.5) states "the Board, in conjunction with the attorney general, shall report annually to senate agriculture, natural resources, and energy committee and the house of representatives agriculture, natural resources, and energy committee on any litigation that involves the use of moneys from the litigation fund created in paragraph (a) of this subsection (2.5)."

This document (with attachments) serves as this year's annual report.



Status of the Litigation Fund

Within the last year, there has been one request from the Attorney General's office containing expenditure requests for litigation-related activities associated with the Colorado River, the Republican River, and the Rio Grande. At their May 2018 meeting, the Colorado Water Conservation Board authorized a total of \$1,294,300 for FY19 as shown in the table below.

Expenses for this fiscal year through March 2018 totaled \$497,471.49, and expenses for April to June 2018 are estimated at \$225,900, for a total FY18 expenditure of \$723,371.49. Unexpended funds for FY18 will be returned to the litigation account and will only be expended based on future authorizations made by the Board.

Basin	Board Authorization	FY19 Expenses*	Estimated Expenses for May-June 2019	Total FY19 Anticipated Expenditures
Colorado River Basin	\$643,000.00	\$359,862.12	\$118,800.00	\$478,662.12
Republican River Basin	\$118,000.00	\$27,968.18	\$20,600.00	\$48,568.18
Rio Grande Basin	\$533,300.00	\$109,641.19	\$86,500.00	\$196,141.19
TOTAL	\$1,294,300.00	\$497,471.49	\$225,900.00	\$723,371.49

*Colorado River expenses include personnel costs through March 2018; all other expenses are through April 2018.

On July 1, 2018, the litigation account received \$0 in funds from the Construction Fund pursuant to HB18-218. In addition, this year's Projects Bill (SB19-221) directs the state treasurer to transfer up to \$2,000,000 to the litigation fund on July 1, 2019. The Board's authorizations for FY20 are expected to be \$1,452,700. Thus, the litigation account is appropriately funded to meet currently anticipated interstate litigation needs through June 30, 2020.

Attachments to this report include the following:

- 1) May 23, 2018 Board memo recommending the Board's authorization of litigation funds for FY19.
- 2) May 16, 2018 letter from the Attorney General requesting the use of litigation funds for FY19.
- 3) Excerpt from the minutes from the May 17-18, 2017 Board meeting when Board authorization occurred.





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P (303) 866-3441
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John Hickenlooper, Governor

Robert Randall, DNR Executive Director

Rebecca Mitchell, CWCB Director

TO: Colorado Water Conservation Board Members

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

DATE: May 23, 2018

AGENDA ITEM: 24b. Litigation Fund: 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 ... 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 Attorney General issues an annual request to the Board for litigation fund authorizations. The official request is currently being prepared and will be provided to the Board prior to the May 23, 2018 Board Meeting. The request will total \$1,294,300 as set forth below.

Adequate funding for the litigation fund is 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 in order to defend Colorado's rights and apportionments as provided by the compacts.

Staff recommendation

CWCB Staff recommends that the Board authorize the expenditure of a total of \$1,294,300 for litigation-related activities in FY2018-19 as follows:

- | | |
|----------------------------|-----------|
| 1) Colorado River Basin: | \$643,000 |
| 2) Republican River Basin: | \$118,000 |
| 3) Rio Grande Basin: | \$533,300 |

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).



CYNTHIA H. COFFMAN
Attorney General

MELANIE J. SNYDER
Chief Deputy Attorney General

LEORA JOSEPH
Chief of Staff

FREDERICK R. YARGER
Solicitor General



**STATE OF COLORADO
DEPARTMENT OF LAW**

RALPH L. CARR
COLORADO JUDICIAL CENTER
1300 Broadway, 10th Floor
Denver, Colorado 80203
Phone (720) 508-6000

Office of the Attorney General

May 16, 2018

Request for Expenditure from Litigation Fund for FY19
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 approve the expenditure of specific funds from your Litigation Fund for Fiscal Year 19 (FY19) 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 18 (FY18) will not be fully expended by June 30, 2018

For accounting clarity, we zero out the remaining FY18 authorizations and make new requests for each basin for the funds needed in FY19. Below is a discrete funding authorization request for each basin for FY19. Attached to this letter is a summary table of the basins which reflects the FY18 authorization, actual expenditures through March 31, 2018 for personnel expenses on the Colorado River, and through April 30, 2018 for operating, travel and contractor expenses in each basin. The Table also includes *estimated* expenditures through June 30, 2018, and the funding request for FY19. As the table shows, the FY 19 authorizations that this letter outlines are partially offset by the unexpended funds authorized for those basins in FY18.

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, demand management, 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 2017, the Board approved \$410,000 for legal staff (2 1/2 FTE Attorneys and 1 FTE Paralegal) from the Department of Law ("DOL"). Additionally, the Board authorized expenditure of \$50,000 for expert consulting work to coordinate ongoing efforts on the Glen Canyon Dam Long Term Experimental and Management Plan (LTEMP), and to inform ongoing legal positions regarding reservoir guideline negotiations, compact compliance investigations and interstate negotiations. Finally, the Board approved an additional \$65,000 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 18 expenditures for DOL were influenced by securing a full staff, following some departures in FY 17, and limited expenditures for consultants and operating costs. FY 18 expenditures for DOL legal staff are estimated to be approximately \$408,500. Contract expenditures are estimated to be closer to \$35,000, and operating and travel costs are estimated to be approximately \$26,075.00.

For FY19, 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 LTEMP, compact administration considerations and evaluation of the 2007 Interim Guidelines and Drought Contingency Plans. It should be noted that additional funds are requested to address next steps in compact compliance investigations per recent discussions with the Board. Finally, DOL remains in the process of evaluating whether it needs to secure additional software to manage the Colorado River Database. As such, the request for operating expenses again includes consideration for software, if needed. For these reasons, I estimate the need to expend \$428,000 for DOL legal staff, \$150,000 for contract costs and \$65,000 for travel and operating costs. **I request the Board authorize the expenditure of \$643,000 for FY19 for the Colorado River Basin.**

Request for approval of expenditure for the Republican River Basin

In May 2017, the Board approved requests for expenditure of \$100,000 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. An additional \$38,500 was authorized to assist the State Engineer's Office in developing compact compliance rules for the entire basin. Because such rules did not come to fruition in FY 18, those funds were left unexpended. Contract expenditures for FY 18 are estimated to be approximately \$37,000.00, and operating and travel costs are estimated to be approximately \$3,350.00.

For FY19, continued case work and work of expert consultants to implement the accounting consistent with settlements and court decisions will be necessary. Additional travel and operating expenses associated with finalizing and implementing settlements with Kansas and Nebraska are also likely. Moreover, funds for additional consultant contracts and travel expenses over and above that contemplated for ongoing interstate discussions continue to be a potential in FY19 to assist and defend the State Engineer's Office Compact Rulemaking efforts, should they go forward for the Basin. **To pay for these efforts, I request the Board authorize the expenditure of \$118,000 for FY 19 for the Republican River Basin.**

Request for approval of expenditure for the Rio Grande Basin

In May 2017, the Board approved a request for expenditure of \$377,000.00 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 was initially slow in FY 18, but accelerated in light of the Special Master's issuance of the First Interim Report, the Supreme Court's decision to hear oral argument on exceptions raised by Colorado, and subsequent ruling that decided the case should proceed. Because Colorado has no claims asserted against it, and is bringing no claims at this time, the state was responsible for a limited 5% of the Special Master fees and costs. In March, the Supreme Court replaced the Special Master with a federal judge from the 8th Circuit Court of Appeals. Concurrently, the litigation team has contracted with expert consultants in ground water, 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 outcome from pending briefings and oral arguments. Overall expenses in FY 18 for interstate litigation work in the Rio Grande Basin is estimated to total approximately \$23,075.00 for contract work, \$7,620.00 for operating and travel expenses and \$18,875.00 for Special Master Fees, for a total estimated FY 2018 expenditure of almost \$50,000.00 by June 30th.

For the upcoming year, I expect the litigation to potentially accelerate in time and activity. The new Special Master is setting a Case Management Order and the case will be at issue on June 1, 2018. Unless the parties get delayed with additional motions to dismiss that will stay discovery, the Unit will be initiating discovery, developing models and participating in depositions. I, therefore, anticipate the need for travel/operating costs to conduct discovery, 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 costs (unrelated to fees), 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 Rio Grande litigation and settlement negotiation costs to total up to \$393,300 for FY 19.**

In September 2015, the State Engineer filed Rules Governing the Withdrawal of Ground Water 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 occurred for three weeks in January and February, 2018. For FY 2018, the Board authorized expenditure of \$8,000 for work in coordinating with the Division of Water Resources to conduct settlement discussions and prepare for trial as appropriate. I estimate actual expenditures to be \$15,075. Although such expenditures exceed the requested allocation due to database and document production costs, court reporting and transcript fees and involvement of a paralegal during trial, the overall costs remain within the full allocation for work to be conducted in the Rio Grande Basin. Because the case has now been fully tried, and is pending before the Division 3 Water Judge, I do not anticipate additional costs or expenses regarding the Ground Water Rules for FY 19.

The Rio Grande Basin requires additional modeling updates to evaluate and improve the state's general understanding of ground water flow in the Upper Rio Grande between Del Norte and South Fork, and to further assure compliance with the pending Rules Governing the Withdrawal of Ground Water in Water Division No. 3. The ground water rules are necessitated in part to promote effective and efficient compliance with the Rio Grande Compact and state water law. **I estimate Upper Rio Grande Ground Water flow work to involve both hydrogeological and modeling expertise that will cost approximately \$140,000.00 to be completed in FY 19.**

Considering the interstate litigation and the depletion modeling, I request the Board authorize a total FY19 expenditure for the Rio Grande Basin of \$533,300.

No Request for the Arkansas River Basin

At this time, I do not anticipate any need for litigation fund expenditures for the Arkansas River Basin.

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 FY19.

I further recommend that the CWCB's authorizations allow the funds to be used in FY20 if not expended in FY19, 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

No Request for the Arkansas River Basin

At this time, I do not anticipate any need for litigation fund expenditures for the Arkansas River Basin.

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 FY19.

I further recommend that the CWCB's authorizations allow the funds to be used in FY20 if not expended in FY19, 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,

A handwritten signature in cursive script, appearing to read "Cynthia H. Coffman".

Cynthia Coffman
Colorado Attorney General

**Federal and Interstate Water Unit
Litigation Fund Expenditures
Current and Projected (FY18 & FY19)**

Project by Basin		Funding Needs FY18	FY 18 Expenses 18-Apr	Estimated Expenses through 6/18	Approx. Available Funds FY 18	Funding Needs FY19	Difference
Colorado River							
	Personnel*	\$410,000.00	\$303,500.00	\$105,000.00	\$1,500.00	\$428,000.00	
	Operating**	\$45,000.00	\$6,188.43	\$300.00	\$38,511.57	\$45,000.00	
	Travel	\$20,000.00	\$12,583.27	\$7,000.00	\$416.73	\$20,000.00	
	Contracting	\$50,000.00	\$22,228.70	\$12,000.00	\$15,771.30	\$150,000.00	
	<i>Colorado River Total</i>	\$525,000.00	\$344,500.40	\$124,300.00	\$56,199.60	\$643,000.00	-\$586,800.40
Republican River							
	Interstate Compact						
	Operating	\$1,000.00	\$44.67	\$100.00	\$855.33	\$2,500.00	
	Travel	\$4,000.00	\$2,709.85	\$500.00	\$790.15	\$7,000.00	
	Contracting	\$95,000.00	\$32,527.41	\$4,500.00	\$57,972.59	\$95,000.00	
	Total	\$100,000.00	\$35,281.93	\$5,100.00	\$59,618.07	\$104,500.00	-\$44,881.93
	Intrastate Compact Rules						
	Operating	\$1,500.00	\$0.00	\$0.00	\$1,500.00	\$1,500.00	
	Travel	\$2,000.00	\$0.00	\$0.00	\$2,000.00	\$2,000.00	
	Contracting	\$35,000.00	\$0.00	\$0.00	\$35,000.00	\$10,000.00	
	Total	\$38,500.00	\$0.00	\$0.00	\$38,500.00	\$13,500.00	\$25,000.00
	<i>Republican River Total</i>	\$138,500.00	\$35,281.93	\$5,100.00	\$98,118.07	\$118,000.00	-\$19,881.93
Rio Grande							
	TX v. NM and CO						
	Contracting	\$320,000.00	\$19,073.59	\$4,000.00	\$296,926.41	\$300,000.00	
	Operating [^]	\$2,000.00	\$1,413.45	\$200.00	\$386.55	\$80,000.00	
	Travel ^{^^}	\$5,000.00	\$5,707.83	\$300.00	-\$1,007.83	\$10,800.00	
	Special Master ^{^^^}	\$50,000.00	\$18,376.50	\$500.00	\$31,123.50	\$2,500.00	
	Total	\$377,000.00	\$44,571.37	\$5,000.00	\$327,428.63	\$393,300.00	-\$65,871.37
	Groundwater Rules [†]						
	Contracting					\$0.00	
	Operating	\$5,000.00	\$11,220.00	\$0.00	-\$6,220.00	\$0.00	
	Travel	\$3,000.00	\$3,855.00	\$0.00	-\$855.00	\$0.00	
	Total	\$8,000.00	\$15,075.00	\$0.00	-\$7,075.00	\$0.00	-\$7,075.00
	Upper Area GW Model ^{††}					\$140,000.00	
	Total					\$140,000.00	-\$140,000.00
	<i>Rio Grande Total</i>	\$385,000.00	\$59,646.37	\$5,000.00	\$320,353.63	\$533,300.00	-\$212,946.37
	TOTALS	\$1,048,500.00	\$439,428.70	\$134,400.00	\$474,671.30	\$1,294,300.00	-\$819,628.70

* Personnel expenses for the Colorado River are identified through March 2018. Estimated expenses for CR personnel are for April, May and June 2018. All other expenses are as identified through April 2018, and estimated for May and June, 2018.

** The Operating Costs for FY 19 contemplate purchase of database software if needed to maintain Colorado River databases. 15

[^] For FY 2019, the Unit anticipates database, production and court reporting/transcript costs to comprise part of the Operating Costs.

^{^^} Travel for the Interstate Rio Grande litigation exceeded estimates in part due to the oral argument in Washington D.C. that was scheduled in early January 2018.

^{^^^} The Special Master has been replaced by a federal judge. The Unit does not anticipate having to pay fees, but may endure some of his expenses.

[†] The Groundwater Rules case experienced additional operating and travel costs to accommodate, production, court reporting and a 3 week trial in Alamosa for 2 attorneys and a paralegal parttime.

^{††} Upper RG Model refers to a small scale model for the area from Del Norte to near South Fork. The model will be used to estimate stream impacts from gw withdrawals so that ground water well owners can come into compliance with the Ground Water Rules pending in Water Division No. 3, and to continue to improve the State's understanding of the flow of groundwater within the Rio Grande Basin.



COLORADO

**Colorado Water
Conservation Board**

Department of Natural Resources

Excerpt:

FINAL

Summary Minutes and Record of Decisions

May 23 - 24, 2018 Board Meeting

1. Litigation Fund

Interstate, Federal & Water Information Section

a. Annual Report to the General Assembly

Action: Report by CWCB staff member Carlee Brown. A motion to approve the staff recommendation was made by Patti Wells, which was seconded by Heather Dutton. The motion was approved unanimously (10-0).

Staff recommendation: CWCB Staff recommends that the Board approve the attached report for submittal to the General Assembly.

b. Requests for Authorization

Action: Report by CWCB staff member Carlee Brown. A motion to approve the staff recommendation was made by Patti Wells, which was seconded by Jack Goble. The motion was approved unanimously (10-0).

Staff recommendation: CWCB Staff recommends that the Board authorize the expenditure of a total of \$1,294,300 for litigation-related activities in FY2018-19 as follows:

- 1) Colorado River Basin: \$643,000
- 2) Republican River Basin: \$118,000
- 3) Rio Grande Basin: \$533,300

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).