

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: November 1, 2010

Jennifer L. Gimbel
CWCB Director

SUBJECT: **Agenda Item 13, November 15-17, 2010 Board Meeting --
Stream and Lake Protection – Contested and Resolved 2010 Instream Flow
Appropriations on the Huerfano River and Cucharas Creek**

Summary

At its January 2009 meeting, the Board declared its intent to appropriate instream flow (ISF) water rights on Cucharas Creek and two segments of the Huerfano River. These appropriations were subsequently contested by Huerfano County (County) and the Huerfano County Water Conservancy District (HCWCD), and Trout Unlimited, the Cucharas Water and Sanitation District and Dwight Harrison filed Notices of Party Status. In November 2009, Staff entered into a stipulation with the County and the HCWCD that postponed a formal hearing on these appropriations to November 2010. This postponement was intended to allow additional time for the County and HCWCD to assess their water needs and apply for additional water rights to satisfy those needs. The County's and HCWD recently withdrew their opposition to these ISF appropriations, and the Parties also withdrew from this matter. Consequently, these appropriations are now ready for final Board action.

Staff Recommendation

Staff recommends that the Board make the following determinations and take the following actions on the proposed appropriations on the Huerfano River and Cucharas 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 27, 2009 Board meeting.

1. Determine, pursuant to section 37-92-102(3), C.R.S., (2010) and based upon the recommendations of the Colorado Division of Wildlife (CDOW), 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 December 31, 2010 as the appropriation date for these ISF water rights pursuant to ISF Rule 5f.

3. Direct Staff to request the Attorney General's Office to file the necessary water rights applications.

Background

On January 27, 2009, the Board declared its intent to appropriate 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, the County and the HCWCD 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 CDOW 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. A major provision of 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 the County, HCWCD and others to develop an assessment of their water supply needs and file for any additional water rights that may be necessary to meet those needs.

On September 10, 2010, the County and HCWCD formally withdrew their opposition to all three segments identified in the table above. In addition, all other parties have withdrawn their contested party status and all three segments are now ready for final board action.

Technical Investigations

The Board was provided detailed information regarding all field data, studies and analyses for each stream segment at the January 27, 2009 Board meeting.

Natural Environment Studies

The CDOW has conducted field surveys on these stream segments and found a natural environment that can be preserved. To quantify the resources and to evaluate ISF requirements, the CDOW 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 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 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. (2010).

Staff Recommendation

Staff recommends that the Board make the following determinations and take the following actions on the proposed appropriations on the Huerfano River and Cucharas 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 27, 2009 Board meeting.

1. Determine, pursuant to section 37-92-102(3), C.R.S., and based upon the recommendations of the CDOW, 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 December 31, 2010 as the appropriation date for these ISF water rights pursuant to ISF Rule 5f.
3. Direct Staff to request the Attorney General's Office to file the necessary water rights applications.

Attachment

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

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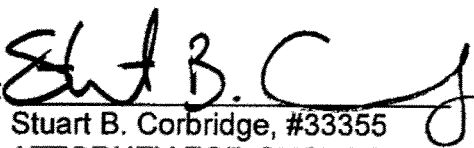
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