

# STATE OF COLORADO

## Colorado Water Conservation Board Department of Natural Resources

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TO: Colorado Water Conservation Board Members

Bill Ritter, Jr.  
Governor

FROM: Jeff Baessler  
Stream and Lake Protection Section

Mike King  
DNR Executive Director

DATE: May 10, 2010

Jennifer L. Gimbel  
CWCB Director

SUBJECT: **Agenda Item 19, May 18-19, 2010 – Board Meeting**  
**Stream and Lake Protection – 2009 Contested Instream Flow Appropriations**

### Summary

At its January 2009 meeting, the Board appropriated ISF rights on Cucharas Creek and two segments of the Huerfano River. These appropriations were subsequently contested by Huerfano County and the Huerfano County Water Conservancy District. This memo provides an overview of the history of these contested appropriations as well as a brief review of stipulated terms that allowed additional time for the Huerfano County and the Water Conservancy District to assess their water needs and apply for additional water rights to satisfy those needs. Because the stipulation postponed the hearing on these appropriations to November 2010, the Board must designate a hearing officer and set hearing dates for the contested appropriations in the event that these cases move forward to a hearing.

Staff recommends that the Board designate a Hearing Officer and set hearing dates for the Cucharas Creek and the Huerfano River ISF appropriations in conjunction with the November, 2010 CWCB meeting

### 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 Cr.	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.

On November 3, 2009, the Parties finalized a stipulation (attached) which the Board later approved at its November 16, 2009 meeting. The stipulation postponed the scheduled contested hearing regarding the Huerfano River and Cucharas Creek ISF appropriations and any final action on those ISF appropriations until the Board's November 2010 meeting. The intent of this provision was to allow additional time for Huerfano County and others to develop an assessment of their water supply needs and file for any additional water rights which may be necessary to meet those needs. Although Staff continues to work with the contested parties in accordance with the terms of the stipulation, the Board must designate a hearing officer and set hearing dates for the contested appropriations in the event that the contested parties are unable to reach settlement.

### **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 November, 2010 CWCB meeting.

BEFORE THE COLORADO WATER CONSERVATION BOARD

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

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STIPULATION

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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

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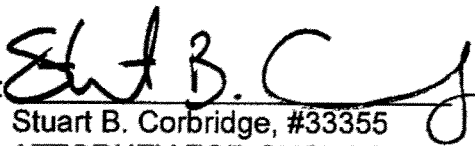
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# Colorado Water Conservation Board

## 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

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

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