

# STATE OF COLORADO

## Colorado Water Conservation Board

### Department of Natural Resources

1313 Sherman Street, Room 721  
Denver, Colorado 80203  
Phone: (303) 866-3441  
Fax: (303) 866-4474  
www.cwcb.state.co.us



TO: Colorado Water Conservation Board Members

FROM: Jeff Baessler  
Stream and Lake Protection Section

DATE: May 4, 2009

SUBJECT: **Agenda Item 7, May 19-20, 2009 – Board Meeting**  
**Stream and Lake Protection – 2009 Contested Instream Flow Appropriations**  
**— Water Division 2**

Bill Ritter, Jr.  
Governor

Harris D. Sherman  
DNR Executive Director

Jennifer L. Gimbel  
CWCB Director

Dan McAuliffe  
CWCB Deputy Director

### Summary

This memo provides a listing of the Contested Streams and Contested Hearing Parties/Participants. The Notice to Contest and Notices of Party Status are attached to this memo. Staff is recommending that the Board designate a Hearing Officer and set hearing dates for the contested appropriations.

### Contested Parties

Pursuant to ISF Rule 5d.(3)(d), the following Instream Flow Recommendations were contested by the listed parties by the March 31, 2009 deadline:

Stream	Contesting Parties
Cucharas Creek (headwaters to Hwy 12)	Huerfano County, by and through its County Commissioners c/o John Galusha, County Administrator 401 Main Street Walsenburg, CO 81089-2045 (719) 738-3485
Huerfano River (Lily Lake to confluence with Central Branch Huerfano River)	
Huerfano River (Unnamed tributary to confluence with Stanley Creek)	Huerfano County Water Conservancy District c/o Dawson Jordan 2192 County Rd. 616 Walsenburg, CO 81089 (719) 738-1483  (both parties represented by Jim Felt and David Shohet)

Staff notified all persons on the ISF Subscription Mailing List of the contested recommendations prior to the April 10, 2009 deadline. Pursuant to Rule 51(4), where a contested ISF appropriation is based fully or in part on another agency's recommendation pursuant to Rule 5a., that agency shall automatically be a Party in any proceeding. The Colorado Division of Wildlife recommended these ISF appropriations, and thus, will be a party to these contested stream proceedings. The following members of the public have requested Contested Hearing Party Status in accordance with Rule 51(1) of the Instream Flow Rules:

Trout Unlimited – Drew Peternell

Dwight A. Harrison

Cucharas Water and Sanitation District – Stuart B. Corbridge

The table below describes the contested stream segments on which the Board declared its intent to appropriate at the January 2009 meeting.

Stream	County	Upper Terminus	Lower Terminus	Length	Amount	Quad Sheet(s)
Cucharas Cr.	Huerfano	Headwaters	Confluence w/ Deadman Creek	5.3 mi	4.9 cfs (5/15 – 6/30) 2.5 cfs (7/1 – 8/14) 1.6 cfs (8/15 – 9/15) 1.2 cfs (9/16 – 4/14) 3.0 cfs (4/15 to 5/14)	Trinchera Peak, Cucharas Pass
Huerfano R - Upper	Huerfano	Lily Lake	Confluence with Central Branch Huerfano R	8.2 mi	4.10 cfs (5/1 – 10/31) 2.70 cfs (11/1 – 4/30)	Blanca Peak, Mosca Pass
Huerfano R - Lower	Huerfano	Unnamed Tributary	Confluence with Stanley Creek	2.6 mi	5.75 cfs (4/1 – 10/31) 2.75 cfs (11/1 – 3/31)	Red Wing, Mosca Pass

## **Notice**

On April 27, 2009, the Huerfano County Commissioners sent the attached letter to the CWCB Board members requesting that the Board delay proceeding with these appropriations until it has acquired additional information. The letter also suggests that the Board's Notice of these streams was inadequate.

Staff provided notice regarding these recommendations in accordance with ISF Rule 5c., which states that "[t]he Board may declare its intent to appropriate for each proposed ISF appropriation at the January Board Meeting, provided that the particular ISF appropriation has been listed as being under consideration in a notice, mailed at least 60 days prior to the January Board meeting, to the ISF Subscription Mailing List for the relevant water division(s)." Specifically, these recommendations were officially noticed to the ISF Subscription Mailing List on November 13, 2008. Staff also provided an earlier notice regarding these recommendations on March 14, 2008.

Staff first became aware of Huerfano County's concerns via an e-mail dated January 9, 2009, from David Shohet, an attorney with Felt, Monson & Culichia representing Huerfano County and the Huerfano County Water Conservancy District. This e-mail was in response to the Board's official notice. In response to this e-mail and subsequent discussions, staff invited the Huerfano County Commissioners to the February 2009 Instream Flow Workshop, which they attended. In addition, on March 11, 2009, staff attended a meeting of the Huerfano County Commissioners, at which staff presented information and responded to questions regarding the proposed appropriations. At that time, staff indicated that it was committed to working with the

County and the District, and would attempt to address fully their concerns. Staff remains committed to negotiating with the County and the District to develop a mutually acceptable approach to moving forward with these ISF appropriations this year.

**Staff Recommendation**

Staff recommends that the Board designate a Hearing Officer and set hearing dates for the Cucharas Creek and the Huefano River ISF appropriations in conjunction with the September CWCB meeting.

Attachment

**RECEIVED**

**MAR 24 2009**

**FELT, MONSON & CULICHIA, LLC**

Colorado Water Conservation Board

319 N. WEBER ST.  
COLORADO SPRINGS, CO 80903

JAMES G. FELT  
STEVEN T. MONSON  
JAMES W. CULICHIA  
CHRISTOPHER D. CUMMINS  
DAVID M. SHOHE

TELEPHONE: 719-471-1212  
FAX: 719-471-1234  
[Dms@fmcwater.com](mailto:Dms@fmcwater.com)

March 23, 2009

Jennifer Gimbel, Director  
Colorado Water Conservation Board  
Department of Natural Resources  
1313 Sherman Street, Room 721  
Denver, Colorado 80203

Re: Notice to Contest Cucharas Creek and Huerfano River (both segments)  
Instream Flow Appropriations

Dear Ms. Gimbel:

Pursuant to Rule 5(k) of the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program of the Colorado Water Conservation Board ("CWCB"), Huerfano County and Huerfano County Water Conservancy District, by and through their undersigned attorneys, Felt, Monson and Culichia, LLC, hereby submit this Notice to Contest the Instream Flow Appropriations on Cucharas Creek and Huerfano River (both lower and upper segments), Huerfano County, Water Division 2. We provide you the following information in accordance with Rule 5(k)(2):

(a) Identification of the parties requesting the hearing:

Huerfano County, by and through  
its County Commissioners  
c/o John Galusha,  
County Administrator  
401 Main Street  
Walsenburg, CO 81089-2045  
(719) 738-3485

Huerfano County Water Conservancy  
District  
c/o Dawson Jordan  
2192 County Rd 616  
Walsenburg, CO 81089  
(719) 738-1483

(b) Identification of the instream flow appropriation at issue:

Recommendation presented by CWCB Staff for an instream flow appropriations on

Cucharas Creek and the Huerfano River (lower and upper segments), Huerfano County, Water Division 2. The CWCB declared its intent to appropriate the recommended instream flows in January 2009.

- (c) Contested facts and a general description of the data upon which the person will rely to the extent known at this time:

Huerfano County and Huerfano County Water Conservancy District (collectively "Huerfano Objectors") are concerned with the instream flows' impact on properties within Huerfano County. The Huerfano Objectors question the need of the instream flows and assert that Huerfano County may be better served by other water projects inconsistent with the instream flow rights. The Huerfano Objectors assert that instream flows are unnecessary in Huerfano County to preserve the natural environment. Huerfano Objectors also believe the instream flows request are not supported by biological and hydrological data.

The Huerfano Objectors may rely upon any biological or hydrological data to refute any scientific evidence presented. Huerfano Objectors may also rely upon any economic data evidencing the impact caused by the instream flow on land in Huerfano County. The Huerfano Objectors reserve the right to identify contested facts and issues, and additional data and documents upon which it may rely as new information becomes available.

In accordance with Rule 5(l), this Notice to Contest grants the Huerfano Objectors Party status to this proceeding. Please send all correspondence in this matter to: Felt, Monson & Culichia, 319 N. Weber Street, Colorado Springs, Colorado 80903.

Sincerely,

FELT, MONSON & CULICHIA, LLC



James G. Felt, Atty. Reg. No. 4369

David M. Shohet, Atty. Reg. No. 36675

ATTORNEYS FOR HUERFANO COUNTY COMMISSIONERS AND HUERFANO COUNTY WATER CONSERVANCY DISTRICT

CC: John Galusha

Dawson Jordan

**RECEIVED**

APR 13 2009

Colorado Water Conservation Board

Director Jennifer Gimbel  
The Colorado Water Conservation Board  
1313 Sherman St.  
7<sup>th</sup> floor  
Denver, CO 80203

4/06/09

Dear Ms. Gimbel:

Pursuant to rule 5(L.) of the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program of the Colorado Water Conservation Board, I wish to submit this Notice of Party Status in contesting any instream flow water right being obtained regarding Colorado's Instream Flow Program.

(a) Identification of person submitting Notice:

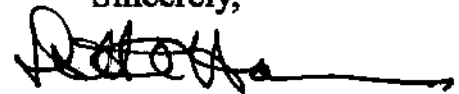
Dwight A. Harrison  
P.O. Box 1559  
Monument, Colorado 80132

(b) Subject of contest:

Cucharas Creek beginning at its headwaters and extending downstream to State Highway 12 in Huerfano County CO.

(c) I own certain water rights within the proposed appropriation and been hired to move water to and within the proposed area concerned. I am The original developer of the Panadero Ski Resort (now Cuchara Valley Resort) in Cuchara, CO. and the original developer of Grandote Golf and Country Club in LaVeta, CO. I have also been involved in development between these two projects. Should the request by CWCB be granted, it would absolutely be impossible to move water up-stream to the Cuchara Valley Resort, in essence killing the ski area since it needs more water for snowmaking. Those rights have been identified and the USFS will insist on the snowmaking water being in place before a USFS ski permit will be re-issued. In actuality, snowmaking at the resort will increase stream flow dramatically on the subject creek making an inflow appropriation unnecessary. The Cucharas is already over-appropriated and over-administered and the last thing the Cucharas Valley needs is a new appropriation to administer. The area is struggling and further rules and regulations hampering the progress in the valley is absolutely unwarranted.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Harrison', followed by a long horizontal line extending to the right.

Dwight A. Harrison

APR 15 2009

Colorado Water Conservation Board

Colorado Water Conservation Board 1313 Sherman Street, Room 721 Denver, Colorado 80203	Administrative Proceeding
Concerning Instream Flow Rights On Cucharas Creek and Huerfano River, Water Division No. 2	
Drew Petermell Trout Unlimited 1320 Pearl Street, Suite 320 Boulder, Colorado 80302 Phone: (303) 440-2937 Email: dpetermell@tu.org	
<b>Trout Unlimited's Corrected Notice of Party Status Cucharas Creek and Huerfano River, Water Division No. 2</b>	

Pursuant Rule 51 of the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program of the Colorado Water Conservation Board ("CWCB" or "Board"), Trout Unlimited ("TU") hereby submits this Notice of Party Status.

1. Reasons For Obtaining Party Status

Trout Unlimited's mission is to conserve, protect and restore North America's trout and salmon fisheries and their watersheds. In Colorado, low stream flow is among the most serious threats to fishery health, and TU commits considerable resources and efforts towards remedying this problem. TU is highly interested in the CWCB's instream flow program and strongly supports the CWCB in its effort to preserve and improve the natural environment through the instream flow program. In this proceeding, Trout Unlimited plans to support the Board's instream flow appropriation.

2. Contested Facts

Trout Unlimited does not contest any facts in this proceeding and concurs with the facts contained in the staff's instream flow recommendation and report.

3. Matters To Be Decided

As required by C.R.S. § 27-92-102(3)(c) and Rule 5i of the Instream Flow and Natural Lake Level Program, the Board must decide three issues:



- That there is a natural environment that can be preserved to a reasonable degree with the Board's water right, if granted;
- That the natural environment will be preserved to a reasonable degree by the water available for the appropriation to be made; and
- That such environment can exist without material injury to other water rights.

4. Data To Be Presented to the Board

In addition to argument, Trout Unlimited may rely on CWCB staff recommendations, reports and memos about the subject water right, including any attachments and appendices thereto, and may present any other public information, such as stream gage records. TU reserves the right to identify additional data which it may present as new information becomes available.

Respectfully submitted this 13th day of April, 2009.

A handwritten signature in black ink, appearing to read 'Drew Peternell', is written over a horizontal line.

Drew Peternell  
Counsel for Trout Unlimited

## **COLORADO WATER CONSERVATION BOARD, STATE OF COLORADO**

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### **NOTICE OF PARTY STATUS - CUCHARAS SANITATION AND WATER DISTRICT**

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#### **IN THE MATTER OF THE CONTESTED INSTREAM FLOW APPROPRIATIONS FOR CUCHARAS CREEK AND THE HUERFANO RIVER**

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Pursuant to Rule 51 of the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program (2 CCR 408-2), and the notice provided by the Colorado Water Conservation Board ("CWCB") on April 9, 2009, the Cucharas Sanitation and Water District ("Cucharas"), by and through its attorneys Vranesh and Raisch, LLP, hereby submits its Notice of Party Status ("Notice") for the Hearing concerning the contested instream flow appropriations for Cucharas Creek and the Huerfano River. In support of this Notice, Cucharas provides the following information:

1. According to Rule 51(1), a Notice of Party Status is timely if filed on or before April 30th, or the first business day thereafter. This Notice satisfies that requirement.
2. Rule 51(1) also requires the party seeking Party Status to submit a brief and plain statement of the reasons for obtaining Party Status, the contested facts, the matters that the party claims should be decided, and a general description of the data to be presented to the Board. Cucharas responds as follows:

a. Reason for Obtaining Party Status

In January of 2009, the CWCB formalized its intent to make new instream flow appropriations on Cucharas Creek and the Huerfano River. In the year prior to this formal action, the CWCB had alerted water users that it would consider these new appropriations, and had provided information about the proposed reaches and flow rates.

Based on the information provided by the CWCB prior to its formal action in January of 2009, Cucharas identified concerns that it had with the proposed instream flow reach for Cucharas Creek. Cucharas communicated with the CWCB about those concerns, and was able to resolve them informally. The ISF appropriation for Cucharas Creek formalized by the CWCB in January of 2009 included the stream reach that was agreed to by Cucharas, the CWCB Staff, and the Colorado Division of Wildlife.

On March 23, 2009, Huerfano County and the Huerfano County Water Conservancy District submitted a Notice to Contest Cucharas Creek and Huerfano

River Instream Flow Appropriations. It is unclear from that notice what aspects of the CWC's Cucharas Creek and Huerfano River instream flow appropriations will be challenged, or how this contested matter will be finally resolved. Cucharas seeks party status so that it can monitor and fully participate in the Hearing so as to protect its interests.

b. Contested Facts

Cucharas does not currently have sufficient information to know what facts it might contest in this matter, and reserves the right to identify contested facts as more information becomes known or available.

c. Matters to be Decided

C.R.S. §37-92-102(3)(c) and Rule 5i of the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program require that the CWC make the following determinations prior to initiating a water right filing to confirm an instream flow appropriation:

- i. That there is a natural environment that can be preserved to a reasonable degree with the Board's water right, if granted.
- ii. That the natural environment will be preserved to a reasonable degree by the water available for the appropriation to be made.
- iii. That such environment can exist without material injury to water rights.

Cucharas does not have sufficient information as of the submittal of this Notice to state any other matters to be decided, and reserves the right to identify other matters as more information becomes known or available.

d. Data to be Presented

In addition to comments, argument, and legal memoranda, Cucharas may rely on information provided by the CWC Staff, including Staff recommendations, and reports and memos concerning the subject instream flow appropriations, including the attached data and appendices. Cucharas may also present any other public information concerning the appropriations, including stream flow records, or other technical evidence and technical witnesses. Cucharas reserves the right to identify additional data which it may present as more information becomes known or available.

3. All pleadings, documents, reports, written comments, legal argument, tangible things, or other information or evidence submitted by any party or contested hearing participant with respect to the Contested Instream Flow Appropriation Hearing identified in this Notice should be provided to counsel for Cucharas as follows:

Stuart B. Corbridge (#33355)  
1720 14th Street, Suite 200  
P.O. Box 871  
Boulder, Colorado 80306-0871  
(303) 443-6151  
(303) 443-9586 (fax)  
[sbc@vrlaw.com](mailto:sbc@vrlaw.com)

Respectfully submitted this 28th day of April, 2009.

VRANESH AND RAISCH, LLP

By: 

*/s/ Signature on File*

*Pursuant to C.R.C.P 121, §1-26*

Stuart B. Corbridge (#33355)

ATTORNEYS FOR CUCHARAS  
SANITATION AND WATER DISTRICT

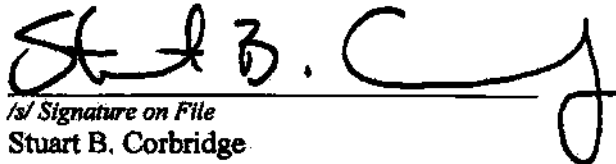
**CERTIFICATE OF SERVICE**

I hereby certify that on this 28th day of April, 2009, I served a true and correct copy of the foregoing **NOTICE OF PARTY STATUS - CUCHARAS SANITATION AND WATER DISTRICT** to the following via email:

Jeff Baessler, *CWCB Staff*  
Jeffrey.Baessler@state.co.us

David M. Shohet, *Huerfano County and*  
*Huerfano County Water Conservancy District*  
dms@fmcwater.com

Drew Peterneil, *Trout Unlimited*  
dpeterneil@tu.org

  
/s/ Signature on File  
Stuart B. Corbridge

**ORIGINAL SIGNED DOCUMENT BEING RETAINED AT THE OFFICE OF  
VRANESH AND RAISCH, LLP**

Art S. Bobian, Chairman  
Scott D. King, Commissioner  
Roger A. Cain, Commissioner



**Board of County Commissioners**

April 27, 2009

**RECEIVED**

**MAY 01 2009**

Colorado Water Conservation Board  
CWCB Stream & Lake Protection Section  
1313 Sherman St., Room 721  
Denver, CO 80203

Colorado Water Conservation Board

**RE: Instream Flow Applications in Huerfano County**

Dear Board Members:

The Board of County Commissioners of Huerfano County hereby formally opposes any instream flow applications within our County. In our limited involvement with the process, it appears that the process is not as open to the public as it could be. Our attendance at the February 24<sup>th</sup> workshop revealed that most attendees were heavily involved in outdoor recreation. There are other water users that can forfeit any future potential for development of their water when your proposed flows are decreed. That may be acceptable, or even desirable in many areas of Colorado, but Huerfano County has been depressed for decades and is unwilling to accommodate limits on water availability that will hamper future growth.

C.R.S. 37-92-102(3) allows your Board to adopt criteria addressing public notice. C.R.S. 37-92-102 (4)(a) further states that "utilizing a public notice procedure" is required and C.R.S. 37-92-102 (4)(b)(i) again refers to an "adequate public notice procedure". Once again, in our limited interaction with the CWCB, the public notice procedure that has been adopted relies on an email list on which one must voluntarily sign up for. Your staff did send emails to the Huerfano County Commissioners email addresses, but, did not send any paper back-up to insure notice was received. The only way we were apprised of the action is a water attorney advised us at a meeting which we coincidentally attended.

Huerfano County has requested that staff delay proceeding with these appropriations until we have more information. We are currently in the process of updating our comprehensive plan and land use guide, and the Upper Huerfano Water Conservancy District is developing a blanket augmentation plan for both the Huerfano and Cucharas Rivers. We ask again that you delay your proceedings concerning the appropriations on both rivers and that you consider broadening your public notice process.

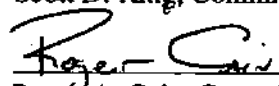
Thank you sincerely for your consideration.

Sincerely,  
BOARD OF COUNTY COMMISSIONERS  
OF HUERFANO COUNTY, COLORADO

BY

  
Art S. Bobian, Chairman

  
Scott D. King, Commissioner

  
Roger A. Cain, Commissioner

Cc: Senator Ken Kester  
Congressman Wes McKinley  
Congressman Ed Vigil  
Congressman Sal Pace  
District Water Engineer Steve Witte  
U.S. Congressman John Salazar  
U.S. Senator Michael Bennett  
City of Walsenburg  
Upper Huerfano Water Conservancy District  
Town of La Veta  
Water Commissioner Doug Brgoch  
Water Commissioner Ray Garcia  
Lindsey Case  
John Stroh  
Max Vezzani  
Jim Felt