

STATE OF COLORADO

Colorado Water Conservation Board Department of Natural Resources

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TO: Colorado Water Conservation Board Members

FROM: Linda Bassi
Jeff Baessler
Stream and Lake Protection Section

DATE: November 10, 2009

SUBJECT: **Agenda Item 1, September 16-18, 2009 – Board Meeting**
Stream and Lake Protection – Proposed Instream Flow Appropriations on
the Huerfano River and Cucharas Creek - Water Division 2

Bill Ritter, Jr.
Governor

Harris D. Sherman
DNR Executive Director

Jennifer L. Gimbel
CWCB Director

Dan McAuliffe
CWCB Deputy Director

Background

On January 27, 2009, the Board declared its intent to appropriate instream flow (ISF) water rights on the reaches of the Huerfano River and Cucharas Creek set forth in the table below.

Stream	County	Upper Terminus	Lower Terminus	Length	Amount	Quad Sheet(s)
Cucharas Creek	Huerfano	Headwaters	State Highway 12	4.7 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

On March 23, 2009, Huerfano County and the Huerfano County Water Conservancy District filed a joint Notice to Contest all three ISF appropriations. In April 2009, Trout Unlimited, the Cucharas Water and Sanitation District, and Dwight Harrison filed Notices of Party Status. The Colorado Division of Wildlife obtained party status by virtue of having recommended these ISF appropriations to the Board, and SeEtta Moss of the Arkansas Valley Audubon Society obtained Contested Hearing Participant Status. The Board set a hearing in this matter for November 16, 2009. In response to requests from the Parties, including CWCB staff, the Hearing Officer extended the deadline for filing prehearing statements to October 6 and held a prehearing conference on October 16, 2009 to provide the Parties with additional time to work on negotiating a settlement. The Prehearing Order dated October 23, 2009 is attached as Exhibit A.

On November 3, 2009, the Parties finalized a stipulation that is attached as Exhibit B. On November 16, 2009, staff will present the stipulation to the Board for approval. Representatives of the Parties will attend and be available to answer questions from the Board.

The Board's approval of the stipulation would constitute agreement to take the following actions:

1. Postpone the scheduled contested hearing regarding the Huerfano River and Cucharas Creek ISF appropriations and any final action on those ISF appropriations, as defined in Paragraph 4g. of the ISF Rules, until its November 2010 meeting.
2. Reasonably review and consider all available data and other information, including water availability and minimum amounts required to preserve the natural environment to a reasonable degree and data and reports prepared by Bikis Water Consultants, LLC on the County's behalf, and work with all Parties to address their concerns, prior to taking final action on the proposed ISF water rights and recommendations on the Cucharas Creek and the Huerfano River, and their tributaries.
3. Allow CWCB staff to make any adjustments, as CWCB staff deems necessary, to the current proposed ISF appropriations ("the Three ISFs") to comply with the provisions of this Stipulation, after reviewing all data and other information submitted by all Parties, before the Board takes final action on the Three ISFs in November 2010.
4. Postpone filing any water court applications for the Three ISFs until December 31, 2010.
5. Reasonably consider delaying the filing of any water court applications for the Three ISFs until a later date, but no later than June 30, 2011, provided the County and District, and/or other Parties, evidence that they have undertaken diligent efforts to identify ways to meet their projected water supply needs and require additional time to file the necessary water court applications, and demonstrate the need for such an extension prior to December 1, 2010.
6. Select appropriation dates for the Three ISFs that are one day after the date the County and the District, and/or other Parties, file their water court applications referenced in Paragraph II.A. above, but no later than December 31, 2010 (except as may be extended until June 30, 2011, as provided in Paragraph II.A.5. above).
7. Not oppose the above-referenced water court applications of the County and the District or the other Parties, unless such applications have the potential to injure an existing decreed ISF water right.

Staff Recommendation

Staff recommends that the Board approve the stipulation attached to this memo.

BEFORE THE COLORADO WATER CONSERVATION BOARD

IN THE MATTER OF PROPOSED INSTREAM FLOW APPROPRIATIONS DIVISION 2: HUERFANO RIVER (UPPER AND LOWER SEGMENTS) AND CUCHARAS CREEK

PREHEARING ORDER

A prehearing conference was held on October 16, 2009, for the proposed instream flow appropriations for the Huerfano River (Upper and Lower Segments) and Cucharas Creek. The parties to the hearing anticipate settlement and requested additional time to finalize a stipulation for presentation to the Colorado Water Conservation Board on November 16, 2009.

The request for additional time to finalize a stipulation in this matter is hereby granted.

Should the parties be unable to reach settlement, or the Colorado Water Conservation Board rejects the stipulation, the prehearing officer will request that the Board continue the hearing to the January 2010 Board meeting. In that instance, a prehearing conference will be held on November 30, 2009, at 10:00 a.m. and rebuttal statements will be due December 16, 2009.

Dated this 23rd day of October 2009.

/s/

Casey Shpall
Hearing Officer
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**IN THE MATTER OF PROPOSED INSTREAM FLOW APPROPRIATIONS
DIVISION 2: HUERFANO RIVER (UPPER AND LOWER SEGMENTS)
AND CUCHARAS CREEK
CERTIFICATE OF SERVICE**

pThis is to certify that I have duly served the within Prehearing Order upon all Parties herein by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 23rd day of October, 2009 addressed as follows:

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_____/s/
Casey Shpall

BEFORE THE COLORADO WATER CONSERVATION BOARD

IN THE MATTER OF PROPOSED INSTREAM FLOW APPROPRIATIONS
DIVISION 2: UPPER HUERFANO RIVER, LOWER HUERFANO RIVER AND
CUCHARAS CREEK

STIPULATION

Huerfano County (hereinafter the "County") and the Huerfano County Water Conservancy District (hereinafter the "District"), through their attorneys FELT, MONSON & CULICHIA, LLC, the Cucharas Sanitation and Water District, through its attorneys Vranesh and Raisch, LLP, Trout Unlimited, Colorado Division of Wildlife, Dwight Harrison and the Colorado Water Conservation Board ("CWCB"), through the office of the Attorney General, submit the following Stipulation. Unless specifically identified, the parties to this Stipulation are referred to as "Parties":

I. **Matters Addressed by this Stipulation.** This Stipulation concerns the following actions under consideration by the CWCB:

A. Addresses the following instream flow appropriations ("the Three ISFs"):

1. Cucharas Creek (headwaters to Hwy 12)
2. Huerfano River (Lily Lake to confluence with Central Branch Huerfano River)
3. Huerfano River (Unnamed tributary to confluence with Stanley Creek)

B. Addresses the following ISF recommendations (the "Three ISF Recommendations"):

1. Bonnett Creek
2. Chaparral Creek
3. Dodgeton Creek

C. Addresses the Baker Creek ISF Recommendation.

II. **Stipulation.** All Parties hereby agree and stipulate as follows:

A. To enable the County and District, and potentially other Parties, to file water court applications for conditional or absolute water rights that would be senior to the Three ISFs, CWCB staff will recommend to the Board that it:

1. Postpone the scheduled contested hearing regarding the Huerfano River and Cucharas Creek ISF appropriations and any final action on those ISF appropriations, as defined in Paragraph 4g. of the *Rules Concerning the Colorado Instream Flow and Natural Lake Level Program*, until its November 2010 meeting.

2. Reasonably review and consider all available data and other information, including water availability and minimum amounts required to preserve the natural environment to a reasonable degree and data and reports prepared by Bikis Water Consultants, LLC on the County's behalf, and work with all Parties to address their concerns, prior to taking final action on the proposed ISF water rights and recommendations on the Cucharas Creek and the Huerfano River, and their tributaries.

3. Allow CWCB staff to make any adjustments, as CWCB staff deems necessary, to the current proposed ISF appropriations (the Three ISFs) to comply with the provisions of this Stipulation, after reviewing all data and other information submitted by all Parties, before the Board takes final action on the Three ISFs in November 2010. The current proposed ISF appropriations are attached to this Stipulation as Exhibit A.

4. Postpone filing any water court applications for the Three ISFs until December 31, 2010.

5. Reasonably consider delaying the filing of any water court applications for the Three ISFs until a later date, but no later than June 30, 2011, provided the County and District, and/or other Parties, evidence that they have undertaken diligent efforts to identify ways to meet their projected water supply needs and require additional time to file the necessary water court applications, and demonstrate the need for such an extension prior to December 1, 2010.

6. Select appropriation dates for the Three ISFs that are one day after the date the County and the District, and/or other Parties, file their water court applications referenced in Paragraph II.A. above, but no later than December 31, 2010 (except as may be extended until June 30, 2011, as provided in Paragraph II.A.5. above).

7. Not to oppose the above-referenced water court applications of the County and the District or the other Parties, unless such applications have the potential to injure an existing decreed ISF water right.

B. CWCB staff agrees not to move forward on the Three ISF Recommendations concerning Bonnett Creek, Chaparral Creek and Dodgeton Creek before January 2011, and agrees to work with the County, the District, and the other Parties to address their concerns about the Three ISF Recommendations.

C. CWCB staff agrees not to move forward on the Baker Creek ISF Recommendation until after January 2013, and agrees to work with the County, the District and the other Parties to reach an agreement regarding the Baker Creek ISF Recommendation.

D. If the Board adopts the staff recommendations set forth in Paragraph II.A., and agrees to comply with the requirements of this Stipulation, all other Parties agree as follows:

1. To postpone the contested hearing concerning the Three ISFs until the November 2010 CWCB Board meeting, or a later date as may be provided by Paragraph II.A.5. above. Such postponement shall not affect the Party or Contested Hearing Participant status of the Parties, and none of the Parties shall be required to re-notice their participation in this matter.

2. To work cooperatively with the CWCB staff and the other Parties to collect appropriate additional data and other information regarding the Three ISFs, the Three ISF Recommendations and the Baker Creek ISF Recommendation.

3. Not to oppose instream flow water right applications filed by the Board regarding the Three ISFs on the Huerfano River and Cucharas Creek, provided that the CWCB staff and Board have complied with the terms of this stipulation in developing and taking final action on the ISF water rights claimed in those applications, and the applications otherwise do not injure a senior water right.

4. To work cooperatively with CWCB staff and the other Parties on developing ISF recommendations for Baker, Bonnett, Chaparral and Dodgeton Creeks.

E. The County and the District agree:

1. To continue working diligently to identify ways to meet their projected water supply needs with the goal of filing water court applications for conditional or absolute water rights by December 30, 2010, to meet those needs.

2. Not to solicit, encourage or provide support to opposition by others to the Three ISFs and the Three ISF Recommendations in any CWCB proceedings and in the water court proceedings to obtain decrees for the Three ISFs.

F. The Parties hereto shall each bear their own costs and attorney fees incurred in this matter to date.

G. The Parties hereto represent and affirm the signatories to this Stipulation are legally authorized to bind the Parties in this matter.

Dated: November 3, 2009

OFFICE OF THE ATTORNEY GENERAL
JOHN SUTHERS

FELT, MONSON & CULICHIA, LLC

By: _____
Susan Schneider, #19961
ATTORNEYS FOR COLORADO
WATER CONSERVATION BOARD
STAFF

By: _____
Chris Cummins, #35154
ATTORNEYS FOR
HUERFANO COUNTY AND THE
HUERFANO COUNTY WATER
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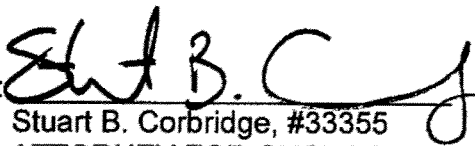
TROUT UNLIMITED

COLORADO DIVISION OF WILDLIFE

By: _____
Andrew Peternell

By: _____

VRANESH AND RAISCH, LLP

By:  10/29/09
Stuart B. Corbridge, #33355
ATTORNEY FOR CUCHARAS
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Dwight Harrison, Pro Se

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Thomas E. Remington, Director
Colorado Division of Wildlife

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ATTORNEY FOR CUCHARAS
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Dwight Harrison, Pro Se



Colorado Water Conservation Board

Instream Flow Tabulation - Streams



Water Division 2

Case Number	Stream	Watershed	County	Upper Terminus	Lower Terminus	Length (miles)	USGS QUADS	Amount(dates) (CFS)	Approp Date
08/2/A-003	Cucharas Creek	Huerfano	Huerfano	headwaters in the vicinity of lat 37 17 47N long 105 9 28W	State Highway 12 at lat 37 19 54N long 105 5 48W	4.70	Cucharas Reservoir Trinchera Peak	3 (4/15 - 5/14) 4.9 (5/15 - 6/30) 2.5 (7/1 - 8/14) 1.6 (8/15 - 9/15) 1.2 (9/16 - 4/14)	1/27/2009
09/2/A-003	Huerfano River	Huerfano	Huerfano	outlet of Lilly Lake at lat 37 35 40N long 105 29 22W	confl Cntrl Branch Huerfano River at lat 37 40 16N long 105 25 16W	8.20	Blanca Peak Mosca Pass	2.7 (11/1 - 4/30) 4.1 (5/1 - 10/31)	1/27/2009
09/2/A-004	Huerfano River	Huerfano	Huerfano	confl. w/ unnamed tributary at lat 37 41 2N long 105 24 9W	confl. w/ Stanley Creek at lat 37 42 33N long 105 22 16W	2.60	Mosca Pass Red Wing	2.75 (11/1 - 3/31) 5.75 (4/1 - 10/31)	1/27/2009

Totals for Water Division 2	Total # of Stream Miles =	15.5
	Total # of Appropriations =	3
<i>(Totals do not include donated/acquired water rights)</i>		

Report Totals	Total # of Stream Miles =	15.5
	Total # of Appropriations =	3
<i>(Totals do not include donated/acquired water rights)</i>		