



COLORADO

**Colorado Water
Conservation Board**

Department of Natural Resources

1313 Sherman Street, Room 718
Denver, CO 80203

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Jared Polis, Governor

Dan Gibbs, DNR Executive Director

Rebecca Mitchell, CWCB Director

TO: Colorado Water Conservation Board Members

FROM: Robert Viehl, Chief
Stream and Lake Protection Section

DATE: November 17, 2021

AGENDA ITEM: 25. Ouray County BOCC Request to Delay Filing of ISF Water Court Application on Cow Creek (Water Division 4)

Staff Recommendation

Staff recommends that the Board consider Ouray County BOCC's request to delay filing of the CWCB's water court application on the Cow Creek Instream Flow (ISF) for six months.

Background

The CWCB took final action on the uncontested ISF recommendation on Cow Creek at its July 2021 meeting. As part of this action staff was directed to work with the Attorney General's Office to file a water court application by the end of the calendar year. On July 27th, the Ouray County Board of County Commissioners sent a letter to staff requesting that we postpone any efforts towards filing an ISF application on Cow Creek to allow further discussion between CWCB, CPW, and the co-applicants in water court case 19CW3098.

Staff subsequently met with the co-applicants in October to discuss resolution of their active water court case and their concerns about the CWCB filing its water court application for the Cow Creek ISF. Staff informed the co-applicants that staff did not have discretion to delay filing the Cow Creek ISF application and that the Board would need to give staff a new directive at its November 2021 meeting in order for this to occur. Shortly after the meeting, the County sent a letter to Staff formally requesting a six-month delay by the CWCB filing its ISF water court application for Cow Creek.

Staff has been working cooperatively with the co-applicants in case 19CW3098 for several years and we have shared common goals in the protection of flows in Cow Creek. It is also staff's belief that an ISF appropriation on Cow Creek and the Ramshorn Reservoir and pipeline project can be complimentary to each other and provide multiple benefits.

Attachment A: July 27, 2021 Letter from Ouray County Requesting Postponement of ISF Application on Cow Creek



Attachment B: October 26, 2021 Letter from Ouray County Requesting a Six-Month Delay in Filing an ISF Application on Cow Creek

Attachment C: November 3, 2021 Response Letter From CWCB Staff



Carol A. Viner
County Attorney

P O Box C, Ouray, Co 81427 • Phone 970-325-4961 • Fax 970-325-4000

County Attorney's Phone 970-208-9418

July 27, 2021

via electronic mail and U.S.P.S.

Mr. Rob Viehl
1313 Sherman St., Room 718
Denver, CO 80203

Re: Ouray County et al Water Right Application; 19CW3098
Request to Postpone an Instream Flow (ISF) Application on Cow Creek

Dear Rob:

We last spoke concerning the above application in February of this year. You presented a proposal to my clients for a new junior ISF on COW Creek in December 2020. The board make-up has since changed. I write to provide you an update on behalf of all co-applicants and make a request on behalf of my client.

My client shares CWCB and CPW's values and mission to conserve and protect Cow Creek for now and the future. They believe conservation measures are necessary for Cow Creek and hope this may be achieved within their application. My client respectfully requests that that you postpone any efforts towards an ISF application on Cow Creek to allow further discussions between CWCB, CPW and co-applicants.

Co-Applicants hope to schedule another meeting in September with you to discuss some developments towards achieving mitigation of injury to instream flows in Cow Creek and reducing the complexity of the exchanges.

Thank you for your consideration of this request.

A handwritten signature in blue ink that reads "Carol A. Viner".

Carol A. Viner

Cc: Client



Carol A. Viner
County Attorney

P O Box C, Ouray, Co 81427 • Phone 970-325-4961 • Fax 970-325-4000
County Attorney's Phone 970-208-9418

October 26, 2021

via electronic mail

Mr. Rob Veihl
1313 Sherman St., Room 718
Denver, CO 80203

Re: Ouray County et al Water Right Application; 19CW3098
Request to Postpone an Instream Flow (ISF) Application on Cow Creek for six months

Dear Rob:

We request that you place our request for a six-month postponement on filing a new junior instream flow on Cow Creek on the agenda for the November 16th CWBC Board meeting. A delay in your filing will allow us to resolve the issues raised in your opposition to our case. We are working toward a specific proposal to offer, but based on our discussions and current hydrological evaluations, we think we are going to be able to meet most, if not all, of the CWCB requests.

On December 15, 2020, you presented plans for a new proposed junior instream flow water right to my client. At that time, the board requested that you hold off on filing any new junior water right and work towards solutions in Ouray County's case first.

On July 28, 2021, my client, who had two new board members, again requested in writing attached here, that you hold off on filing your case this year and work with us on resolving your opposition to Ouray County's case first.

We respectfully request to address the board at the meeting regarding our request to delay because (1) CWCB will not be injured by the delay since the water is already appropriated, (2) if you file in December it will mean we must oppose your case which will complicate not only your case, but ours, (3) we have shared common goals in protecting Cow Creek, (4) new people will oppose your case making it more difficult for us to finish our case, and (5) we have been working cooperatively for some time and if the CWCB moves forward with its filing it will give an appearance that we are not continuing to strive for a collaborative relationship.

Sincerely,

A handwritten signature in blue ink that reads "Carol A. Viner".

Carol A. Viner

Cc: Client
Encl.



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1313 Sherman Street, Room 718
Denver, CO 80203

Attachment C
Agenda Item # 25

November 3, 2021

Carol A. Viner
Masters & Viner, P.C.
152 Colorado Ave
Montrose, CO 81401
cviner@cvinerlaw.com

RE: Response to Ouray County et al Water Right Application, Case No. 19CW3098,
Request to Postpone an Instream Flow (ISF) Application on Cow Creek for six months

Dear Carol,

We are in receipt of your letter dated October 26, 2021 on behalf of Ouray County requesting that CWCB delay filing an application in water court for an instream flow water right on Cow Creek for six months. Since the Board has already taken final action on the appropriation of this water right, the request must be considered by the Directors of the CWCB. Staff added this request for the delay on the agenda for the CWCB's November meeting. Currently this item is scheduled to take place from 3:45-4:30 PM on Thursday, November 18, 2021. I will contact you if the agenda is modified and the timing of this item is changed.

Your letter indicates that on December 15, 2020, during the CWCB and CPW presentation about the Cow Creek ISF, the County requested that CWCB Staff hold off on filing any new junior water right and work towards solutions with Ouray County's case first. We do not recall a specific direction from the Commissioners to delay filing an ISF on Cow Creek, and the meeting minutes do not reflect such a request. We do recall receiving input from the Commissioners at that time to continue to work with the County and to come up with solutions for Cow Creek. We requested the February 5th 2021 meeting in an effort to continue to work together and collaborate on solutions that provide flow protection for Cow Creek while allowing the pipeline and reservoir project to be decreed. At this meeting, staff stated its intention to bring Cow Creek to the CWCB Board in March of 2021 and there was discussion of the Board process.

We did receive your letter dated July 28, 2021, in which Ouray County requested that CWCB staff postpone any efforts towards an ISF application on Cow Creek to allow further discussions between CWCB, CPW and co-applicants. We honored this request, worked to schedule the meeting, and met with you and other applicants in the 19CW3038 case in an effort to better understand your concerns.



Your October 26, 2021 letter states that the CWCB will not be injured by the delay since the water is already appropriated. While the CWCB has already appropriated the water right, the more important date for a water right is the priority date, and the CWCB would lose the 2021 priority date by waiting six months.

It is also stated in the letter that if CWCB files in December, it will mean Ouray County must oppose the case which will complicate not only the CWCB's case but also Ouray County's case. We do not feel that Ouray County filing as a party to the instream flow case will complicate either case. Ouray County could file a statement of opposition in support of the CWCB's application and request terms and conditions be included in the CWCB's decree to protect Ouray County's water rights. Alternatively, as we mentioned during our October 15, 2021 meeting, and described in a draft "letter-in-lieu" of filing an opposition agreement that we sent to you on October 26, 2021, the CWCB could commit to moving for a stay in its case for six months while the applicants in Case No. 19CW3098 work to get a decree entered.

We also note that for CWCB's instream flow appropriations, the CWCB has a very clear and specific administrative procedure, codified in statutes and rules that provides details and timelines for notice and opportunity to comment, as well as timelines for making hearing requests. Any entity had the opportunity to state concerns with the Cow Creek appropriation and filing of the water right at the CWCB's March, May and July, 2021 meetings, when the appropriation was noticed to be before the Board. This request by Ouray County is outside of the set administrative process for the appropriation and filing on instream flow water rights.

With all of that said we remain committed to working together with the County as we have done over the past few years, and look forward to continuing our efforts to find the best solution for Cow Creek. We believe that an ISF appropriation and the Ramshorn Reservoir and Pipeline Project can be complimentary to each other and provide multiple benefits.

Regards,



Robert Viehl
Chief, Stream and Lake Protection Section