

# STATE OF COLORADO

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## Colorado Water Conservation Board

### Department of Natural Resources

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TO: Colorado Water Conservation Board Members

FROM: Linda J. Bassi, Chief  
Kaylea White  
Stream and Lake Protection Section

DATE: March 5, 2014

SUBJECT: **Agenda Item 18, March 18-19, 2014 Board Meeting**  
**Stream and Lake Protection Section – Deferral of**  
**Consideration of Request to Inundate – Case No. 2-04CW130 -**  
**Application of Board of Water Works of Pueblo**

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John W. Hickenlooper  
Governor

Mike King  
DNR Executive Director

James Eklund  
CWCB Director

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### Introduction

This agenda item addresses a proposed pretrial resolution under ISF Rule 7, Inundation of ISF Rights (“Inundation”). The Board of Water Works of Pueblo (“Pueblo”), has requested that the Board defer its consideration on Pueblo’s request to inundate CWCB’s instream flow water right on Clear Creek, tributary to the Arkansas River. At this time, Pueblo desires to move ahead with its water court decree for a conditional water right to enlarge Clear Creek Reservoir. Pueblo has agreed to include a term and condition in its decree that it shall request the Board’s consideration of its request to inundate after applying for the required state and federal permits and approvals and prior to diverting the enlargement water right.

This memo addresses the deferral request with a general description of the potential extent of inundation. A general map is attached as Appendix A and Applicant’s request for deferral is attached as Appendix B.

### Staff Recommendation

Staff recommends that the Board:

- Defer consideration of the request to inundate until after Pueblo has applied for the required state and federal permits and approvals and before it diverts the enlargement water right, so long as,
- Pueblo agrees to terms and conditions in its water court decree requiring Pueblo to request the Board’s approval of its inundation request after it has applied for the required state and federal permits and approvals and to obtain such Board approval before it diverts the enlargement water right.

## Case Background

Pueblo submitted an application for a conditional water storage right in Case No. 2-04CW130, seeking an 18,561 acre-foot enlargement in Clear Creek Reservoir, an existing on-channel reservoir on Clear Creek, tributary to the Arkansas River, with an appropriation date of September 19, 2000. If decreed, this conditional water storage right will be junior to the instream flow water right (“ISF”) on Clear Creek and may inundate approximately 0.9 miles of the ISF. Proposed uses of the stored water are generally, all beneficial uses of Pueblo’s municipal water supply and distribution system with a right to fill and refill, recapture and reuse.

In March 2005, the Board ratified the statement of opposition to this application partially because the inundation could injure the Board’s ISF water right set forth below. CWCB became a party in this case with the intent of negotiating terms and conditions to fully protect the Board’s ISF water right.

The Board holds the following ISF water right that could be injured by this application:

<b>CWCB Case No.</b>	<b>Stream/Lake</b>	<b>Amount (cfs)</b>	<b>Approp. Date</b>	<b>Watershed</b>	<b>County</b>
W4668 (1977)	Clear Creek	20	11/15/77	Arkansas Headwaters	Chaffee

See map attached as Appendix A. The Clear Creek ISF water right decreed in W4668 (1977) that may be partially inundated by the Clear Creek Reservoir expansion extends from the confluence with Waverly Gulch to the confluence with Clear Creek Reservoir, approximately 12 miles northwest of Buena Vista, Colorado. Staff will continue negotiations in this case to insure that the ISF water right on Clear Creek will be 100% protected with terms and conditions in the decree.

## Discussion

ISF Rule 7g. allows the Board several options regarding a request to inundate an ISF water right: to approve, approve with conditions, defer, or deny the request to inundate. Rule 7j. allows the Board to defer, as follows:

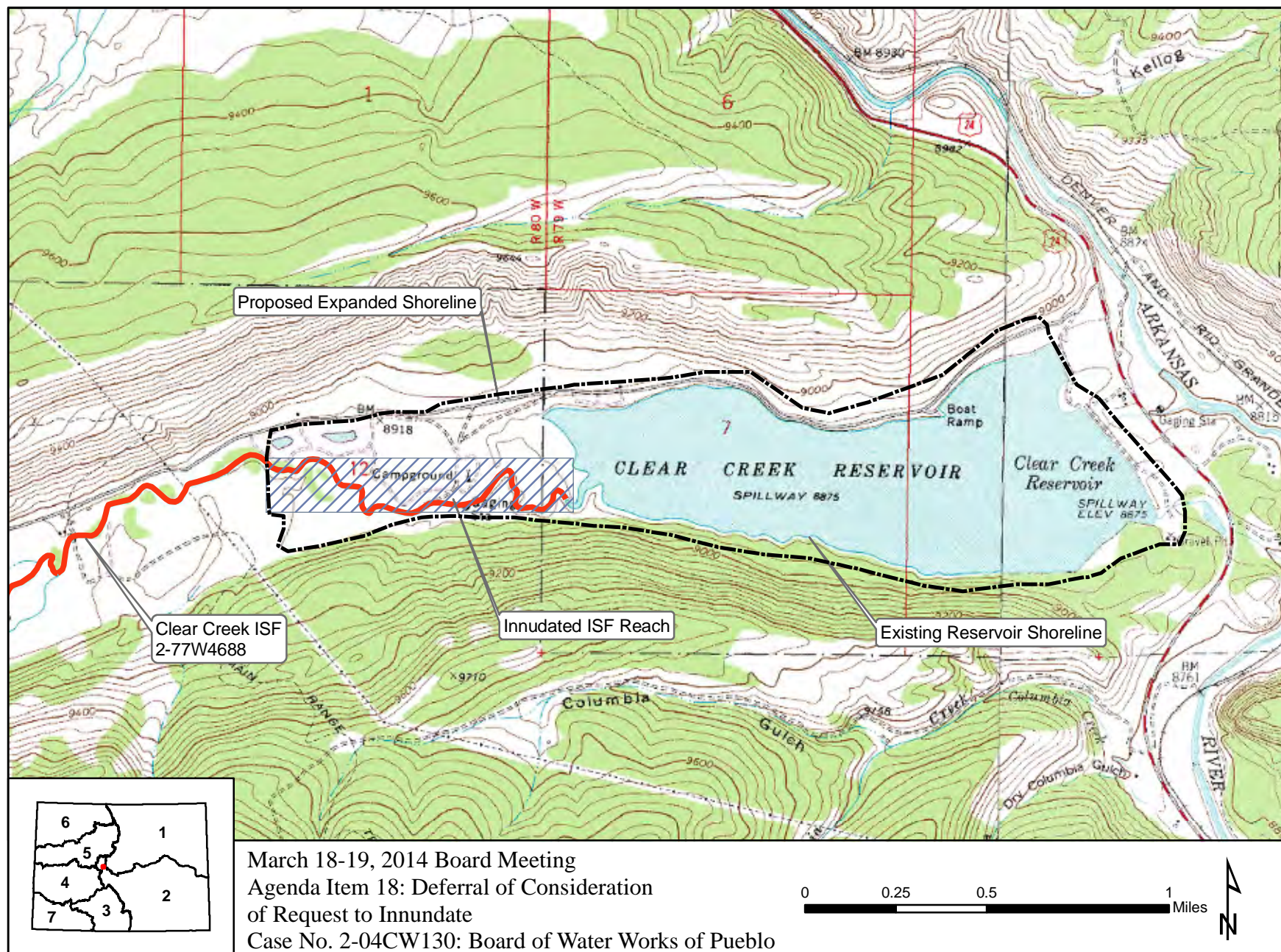
When it appears that other governmental agencies may impose terms and conditions upon the issuance of a permit to construct a facility which will cause an inundation, the Board may defer consideration of the request to inundate until all other governmental bodies have finalized the permit or approval conditions.

Pueblo requests that the Board defer its consideration and has agreed to including terms and conditions in its decree that it shall request the Board’s consideration of its request to inundate after applying for the required state and federal permits and approvals and prior to diverting the enlargement water right. CWCB and Colorado Parks and Wildlife (“CPW”) staff agree that the appropriate course of action is to defer the request at this time.

## Attachments

Appendix A: Map

Appendix B: Applicant’s Request to Defer its Request to Inundate





**CARLSON, HAMMOND & PADDOCK, L.L.C.**  
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March 4, 2014

Ms. Kaylea White  
Stream and Lake Protection  
Colorado Water Conservation Board  
Department of Natural Resources  
1313 Sherman Street, Room 721  
Denver, CO 80203

Re: Case No. 04CW130 – Request to Inundate Instream Flow Right on Clear Creek  
(ISF Decree Case No. W-4668-1977)

Dear Ms. White:

This letter constitutes the Board of Water Works of Pueblo, Colorado's request to the Colorado Water Conservation Board ("CWCB") that it defer its review and decision on the Board's May 17, 2013, application for inundation of a portion of an instream flow water right until such time as the Board has applied for the required state and federal permits and is in the process of preparing mitigation plans pursuant to those permit applications.

On May 17, 2013, the Board of Water Works of Pueblo, Colorado ("the Board") requested approval to partially inundate an existing decreed instream flow water right pursuant to Section 7 of the CWCB's Rules and Regulations. The instream flow right held by the CWCB was decreed in Case No. W-4668, Water Division No. 2, for a 20 c.f.s. instream flow water right extending upstream of Clear Creek Reservoir for five miles on Clear Creek in Water Division No. 2. The Board has applied for an enlargement to Clear Creek Reservoir to 30,000 acre-feet and, as a result of such enlargement, approximately 0.9 miles of the 5 mile instream flow right will be inundated.

Pursuant to CWCB's Instream Flow Rule 7j, CWCB "may defer consideration of the request to inundate until all other governmental bodies have finalized the permit or approval conditions." Permit approvals typically include mitigation plans developed in coordination with Colorado Parks and Wildlife under C.R.S. § 37-60-122.2. Ordinarily, Colorado Parks and Wildlife does not consider or complete plans for mitigation under C.R.S. §37-60-122.2 until after a qualifying project has applied for the required state and federal permits and begun the mitigation planning process. In this instance, the Board is seeking to receive a final decree for the proposed enlargement in Clear Creek Reservoir in Case No. 04CW130 prior to completing the permit applications for the enlargement. After several discussions with representatives from the CWCB, Colorado Parks and Wildlife, and the Attorney General's Office, the Board and the

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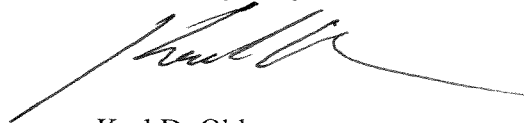
CWCB Staff agree that it is appropriate for the Board to request a deferral under Instream Flow Rule 7j of the CWCB's review of the request for inundation at this time.

The Board asserts that a decision to defer final determination of the application to inundate an instream flow at this time will allow the Board to proceed forward in negotiation of a stipulation with the CWCB to a proposed decree contemplating such a deferral in Case No. 04CW130, and subsequently receive a final decree in that matter. The Board then intends to apply for the required state and federal permits and at such time will set a schedule with the CWCB Staff for review and final determination on the application to inundate a portion of the instream flow water right.

After a decision has been made on the request to defer, the Board will continue to work with CWCB Staff to resolve the CWCB's remaining questions and concerns regarding the proposed decree in this matter, and the Board will be able to present to CWCB Staff a final proposed decree for the CWCB's approval.

Thank you for your time and consideration in this matter. I will be present at the March 2014 CWCB Board Meeting along with a representative from the Board, should you have any questions or concerns about this letter or the underlying matter. I look forward to meeting with you then.

Yours very truly,

A handwritten signature in black ink, appearing to read 'Karl D. Ohlsen', with a long horizontal flourish extending to the right.

Karl D. Ohlsen