

STATE OF COLORADO

Colorado Water Conservation Board Department of Natural Resources

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TO: Colorado Water Conservation Board Members

John W. Hickenlooper
Governor

FROM: Linda Bassi, Chief
Jeff Baessler, Deputy Section Chief
Stream and Lake Protection Section

Mike King
DNR Executive Director

Jennifer L. Gimbel
CWCB Director

DATE: August 31, 2011

SUBJECT: **Agenda Item 8, September 13-14, 2011 Board Meeting**
Stream and Lake Protection – Final Action on Colorado River Instream Flow Appropriations

Summary

At its July 12, 2011 meeting, the CWCB formed its intent to appropriate instream flow (“ISF”) water rights on three segments of the Colorado River in Water Division 5 between Kremmling and Dotsero, as set forth on the attached Tabulation of Instream Flow Recommendations. All 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”). These ISF appropriations are a key component of a Management Plan Alternative to potential federal determinations that these Colorado River segments are “suitable” for designation under the Wild and Scenic River Act, and will protect Outstandingly Remarkable Values (“ORVs”) associated with the River.

Staff Recommendation

Staff recommends that the Board make the following determinations and take the following actions on the proposed ISF appropriations on the Colorado River, based on the information contained in this memo as well as the information presented by staff both in writing and orally at the July 12, 2011 Board meeting.

1. Determine, pursuant to section 37-92-102(3), C.R.S. (2010), and based upon the recommendation of the Upper Colorado Wild and Scenic Stakeholder Group (“Stakeholder Group”), 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 the subject stream reaches for the recommended 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. Direct staff to request the Attorney General's Office to file the necessary water rights application in 2011, and include the terms and conditions set forth in this memo. In order for any

Colorado River Cooperative Agreement (CRCA) application made in 2011 to be senior in priority to the ISF filing, the CWCB will claim an appropriation date within 2011 for the ISF that is junior to the appropriation date claimed in any CRCA application made in 2011. The CWCB is willing to make this accommodation because the contemplated CRCA application(s) is/are intended to provide environmental benefits within the Colorado River basin.

3. Direct staff and the Attorney General's Office to work cooperatively with the Stakeholder Group and the parties to the CRCA to address material conflicts, if any, that may arise between the ISF and CRCA applications if the CRCA application(s) cannot reasonably be filed in 2011.

4. State its intent to take the following actions regarding the water court application: The CWCB will seek to defer the prosecution of the filed application for these ISF water rights until formal federal approval of the Stakeholder Group Plan without material change. If the water court declines to defer prosecution of the CWCB application, then the State will consult with the Stakeholder Group and seek a recommendation from the Stakeholder Group on a further course of action. Following consultation, the CWCB will take one of the following actions: (1) prosecution of the ISF application seeking a decree upon agency approval of the Stakeholder Group Plan; (2) withdrawal of the ISF application; or (3) any other action deemed appropriate by the CWCB. If the CWCB withdraws the application, but the Stakeholder Group Plan is subsequently adopted by the federal agencies, then the CWCB will promptly file a new ISF application for the same amounts and subject to the same conditions. Nothing herein is intended to limit the discretion of the CWCB to make or respond to other ISF filings.

Discussion

At its July 12, 2011 meeting, the Board declared its intent to appropriate ISF water rights on the reaches of the Colorado River listed on the attached Tabulation of ISF Recommendations, and to include the proposed terms and conditions set forth below in the water court application and decree for the water rights. On July 15, 2011, Staff provided formal notice of these appropriations to the ISF Subscription Mailing List as required by Rule 5d.(2). These appropriations were not contested, and pursuant to ISF Rule 5h., are being recommended to the Board for Final Action.

Terms and Conditions

- 1) This ISF is a unique ISF appropriation in that it is recommended by the consensus of a diverse stakeholder group under a local management plan designed to help protect resources of "outstanding remarkable value" that have been identified by the Bureau of Land Management and the United States Forest Service. This ISF is also unique because it involves the mainstem of the Colorado River, the relative size of that river, the current level of water supply development, the level of use for recreational fishing purposes, and the river's overall importance to the State of Colorado. The terms of this appropriation are part of a compromise and settlement and are unique circumstances that shall not establish any precedent and shall not be construed as a commitment to include any specific findings of fact, conclusions of law or administrative practices in future appropriations.
- 2) Pursuant to section 37-92-102(3)(b), C.R.S. (2010), this instream flow appropriation shall be subject to the present uses or exchanges of water being made by other water users, pursuant to appropriation or practices in existence on the date of this appropriation. The CWCB will apply this provision if the proponent provides adequate documentation and verification of present uses and exchanges.
- 3) During any period identified by the Upper Colorado River Commission in a finding issued pursuant to Article VIII(d)(8) of the Upper Colorado River Basin Compact of 1948 for curtailment of Colorado River basin water uses within Colorado, which the State of Colorado

has agreed to implement in a manner that impacts water diversions within Water Division 5, the CWCB agrees that this ISF water right will be administered in accordance with compact curtailment rules adopted by the State of Colorado that are then in effect, if any. If no such compact curtailment rules are then in effect, it is the intent of the CWCB that this instream flow right will not be administered during the period of any such compact curtailment. The ISF water right decreed herein shall be administered in accordance with any rules promulgated by the State Engineer related to Colorado River compact compliance. The ISF water right decreed herein is not intended to deprive the people of the state of Colorado of the beneficial use of those waters available by law and interstate compact.

- 4) The CWCB agrees not to file a statement of opposition to adjudications of water rights made after the date of this filing that: (1) result in depletions that do not exceed 100 acre feet; or (2) are for changes of water rights that do not seek to change more than 2500 acre feet, provided such changes of water rights do not involve an exchange through the subject ISF reaches; and (3) do not exceed a *total* 1% depletive effect on the instream flow right decreed herein in accordance with the *de minimis* Rule 8e of the Rules Concerning the Instream Flow and Natural Lake Level Program. This term and condition does not preclude the CWCB from enforcing this ISF appropriation in accordance with the priority system. The CWCB may also evaluate any water court applications made after the date of this filing to determine whether they are appropriate for application of the Injury with Mitigation Rule 8i.(3) of the Rules Concerning the Instream Flow and Natural Lake Level Program.
- 5) It is the intent of the CWCB that this ISF provide protection of the natural environment only to the extent authorized by state statute as against adjudications of water rights made after the date of this filing. The CWCB intends that the ISF water right decreed herein is not appropriate for consideration as a stream flow standard in other administrative or regulatory permitting contexts.

Technical Investigations

The Board was provided detailed information regarding all field data, studies and analyses for each stream segment at the July 12, 2011 Board meeting.

Natural Environment Studies

The Stakeholder Group recommendation was based upon 2008 - 2010 fish sampling studies completed by the Colorado Division of Wildlife (now Colorado Parks and Wildlife). The natural environment on the reach of the Colorado River between Kremmling and Dotsero is indicated by the presence of a high number of different fish species, including rainbow and brown trout, flannemouth and bluehead suckers, and mountain whitefish. To quantify the amount of water necessary for these ISF appropriations, the Stakeholder Group utilized PHABSIM relationships to evaluate total weighted usable habitat and the relative quality of habitat available for all fish species and life stages.

In formulating its ISF recommendations, the Stakeholder Group incorporated the following specific relationships, analyses and/or considerations:

- Physical habitat – flow relationships primarily for adult trout life stages, which provide a basis to support the recreational fishing ORV, and also for native fish. This information is contained in a report by Miller Ecological Consultants dated February 18, 2011.
- An analysis of potential water availability constraints.
- An emphasis on total habitat availability for adult nonnative brown trout and rainbow trout, which provide the majority of the recreational values identified by the BLM.

- An effort to recommend ISF amounts that would provide adequate habitat for all life stages of native species as well as some consideration of flows necessary to provide habitat for the non-native mountain whitefish.

Based upon the considerations listed above, the recommended ISF amounts were determined to be the minimum flow amounts that will provide habitat for all of the fish species of interest and their life stages in the proposed ISF reaches, thereby protecting the fish-related ORVs identified by the BLM.

Water Availability Studies

In its analysis of the amount of water available for an ISF recommendation, the Stakeholder Group evaluated both historical and future simulated flow conditions at three points of reference along the Upper Colorado River, from Kremmling downstream to Dotsero. The Kremmling gage (09058000) provided the upstream reference point for the Blue River to Piney River Segment; the Kremmling gage plus the Piney gage (09059500) provided a reference point for the Piney River to Cabin Creek Segment; and lastly, the Dotsero gage (0907050) minus the Eagle gage (09070000) provided a downstream reference point for the Cabin Creek to Eagle River Segment. The data sets that were developed for each of these points were statistically analyzed in order to determine the geometric mean value and the upper and lower 95% confidence intervals for each day of the year. The geometric mean analysis is used to characterize the central tendency of flows on a daily basis for the chosen period of record without the distorting effects of rare high magnitude flood events. Because all of the recommended flow amounts fall below the historic geometric mean or within the 95% confidence intervals at all three reference points, CWCB staff concludes that water is available for 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. (*Note: Because the Board declared its intent to appropriate in July, final action is appropriate in September.*)

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).

Public Input on ISF Appropriation

A comment letter from the Eagle River Watershed Council dated August 1, 2011 is attached.



Colorado Water Conservation Board

Instream Flow Tabulation - Streams



Water Division 5

Case Number	Stream	Watershed	County	Upper Terminus	Lower Terminus	Length (miles)	USGS QUADS	Amount(dates) (CFS)	Approp Date
10/5/A-001	Colorado River	Colorado headwaters	Grand Eagle	confl Blue River at lat 40 02 33N long 106 23 53W	confl Piney River at lat 39 51 19N long 106 38 31W	23.70	Kremmling	600 (5/15 - 7/31)	
							McCoy	750 (8/1 - 9/15)	
							Radium	500 (9/16 - 5/14)	
							Sheephorn Mountain State Bridge		
10/5/A-002	Colorado River	Colorado headwaters	Eagle	confl Piney River at lat 39 51 19N long 106 38 31W	confl Cabin Creek at lat 39 52 29N long 106 53 36W	20.80	Blue Hill	650 (5/15 - 7/31)	
							Burns North	800 (8/1 - 9/15)	
							Burns South	525 (9/16 - 5/14)	
							McCoy State Bridge		
10/5/A-003	Colorado River	Colorado headwaters	Eagle	confl Cabin Creek at lat 39 52 29N long 106 53 36W	pt immed u/s of confl Eagle River at lat 39 38 48N long 107 03 30W	25.00	Burns South	900 (5/15 - 6/15)	
							Dotsero	800 (6/16 - 9/15)	
							Sugarloaf Mountain	650 (9/16 - 5/14)	

Totals for Water Division 5	Total # of Stream Miles =	69.5
	Total # of Appropriations =	3
<i>(Totals do not include donated/acquired water rights)</i>		

Report Totals	Total # of Stream Miles =	69.5
	Total # of Appropriations =	3
<i>(Totals do not include donated/acquired water rights)</i>		



Advocates for our rivers

Kathy R. Chandler-Henry, Board President
Susan G. Pollack, Vice President
Phil Frank, Treasurer
Phil Hancock, Ass't. Treasurer
Adam Bybliw, Director
Bill Carlson, Director
Pete Denise, Director
Keith C. Kepler, Director
Dr. Joseph LeBeau, Director
Jessica Mason, Director
Timm E. Paxson, Director
Steve Sarro, Director
Cliff Thompson, Director
Arlene S. Quenon, Emeritus
Josiah Macy, Emeritus
Dr. Thomas Steinberg, Chairman Emeritus
Melissa Macdonald, Executive Director

August 1, 2011

Jeffrey Baessler, Deputy Section Chief
Stream and Lake Protection Section
Colorado Water Conservation Board
1313 Sherman Street, Room 721
Denver, CO 80203

Via email: Jeffrey.baessler@state.co.us

**RE: Comments on proposed ISF filings for Colorado River, CDOW #21262,
19637; CWCB ID: 10/5/A-001, 10//A-002, 10/5/A-003**

On behalf of the board and staff of the Eagle River Watershed Council, we are submitting this letter of support for the proposed Instream Flow for the Colorado River segments noted above, all of which begin or end in Eagle County.

In the Upper Colorado watershed, our economy is directly linked to clean water and protection of water and riparian resources. Although CWCB staff correctly notes that the proposed recommended flows are significantly below the historic geometric mean, the lower 95% confidence level and in some cases the 25th percentile value of daily flows, the management plan provides voluntary measures to provide additional flows during these dry periods by the entities involved in crafting this ISF proposal.

While this is not an ideal scenario for approving a new ISF right, it is at least a starting point for discussion about necessary minimum flows and protection of aquatic habitat of the Colorado River. Paired with further study and new ecologically based restoration initiatives, the ERWC is committed to conserve and enhance the river as it runs through Eagle County.

P.O. Box 7688 Avon, CO 81620 Phone (970) 827-5406
A community supported 501 (c)3 nonprofit organization
www.eagleriverwatershedcouncil.org

We urge the CWCB to take final action and approve the ISF proposal on the Colorado River on these three segments (Confluence with Blue River to Confluence with Piney River; Confluence with Piney River to Confluence with Cabin Creek; and Confluence with Cabin Creek to point immediately upstream of confluence with Eagle River).

Sincerely,

A handwritten signature in black ink that reads "Kathy Chandler-Henry". The script is fluid and cursive, with the first letters of each name being capitalized and prominent.

Kathy Chandler-Henry, President
Eagle River Watershed Council Board