



**COLORADO**

**Colorado Water  
Conservation Board**

Department of Natural Resources

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Jared Polis, Governor

Dan Gibbs, DNR Executive Director

Rebecca Mitchell, CWCB Director

**TO:** Colorado Water Conservation Board Members

**FROM:** Amy Ostdiek, Interstate & Federal Manager

**DATE:** May 20, 2020 Board Meeting

**AGENDA ITEM:** 18. Litigation Fund

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**Staff Recommendation:**

CWCB Staff recommends that the Board authorize the expenditure of a total of \$1,516,090 for litigation-related activities in FY2020-21 as follows:

- 1) Colorado River Basin: \$893,090
- 2) Republican River Basin: \$98,000
- 3) Rio Grande Basin: \$525,000

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).

**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. 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.

**\*\*2020 letter from Attorney General requesting the use of litigation funds for FY21 Attached\*\***



**PHIL WEISER**  
Attorney General

**NATALIE HANLON LEH**  
Chief Deputy Attorney General

**JUNE TAYLOR**  
Chief Operating Officer

**ERIC R. OLSON**  
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**STATE OF COLORADO**  
**DEPARTMENT OF LAW**

May 18, 2020

Request for Expenditure from Litigation Fund for Fiscal Year 2021  
Federal and Interstate Water Unit Legal Expenses

Dear Colorado Water Conservation 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 the Litigation Fund for Fiscal Year 2021 (“FY21”) to continue our efforts to effectively protect Colorado’s interests in the Colorado, Republican, Rio Grande, and Arkansas River Basins in the upcoming year. 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 Colorado, Republican, and Rio Grande Basins this year, as it is anticipated that the funds you authorized for Fiscal Year 2020 (“FY20”) will not be fully expended by June 30, 2020.

To provide some clarity between accounting divisions at the Department of Natural Resources and Department of Law, we “zero out” the remaining FY20 authorizations and make new requests for each basin for the funds needed in FY21. Below is the estimated reconciliation between funding authorizations and actual expenditures for each basin for FY20, and a discrete funding authorization request for each basin for FY21. Attached to this letter is a summary table of the basins which reflects the FY20 authorization, actual expenditures through March 23, 2020 for personnel operating, travel and contractor expenses in each of the basins. The Table also includes *estimated* expenditures through June 30, 2020, and a separate

summary of the funding request for FY21. As the table shows, the FY21 authorizations as outlined in this letter are partially offset by the unexpended funds authorized for FY20.

**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 involved in basin planning investigations, National Environmental Policy Act and Endangered Species Act processes, 7-State and federal negotiations for coordinated reservoir operations, demand management, compact compliance investigations, Animas La-Plata negotiations, Upper Basin Fund Memorandum of Agreement implementation, multi-state litigations 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 2019, the Board approved \$450,000 to support legal staff (2 1/2 FTE Attorneys and 1 FTE Paralegal) at the Department of Law ("DOL"). Additionally, the Board authorized an expenditure of \$180,000 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 FY20 expenditures for DOL were influenced by staff openings during the year and limited expenditures for consultants and operating costs. FY20 expenditures for DOL legal staff are estimated to be approximately \$387,644.22. Contract expenditures are estimated to be approximately \$111,200. Operating and travel costs are estimated to be approximately \$17,036.45.

For FY21, we anticipate building back up to full staff of 2 1/2 FTE attorneys and 1 FTE paralegal to address the issues arising in the Colorado River basin, including but not limited to: (1) participating in intra- and inter-state demand management investigations; (2) implementing the Upper Basin and Lower Basin Drought Contingency Plans; (3) preparing for Renegotiating the 2007 Interim Guidelines; (4) participating in litigation related to the Glen Canyon Dam Long Term Experimental Plan ("LTEMP") and implementation of the LTEMP; (5) operating of the Aspinall Unit consistent with the 2012 Record of Decision; (6) operating the Animas-La Plata Project; (5) Endangered Species Act and Salinity Control Act considerations; (7) implementing the Upper Colorado River Basin Fund MOA; (8) serving as legal members of the Upper Colorado River Commission legal committee; (9) advising on demand management investigations, compact compliance strategies, and water rights administration throughout the basin as it relates to the compacts; and (10) any ongoing or upcoming litigation that could implicate Colorado's interests in the Colorado River system. This is a significant amount of work and

thus will entail an increase in funds to accommodate possible increases in state benefit requirements and salaries. Moreover, we anticipate continuing the contracting work associated with implementation of the Glen Canyon Dam LTEMP and Upper Basin Drought Contingency Plans, consideration of demand management and compact compliance matters within Colorado, and new contracts with expert consultants to assist in preparation for renegotiation of the 2007 Interim Guidelines. For these reasons, we estimate the need to expend \$466,000 for DOL legal staff, \$382,090 for contract costs, and \$45,000 for travel and operating costs. **We request the Board authorize the expenditure of \$893,090 for FY21 for the Colorado River Basin.**

**Request for approval of expenditure for the Republican River Basin**

In May 2019, the Board approved requests for expenditure of \$107,500 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 negotiation meetings, travel, and other expenses related to compact administration among Nebraska, Kansas, and Colorado. They have also paid for consultant fees that were less than anticipated as compact administration modeling becomes more routine following resolution of key issues among the compacting states.

Included in the approved expenditure were funds to assist the State Engineer’s Office in developing, evaluating, and defending compact compliance rules for the entire basin. Because litigation of such rules has not progressed as quickly as first anticipated, some funds were not expended. Contract expenditures for Republican River Basin work for FY20 are estimated to be approximately \$56,367 and operating and travel costs are estimated to be approximately \$2,361, for a total of \$58,728.

For FY21, continued case work and work of expert consultants to implement the accounting consistent with settlements and court decisions will be necessary. Moreover, the DOL will require funds for additional consultant contracts and travel expenses over and above that contemplated for ongoing interstate discussions, to continue to defend the proposed compact compliance rules as they make their way through the water court process for consideration and approval. **To pay for these efforts, we request the Board authorize the expenditure of \$98,000 for FY21 for the Republican River Basin.**

**Request for approval of expenditure for the Rio Grande Basin**

In May 2019, the Board approved a request for expenditure of \$569,500 for retaining expert consultants, providing for travel and operating expenses associated with Rio Grande litigation and settlement negotiation among Texas, New Mexico, Colorado and the United States for FY 20. Progress on this original action was initially slow but has accelerated as the case has been set for trial and is currently in the middle of the discovery process. As part of this process, the Special Master ordered Colorado to pay 10% of costs associated with data storage, which

## FY21 Litigation Fund Request

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significantly increased operating costs for the FY. Additionally, 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. The consultants have conducted initial investigations and provided review of other parties' expert reports. They have not, however, had to go through depositions or trial preparation at this time. Overall expenses in FY20 for interstate litigation work in the Rio Grande Basin is estimated to total approximately \$124,883 for contract consulting work, and \$60,066.35 for operating and travel expenses, for a total estimated FY19 expenditure of \$184,949.35.

Also, in May 2019, the Board authorized expenditure of \$78,200 related to modeling the Upper Rio Grande. The Rio Grande Basin required 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. At that time, the Rules Governing the Withdrawal of Ground Water in the Rio Grande Basin were pending before the Division 3 Water Court. These rules were necessitated in part to promote effective and efficient compliance with the Rio Grande Compact and state water law. This work was completed during FY20, based on the funds requested. Expenses in FY20 totaled \$78,200.

For FY21, we expect the interstate litigation to continue to pick up at a faster pace in time and activity. Trial is set for the spring of 2021, with briefings and motions practice likely to be a significant activity throughout. Additionally, the parties are in the middle of discovery processes, and are expected to review and evaluate various models by the end of the calendar year. Due to reductions in the General Fund for FY 21 including to the Federal and Interstate Water Unit, the JBC recommended repurposing an existing Senior Assistant Attorney General out of their river basin of subject matter expertise and into the Colorado River SubUnit. In order to avoid disruptions to the important work occurring in the Rio Grande that would result from such a repurposing, we therefore, anticipate the need to fund an existing 1 FTE (estimated cost \$150,000 for salary and benefits). We also anticipate travel and operating costs, to manage documents, conduct discovery, prepare briefs, and attend arguments before the Special Master and potentially the U.S. Supreme Court (estimated at \$30,000) and to provide a portion of the funding for data management and related operating costs (estimated at \$70,000). Moreover, Colorado will continue to retain the expert consultants pursuant to current contracts for the upcoming year (estimated at \$275,000). **We estimate Rio Grande litigation and settlement negotiation costs to total up to \$525,000 for FY21.**

### **No Request for the Arkansas River Basin**

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

**Conclusion**

The efforts highlighted above are essential to accomplish the work at DOL in support of 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. We therefore request and recommend that CWCB authorize the above-identified expenditures for FY21.

We further recommend that the CWCB's authorizations allow the funds to be used in FY21 if not expended in FY20, and allow the Board Director, in consultation with the State Engineer and DOL staff, to allocate funds between these activities based on actual costs and litigation necessities.

Thank you for your consideration.

Sincerely,

A handwritten signature in blue ink that reads "Phil J. Weiser". The signature is written in a cursive style with a large, looped initial "P".

Phil Weiser  
Colorado Attorney General

**Federal and Interstate Water Unit  
Litigation Fund Expenditures  
Current and Projected (FY20 & FY 21)**

Project by Basin	Funding Needs FY20	FY 20 Expenses Through 3/23/2020	FY 20 Estimated Expenses Through 6/30/2020	Approx. Available Funds FY 20	Funding Needs FY21	Difference
<b>Colorado River</b>						
Personnel *	\$ 450,000.00	\$ 307,644.22	\$ 80,000.00	\$ 62,355.78	\$ 466,000.00	
Operating**	\$ 40,000.00	\$ 2,246.42	\$ 1,200.00	\$ 36,553.58	\$ 30,000.00	
Travel	\$ 25,000.00	\$ 12,036.45	\$ 5,000.00	\$ 7,963.55	\$ 15,000.00	
Contracting ***	\$ 180,000.00	\$ 68,450.18	\$ 42,750.00	\$ 68,799.82	\$ 382,090.00	
<i>Colorado River Total</i>	\$ 695,000.00	\$ 390,377.27	\$ 128,950.00	\$ 175,672.73	\$ 893,090.00	\$ (717,417.27)
<b>Republican River</b>						
Operating/Travel	\$ 7,500.00	\$ 1,261.00	\$ 1,100.00	\$ 5,139.00	\$ 3,000.00	
Contracting	\$ 100,000.00	\$ 32,367.00	\$ 24,000.00	\$ 43,633.00	\$ 95,000.00	
<i>Republican River Total</i>	\$ 107,500.00	\$ 33,628.00	\$ 25,100.00	\$ 48,772.00	\$ 98,000.00	\$ (49,228.00)
<b>Rio Grande</b>						
Tx v. NM and CO						
Operating ^/Travel ^^	\$ 65,000.00	\$ 42,566.35	\$ 17,500.00	\$ 4,933.65	\$ 100,000.00	
Contracting	\$ 502,000.00	\$ 107,883.00	\$ 17,000.00	\$ 377,117.00	\$ 275,000.00	
Special Master ^^^	\$ 2,500.00	\$ -	\$ -	\$ 2,500.00	\$ -	
Personnel^^^^					\$ 150,000.00	
<i>Total</i>	\$ 569,500.00	\$ 150,449.35	\$ 34,500.00	\$ 384,550.65	\$ 525,000.00	\$ (140,449.35)
Upper Area GW Model ++	\$ 78,200.00	\$ 78,200.00	\$ -	\$ -	\$ -	
<i>Total</i>	\$ 78,200.00	\$ 78,200.00	\$ -	\$ -	\$ -	\$ -
<i>Rio Grande Total</i>	\$ 647,700.00	\$ 228,649.35	\$ 34,500.00	\$ 384,550.65	\$ 525,000.00	\$ (140,449.35)
<b>TOTALS</b>	<b>\$ 1,450,200.00</b>	<b>\$ 652,654.62</b>	<b>\$ 188,550.00</b>	<b>\$ 608,995.38</b>	<b>\$ 1,516,090.00</b>	<b>\$ (907,094.62)</b>

\* Personnel expenses for Colorado River contemplate full staffing coming on line soon.

\*\*Operating Costs for FY20 contemplated the potential purchase of software if needed to maintain Colorado River databases. FY21 estimate do not contemplate such purchase

\*\*\* The Contracting Costs for FY21 contemplated entering into expert consultant contracts to assist in preparation for Re-evaluation of the 2007 Interim Guidelines

^ For FY2021, the Unit anticipates database development, document production, data storage and court reporting costs to comprise part of the Operating Costs.

^^ Travel for the interstate Rio Grande Litigation may be extensive due to discovery activities in other states.

^^^ The Unit does not anticipate Special Master Costs going forward.

^^^^ Personnel expenses for the Rio Grande River contemplate salary and benefits for an existing Senior Assistant Attorney General

++ The Upper RG GW Model refers to a small scale model for the area from Del Norte to South Fork. The model is used to estimate stream

impacts from ground water withdrawals so that well owners can come into compliance with the Ground Water Management Rules

approved by Water Division No. 3, and to continue to improve the State's understanding of the flow of ground water within the Rio Grande Basin.