

STATE OF COLORADO

Colorado Water Conservation Board Department of Natural Resources

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TO: Colorado Water Conservation Board Members

FROM: Linda Bassi
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Stream and Lake Protection Section

DATE: January 8, 2013

SUBJECT: **Agenda Item 30, January 28-29, 2013 Board Meeting – Stream and Lake Protection Section – Instream Flow Recommendations in Jackson County**

John W. Hickenlooper
Governor

Mike King
DNR Executive Director

Jennifer L. Gimbel
CWCB Director

Introduction

This memo outlines the history of three Bureau of Land Management (BLM) instream flow recommendations in Jackson County on the North Fork North Platte River, South Fork Big Creek and Wheeler Creek that were initially brought to Staff in February 2005. Since that time, Staff has negotiated with the Jackson County Water Conservancy District (JCWCD) on several different occasions in an attempt to address concerns, but has been unable to devise mutually acceptable language to address those concerns.

Although these recommendations are not currently being pursued by Staff, they remain on the list of active recommendations that Staff may move forward in the future. Based upon discussions with Board member Ty Wattenberg, staff is seeking direction from the Board on next steps regarding these recommendations.

Background

In February 2005, Staff received instream flow (ISF) recommendations from the BLM on Indian Creek, South Fork Big Creek, and North Fork North Platte River, located in Jackson County. In November 2005, Staff provided notice that these streams would be considered for appropriation in January 2006. However, as a result of concerns expressed by JCWCD, Staff did not bring the recommendations forward in January and chose instead to provide additional time for public notice and comment.

In February 2006, CWCB and BLM staff met with the JCWCD board members and others to discuss the proposed recommendations. At that meeting, although generally opposed to the recommendations, JCWCD officials indicated to Staff and the BLM a willingness to consider proposed settlement language. In June 2006, Staff requested that the Attorney General's ("AG") Office evaluate settlement language from previous ISF appropriations in Jackson County that JCWCD and the CWCB negotiated and agreed to in 1979 and 1992. Staff also requested that the

AG develop new language that would protect JCWCD water users' ability to develop water allocated to Colorado by the Nebraska v. Wyoming equitable apportionment decree, while avoiding issues related to selective subordination of ISF water rights. In November 2006, Staff provided JCWCD with draft settlement language for their consideration. This language attempted to address future irrigation uses as contemplated by the equitable apportionment decree while still protecting the proposed ISF recommendations from a general subordination to all new water rights, irrigation or otherwise, that would potentially be developed until such time as JCWCD had fully developed its irrigation rights under that decree. JCWCD reviewed the proposed language and concluded that it did not provide adequate protection. In mid-December, JCWCD contacted Staff and indicated that they had decided against further negotiations and requested that Staff bring the recommendations to the Board at its January 2007 meeting for final consideration. Prior to the Board meeting, Staff received letters from numerous entities and individuals both opposing and supporting the proposed ISF recommendations. As result of the letter writing campaign, BLM requested Staff to delay the recommendations for another year to provide time to collect additional data and further investigate reasonable solutions to issues raised in the letters.

At the January 2007 meeting, Staff provided the Board with a confidential memorandum from Assistant Attorney General Paul Benington addressing the JCWCD settlement language issues. Based upon Staff's recommendation, the Board tabled the recommendations for a period of one year and directed Staff to continue negotiating settlement language with the JCWCD. In March 2007, Staff once again provided notice that the ISF recommendations would be brought to the Board for consideration at its January 2008 meeting. In October 2007, Staff received proposed settlement language from the JCWCD. Staff and the AG's Office concluded that the language would still result in a general subordination of the proposed appropriations to all future uses until such time as Jackson County had fully developed its irrigation rights under the equitable apportionment decree.

In January 2008, CWCB and AG Staff met with JCWCD representatives and their counsel to determine if there was any common ground that could result in a mutually acceptable resolution of the issues. Although no settlement was reached, both parties agreed that the collection and analysis of additional data on irrigation uses in the County could shed light on whether the proposed ISF rights would interfere with the development of future irrigation rights under the equitable apportionment decree. The parties believe that a maximum two-year delay in the appropriations would provide time for the necessary data to be analyzed relative to the ISF recommendations. The Board approved a 2-year delay to allow time for this analysis. In general, the results of the data analysis indicated that the proposed ISFs would reduce the available flow on the subject streams and consequently the additional acreage that could be served under the equitable apportionment decree. However, the model only addressed direct flow irrigation uses and its accuracy was extremely limited by the use of the Northgate gage, which is located over 50 stream miles downstream from the subject reaches. It was concluded that additional local data and further analysis would be necessary. As a result, staff and BLM agreed to install pressure transducers and investigate the installation of more permanent gages so that additional data could be acquired.

In 2009, the State of Colorado's depletion plan within the Platte River Recovery Implementation Program was modified. The new plan utilized a basin depletion approach ("one-bucket" concept) that provides one consumptive use entitlement baseline for the entire basin for all types of uses. As long as the baseline depletions are not exceeded, new uses would be covered under the Program. These changes provided North Platte basin water users more flexibility in

developing water under the Program. Because of the changes, Staff resumed negotiations with Jackson County in an attempt to recognize the basin depletion plan while providing reasonable limits on the amount of new depletions within the baseline to which the ISFs would be subject to within the sub-basins where the recommended ISFs are located. Once again, Staff provided proposed language to the JCWCD. The JCWCD rejected the proposed language, expressing concerns that Staff's proposal would limit their flexibility to develop their depletion allowance under the Program and erode the baseline allowance.

In January 2010, Staff brought the recommendation back to the Board in executive session for further discussion and direction from the Board. Based upon the executive session discussion, it was decided that no immediate action would be taken by staff on these recommendations, and that staff would focus its efforts on other higher priority ISF recommendations. Late last year, Staff engaged in some preliminary discussions with Board member Ty Wattenberg about renewing negotiations on the pending ISF recommendations. As a result of those discussions, Staff has compiled this background information for the Board to enable it to discuss and give Staff direction on these ISF recommendations.