



COLORADO

Colorado Water Conservation Board

Department of Natural Resources

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TO: Colorado Water Conservation Board Members

FROM: Robert Viehl, Chief
Brandy Logan, Water Resource Specialist
Stream and Lake Protection Section

DATE: May 17, 2023

AGENDA ITEM: 22 b. Public Comment and Conditional Approval of Terms and Conditions for ISF Water Rights in Water Division 4 on Cottonwood Creek, Monitor Creek, and Potter Creek (Montrose, & Delta Counties)

Staff Recommendation

Staff requests the Board:

- 1) Conditionally approve the Stipulation and Agreement (Stipulation) between the Colorado River Water Conservation District (River District) and the Colorado Water Conservation Board (CWCB), included here as “Attachment A” for the Cottonwood Creek, Monitor Creek, and Potter Creek instream flow (ISF) appropriations. The terms and conditions for the proposed ISF water rights set forth in the Stipulation and Agreement will be included in the final action for these appropriations at the July 2023 CWCB meeting if these ISF water rights remain uncontested.

- 2) Authorize the Director of the CWCB to sign the aforementioned Stipulation and Agreement on behalf of the Board.

Background

On April 24, 2023, the CWCB formed its intent to appropriate increases to the existing ISF water rights on Cottonwood Creek (Cottonwood Creek ISF) and Potter Creek (Upper Potter Creek ISF and Lower Potter Creek ISF), and an increase to the pending ISF on Monitor Creek (Monitor Creek ISF), as follows:

Stream	Watershed	County	Length (miles)	Upper Terminus	Lower Terminus
Cottonwood Creek (Increase)	Lower Gunnison	Delta, Montrose	23.3	Hawkins Ditch headgate	confluence Roubideau Creek
					ISF protection initiates at 183 cfs and protects all unappropriated streamflow until flow rates recede to the existing 3.6 cfs ISF rate or 9/30, whichever occurs first.



Stream	Watershed	County	Length (miles)	Upper Terminus	Lower Terminus
Monitor Creek <i>(Increase)</i>	Lower Gunnison	Montrose	8.29	confluence Little Monitor Creek	confluence Potter Creek
	ISF protection initiates at 111 cfs and protects all unappropriated streamflow until flow rates recede to the pending ISF of 4.6 cfs (4/1 - 5/31), 3.6 cfs (6/1 - 6/30) or 3.6 cfs if outside of these times or 9/30, whichever occurs first.				
Potter Creek <i>(Increase)</i>	Lower Gunnison	Montrose	8.10	USFS property boundary	confluence Monitor Creek
	ISF protection initiates at 177 cfs and protects all unappropriated streamflow until flow rates recede to the existing ISF of 4 cfs (4/1 - 6/15), 1.8 cfs (6/16 - 7/31), 1.4 cfs (8/1 - 2/29), or until 9/30, whichever occurs first.				
Potter Creek <i>(Increase)</i>	Lower Gunnison	Montrose	1.72	confluence Monitor Creek	confluence Roubideau Creek
	ISF protection initiates at 225 cfs and protects all unappropriated streamflow until flow rates recede to the existing ISF of 4 cfs (4/1 - 6/15), 1.8 cfs (6/16 - 7/31), 1.4 cfs (8/1 - 2/29), or until 9/30, whichever occurs first.				

CWCB staff has been working with River District staff on ISF recommendations for riparian vegetation on Cottonwood, Monitor, and Potter Creeks for the past several years. During these discussions, River District staff expressed concerns that when the proposed riparian ISFs are in effect, the appropriations function as water rights of all unappropriated flows. River District staff proposed that a water development allowance (WDA) be created and made a part of the proposed appropriations to protect the ability of future water users to appropriate and use water in these systems when the riparian ISFs are active. The WDA identified reasonable water uses that may occur within the study area in the future. Staff for the CWCB and for the River District further developed a Stipulation and Agreement with specific terms and conditions to include in future CWCB administrative actions, water court applications, and water court decrees affecting the proposed riparian ISFs. Those proposed terms and conditions describe how the WDA will operate and what administrative/water court actions would be acceptable to CWCB without objection. One of the underlying assumptions of the WDA is that currently decreed water rights within these basins may eventually need to change the points of diversion or the places of use to allow for additional future irrigation under the existing water rights. Thus, the proposed terms and conditions, as set forth in Attachment A, clarify the parameters for when these decreed water rights could be changed in future water court proceedings without opposition from the CWCB.

Attachment A. Draft Stipulation and Agreement between the Colorado Water Conservation Board and the Colorado River Water Conservation District.

**BEFORE THE COLORADO WATER CONSERVATION BOARD
STATE OF COLORADO**

**IN THE MATTER OF PROPOSED INSTREAM FLOW APPROPRIATIONS IN WATER
DIVISION NO. 4:**

**COTTONWOOD CREEK, MONITOR CREEK, AND POTTER CREEK,
(Increases)**

MONTROSE AND DELTA COUNTIES, COLORADO.

**STIPULATION AND AGREEMENT BETWEEN THE COLORADO WATER
CONSERVATION BOARD AND THE COLORADO RIVER WATER CONSERVATION
DISTRICT**

The Colorado Water Conservation Board (“CWCB”) and the Colorado River Water Conservation District (“River District”) hereby stipulate and agree as follows:

1. Staff of the CWCB recommended increases to the instream flow water right appropriations for Cottonwood Creek (“Cottonwood Creek ISF”), Monitor Creek (“Monitor Creek ISF”), and Potter Creek (“Upper Potter Creek ISF” and “Lower Potter Creek ISF”)¹ as follows:

A. The proposed Cottonwood Creek ISF represents an increase to the existing instream flow water right on Cottonwood Creek as decreed in Case No. 06CW166, Water Division No. 4, in the amount of 3.6 c.f.s. (4/1 – 6/15) with an upper terminus located at the Hawkins Ditch headgate at UTM North: 4267895.51, UTM East: 206860.73 and with a lower terminus at the confluence with Roubideau Creek at UTM North: 4289842.88, UTM East: 226016.62. The proposed increase in the Cottonwood Creek ISF would result in additional instream flow protection initiating at 183 c.f.s. to protect all unappropriated streamflow until flow rates recede to the existing 3.6 c.f.s. instream flow water right. The flow protection will only be in effect from 4/1 to 9/30 if the 183 c.f.s. threshold amount is reached. Flows will be protected as they recede to a 3.6 c.f.s. flow rate or until 9/30, whichever occurs first.

B. The proposed Monitor Creek ISF represents an increase to the pending² instream flow water right on Monitor Creek in Water Division No. 4, in the amount of 4.6 c.f.s. (4/1 – 5/31), and 3.6 c.f.s. (6/1 – 6/30), with an upper terminus located at the

¹ For purposes of this Stipulation and Agreement, the Upper Potter Creek ISF and Lower Potter Creek ISF may be collectively referred to as the “Potter Creek ISF”.

² The CWCB formed its intent to appropriate the initial Monitor Creek ISF at its regular meeting held on January 24, 2023. Final action by the CWCB with respect to the initial Monitor Creek ISF shall not occur until the CWCB's May 2023 meeting, at the earliest.

confluence with Little Monitor Creek at UTM North: 4270075.83, UTM East: 212258.00 and with a lower terminus at the Potter Creek confluence at UTM North: 4279535.32, UTM East: 220671.03. The proposed increase in the pending Monitor Creek ISF would result in additional instream flow protection initiating at 111 c.f.s. to protect all unappropriated streamflow until flow rates recede to the pending instream flow water right of 4.6 c.f.s. (4/1 – 5/31), 3.6 c.f.s. (6/1 – 6/30), and 3.6 c.f.s. (7/1 – 9/30). The flow protection will only be in effect from 4/1 to 9/30 if the 111 c.f.s. threshold amount is reached. Flows will be protected as they recede to the pending ISF rates and to a 3.6 c.f.s. flow rate from 7/1 to 9/30 or until 9/30, whichever occurs first.

C. The proposed Upper Potter Creek ISF represents an increase to the existing instream flow water right on Potter Creek as decreed in Case No. 04CW161, Water Division No. 4, in the amount of 4 c.f.s. (4/1 – 6/15), 1.8 c.f.s. (6/16 – 7/31), 1.4 c.f.s. (8/1 – 2/29), and 1.8 c.f.s. (3/1 – 3/31), with an upper terminus located in the vicinity of the United States Forest Service boundary at UTM North: 4269972.26, UTM East: 216078.92 and with a lower terminus located at the confluence with Monitor Creek at UTM North: 4279535.32, UTM East: 220671.03. The proposed increase in the Upper Potter Creek ISF would result in additional instream flow protection initiating at 177 c.f.s. to protect all unappropriated streamflow until flow rates recede to the existing instream flow water right or until 9/30, whichever occurs first. The proposed Upper Potter Creek ISF would only be in effect from 4/1 to 9/30.

D. The proposed Lower Potter Creek ISF represents an increase to the existing instream flow water right on Potter Creek as decreed in Case No. 04CW161, Water Division No. 4, in the amount of 4 c.f.s. (4/1 – 6/15), 1.8 c.f.s. (6/16 – 7/31), 1.4 c.f.s. (8/1 – 2/29), and 1.8 c.f.s. (3/1 – 3/31), with an upper terminus located at the confluence with Monitor Creek at UTM North: 4279535.32, UTM East: 220671.03, and with a lower terminus located at the confluence with Roubideau Creek at UTM North: 4281496.83, UTM East: 221904.86. The proposed increase in the Lower Potter Creek ISF would result in additional instream flow protection initiating at 225 c.f.s. to protect all unappropriated streamflow until flow rates recede to the existing instream flow water rights or until 9/30, whichever occurs first. The proposed Lower Potter Creek ISF would only be in effect from 4/1 to 9/30.

2. Subject to the terms and conditions of this Stipulation and Agreement, the River District supports the increases to the Cottonwood, Monitor, and Potter Creek ISF appropriations as set forth in paragraph 1 above.

3. The CWCB conditionally approves the following terms and conditions³ for inclusion in the appropriations for each of the proposed increases to the decreed and pending

³ The specific terms and conditions set forth in subparagraphs 3.A through 3.I shall be included in the appropriations for each of the proposed instream flow water rights, in the applications to be filed with the Water Court to adjudicate the Cottonwood, Monitor, and Potter Creek ISFs, and in any decrees to be entered by the Water Court in and for Water Division No. 4 for the aforementioned instream flow water rights. Individual appropriations, water court applications, and water court decrees will be necessary for each of the three proposed instream flow water rights described in this Stipulation and Agreement, As such, the parties hereto acknowledge that placeholders have been incorporated where necessary (e.g., “[XXXX]” to represent currently undefined case numbers, paragraphs, etc.), and

instream flow water rights described herein, in any applications filed with the Water Court to adjudicate the Cottonwood, Monitor, and Potter Creek ISFs, and in any decrees to be entered by the Water Court in and for Water Division No. 4 for the aforementioned instream flow water rights in the event the CWCB takes final action to move forward with adjudication of the water rights at its July 2023 meeting:

A. The CWCB is provided with the authority to adopt conditions attached to an appropriation and to enter into stipulations for decrees or other forms of contractual agreements that the CWCB determines will preserve the natural environment to a reasonable degree. § 37-92-102(4)(a), C.R.S.

B. The CWCB determines that the instream flow water right appropriated by the CWCB and claimed in this Case No. [XXXXX] shall be subject to the terms and conditions identified in paragraphs [XXXX, below], and further determines that the inclusion of such terms and conditions as a component of the claimed instream flow water right will preserve the natural environment to a reasonable degree.

C. This instream flow appropriation is unique in that it is the result of a consensus of various stakeholders with diverse interests, that the appropriation seeks to protect a range of flows between base and peak flows that were determined important to maintain the unique and rare riparian habitat, and that the appropriation was designed in part, and is intended in part, to be an alternative for protecting resources identified by the Bureau of Land Management and the United States Forest Service to be of "outstanding remarkable value" in lieu of a formal designation of the subject stream segment by the United States Congress pursuant to the Wild and Scenic Rivers Act. The terms and conditions of this agreement, below, 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.

D. Pursuant to section 37-92-102(3)(b), C.R.S., 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 whether or not previously confirmed by court order or decree.

E. The CWCB agrees that the instream flow appropriation in this Case No. XXXX shall be subject to a future water development allowance of [AF/CFS] and that water rights decreed subsequent to the priority date of the instream flow that are within the applicable volume or flow rate of the development allowance do not result in injury or adverse impact to the instream flow. New water uses that fall within the development allowance provided in this paragraph [XXXX], shall not be subject to curtailment by a water rights priority call placed by the instream flow water right decreed herein. The CWCB shall install and maintain suitable and proper measuring devices and keep such

the parties further acknowledge and agree that the terms and conditions contained in paragraph 3 hereto will be subsequently modified as needed to include specific information relative to each of the specific instream flow water rights.

records as the Division Engineer may require for administration of the instream flow water right decreed herein.

F. Any decree for this instream flow water right must indicate that the State Engineer finds the decree administrable.

G. In addition to the water development allowance provided for in paragraph [XXXX], above, the CWCB agrees not to file a statement of opposition to applications for water rights filed after XXXX, 2023 that: (1) are for changes of existing senior water rights in the XXXX Creek basin for a change in point of diversion so long as there is no change in the type of use, and provided that the diversion and use of the changed senior water right continues to occur within the XXXX Creek basin as originally decreed; or (2) are for new junior water rights with decreed diversion amounts that do not result in an exceedance of the future water development allowance of [XXXX AF/CFS] within the subject instream flow basin. This paragraph [XXXX] applies only to water court applications for water rights and does not preclude the Board from enforcing its instream appropriation in accordance with the priority system against such water rights, provided, however, that new water rights decreed subsequent to the priority date of the instream flow that fall within the development allowance set forth in paragraph [XXXX], above, shall not be subject to curtailment by a water rights priority call placed by the instream flow water right decreed herein.

H. It is the intent of the CWCB that the instream flow water right decreed herein provide protection of the natural environment only to the extent authorized by state statute against adjudications of water rights made after the date of this filing. The CWCB intends that the instream flow water right decreed herein is not intended to be used as a stream flow standard in other administrative or regulatory permitting contexts.

I. The findings of fact, conclusions of law and decree in this matter were completed as a result of substantial discussions, negotiations, and compromises by, between and among the CWCB and stakeholders pertaining to all parts of the findings, conclusions and decree. It is specifically understood and agreed by the parties hereto, and found and concluded by the Court, that the acquiescence of the parties to a stipulated decree under the specific factual and legal circumstances of this matter and upon the numerous and interrelated compromises reached by the parties shall never give rise to any argument, claim, defense or theory of acquiescence, waiver, bar, merger, stare decisis, res judicata, estoppel, laches, or otherwise, nor to any administrative or judicial practice or precedent, by or against any of the parties hereto in any other matter, case or dispute, nor shall testimony concerning such acquiescence of any party to a stipulated decree herein be allowed in any other matter, case or dispute. All parties stipulate and agree that they do not intend the findings, conclusions, and decree to have the effect of precedent or preclusion on any factual or legal issue in any other matter. The parties further stipulate and agree that they each reserve the right to propose or to challenge any legal or factual position in any other matter filed in this or any other court without limitation by these Findings, Conclusions and Decree.

4. The parties acknowledge and agree that the CWCB's conditional approval of the terms and conditions set forth in subparagraphs 3.A through 3.I of this Stipulation and Agreement shall not be construed as a predisposition by the CWCB in favor of the appropriations for the Cottonwood, Monitor, and Potter ISFs. Final action by the CWCB with respect to those appropriations shall not occur until the CWCB's July 2023 meeting, at the earliest. The parties further acknowledge and agree that should the CWCB take formal action to approve this Stipulation and Agreement at the CWCB meeting to be held in May 2023, such approval by the CWCB shall be expressly conditioned upon the CWCB taking final action to approve the appropriations and authorize the filing of applications for the Cottonwood, Monitor, and Potter Creek ISFs at the CWCB meeting to be held in July 2023. If the CWCB approves this Stipulation and Agreement at the meeting to be held in May 2023, but at the July 2023 meeting the CWCB Board declines to direct staff to work with the Attorney General's Office to file water court applications for the subject instream flow appropriations, this Stipulation and Agreement shall be null and void.

5. In consideration of the mutual promises contained herein, the River District agrees that upon the CWCB's conditional approval of the terms and conditions set forth in subparagraphs 3.A through 3.I, above, which approval is conditioned on the CWCB taking final action on any uncontested appropriations at the CWCB's meeting to be held on July 19 and July 20, 2023 as set forth in paragraph 4 above, the River District shall not oppose or contest appropriation of the Cottonwood, Monitor, or Potter Creek ISFs in the administrative proceedings, provided, however, that the River District reserves the right to participate as a Party in any administrative proceeding in the event a notice to contest is filed by another party solely to defend the terms and conditions described herein. Furthermore, the River District shall not oppose the aforementioned instream flow water rights in any water court proceeding to adjudicate any of the proposed instream flow water rights described in paragraph 1 above and consistent herewith, provided, however, that the River District reserves the right to file a statement of opposition in any such water court adjudication to ensure that the CWCB remains in compliance with the terms and conditions agreed upon by the parties in this Stipulation and Agreement.

6. The CWCB Staff shall provide counsel for the River District copies of the following for the purposes of ensuring consistency with the terms and conditions of this Stipulation and Agreement: (a) the CWCB's proposed applications to the Water Court to adjudicate the Cottonwood, Monitor, and Potter Creek ISFs before those applications are filed; and (b) the final versions of any proposed rulings and decrees before they are filed with the Water Court.

7. If, at the CWCB meeting to be held in July 2023, the CWCB ultimately declines to take final action to file water court applications for the appropriations for the instream flow water rights identified herein, assuming such appropriations are uncontested, then: (a) this Stipulation and Agreement is void and the River District may late file a Notice to Contest; (b) the CWCB and the River District (including any other parties, as the case may be) will proceed to coordinate with the Hearing Officer to schedule the deadline for prehearing statements and rebuttal statements, and schedule the prehearing conference; and (c) neither the CWCB nor the River District will have waived any rights, claims or defenses as a result of this Stipulation and Agreement.

8. This Stipulation and Agreement shall be binding upon and inure to the benefit of the parties and their successors and assigns and shall be enforceable.

9. The parties shall each bear their own costs and attorneys' fees associated with this matter.

10. This Stipulation and Agreement may be executed in counterparts, each of which shall be deemed to be an original, but all of which, taken together, shall constitute one and the same agreement.

[signature blocks follow on next page]

Stipulated and agreed to this ___ day of May, 2023.

THE COLORADO WATER
CONSERVATION BOARD

THE COLORADO RIVER WATER
CONSERVATION DISTRICT

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