

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

James B. Martin
DNR Executive Director

DATE: July 7, 2010

Jennifer L. Gimbel
CWCB Director

SUBJECT: **Agenda Item 32, July 20-21, 2010 Board Meeting**
Stream and Lake Protection – Big and Little Dominguez Creeks Uncontested
2010 Instream Flow Appropriations

Summary

At its May 19, 2010 meeting, the CWCB formed its intent to appropriate instream flow (“ISF”) water rights on Big Dominguez and Little Dominguez Creeks in Water Division 4. Both segments were uncontested and are ready for final Board action pursuant to Rule 5h of the Instream Flow and Natural Lake Level Rules (“ISF Rules”).

Staff Recommendation

Staff requests that the Board make the following determinations and take the following actions on the proposed appropriations on Big Dominguez Creek and Little Dominguez Creek, based on the information contained in this memo as well as the information presented by staff both in writing and orally at the May 19, 2010 Board meeting.

1. Determine, pursuant to section 37-92-102(3), C.R.S., and based upon the recommendations of the BLM, and a review of the data and other information presented by Staff, in this memo and orally, that:

- (a) There is a natural environment that can be preserved to a reasonable degree with the recommended water rights, if granted;
- (b) Water is available in each stream for appropriation;
- (c) The natural environment will be preserved to a reasonable degree by the water available for the recommended appropriations; and
- (d) Such natural environment can exist without material injury to water rights.

2. Pursuant to ISF Rule 5f., establish May 19, 2010 as the appropriation date for these instream flow water rights.

3. Direct staff to request the Attorney General's Office to file the necessary water rights applications and include language in each of the applications that defines the development allowance; outlines the non-precedential nature of these appropriations; and reiterates the Board's requirement under 37-92-102 (3)(b) which provides that these instream flow water rights will be subject to uses or exchanges of water (even if not decreed by the water court) being made on the date the CWCB appropriated these water rights.

Discussion

On May 19, 2010, the CWCB formed its intent to appropriate ISF water rights on Big and Little Dominguez Creeks in Water Division 4 in the amount of all the annually available flow on the subject streams, minus a development allowance. On May 26, 2010, Staff provided formal notice on these appropriations to the ISF subscription mailing list as required by Rule 5d(2). In addition, on June 4, 2010, Staff sent out a letter (attached) to all private land owners located above the wilderness area to 1) personally inform each individual of the Board's appropriations; 2) assure them that the Board will recognize their existing senior rights and any existing uses or exchanges of water (even if not decreed by the water court) that were being made on the date of the ISF appropriations; and 3) inform them of the details of the development allowance that would be available to them on a first come - first served basis.

These water rights were not contested and pursuant to ISF Rule 5h, are being recommended to the Board for Final Action. These stream segments are listed in detail in the following table.

Div	Stream	Watershed	Counties	Length (miles)	Upper Terminus	Lower Terminus	Quad Sheets	Flow (CFS)
4	Big Dominguez Creek	Lower Gunnison	Delta/Mesa	14.22	Wilderness Area Boundary	Wilderness Area Boundary	Jacks Canyon, Keith Creek, Triangle Mesa	All the annually available flow minus development allowance
4	Little Dominguez Creek	Lower Gunnison	Delta/Mesa	15.60	Wilderness Area Boundary	confl Big Dominguez Creek	Dominguez, Escalante Forks, Triangle Mesa	All the annually available flow minus development allowance

Development Allowance

	Maximum Storage Volume Allowed - AF (Total of all new water rights)	Max Diversion Rate (cfs) (April 15 – June 30)	Max Diversion Rate (cfs) (July 1 – October 31)
Big Dominguez Creek			
Private Parcels	100	3.30	0.198
USFS	5.7	.066	
BLM	1.0	0.11	
Little Dominguez Creek			
Private Parcels	1	0.033	0.033
USFS	3.7	.066	
BLM	2.0	0.22	

Notes for private parcels:
1. Storage volumes are for all future purposes, including irrigation, stock watering, wildlife, and any augmentation required for non-exempt domestic uses.
2. Domestic use is assumed to be an exempt use and is not included in the allowance.
3. The maximum diversion rate for Big Dominguez Creek for April 15-June 30 is 3.30 cfs for diversion to storage and/or direct irrigation. The maximum diversion rate from July 1 – October 31 is 0.198 cfs for diversion to storage. The cumulative yearly diversions are limited to a total maximum volume of 100 acre feet.
4. The maximum diversion rate for Little Dominguez Creek is based on extremely limited natural water supply to the only privately owned parcel within the watershed. The allowance assumes that one pond could be constructed with a diversion rate of 0.033 cfs into the pond.
Notes for BLM and USFS lands:
1. The storage volumes identified for the BLM and USFS are for stock water purposes only. The ponds may be filled with water from surface diversions, spring diversions, or well diversions. If a pond is constructed under an exempt use, such as a livestock tank filled with water from an ephemeral channel, that pond is not counted against the allowance.
2. The maximum diversion rate for all BLM and USFS ponds from July 1 – October 31 is assumed at 0.033 cfs/pond.
3. The diversion rates shown in the table are for multiple purposes, including livestock watering, wildlife watering, and recreation. The diversion rates may be used to satisfy water needs for developed facilities, such as campgrounds, or may be used for more dispersed uses such as wildlife watering. Exempt uses, such as livestock watering wells operating at 15gpm or less, will not count against this allowance.

Technical Investigations

The Board was provided detailed information regarding all field data, studies and analyses for each stream segment at the May 19, 2010 Board meeting.

Natural Environment Studies

The BLM has conducted field surveys on these streams and found a natural environment that can be preserved. To quantify the resources and to evaluate instream flow requirements, the BLM conducted extensive field surveys and studies of the natural environment, and the CWCB Staff reviewed and analyzed the data produced from these studies. Based on the results of these reviews/analyses, the CWCB staff prepared recommendations for the amount of water necessary to preserve the natural environment to a reasonable degree for each of the streams.

Water Availability Studies

The CWCB Staff has conducted an evaluation of water availability for these streams. To determine the amount of water physically available for the Board's appropriations, Staff analyzed available USGS gage records, available streamflow models, and/or utilized appropriate standard methods to develop a hydrograph of mean daily flows for each recommendation. Staff also relied upon the flow measurements made as part of the field survey, and/or used pressure transducers to further verify the amount of water physically available in this stream. In addition, Staff analyzed the water rights tabulation and consulted with the Division Engineer's Office to identify any potential water availability problems. Based upon its analysis, Staff has determined that water is available for appropriation on each stream to preserve the natural environment to a reasonable degree without limiting or foreclosing the exercise of valid water rights.

Issues

In order to address concerns regarding the potential for these appropriations to establish a precedent, Staff and the Attorney General's office have developed the following non-precedent language for inclusion in the water court decree for these ISF water rights.

As noted by the Colorado Supreme Court in Colorado River Water Conservation Dist. v. Colorado Water Conservation Bd. 594 P.2d 570 (Colo. 1979), it would be an "impossible task" for the Legislature to enumerate "the forms of plant and animal life, as well as natural formations, which the legislature wished to preserve..." Id., at 576. Thus, the Legislature properly delegated to the CWCB the authority to make case-by-case "factual determinations regarding such questions as which areas are most amenable to preservation and what life forms are presently flourishing or capable of flourishing..." Id. In this case, the CWCB has, in consultation with the BLM and the Colorado Division of Wildlife, determined the habitat and life forms to be preserved and the amount of water needed for this instream flow water right based upon the unique location and natural environment to be preserved in this case only. That determination applies in this case only, and shall not serve as precedent nor be binding upon the CWCB in any other ISF appropriation.

Relevant Instream Flow Rules

5f. Date of Appropriation. The Board may select an appropriation date that may be no earlier than the date the Board declares its intent to appropriate. The Board may declare its intent to appropriate when it concludes that it has received sufficient information that reasonably supports the findings required in Rule 5i.

5h. Final Board Action on an ISF Recommendation. The Board may take final action on any uncontested Staff Recommendation(s) at the May Board meeting or any Board meeting thereafter. If a Notice to Contest has been filed, the Board shall proceed under Rule 5j-5q.

5i. Required Findings. Before initiating a water right filing to confirm its appropriation, the Board must make the following determinations:

- (1) Natural Environment. That there is a natural environment that can be preserved to a reasonable degree with the Board's water right if granted.
- (2) Water Availability. That the natural environment will be preserved to a reasonable degree by the water available for the appropriation to be made.
- (3) Material Injury. That such environment can exist without material injury to water rights.

These determinations shall be subject to judicial review in the water court application and decree proceedings initiated by the Board, based on the Board's administrative record and utilizing the criteria of section 24-4-106(6) and (7), C.R.S. (2008).

Staff Recommendation

Staff requests that the Board make the following determinations and take the following actions on the proposed appropriations on Big Dominguez Creek and Little Dominguez Creek, based on the information contained in this memo as well as the information presented by Staff both in writing and orally at the May 19, 2010 Board meeting.

1. Determine, pursuant to section 37-92-102(3), C.R.S., and based upon the recommendations of the BLM, and a review of the data and other information presented by Staff, in this memo and orally, that:

- (a) There is a natural environment that can be preserved to a reasonable degree with the recommended water rights, if granted;
- (b) Water is available in each stream for appropriation;
- (c) The natural environment will be preserved to a reasonable degree by the water available for the recommended appropriations; and
- (d) Such natural environment can exist without material injury to water rights.

2. Pursuant to ISF Rule 5f., establish May 19, 2010 as the appropriation date for these instream flow water rights.

3. Direct Staff to request the Attorney General's Office to file the necessary water rights applications and include the specific language in this memo in each of the applications that defines the development allowance; outlines the non-precedential nature of these appropriations; and reiterates the Board's requirement under 37-92-102 (3)(b) which provides that these instream flow water right will be subject to uses or exchanges of water (even if not decreed by the water court) being made on the date the CWCB appropriated these water rights.

Attachments

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June 3, 2010

Bartholomew R. Newton
3026 E. ½ Rd.
Grand Junction, CO 81504-5626

Bill Ritter, Jr.
Governor

Mike King
DNR Executive Director

Jennifer L. Gimbel
CWCB Director

Dear Mr. Newton:

I am writing you to follow up on previous correspondence that you received from both the Colorado River Water Conservation District (River District) and the Colorado Water Conservation Board (CWCB) regarding both Big Dominguez Creek and Little Dominguez Creek and the newly created Dominguez Canyon Wilderness Area. If you will recall, the legislation that created the wilderness area provided an opportunity for the Colorado Water Conservation Board to appropriate instream flow water rights on these streams to protect the Area's water resources in lieu of a Federal water right.

In its October 2009 letter, the River District indicated that it was working with the State of Colorado to protect present and future water uses in Big and Little Dominguez Creeks that could be affected by the creation of the Dominguez Canyon Wilderness Area. As a result, the letter asked for your help in identifying whether your existing water rights meet all of your water use needs and if you have plans which may require additional water use from either of these creeks. Although few responses were received, it appeared that at least one land owner in the basin indicated that he may have a use for an additional 15 to 20 acre-feet of water in the Big Dominguez Creek watershed.

To further assure that water users' needs would be addressed in relation to quantifying the water needs for the Dominguez Canyon Wilderness Area, CWCB staff hired a consultant to identify the potential for additional water development on the private parcels in the upper Dominguez watershed. After reviewing the results of the consultant's analysis and coordinating with the River District, Staff recommended that the CWCB appropriate instream flow water rights on these creeks through the Wilderness Area, but also incorporate a development allowance to address potential future needs of the private property owners.

Attached is the official notice that outlines the Board's appropriation of water rights on these creeks as well as the recommended development allowance. Note that relatively small allowances are also made with regard to future water needs of the United States Forest Service and the Bureau of Land Management.

It is important to note that your existing water rights are senior to the Board's new instream flow appropriations on these streams. In addition, the Board will recognize any existing uses or exchanges of water (even if not decreed by the water court) that were being made on the date the Colorado Water Conservation Board appropriated these new instream flow water rights for the Dominguez Wilderness Area. Finally, the development allowance will permit you (on a first come – first serve basis) to develop additional future water rights that will also be senior to the Board's rights.

Please review the attached notice which outlines the Board's appropriations as well as the conditions of the development allowance and let me know if you have any questions. You may reach me by calling 303-866-3441 x3202 or by email: Jeffrey.baessler@state.co.us.

Sincerely,

Jeff Baessler,
Acting Section Chief
Stream and Lake Protection Section.

Attachment