

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: September 1, 2010

Jennifer L. Gimbel
CWCB Director

SUBJECT: **Agenda Item 13b, September 14-15, 2010 – Board Meeting -- Stream and Lake Protection Section – Contested and Resolved 2010 Instream Flow Appropriations – Morrison Creek**

Summary

At its January 2010 meeting, the Board appropriated ISF rights on two segments of Morrison Creek. These appropriations were subsequently contested by the Upper Yampa Water Conservancy District. Staff and the District recently entered into a stipulation that addressed the District's concerns, and both segments of Morrison Creek are now ready for final Board action.

Staff requests that the Board make the following determinations and take the following actions on the proposed appropriations on Morrison Creek, based on the information contained in this memo as well as the information presented by staff both in writing and orally at the January 26, 2010 Board meeting.

1. Determine, pursuant to section 37-92-102(3), C.R.S., (2009) 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. Establish January 26, 2010 as the appropriation date for these Instream Flow water rights pursuant to ISF Rule 5f.
3. Direct staff to request the Attorney General's Office to file the necessary water rights applications and include the stipulated terms and conditions in the final decree that are consistent with the attached stipulation.

Background

On January 26, 2010, the Board declared its intent to appropriate Instream Flow (ISF) water rights on the reaches of Morrison Creek set forth in the table below.

Stream	County	Upper Terminus	Lower Terminus	Length (mi)	Amount	Quad Sheet(s)
Morrison Creek	Routt	confl. Muddy Creek at	confl. Silver Creek	8.99	1.4 (11/1-3/31) 3.1 (4/1-10/30)	Green Ridge
Morrison Creek	Routt	confl. Silver Creek	confl. Yampa River	4.91	13.2 (4/1-8/15) 8.1 (8/16 – 3/31)	Blacktail Mountain, Green Ridge

On March 30, 2010, the Upper Yampa Water Conservancy District filed a Notice to Contest the Morrison Creek appropriations. The primary concern that the District identified was the potential for the proposed ISF rights to interfere with the District's senior water rights, including the conditional storage water rights decreed for the proposed Morrison Creek Reservoir.

In April 2010, Trout Unlimited, James A. Larson, and Flying Diamond Resources filed Notices of Party Status. In addition, The Colorado Division of Wildlife obtained Party Status by virtue of having recommended these ISF appropriations to the Board. The Board set a hearing in this matter to be held in conjunction with its September 2010 Board Meeting. On July 16, 2010 a prehearing conference was held to afford the parties an opportunity to address both procedural and substantive issues. In its Prehearing Statement, the UYWCD requested that the CWCB consider a Request for Permission to Inundate a Portion of Silver Creek in conjunction with the Morrison Creek Instream Flow hearing scheduled for September 2010. Flying Diamond and James A. Larson filed an Opposition to this request and argued that the UYWCD's request could not be considered in conjunction with the Morrison Creek ISF hearing under the state law and the CWCB's rules. CWCB staff also raised the issue as to whether the timing of the inundation hearing in conjunction with the Morrison ISF hearing was appropriate. In order to resolve this issue in time for the September meeting, the Prehearing Officer requested that this issue be placed on the CWCB's agenda for its July 2010 meeting in order for the Parties to brief the issue before the Board. At the July 2010 meeting, the Board directed staff to separate the two issues and address the ISF hearing in September and the request to inundate at the November Board Meeting.

On September 18, 2010, the CWCB Staff and UYWCD finalized a stipulation (attached) in which the CWCB acknowledged the seniority of the District's rights on Morrison Creek, and agreed that the District would not be required to make any request to inundate the proposed junior Morrison Creek Instream Flow Appropriations. In return, the District withdrew its contested party status and agreed to not oppose a water court application for the Instream Flow rights identified in the table above. After reviewing the stipulation between CWCB and UYWCD, Trout Unlimited, James A. Larson, Flying Diamond Resources, and the DOW withdrew their Notice of Party Status.

These ISF water rights are now being recommended to the Board for Final Action.

Technical Investigations

The Board was provided detailed information regarding all field data, studies and analyses for each stream segment at the January 26, 2010 Board meeting.

Natural Environment Studies

The DOW has conducted field surveys on these stream segments and found a natural environment that can be preserved. To quantify the resources and to evaluate Instream Flow requirements, the DOW 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 stream segments. 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.

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. (2009).

Staff Recommendation

Staff requests that the Board make the following determinations and take the following actions on the proposed appropriations on Morrison Creek, based on the information contained in this memo as well as the information presented by staff both in writing and orally at the January 26, 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. Establish January 26, 2010 as the appropriation date for these Instream Flow water rights pursuant to ISF Rule 5f.
3. Direct staff to request the Attorney General's Office to file the necessary water rights applications and include the stipulated terms and conditions in the final decree that are consistent with the attached stipulation.

Attachment

BEFORE THE COLORADO WATER CONSERVATION BOARD

STATE OF COLORADO

IN THE MATTER OF AN INSTREAM FLOW APPROPRIATION ON MORRISON CREEK, WATER DIVISION 6; MORRISON CREEK (CONFLUENCE MUDDY CREEK TO CONFLUENCE SILVER CREEK) AND MORRISON CREEK (CONFLUENCE SILVER CREEK TO CONFLUENCE YAMPA RIVER)

STIPULATION AND AGREEMENT BETWEEN THE UPPER YAMPA WATER CONSERVANCY DISTRICT AND THE COLORADO WATER CONSERVATION BOARD

The Upper Yampa Water Conservancy District ("UYWCD") and Colorado Water Conservation Board ("CWCBC"), through their respective attorneys, stipulate and agree to the following:

1. The CWCBC has declared its intent to appropriate instream flow water rights on Morrison Creek, tributary to the Yampa River, in Routt County, Colorado. The claimed "Morrison Creek Instream Flow Appropriations" are described as follows:

a. The Upper Segment: The natural stream channel from the confluence with Muddy Creek at latitude 40° 10' 54.50"N and longitude 106° 45' 0.35"W as the upstream terminus and extending to the confluence with Silver Creek at latitude 40° 14' 42.44"N and longitude 106° 47' 10.75"W as the downstream terminus. The amount claimed for this Upper Segment is 3.1 cfs from April 1 through October 31 and 1.4 cfs from November 1 through March 31.

b. The Lower Segment: The natural stream channel from the confluence with Silver Creek at latitude 40° 14' 42.44"N and longitude 106° 47' 10.75"W as the upstream terminus and extending to the confluence with the Yampa River at latitude 40° 17' 23.60"N and longitude 106° 48' 57.05"W as the downstream terminus. The amount claimed for this Lower Segment is 13.2 cfs from April 1 through August 15 and 8.1 cfs from August 16 through March 31.

2. The UYWCD has timely filed a Notice to Contest the Morrison Creek Instream Flow Appropriations pursuant to Rule 5k of the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2 CCR 408-2.

3. By this agreement UYWCD agrees to withdraw its notice to contest the proposed instream flow appropriations on Morrison Creek before the Colorado Water Conservation Board, and to not oppose a water court application filed by the CWCB to confirm water rights for the Morrison Creek Instream Flow Appropriations described above provided that the CWCB agrees to include the following terms in any proposed decree submitted by the CWCB to the water court to confirm the Morrison Creek Instream Flow Appropriations:


- a. The UYWCD holds conditional surface water rights and water storage rights in the Morrison Creek Basin that are senior to the instream flow rights now claimed by the CWCB on Morrison Creek. These include:
 - i. The Little Morrison Diversion, Little Morrison Diversion Alternate Point, decreed in Case No. 94CW149, District Court, Water Division 6. This water right has an appropriation date of December 30, 1994 and may divert up to 50 cfs for "municipal, industrial, domestic, irrigation, stock watering, power production, recreational, fishery and aesthetic purposes, and for use by exchange or augmentation purposes, including diversion into Little Morrison Creek for such uses and for storage in Stagecoach Reservoir for such uses, including later releases from storage for such uses." This water right was conditionally decreed subject to the condition that the UYWCD shall not divert water from Morrison Creek at either decreed point of division if such diversion would reduce the stream flow immediately below the point of diversion below 15 cfs. See decree in Case No. 94CW149, paragraph 9, page 3.
 - ii. A change of water right for the Pleasant Valley Reservoir and Pleasant Valley Feeder Canal that may be stored in the proposed Morrison Creek Reservoir decreed on October 5, 2009 by the District Court Water Division 6, in Case No. 07CW61.


- iii. A claimed water right for the Morrison/Silver Creek/Stagecoach Pipeline claimed in Case No. 03CW53, District Court, Water Division 6. The UYWCD has appealed the dismissal of this water right in Case No. 09SA118. If this water right is granted in whole or in part with a priority date senior to the proposed instream flow appropriations on Morrison Creek, the portion of such water right granted with a senior priority date shall be senior to the Morrison Creek Instream Flow Appropriation decreed herein.
 - b. The UYWCD's water rights described in paragraph 3.a.i&ii above are senior in priority, and the UYWCD's water rights described in paragraph 3.a.iii may be senior in priority, to the Morrison Creek Instream Flow Appropriations claimed by the CWCB. Pursuant to Rule 7b of the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2 CCR 408-2, the UYWCD shall not be required to make any request to inundate the junior Morrison Creek Instream Flow Appropriations for the Morrison Creek Reservoir as decreed in Case No. 07CW61, the Little Morrison Diversion, Little Morrison Diversion Alternate Point decreed in Case No. 94CW149, and/or any water right that may be decreed pending the result of the appeal in Case No. 03CW53 for the Morrison/Silver Creek/Stagecoach Pipeline.
4. The CWCB shall provide the UYWCD with copies of any proposed ruling and decree submitted to the water court for the Morrison Creek Instream Flow Appropriations together with a copy of any final ruling of referee and/or decree entered for those water rights so as to ensure compliance with the provisions of this Stipulation. The CWCB agrees that it will not oppose a motion to intervene in any application filed by the CWCB for the Morrison Creek Instream Flow Appropriations filed by the UYWCD to ensure compliance with the terms of this Stipulation and Agreement.
 5. The Stipulation shall be binding on the parties, their successors and assigns.
 6. Each Party shall bear its own costs and attorney's fees.

Submitted this 18th day of August 2010.

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