

# STATE OF COLORADO

## Colorado Water Conservation Board Department of Natural Resources

1313 Sherman Street, Room 721  
Denver, Colorado 80203  
Phone: (303) 866-3441  
Fax: (303) 866-4474  
www.cwcb.state.co.us



TO: Colorado Water Conservation Board Members

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

DATE: January 20, 2009

SUBJECT: **Agenda Item 13, January 27-28, 2009 Board Meeting  
Stream and Lake Protection – Instream Flow Rulemaking Hearing**

Bill Ritter, Jr.  
Governor

Harris D. Sherman  
DNR Executive Director

Jennifer L. Gimbel  
CWCB Director

Dan McAuliffe  
CWCB Deputy Director

### Introduction

This agenda item is a formal rulemaking hearing to be conducted according to section 24-4-103, C.R.S. (2008) ("State Administrative Procedure Act or APA"). Notice of the rulemaking hearing was emailed to the ISF Subscription Mailing List on December 5, 2008 and published in the Colorado Register on December 10, 2008. The U.S. Bureau of Land Management, Trout Unlimited, Denver Water, Aurora Water, Pueblo Board of Water Works, and Colorado Springs Utilities submitted written comments on the Rules and will address the Board at the hearing. The Prehearing Order issued by Hearing Coordinator Casey Shpall on January 14, 2009 identifies four issues that the rulemaking participants have raised for Board discussion, and includes a schedule for the hearing. In response to comments received from four parties, Staff has made and will recommend that the Board adopt several changes to ISF Rules 8i.(3) and 6. Staff will present those proposed changes to the Board at the hearing. Staff also will present for Board discussion a proposed change to ISF Rule 4o., and two statements proposed to be included in the Statement of Basis and Purpose.

### Staff Recommendation

Staff recommends that the Board adopt: (1) the revised ISF Rules with any changes it has made to the version of the Rules published in the Colorado Register on December 10, 2008, and (2) the Statement of Basis and Purpose for the Rules, with any changes made by the Board to the version posted on the CWCB website.

### Attachments to Memo

- Exhibit A: Prehearing Order
- Exhibit B: Comments received on Rules
- Exhibit C: Rule 6 with changes since publication
- Exhibit D: Rule 8i.(3) with changes since publication
- Exhibit E: Statement of Basis and Purpose
- Exhibit F: Notice of Rulemaking with proposed revised Rules
- Exhibit G: House Bill 08-1280

## Changes to Rules Since November CWCB Meeting

Staff has made the following changes to the revised Rules:

### 1. Grammatical or editorial changes to ISF Rules

- a. In Rules 4a., d., e., j, l, and n.; 5a., c., d., e., g., j., l., m., o., and r; 7c. and e.; 9a., b., c., and e.; and 11c., Staff capitalized the word “person” because it is a defined term (defined in Rule 4m.).
- b. Rule 7m.: Staff corrected a typo.
- c. Rule 8: Staff added a reference to Rule 8e.(2).
- d. Rule 11b.: Staff updated a reference to Rule 6m., which used to be Rule 6i.

### 2. Changes to Rule 6 – Acquisitions (attached as Exhibit C with new language in bold type)

**Rule 6e.**, second sentence: “Such evaluation **shall** include, but need not be limited to consideration of the following factors:” (changed “may” to “shall”).

**Rule 6e.(5):** “The natural environment that may be preserved or improved by the proposed acquisition, **and whether the natural environment will be preserved or improved to a reasonable degree by the water available from the proposed acquisition;**”

**Rule 6e.(7):** “The effect of the proposed acquisition on any relevant interstate compact issue, including whether the acquisition would assist in meeting or result in the delivery of **more water than required under compact obligations;**” (replaced “overdelivery” with new language).

**Rule 6f.(5):** “The Board shall calculate and determine **a reasonable** amount of compensation **to be** paid to the lessor of the water based, in part, upon the **anticipated** use of the water during and after the term of the lease **and upon what compensation for the lease the lessor has requested.**”

**Rule 6f.(6):** “The Board shall consider **evidence of water availability based upon** the historical record(s) of diversion, the beneficial use of the subject water right, the location where return flows have historically returned to the stream, ~~the location of other water users on the subject reach of stream,~~ and the reason(s) the water is available for lease or loan.”

**Rule 6g.(1)(b):** “Install any measuring device(s) deemed necessary by the Division Engineer (1) to administer the lease or loan of water; (2) to measure and record how much water flows out of the reach after use by the Board under the lease or loan; **and (3) to meet any other applicable statutory requirements.**”

**Rule 6g.** (added subsection (2)): “**All contracts or agreements for leases or loans of water also shall require the Board and the owner of the water right to record in their diversion records the actual amount of water available to the leased or loaned water right as diversions made under the water right, during the term of the lease or loan.**”

**Rule 6i.** (changed title): “**Applications for a Decreed Right to Use Water for ISF Purposes** ~~Change of Water Right~~”

**who has facilitated the acquisition, if requested by such Person.”** Third sentence: “In a the change of water right proceeding, the Board shall request the Water Court to:”

**Rule 6i.(2):** “Verify the identification, quantification and location of return flows available for ISF use to the extent **ensure** that no injury will result to vested water rights and decreed conditional water rights;”

**Rule 6i.(4):** “~~Determine~~ **Decree** the method by which the historical consumptive use should be quantified and credited during the term of the agreement for the lease or loan of the water right pursuant to section 37-92-102(3), C.R.S.”

**3. Changes to Rule 8i.(3) – Injury with Mitigation** (attached as **Exhibit D** with new language in bold type)

**Natural lake level water rights:** Staff added references to natural lake level water rights throughout the Rule.

**Rule 8i.(3),** introductory sentence: “In the event a proposed pretrial resolution will allow injury to or interference with an ISF **or natural lake level (NLL) water right**, but mitigation offered by the applicant ~~would~~ **could** enable the Board to accept the injury or interference while continuing to preserve or improve the natural environment to a reasonable degree, and if the proposed pretrial resolution does not include a modification under ISF Rule 9, the Board shall:”

**Rule 8i.(3)(e)(vii):** “Identification and feasibility analysis of **(1) all water supply alternatives considered by the proponent in the context of this proposal; (2) all alternatives evaluated by the proponent to fully protect the potentially affected ISF or NLL water right, but rejected as infeasible; and (3) all alternatives evaluated by the proponent and designed to mitigate the injury to or interference with the affected ISF or NLL water right. This information shall include** discussion of environmental and economic benefits and consequences of each alternative; and”

**Rule 8i.(3)(f),** addition of last sentence: “**CWCB staff also will use best efforts to consult with affected land owners and managers regarding the proposal.**”

**Rule 8i.(3)(j):** “Evaluation of proposed alternatives. **The Board shall evaluate: (1) all water supply alternatives considered by the proponent in the context of this proposal; (2) all alternatives evaluated by the proponent to fully protect the potentially affected ISF or NLL water right, but rejected as infeasible; and (3) all alternatives evaluated by the proponent and designed to mitigate the injury to or interference with the affected ISF or NLL water right. In its evaluation, the Board shall consider the following factors:**”

**4. Rules 8e. – h. – De Minimis Rule**

Staff did not receive any written comments on ISF Rules 8e. – h. (De Minimis Rule) after the December 10, 2008 publication of the revised ISF Rules, and has not made any further changes to the De Minimis Rule since the November Board meeting.

**Statement of Basis and Purpose** (attached as **Exhibit E**)

Section 24-4-103(4)(c) of the APA requires the Board to “incorporate by reference on the rules adopted a written concise general statement of their basis, specific statutory authority, and

purpose.” Staff posted a draft Statement of Basis and Purpose (“SBP”) on the CWCB website in December with the proposed revised ISF Rules. Based upon written comments received and discussions with the authors of those comments, Staff has added proposed language to the SBP for Board consideration. The proposed language is discussed below in the “Issues for Rulemaking Hearing” section of this memo.

### **Issues for Rulemaking Hearing**

The Prehearing Order identifies four issues raised by the participants for Board discussion, which are set forth below with Staff’s responses to the issues.

#### **1. Whether the meaning of “stacking” needs to be clarified in the proposed rules? (ISF Rules 6c. and 4o.)**

In its written comments, Denver Water requested that the Board clarify the meaning of the term “stacking,” which is the subject of Rule 6c. After discussing the issue with Denver Water representatives, Staff recommends amending Rule 4o. to read as follows:

As used in Rule 6, the terms “stack” or “stacking” refer to an instance in which the Board holds more than one ISF water right for the same lake or reach of stream and exercises the rights **separately independently** according to their decrees.

While Staff does not believe that the current definition of “stacking” is ambiguous, attendees at the prehearing conference agreed that the word “independently” more clearly describes how the Board exercises its water rights than the word “separately.” Because Staff agrees that the change makes the definition a bit clearer, it is recommending that the Board adopt the change. It is important to note that the Notice of Rulemaking did not specifically identify Rule 4o. as a rule that would be amended in this proceeding. However, the fact that Rule 6c., which is covered by the Notice, addresses “stacking” provides reasonable notice that issues related to “stacking” could be reviewed to allow the Board to amend the definition of “stacking” in Rule 4o.

#### **2. Whether the historic consumptive use analyses of a water right leased or loaned to the CWCB under the proposed rules should no longer apply to that water right after the expiration of the lease or loan? (ISF Rule 6i.(3))**

In its written comments, Denver Water requested the addition of language to Rule 6i.(3) providing that in a water court case to change a leased or loaned water right to add ISF use, at the election of the water rights owner, the Board shall request the court to include a term and condition that the historical consumptive use determination shall not apply to the water right at the expiration of the lease or loan. Staff does not recommend this change to the rules because relitigation of the historical consumptive use determination would result in more time and expense for the State and the courts. Further, after a court makes a finding of fact, such as a historical consumptive use determination, such finding of fact is entitled to deference and eventually becomes *res judicata*. However, the Board could agree not to object to a request by the water rights owner for the term and condition where the Board and water rights owner have filed a joint application. To document that agreement, the Board could include the following statement in the Statement of Basis and Purpose:

Regarding the historical consumptive use quantification referred to in Rule 6i.(1), the Board will not object to a water rights owner requesting a term and condition from the water court that the historical consumptive use determination shall not apply to the water right at the expiration of the lease or loan.

**3. Should injury with mitigation be available only if there are no other feasible water supply alternatives that can be implemented without injury to an instream flow or natural lake level water right? (ISF Rule 8i.(3))**

In its written comments, the U.S. Bureau of Land Management (“BLM”) requested that the Board require an IWM proponent to provide information about water supply alternatives explored, in addition to alternatives explored to fully protect the affected ISF or NLL water right and to mitigate the proposed injury to such water right. Staff has added a reference to water supply alternatives in Rules 8i.(3)(e)(vii) and 8i.(3)(j), and recommends that the Board adopt the rule with those additions. BLM also requested that the Board adopt a policy that it will only accept injury to an ISF or NLL water right under Rule 8i.(3) when other water supply alternatives explored are not reasonable. Staff recommends inclusion of the following statement in the Statement of Basis and Purpose:

In general, it is the policy of the CWCB to approve injury with mitigation proposals only when no other reasonable water supply alternatives can be implemented. Exceptions to the policy may be granted when the proponent can demonstrate that the proposed mitigation will result in significant and permanent enhancements to the natural environment of the subject stream or lake existing at the time the proponent proposes the injury with mitigation.

**4. Whether the meaning of “alternative” in proposed Rule 8i.(3)(e)(vii) should be clarified?**

In their written comments and subsequent discussions with Staff, both the Front Range Council and the BLM requested additions to Rule 8i.(3) to clarify the concept of “alternatives.” As noted above, Staff added part of the language requested by the BLM to Rules 8i.(3)(e)(vii) and 8i.(3)(j). Staff also has incorporated language suggested by the Front Range Council to those rules, and recommends that the Board adopt the rules with the additional language:

**Rule 8i.(3)(e)(vii):** “Identification and feasibility analysis of (1) **all water supply alternatives considered by the proponent in the context of this proposal;** (2) **all alternatives evaluated by the proponent to fully protect the potentially affected ISF or NLL water right, but rejected as infeasible;** and (3) **all alternatives evaluated by the proponent and designed to mitigate the injury to or interference with the affected ISF or NLL water right. This information shall include** discussion of environmental and economic benefits and consequences of each alternative; and”

**Rule 8i.(3)(j):** “Evaluation of proposed alternatives. **The Board shall evaluate: (1) all water supply alternatives considered by the proponent in the context of this proposal;** (2) **all alternatives evaluated by the proponent to fully protect the potentially affected ISF or NLL water right, but rejected as infeasible;** and (3) **all alternatives evaluated by the proponent and designed to mitigate the injury to or interference with the affected ISF or NLL water right. In its evaluation, the Board shall consider the following factors:**”

**Staff Recommendation**

Staff recommends that the Board adopt (1) the revised ISF Rules, with any changes made by the Board to the version of the Rules published in the Colorado Register on December 10, 2008; and (2) the Statement of Basis and Purpose for the Rules, with any changes made by the Board to the version posted on the CWCB website.

**EXHIBIT A**



BEFORE THE COLORADO WATER CONSERVATION BOARD

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IN THE MATTER OF PROPOSED AMENDMENTS TO THE RULES CONCERNING  
THE COLORADO INSTREAM FLOW AND NATURAL LAKE LEVEL PROGRAM,  
2 CCR 408-2

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**PREHEARING ORDER**

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A prehearing conference on the proposed amendments to the Colorado Water Conservation Board's Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2 CCR 408-2, was held on January 12, 2009, at 1:30 p.m., at the Colorado Department of Natural Resources, 1313 Sherman Street, Denver, Colorado. The purpose of the prehearing conference was to establish an agenda for the hearing before the Board and to identify and resolve issues prior to the hearing. The hearing is scheduled to commence at the CWCB's meeting on January 27, 2009, at 1:30 p.m., at the Denver Tech Center, Hilton Garden Inn, 7675 East Union Avenue, Denver, Colorado.

In attendance at the prehearing conference, either by telephone or in person, were: hearing coordinator Casey Shpall; Linda Bassi, Kaylea White, and Susan Schneider for CWCB; Dan Arnold and Norm Carlson for Denver Water; Linda Darling for Aurora Water; Brett Gracely for Colorado Springs Utilities; Drew Peternell for Trout Unlimited; and Roy Smith for Bureau of Land Management.

Issues for Rulemaking Hearing

- 1) Whether the meaning of "stacking" needs to be clarified in the proposed rules?
- 2) Whether the historic consumptive use analyses of a water right leased or loaned to the CWCB under the proposed rules should no longer apply to that water right after the expiration of the lease or loan?
- 3) Should injury with mitigation be available only if there are no other feasible water supply alternatives that can be implemented without injury to an instream flow or natural lake level water right?
- 4) Whether the meaning of "alternative" in proposed rule 8i(3)(e)(vii) should be clarified?



Rulemaking Hearing Agenda

The Hearing will be conducted as an informal rulemaking hearing. The Hearing Coordinator recommends the following hearing agenda to the CWCB. The following times include both presentation time and rebuttal time.

CWCB Staff: 45 minutes;

Aurora Water: 15 minutes;

Denver Water: 15 minutes;

Trout Unlimited: 15 minutes; and,

BLM: 15 minutes

General public comment: 3 minute limit per commenter

Response to questions arising during presentations and public comment

Rebuttal - if reserved by presenters

CWCB Staff rebuttal – 15 minutes

Board deliberations

Hearing adjourns

Dated this 14th day of January 2009.

/s/  
Casey Shpall  
Deputy Attorney General



# United States Department of the Interior

## BUREAU OF LAND MANAGEMENT

Colorado State Office  
2850 Youngfield Street  
Lakewood, Colorado 80215-7093  
www.blm.gov/co



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7250 (CO-932)

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Colorado Water Conservation Board

Ms. Linda Bassi  
Colorado Water Conservation Board  
1313 Sherman Street, 7<sup>th</sup> Floor  
Denver, CO 80203

Dear Ms. Bassi:

The purpose of this letter is to communicate comments from the Bureau of Land Management (BLM) regarding proposed changes to the rules governing the Colorado Instream Flow and Natural Lake Level Program. The BLM supports the Colorado Water Conservation Board's (CWCB) effort to clarify the rules in important areas of program operation. All of the comments are focused on proposed changes to the "Injury Accepted with Mitigation" Section. Since the BLM has recommended more than 100 instream flow water rights to the CWCB, and multiple historic instream flow water rights cross BLM lands, it is highly likely that an injury proposal may affect public lands. Our comments are as follows:

1. The language for the proposed rule changes appears to address only potential injury to instream flow water rights on streams, and doesn't address proposed injuries to natural lake level water rights. Given that there is currently an injury with mitigation proposal for Lake San Cristobal, the BLM believes it is important that the rules are also clarified for natural lake level water rights.
2. The language requiring proponents to address "alternatives" could be interpreted as requiring the injury proponent to examine mitigation alternatives, rather than water supply alternatives. The CWCB may want to consider an explicit policy that makes it clear that injury will be accepted only when other alternatives aren't reasonable. This provision of the rules could have a large impact on federal agency reliance upon the CWCB program because federal agencies are seeking assurance that natural lake levels and instream flow water rights will not regularly be altered to meet water supply objectives.
3. We suggest that proponents of injury should be required to carry some, or all, of the burden of analyzing and quantifying the impacts of the proposed injury. This provision would help ensure that injury is the last resort, rather than the most convenient water

supply alternative. The proposed language appears to place the entire burden upon the Colorado Division of Wildlife.

4. The proposed language requires consultation with entities who recommended the instream flow water right. This is an important addition to the rules. However, as we noted earlier, there are many historic instream flow and natural lake level water rights that cross BLM lands in which we were not the recommending entity. We recommend including a provision in the rules stating that the CWCB will make efforts to consult with affected land owners and managers when an injury with mitigation proposal is received.

Thank you for the opportunity to review and provide comments on the proposed rule changes. If you have any questions, please contact Roy Smith, Water Rights Specialist, at 303-239-3940.

Sincerely,



Linda Anafia  
Deputy State Director, Resources and Fire

Colorado Water Conservation Board

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Comments of the City and County of Denver, Acting by and Through its Board of Water Commissioners

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In the Matter of the Proposed Amendments to the Rules Concerning the Colorado Instream Flow and natural lake Level Program, 2CCR 408-2

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The City and County of Denver, acting by and through its Board of Water Commissioners (“Denver Water”) hereby submits its comments to the proposed amendments to the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2 CCR 408-2.

Denver Water supports and joins in the comments submitted by Aurora Water, Pueblo Board of Water Works, and Colorado Springs Utilities. In addition to those comments, Denver Water hereby submits the following additional comments to the Colorado Water Conservation Board.

**Denver Water’s Comments to the Proposed Amendments to 2 CCR 408-2**

**1. Comments – Section 6c**

Rule 6(c) is unclear insofar as it uses the term “stacking” with regard to leased or loaned water and preexisting instream flow rights. The word “stacking” implies the combination of instream flow rights to make a larger right. However, “stacking” is defined by section 4(o) to mean that the Board will operate the rights separately. Specifically, Rule 4(o) defines the term “stacking” as “an instance in which the Board holds more than one ISF water right for the same lake or reach of stream and exercises the rights *separately* according to their decrees.” (emphasis added).

Rule 6(c) could possibly be construed to allow the Board to do one of several things. It could mean that the Board may combine instream flow rights with other rights, including leased or loaned water rights to create an even larger instream flow right. Alternatively, “stacking” could allow instream flow rights to be combined during dry years to maximize the water rights in order to meet an already designated inflow amount for the designated reach. Based on the definition in Rule 4(o), Rule 6(c) could also be interpreted to mean that the Board will operate the instream flow rights separately from each other. Given the various interpretations of Rule 6(c), the Board should take the opportunity to clarify the meaning of the term “stacking.”

2. Comments – Rule 6f(5)

Rule 6f(5) provides that “[t]he Board shall calculate and determine the amount of compensation paid to the lessor of the water based, in part, upon the use of the water during and after the term of the lease.” This proposed rule raises several questions. First to what extent is the determination of the compensation paid determined by the person leasing or loaning the water right? This rule disregards the fact that it is up to the person leasing the water right to determine the amount of compensation they are entitled to for the use of the water right. Thus, Rule 6f(5) should be revised to state that “**in determining whether to enter into a lease or loan of a water right for instream flow purposes,** the Board shall calculate and determine **whether** the amount of compensation **to be** paid to the lessor of the water **is reasonable. The Board’s determination shall be** based, in part, upon the **decreed** use of the water **right during and after the term of the lease.**”

3. Comments – Rule 6i

a. Joint Applications

The proposed language for Rule 6i should be revised to require that the Board file a joint application if the person leasing, loaning, or facilitating the acquisition so desires. As presently drafted, Rule 6i gives the Board the discretion to file a joint application. To the extent a person is leasing, loaning or facilitating the acquisition of a water right, the person should be able to require that the Board file a joint application if the person so chooses. As such, Rule 6i should be revised as follows:

6i.

. . . The Board **shall** ~~may~~ file a joint application to change a water right with the Person from whom the Board has acquired the water or a Person who has facilitated the acquisition, **at the election of the Person leasing, loaning, or facilitating the acquisition** . . . .

b. References to “Change of Water Right.”

Rule 6i also unnecessarily refers to “change of water right” in the heading and the first and last sentence of the proposed rule. Section 37-92-102 authorizes the Board to submit other forms of application with the water court. Specifically, C.R.S. § 37-92-102(3) states that “[t]he board shall file a change of water right application *or other application* with the water court to obtain a decreed right to use water for instream flow purposes under a contract or agreement for

a lease or loan of water, water rights, or interests in water pursuant to this subsection (3).” (emphasis added). The statute also provides that “[t]he board may initiate such applications as it determines are necessary or desirable for utilizing water, water rights, or interest in water appropriated, acquired or held by the board, including *applications for changes of water rights, exchanges, or augmentation plans.*” (emphasis added).

Although Rule 6i recognizes the Board’s broad authority to file “other” applications, the proposed rule unnecessarily refers to “change of water right.” There is no reason why Rule 6i should specifically refer “changes of water rights” as opposed to the many other types of applications which the Board may file. As such, Rule 6i should be revised to strike “change of water right” to avoid confusion as to the type of applications which the Board may file.

In addition, to the extent it is necessary to refer to “changes of water rights” in Rule 6i, the rule should also refer to applications for implementation of a lease or loan. Many entities who may desire to lease or loan water to the Board may be deterred by having to subject their water rights to a change of water right proceeding. Thus, to the extent that there are other methods by which the Board could seek water court approval of a lease or loan that do not involve a change of water right proceeding, the rule should refer to them.

Denver proposes the following revisions to Rule 6i for the Board’s consideration:

6i. **Applications for a Decreed Right to Use Water for ISF Purposes**  
**Change of Water Rights.**

The Board shall file ~~an~~ **change of water right application or other** application with the water court to obtain a decreed right to use water for ISF purposes under all contracts or agreements for acquisitions of water, water rights or interests in water under section 37-92-102(e), including leases and loans of water. . . . The Water Court shall determine matters that are within the scope of section 37-92-305, C.R.S. In ~~a the change of water right~~ proceeding **involving change of a water right or implementation of a lease or loan for ISF purposes,** the Board shall request the Water Court to . . . .

4. Comments – Rule 6i(3)

The requirement of having to subject their water right to a historical consumptive use analysis will discourage many entities from leasing or loaning water to the Board. As such an additional paragraph should be added to Rule 6i(3) providing that at the election of a Person who leases or loans water to the Board, the Board shall seek a term and condition that the historical consumptive use determination shall not apply to the water right at the expiration of the lease.

(3) . . .

(c) At the election of the Person who leases or loans a water right to the Board, the Board shall seek a term and condition providing that the historical consumptive use determination shall not apply to the water right at the expiration of the lease or loan, and any volumetric limits imposed on the water right as a result of the historical consumptive use determination will expire at the end of the lease or loan.

5. Comments – Section 6i(4)

As currently drafted, Paragraph 6i provides that “the Board shall request the Water Court to: . . . [d]etermine the method by which the historical consumptive use should be quantified and credited during the term of the agreement for the lease or loan of the water right . . .” Many entities may desire to enter into a lease or loan with the Board contingent on the water court’s acceptance of a certain type of methodology for the historical consumptive use determination. Thus, this paragraph should be revised to provide that “the Board shall request the Water Court to: . . . ~~Decree Determine~~ the method by which the historical consumptive use should be quantified and credited during the term of the agreement for the lease or loan of the water right.”

6. Comments – Clarification of the Effect of a Historical Consumptive Use Analysis Under C.R.S. § 37-92-102(3)

In amending its Rules concerning the Colorado Instream Flow and Natural Lake Level Program, the Board should take the opportunity to clarify C.R.S. § 37-92-102(3) by offering its own interpretation of the language contained in the statute. The following sentences in § 37-92-102(3) are confusing and ambiguous:

(3) . . . The resulting water court decree shall quantify the historical consumptive use of the leased or loaned water right and determine the method by which the historical consumptive use should be quantified and credited during the term of the agreement for the lease or loan of the water right. Said method shall recognize the actual amount of consumptive use available under the leased or loaned water right and shall not result in a reduction of the historical consumptive use of that water right during the term of the lease or loan, except to the extent such reduction is based upon the actual amount of water available under said rights.

To avoid future confusion over this statutory language and to encourage entities to lease or loan water to the Board, the Board should offer its own interpretation of the meaning of the language in a separate section under the rules regarding the “historical consumptive use analyses for leased or loaned water rights.” The sentences quoted above should be interpreted to mean that:

- (1) The resulting water court decree shall quantify the historical consumptive use of the leased or loaned water right for the term of the lease or loan of the water right. The decree shall also decree the method used to determine the historical consumptive use that is quantified and credited during the term of the agreement for the lease or loan.
- (2) The historical consumptive use analysis, including any volumetric limits imposed as a result of such an analysis, will not apply to the water right at the expiration of the lease or loan unless otherwise agreed to by the Person leasing or loaning the water right.
- (3) During the periods of time when water is leased or loaned to the Board, the Board and the owner of the water right shall record in their diversion records the actual amount of water available to the leased or loaned water right during the term of the lease or loan as actual diversions made under the water right.
- (4) In the event the owner of a water right, which was leased or loaned to the Board, seeks to change the water right after the expiration of the lease or loan and perform a subsequent historical use analysis as part of an application for change of water right, the Person leasing or loaning the water shall be allowed to record diversions as provided by paragraph (3) above under the water right during the years the lease or loan with the Board was in effect.

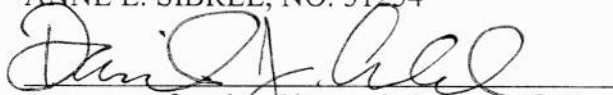


**Request for Oral Comment**

Denver Water will be seeking a time for an oral presentation of its comments, though such presentation may become unnecessary depending upon the discussions with staff prior to the hearing. Denver Water's oral presentation may be limited to answering any questions on the written submission.

Respectfully submitted this 30th day of December, 2008.

PATRICIA L. WELLS, GENERAL COUNSEL  
DANIEL J. ARNOLD, NO. 35458  
ANNE E. SIBREE, NO. 31254



Attorneys for the City and County of Denver,  
Acting by and Through its Board of Water  
Commissioners  
1600 W. 12th Avenue  
Denver, Colorado 80204  
Phone: (303) 628-6460  
Fax: (303) 628-6478

In re: Amendments to the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program 2CCR 4008-2.

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Comments of Aurora Water, Pueblo Board of Water Works, Colorado Springs Utilities and Denver Water

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## **I. Introduction**

The following comments on the proposed rules are being submitted on behalf of Aurora Water, Denver Water, the Pueblo Board of Water Works and Colorado Springs Utilities, each of whom are members of the Front Range Water Council (FRWC). The FRWC previously submitted written comments on prior drafts of the rules and appreciates the cooperation and assistance of CWCB staff in working with the above referenced members of the Council and other stakeholders in responding thereto.

These final comments fall into three categories: (i) proposed housekeeping type adjustments to clarify intent; (ii) substantive modifications designed to more clearly reflect statutory directives; and (iii) questions, principally of a policy nature, for Board consideration.

## **II. Specific Comments**

A. Proposed rule 6.e states:

“The Board shall evaluate the appropriateness of any acquisition of water, water rights, or interests in water to preserve or improve the natural environment. Such evaluation may include, but need not be limited to consideration of the following factors”: (emphasis added).

This section then goes on to identify a list of eleven factors including: “The natural environment may be preserved or improved by the proposed acquisition.” Rule 6.e (5). Whether the CWCB is seeking a new appropriation or an “acquisition,” it should be required to meet the historical statutory criteria, i.e. that there is a natural environment that can be preserved to a reasonable degree, that the natural environment will be preserved by the water available, and that the environment can exist without material injury to water rights. See Rule 5.i. However, some of these factors are not referenced in Rule 6.e, and to the extent they are, the Board simply “may” consider them. Hence, it would be better if the introductory paragraph in 6.e as quoted above be modified to provide:

“The Board, HAVING MADE THE FINDINGS REFERENCED IN PARAGRAPH 5.i, shall evaluate the appropriateness of any acquisition of water, water rights, or interests in water to preserve or improve the natural environment.”

Appropriate modifications can then be made in 6.e(1) through (11) so as to eliminate any redundancy by virtue of the cross reference to paragraph 5.i.

B. Proposed paragraph 6.e(4) provides that one of the factors to be considered includes:

“(4) the historical consumptive use and historical return flows of the water right proposed for acquisition, that may be available for instream flow use.”

This factor, as noted again below, raises the question as to what right the original owner had to the “return flows.” If there was no such right, how can the return flows be acquired by the CWCB absent a new adjudication?

C. Paragraph 6.e(7) identifies one of the factors as:

“The effect of the proposed acquisition on any relevant interstate compact issue, including whether the acquisition would assist in meeting or result in the overdelivery of compact obligations.”

Perhaps the reference should be to whether the proposed acquisition would “impair the ability to develop compact entitlements”, rather than the general reference to compact issues. Further, one cannot really “overdeliver” an “obligation,” as compared to “delivering more water than required under the compact.” Finally, is meeting compact obligations through the use of instream flows consistent with the statutory delegation of powers to the CWCB? The Board must answer this question, as there may not be a concomitant benefit to the natural environment in every instance. In any event, the CWCB should not be adjudicating instream flows that would impair the ability to develop the state’s compact entitlements.

D. Paragraph 6.f(5) provides:

“The Board shall calculate and determine the amount of compensation paid to the lessor of the water based, in part, upon the use of the water during and after the term of the lease.”

A suggested rewording would be:

“The Board shall calculate and determine A REASONABLE ~~the~~ amount of compensation TO BE paid to the lessor of the water based, in part, upon the use of the water during and after the term of the lease.”

E. Paragraph 6.f(6) provides:

“The Board shall consider the historical records of diversion, the beneficial use of the subject water right, the location where return flows have historically returned to the stream, the locations of other water users on the subject reach of stream, and the reason(s) the water is available for lease or loan.”

The above wording does not address the “reason” or “objective” behind some of the identified factors. Hence, it may be more appropriate to state:

“The Board shall consider EVIDENCE OF WATER AVAILABLE BASED UPON the historical record(s) of diversion, beneficial use of the subject water right, the location of where return flows have historically returned to the stream, the ~~locations of~~ NEED TO AVOID HARM TO other water users on the subject reach of stream, and the reason(s) the water is available for lease or loan.”

F. Paragraph 6.g(2) indicates that the Board shall be required to:

“(2) Install any measuring device(s) deemed necessary by the Division Engineer (a) to administer the lease or loan of water and (b) to measure and record how much water flows out of the reach after use by the Board under the lease or loan.”

Shouldn't (2)(b) require that the Board measure the amount of “leased or loaned water” which flows out of the reach, as compared to all flows?

G. Paragraph 6.i(2) indicates that in a change of water right proceeding the Board shall request the water court to:

“(2) Verify the identification, quantification and location of return flows available for ISF use to the extent that no injury will result to vested water rights and decreed conditional water rights.”

Once again, this raises the question of what right to return flows could have been transferred to the CWCB in the first instance, such that they would be the subject of a change case. If the original owner had no right to the return flows, how can they be acquired by the CWCB? Furthermore, it would seem that one of the criteria must be that return flows are replaced to the river at the historic time and location. No such criteria is identified.

H. Paragraph 6.i(3)(b) of this same section provides:

“(b) when the Board has not identified such downstream beneficial use at the time of the change of water right, the Board may amend the subject change decree, if required by the Division Engineer, to add such beneficial use(s) of the historical consumptive use downstream of the IFS reach at the time the Board is able to bring about such use or reuse, without requiring requantification of the original historical consumptive use calculation.”

This provision raises three questions. First, shouldn't the Board have to amend the decree even if not “required by the Division Engineer”? Second, shouldn't there be court review of such an amendment even though it may not be necessary to requantify the consumptive use? Finally, this provision implies that the CWCB is in the business of acquiring water rights for purposes unrelated to preservation of the natural environment, i.e., for any use. That is to say, if the acquisition were for the environment, it would ostensibly have been identified at the time the initial change decree was entered. Though one could conclude that the recent statutory amendments allow such an expansion of CWCB uses, is this a legitimate undertaking by the Board, or should the regulation be narrowed so as to encompass only traditional instream uses?

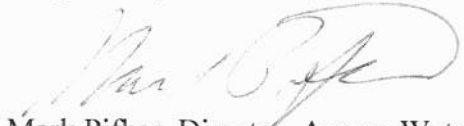
I. Paragraph 8i.(3)(d) is vague. What condition would result in the Division of Water Resources being unable to administer the affected ISF water right in accordance with the priority system? An ISF water right is not called out by senior rights.

J. Paragraph 8.i(3)(e)(vii) and (viii) each reference "alternatives." However, at this point in the rule, the concept of alternatives has not been defined, which makes the references unclear. For example, paragraph (j) of the same section then goes on to indicate that there are at least two types of alternatives. It would be best if somewhere early in the regulation the concepts of "alternatives" was defined. In addition, with reference to subparagraph (j), it would be advisable to indicate the range or number of alternatives, to be considered, as it is now open ended.

### **III. Request for Oral Comment**

The above entities will be seeking a time allocation from oral presentation, though such presentation may prove unnecessary depending upon what discussions with staff may transpire prior to the hearing. In any event, the oral presentation may be limited to answering any questions on the written submission.

Respectively submitted,



Mark Pifher, Director, Aurora Water

On Behalf of Aurora Water, Denver Water, Pueblo Board of Water Works and Colorado Springs Utilities



**6. ACQUISITION OF WATER, WATER RIGHTS OR INTERESTS IN WATER FOR INSTREAM FLOW PURPOSES.**

The Board may acquire water, water rights, or interests in water for ISF purposes by the following procedures:

**6a. Means of Acquisition.**

The Board may acquire, by grant, purchase, donation, bequest, devise, lease, exchange, or other contractual agreement, from or with any Pperson, including any governmental entity, such water, water rights, or interests in water that are not on the Division Engineer's abandonment list in such amounts as the Board determines are appropriate for stream flows or for natural surface water levels or volumes for natural lakes to preserve or improve the natural environment to a reasonable degree.

**6b. 120 Day Rule.**

At the request of any Pperson, including any governmental entity, the Board shall determine in a timely manner, not to exceed one hundred twenty days, unless further time is granted by the requesting Pperson, what terms and conditions the Board will accept in a contract or agreement for the acquisition. The 120-day period begins on the day the Board first considers the proposed contract or agreement at a regularly scheduled or special Board meeting.

**6c. Stacking Evaluation.**

The Board shall evaluate whether to combine or stack the acquired water right with any other ISF appropriation or acquisition, based upon the extent to which the acquired water will ~~in order to provide~~ flows or lake levels to preserve or improve the natural environment to a reasonable degree.

If the Board elects to combine or stack the acquired water right, the details of how the water rights are to be combined or stacked with other existing ISF appropriations or acquisitions must be set forth in the change application for the acquired right.

**6d. Enforcement of Acquisition Agreement.**

Pursuant to section 37-92-102(3), C.R.S., any contract or agreement executed between the Board and any Pperson which provides water, water rights, or interests in water to the Board shall be enforceable by either party thereto as a water matter in the water court having jurisdiction over the water right according to the terms of the contract or agreement.

**6e. Appropriateness of an Acquisition.**

The Board shall evaluate the appropriateness of any acquisition of water, water rights, or interests in water to preserve or improve the natural environment. Such evaluation shall ~~may~~ include, but need not be limited to consideration of the following factors:

- (1) (1) ~~•~~ ~~—~~ ~~†~~ The reach of stream or lake level for which the use of the acquired water is proposed, which may be based upon any one or a combination of the following: the historical location point of return flow; the length of the existing instream flow reach, where applicable; whether an existing instream flow water right relies on return flows from the water right proposed for acquisition; the environment to be preserved or improved by the proposed acquisition; or such other factors the Board may identify;
- (2) (2) ~~•~~ ~~—~~ ~~†~~ The natural flow regime;

- (3) (3) • Any potential material injury to existing decreed water rights;
- (4) (4) • The historical consumptive use and historical return flows patterns of the water right proposed for acquisition, that may be available for instream flow use;
- (5) (5) • The natural environment that may be preserved or improved by the proposed acquisition, **and whether the natural environment will be preserved or improved to a reasonable degree by the water available from the proposed acquisition;**
- (6) (6) • The location of other water rights on the subject stream(s);
- (7) (7) • The effect of the proposed acquisition on any relevant interstate compact issue, including whether the acquisition would assist in meeting or result in the **ever**delivery of **more water than required under compact obligations;**
- (8) (8) • The effect of the proposed acquisition on the maximum utilization of the waters of the state;
- (9) (9) • Whether the water acquired will be available for subsequent use or reuse downstream;
- (10) (10) • and/or The cost to complete the transaction or any other associated costs; and
- (11) (11) The administrability of the acquired water right when used for instream flow purposes.

The Board shall also determine how to best utilize the acquired water, water rights or interest in water to preserve or improve the natural environment.

**6f. Factors Related to Loans and Leases.**

In addition to considering the factors listed above, for loans and leases of water, water rights and interests in water for ISF purposes under section 37-92-102(3).

- (1) The Board shall consider the extent to which the leased or loaned water will preserve or improve the natural environment to a reasonable degree, including but not limited to:
  - (a) Whether the amount of water available for acquisition is needed to provide flows to meet a decreed ISF amount in below average years; and
  - (b) Whether the amount of water available for acquisition could be used to and would improve the natural environment to a reasonable degree, either alone or in combination with existing decreed ISF water rights.
- (2) In considering the extent to which the leased or loaned water will preserve or improve the natural environment to a reasonable degree, the Board will request and review a biological analysis from the Colorado Division of Wildlife, and will review any other biological or scientific evidence presented to the Board.
- (3) If other sources of water are available for acquisition on the subject stream reach(es) by purchase or donation, the Board shall fully consider each proposed acquisition and give preference first to the donation and then to a reasonable acquisition by purchase.
- (4) The Board shall obtain confirmation from the Division Engineer that the proposed lease or loan is administrable and is capable of meeting all applicable statutory requirements.



(5) The Board shall calculate and determine thea reasonable amount of compensation to be paid to the lessor of the water based, in part, upon the anticipated use of the water during and after the term of the lease and upon what compensation for the lease the lessor has requested.

(6) The Board shall consider evidence of water availability based upon the historical record(s) of diversion, the beneficial use of the subject water right, the location where return flows have historically returned to the stream, the locations of other water users on the subject reach of stream, and the reason(s) the water is available for lease or loan.

**6g. Recording Requirements.**

(1) All contracts or agreements for leases or loans of water, water rights or interests in water under section 37-92-102(3) shall require the Board to:

(a1) Maintain records of how much water the Board uses under the contract or agreement each year it is in effect; and

(b2) Install any measuring device(s) deemed necessary by the Division Engineer (a1) to administer the lease or loan of water; and (b2) to measure and record how much water flows out of the reach after use by the Board under the lease or loan; and (3) to meet any other applicable statutory requirements.

(2) All contracts or agreements for leases or loans of water also shall require the Board and the owner of the water right to record in their diversion records the actual amount of water available to the leased or loaned water right as diversions made under the water right, during the term of the lease or loan.

**6h. Water Reuse.**

All contracts or agreements for the acquisition of water, water rights or interests in water under section 37-92-102(3) shall provide that the Board or the seller, lessor, lender or donor of the water may bring about beneficial use of the historical consumptive use of the acquired water right downstream of the ISF reach as fully consumable reusable water, pursuant to the water court decree authorizing the Board to use the acquired water.

(1) The bringing about of beneficial use of the historical consumptive use of the water may be achieved by direct use, sale, lease, loan or other contractual arrangement by the Board or the seller, lessor, lender or donor.

(2) The contract or agreement also shall provide that the Division Engineer must be notified of any agreement for such beneficial use downstream of the ISF reach prior to the use.

(3) Prior to any beneficial use by the Board of the historical consumptive use of the acquired water right downstream of the ISF reach, the Board shall find that such use:

(a) Will be consistent with the Board's statutory authority and with duly adopted Board policies and objectives; and

(b) Will not injure vested water rights or decreed conditional water rights.

**6i. Applications for a Decreed Right to Use Water for ISF PurposesChange of Water Right.**

The Board shall file a change of water right application or other application with the water court to obtain a decreed right to use water for ISF purposes under all contracts or agreements for acquisitions of water,

water rights or interests in water under section 37-92-102(3), including leases and loans of water. The Board may shall file a joint application to change a water right with the Person from whom the Board has acquired the water or a Person who has facilitated the acquisition, if requested by such Person. The Water Court shall determine matters that are within the scope of section 37-92-305, C.R.S. In a the change of water right proceeding, the Board shall request the Water Court to:

(1) Verify the quantification of the historical consumptive use of the acquired water right;

(2) Verify the identification, quantification and location of return flows available for ISF use to the extent ensure that no injury will result to vested water rights and decreed conditional water rights;

(3) Include terms and conditions providing that:

(a) The Board or the seller, lessor, lender, or donor of the water may bring about the beneficial use of the historical consumptive use of the changed water right downstream of the ISF reach as fully consumable reusable water, subject to such terms and conditions as the water court deems necessary to prevent injury to vested water rights and decreed conditional water rights; and

(b) When the Board has not identified such downstream beneficial use at the time of the change of water right, the Board may amend the subject change decree, if required by the Division Engineer, to add such beneficial use(s) of the historical consumptive use downstream of the ISF reach at the time the Board is able to bring about such use or reuse, without requiring requantification of the original historical consumptive use calculation;

and

(4) Decree Determine the method by which the historical consumptive use should be quantified and credited during the term of the agreement for the lease or loan of the water right pursuant to section 37-92-102(3), C.R.S.

**6jf. Limitation on Acquisitions.**

The Board may not accept a donation of water rights that were acquired by condemnation, or that would require the removal of existing infrastructure without approval of the current owner of such infrastructure, or a donation of water rights that were acquired by condemnation.

**6kg. Temporary Loans of Water to the Board.**

The Board may accept temporary loans of water for instream flow use for a period not to exceed 120 days in any one year, in accordance with the procedures and subject to the limitations set forth in section 37-83-105, C.R.S.

(1) Within 5 working days after receiving an offer of a temporary loan of water to the Board for temporary instream flow use, the Director will provide a response to the proponent and, unless the proposed loan has no potential value for instream flow use, staff will coordinate with the proponent on preparing and submitting the necessary documentation to the State and Division Engineers required by sections 37-83-105(2)(a)(I) and (2)(b)(I), C.R.S., and providing the public notice required by section 37-83-105(2)(b)(II), C.R.S.

(2) Provided that the State Engineer has made a determination of no injury pursuant to section 37-83-105(2)(a)(III), C.R.S., the Board hereby delegates authority to the CWCB Director to accept temporary loans of water for instream flow use in accordance with the procedures and subject to

the limitations set forth in section 37-83-105 and to take any administrative action necessary to put the loaned water to instream flow use.

(3) ~~In subsequent years, and p~~ Provided that the State Engineer's determination of non-injury is still in effect, the Director shall notify the proponent and the State Engineer whether the temporary loan is to be exercised in subsequent years. Such notification shall be provided within 5 working days of the Director being notified by the proponent that the water is available for use under the temporary loan. The CWCB's use of loaned water for instream flows shall not exceed the CWCB's decreed instream flow amount or extend beyond the CWCB's decreed instream flow reach at any time during the loan term, and shall comply with any terms and conditions imposed by the State Engineer to prevent injury. The purpose of this delegation is to expedite use of temporarily loaned water for instream flows by the Board.

(43) At the first regular or special Board meeting after the Director accepts or rejects an offer of a loan of water to the Board for temporary instream flow use under (1) or (2) above, the Board shall vote either to ratify or overturn the Director's decision.

(54) The Board, Director and staff will expedite all actions necessary to implement Rule 6k.g.

**6l.h. Funds for Water Right Acquisitions.**

The Board may use any funds available to it, ~~other than the Construction Fund created in §37-60-121, C.R.S.,~~ for costs of the acquisition of water rights and their conversion to ISF water rights ~~use~~. The Board shall spend available funds for such costs in accordance with section 37-60-123.7, C.R.S. and any other applicable statutory authority, and with applicable Board policies and procedures.

**6m.i. Public Input on Proposed Acquisitions.**

The Board shall follow the public review process in Rules 11a. - 11c. when acquiring water, water rights or interests in water, except for temporary loans or leases as provided in Rule 6k.g. above and except as provided below.

- (1) Prior to Board consideration of any proposed acquisition, Staff shall mail notice of the proposed acquisition to all ~~p~~persons on the ISF Subscription Mailing List and the State Engineer's Substitute Supply Plan Notification List for the relevant water division, and shall provide Proper Notice. ~~Such notice shall include:~~
- (a) ~~T~~the case number adjudicating the water right proposed to be acquired, and the appropriation date, adjudication date, priority, decreed use(s), and flow amount of the water right proposed to be acquired, and approximately how much of the water right the Board will consider acquiring;
  - (b) ~~†~~The location of the stream reach or lake that is the subject of the proposal, including, when available, the specific length of stream reach to benefit from the proposed acquisition;
  - (c) ~~A~~any available information on the purpose of the acquisition, including the degree of preservation or improvement of the natural environment to be achieved; ~~and~~
  - (d) ~~A~~any available scientific data specifically supporting the position that the acquisition will achieve the goal of preserving or improving the natural environment to a reasonable degree; and

(e) In addition to (a) - (d) above, for leases and loans of water, water rights or interests in water under section 37-92-102(3), such notice shall include the proposed term of the lease or loan and the proposed season of use of the water under the lease or loan.

(2) At every regularly scheduled Board meeting subsequent to the mailing of notice, and prior to final Board action, Staff will report on the status of the proposed acquisition and time will be reserved for public comment.

(3) Any Person may address the Board regarding the proposed acquisition prior to final Board action. Staff shall provide any written comments it receives regarding the proposed acquisition directly to the Board.

(4) Any Person may request the Board to hold a hearing on a proposed acquisition. Such a request must be submitted to the Board in writing within twenty days of the first Board meeting at which the Board considers the proposed acquisition, and must include a brief statement, with as much specificity as possible, of why a hearing is being requested.

(5) At its next regularly scheduled meeting after receipt of the request for a hearing, or at a special meeting, the Board will consider the request and may, in its sole discretion, grant or deny such a request. All hearings scheduled by the Board shall be governed by the following procedures:

(a) A hearing on a proposed acquisition must be held within the 120 day period allowed for Board consideration of an acquisition pursuant to Rule 6b., unless the Person requesting the Board to consider the proposed acquisition agrees to an extension of time.

(b) The Board shall appoint a Hearing Officer to establish the procedures by which evidence will be offered.

(c) -At least thirty days prior to the hearing date(s), the Board shall provide written notice of the hearing(s) to the Person proposing the acquisition, all interested parties known to the Board, and all Persons on the ISF Subscription Mailing List and the State Engineer's Substitute Supply Plan Notification List for the relevant water division. The Board also shall provide Proper Notice, as defined in ISF Rule 4n.

(d) Any Person who desires party status shall become a Party upon submission of a written Notice of Party Status to the Board Office. The Notice shall include the name and mailing address of the Person and a brief statement of the reasons the Person desires party status. The Board Office must receive Notice of Party Status within seven days after notice of the hearing is issued.

(e) The Hearing Officer shall set timelines and deadlines for all written submissions. Prehearing statements will be required, and shall include, but not be limited to, the following: 1) a list of all disputed factual and legal issues; 2) the position of the Party regarding the factual and legal issues; 3) a list identifying all of the witnesses that will testify for the Party, and a summary of the testimony that those witnesses will provide; and 4) copies of all exhibits that the Party will introduce at the hearing(s).

(f) Any Party may present testimony or offer ~~other evidence~~ identified in its prehearing statement regarding the proposed acquisition.

(g) The Hearing Officer shall determine the order of testimony for the hearing(s), and shall decide other procedural matters related to the hearing(s). The Hearing Officer does not have authority to rule on substantive issues, which authority rests solely with the Board.

- (h) The Board will not apply the Colorado Rules of Evidence at hearings on proposed acquisitions.
- (i) The Board may permit general comments from any Person who is not a Party; however, the Board may limit these public comments to five minutes per Person.
- (j) The Board may take final action at the hearing(s) or continue the hearing and/or deliberations to a date certain.
- (k) Board hearings may be recorded by a reporter or by an electronic recording device. Any Party requesting a transcription of the hearing(s) shall be responsible for the cost of the transcription.
- (l) -When necessary, the Board may modify this hearing procedure schedule or any part thereof as it deems appropriate.

**6nj. Board Action to Acquire Water, Water Rights or Interests in Water.**

The Board shall consider the acquisition during any regular or special meeting of the Board. At the Board meeting, the Board shall consider all presentations or comments of Staff or any other Person. After such consideration, the Board may acquire, acquire with limitations, or reject the proposed acquisition.

**6k. Water Court Proceeding.**

~~In the event water, water rights or interests in water acquired by the Board are not decreed for ISF uses to preserve or improve the natural environment to a reasonable degree, the Board may authorize the Attorney General to file a water court application to change the decreed type of use and place of use of the water, water rights or interests in water acquired by the Board. The Board may pursue joint applications to change a water right with the owner of any water, water right, or interests in water. The Water Court shall determine matters that are within the scope of §37-92-305, C.R.S., which may include injury and the potential impact of the change upon return flows.~~

**EXHIBIT D**

**8i. Pretrial Resolution.**

Staff may negotiate a pretrial resolution of any injury or interference issue that is the subject of a Statement of Opposition. The Board shall review the pretrial resolution pursuant to the following procedures:

**(1) No Injury.**

In the event the pretrial resolution includes terms and conditions preventing injury or interference and does not involve a modification, or acceptance of injury or interference with mitigation, the Board is not required to review and ratify the pretrial resolution. Staff may authorize its counsel to sign any court documents necessary to finalize this type of pretrial resolution without Board ratification.

**(2) No Injury/Modification.**

In the event the pretrial resolution addresses injury or interference through modification of the existing ISF decree, the process set forth in Rule 9 shall be followed prior to any Board decision to ratify the pretrial resolution.

**(3) Injury Accepted with Mitigation.**

In the event a proposed the pretrial resolution will allow injury to or interference with ~~to an~~ **ISF or natural lake level (NLL) water right**, but mitigation offered by the applicant would enable the Board to accept the injury or interference while continuing to preserve or improve the natural environment to a reasonable degree, and if the proposed pretrial resolution does not include a modification under ISF Rule 9, the Board shall:

- (a) Conduct a preliminary review of the proposed pretrial resolution during any regular or special meeting to determine whether the natural environment could be preserved or improved to a reasonable degree with the proposed injury or interference if applicant provided mitigation; and;
- (b) At a later regular or special meeting, take final action to ratify, refuse to ratify or ratify with additional conditions.
- (c) No proposed pretrial resolution considered pursuant to this Rule 8i.(3) may receive preliminary review and final ratification ~~in~~ at the same Board meeting.
- (d) The Board shall not enter into any stipulation or agree to any decretal terms and conditions under this Rule that would result in the Division of Water Resources being unable to administer the affected ISF or NLL water right(s) in accordance with the priority system or with Colorado water law.
- (e) To initiate CWCB staff review of an Injury with Mitigation proposal, the proponent must provide the following information in writing:
  - i. Location of injury to ISF or NLL water right(s) (stream(s) or lake(s) affected, length of affected reach(es));
  - ii. Quantification of injury (amount, timing and frequency);
  - iii. Type of water use that would cause the injury;
  - iv. Analysis showing why full ISF or NLL protection is not possible;

- v. Detailed description of the proposed mitigation, including all measures taken to reduce or minimize the injury;
  - vi. Detailed description of how the proposed mitigation will enable the Board to continue to preserve or improve the natural environment of the affected stream or lake to a reasonable degree despite the injury;
  - vii. Identification and feasibility analysis of all **(1) all water supply alternatives considered by the proponent in the context of this proposal; (2) all alternatives evaluated by the proponent to fully protect the potentially affected ISF or NLL water right, but rejected as infeasible; and (3) all alternatives evaluated by the proponent and designed to mitigate the injury to or interference with the affected ISF or NLL water right.** ~~other alternatives~~ **This information shall include** ~~considered, including discussion of~~ environmental and economic benefits and consequences of each alternative; and
  - viii. A discussion of the reasonableness of each alternative considered.
- (f) After receipt and review of the required information, staff will consult with the DOW and with the entity that originally recommended the affected ISF or NLL water right(s) (if other than DOW) to determine whether additional field work is necessary and to identify any scheduling concerns. Staff will request a recommendation from the DOW as to whether the proposed mitigation will enable the Board to continue to preserve or improve the natural environment of the affected stream or lake to a reasonable degree despite the injury, including a discussion of the reasonableness of the alternatives considered. **CWCB staff also will use best efforts to consult with affected land owners and managers regarding the proposal.**
- (g) Prior to bringing the proposal to the Board for preliminary consideration, staff will consult with the Division of Water Resources on whether the proposal would result in the Division of Water Resources being unable to administer the affected ISF or NLL water right(s) in accordance with the priority system or with Colorado water law.
- (h) At the first meeting of the two-meeting process required by this Rule, staff will bring the proposal to the Board for preliminary consideration after completing its review of the proposal and its consultation with DOW. Staff will work with the proponent and interested parties to address any preliminary concerns prior to bringing a proposal to the Board. Preliminary consideration by the Board may result in requests for more information or for changes to the proposal. Staff will work with the proponent and interested parties to finalize the proposal and bring it back to the Board for final action at a subsequent Board meeting.
- (i) The Board will consider the following factors when evaluating Injury with Mitigation proposals. Because Injury with Mitigation proposals may involve unique factual situations, the Board may consider additional factors in specific cases. Further, evaluation of each Injury with Mitigation proposal will require the exercise of professional judgment regarding the specific facts of the proposal.
- i. Extent of the proposed injury:
    - 1. Location of injury – affected stream(s) or lake and length of affected reach(es);
    - 2. Amount, timing and frequency of shortage(s) or impacts to the affected ISF or NLL water right(s); and



3. Potential impact to the natural environment of the affected stream reach(es) **or lake** from such shortage(s) **the proposed injury.**
- ii. Benefits of the mitigation to the natural environment:
    1. The nature and extent of the benefits the mitigation will provide to the existing natural environment of the affected stream **or lake**;
    2. The scientific justification for accepting the mitigation; and
    3. Whether the mitigation will enable the Board to continue to preserve or improve the natural environment of the subject stream **or lake** to a reasonable degree.
- (j) Evaluation of proposed alternatives. **The Board shall evaluate: (1) all water supply alternatives considered by the proponent in the context of this proposal; (2) all alternatives evaluated by the proponent to fully protect the potentially affected ISF or NLL water right, but rejected as infeasible; and (3) all alternatives evaluated by the proponent and designed to mitigate the injury to or interference with the affected ISF or NLL water right. In its evaluation, the Board shall consider the following factors:**~~This evaluation applies both to alternatives explored to provide full protection of the potentially affected ISF water right, and to mitigation alternatives:~~
- i. Availability of on-site mitigation alternatives;
  - ii. Technical feasibility of each alternative;
  - iii. Environmental benefits and consequences of each alternative;
  - iv. Economic benefits and consequences of each alternative;
  - v. Reasonableness of alternatives; and
  - vi. For mitigation alternatives, whether the mitigation was or will be put in place to satisfy a requirement or need unrelated to the Injury with Mitigation proposal.
- (k) The Board will consider mitigation on a different reach of stream or another stream ("off-site mitigation") as a last resort and will only consider mitigation in an area other than the affected stream reach if no reasonable alternative exists for mitigation on the affected stream reach. The Board only will consider off-site mitigation on stream(s) located in the same drainage as the affected stream. Factors that the Board may consider in looking at such a proposal include, but are not limited to, the degree and frequency of impact to the affected stream; the environmental benefits provided to the off-site stream by the mitigation; whether the proposal could, in effect, constitute a modification of the ISF water right on the affected stream; or whether the proposal could result in the Division of Water Resources being unable to administer the affected ISF water right(s) in accordance with the priority system or with Colorado water law.
- (l) Stipulations and water court decrees that incorporate Injury with Mitigation shall include, but not be limited to inclusion of, the following terms and conditions:
- i. A provision that the proponent will not divert water or take any other action that would reduce flows in the affected stream **or levels in the affected lake** below the decreed ISF **or NLL** amount until the agreed-upon mitigation measures are in place and fully operational;

- ii. A requirement that the structural components of the mitigation be maintained permanently;
- iii. A provision allowing CWCB or DOW staff access to the property on which structural components of the mitigation are located to inspect the structures at certain time intervals, and, if necessary, to perform biological stream **or lake** monitoring. This provision shall clearly define the reasonable nature, extent and timing of such access (i.e. advance notice, dates, times or season of access, coordination with proponent, and location and routes of access);
- iv. A term providing that if the proponent ceases to provide the agreed upon mitigation (such as removing structural components or failing to maintain them to a specified level, or ceasing to implement non-structural components), that the proponent will not divert water or take any other action that would reduce flows in the affected stream **or levels in the affected lake** below the decreed ISF **or NLL** amount because the Board will no longer accept the injury based upon the mitigation no longer being in effect -- in such case, if the Board places a call for the affected ISF **or NLL** water right, the Board will notify the Division Engineer that this provision of the decree now is in effect and that the Board is not accepting the injury;
- v. A requirement that the proponent install and pay operation and maintenance costs of (or commit to pay operation and maintenance costs if the CWCB installs) any measuring devices deemed necessary by the Division Engineer to administer the terms of the stipulation and decree implementing the Injury with Mitigation pretrial resolution; and
- vi. A term providing that the water court will retain jurisdiction to enforce the terms and conditions set forth above in subsections (i) - (vi), and any other terms and conditions specific to the Injury with Mitigation pretrial resolution, as a water matter.

**EXHIBIT E**

## Statement of Basis and Purpose

In 1973, the General Assembly enacted Senate Bill 97, creating the Colorado Instream Flow and Natural Lake Level Program (“ISF Program”), to be administered by the Colorado Water Conservation Board (“Board”). The statutory authority for these Rules is found at sections 37-60-108 and 37-92-102(3), C.R.S. (2008). The purpose of these Rules, initially adopted in 1993, is to codify and establish procedures for the Board to implement the ISF Program.

The Board has amended the Rules several times since 1993 to reflect changes in the statutes related to the ISF Program. Notably, in 1999, the Board repealed the existing Rule 5 in its entirety, and, among other things, adopted a new Rule 5 to establish a public notice and comment process for instream flow water right appropriations. In 2003, the Board amended Rule 6 to implement the provisions of Senate Bill 02-156 by identifying factors that the Board will consider when determining whether to acquire water, water rights, or interests in water, and by establishing procedures for notice, public input, and, if necessary, hearings. In 2004, the Board amended Rule 6 to implement House Bill 03-1320, codified at section 37-83-105, C.R.S. (2003), to allow for emergency loans of water for instream flows. The Board also amended Rule 6 to enable the Board to finalize an acquisition within a two-meeting time frame, if necessary. In 2005, the Board amended Rule 6 to implement House Bill 05-1039, establishing how the Board and its staff will respond to offers of water for temporary instream flow use and expedite use of loaned water for instream flow purposes.

In 2009, the Board amended Rule 6 to adopt criteria specified in House Bill 08-1280 (codified at sections 37-92-102(3), 37-92-103 and 37-92-305, C.R.S.) for evaluating proposed leases or loans of water, and to incorporate H.B. 1280’s requirements for: (1) specific conditions that must be met as part of the CWCB’s approval of a proposed loan or lease of water; (2) provisions that must be included in all agreements for loans or leases of water under section 37-92-102(3); and (3) actions that the Board must take in connection with loans or leases of water. Rule 6 does not incorporate those provisions of H.B. 1280 that direct the water courts or the Division of Water Resources to take certain actions in regard to water acquisitions by the Board for instream flow use.

Specifically, the 2009 Rules 6a., 6c., 6e, 6j., 6k., 6l., and 6m. clarify the Board’s evaluation process, Board funding for water leases and purchases, and public input for proposed acquisitions of water, water rights or interests in water for instream flow use. Rule 6f. identifies additional factors for loans and leases of water, and Rules 6g. and 6h. describe recording requirements and water reuse provisions to be included in contracts or agreements for water acquisitions. Rule 6i. incorporates H.B. 1280’s requirements regarding water court applications filed by the Board to obtain a decreed right to use acquired water for instream flow purposes. Regarding the historical consumptive use quantification referred to in Rule 6i.(1), the Board will not object to a water rights owner requesting a term and condition from the water court that the historical consumptive use determination shall not apply to the water right at the expiration of the lease or loan.

In 2009, the Board also amended Rules 8e.—h. (De Minimis Rule) to recognize priority administration of the CWCB’s instream flow water rights and clarify that the

decision not to file a statement of opposition under this Rule does not constitute: (1) acceptance by the CWCB of injury to any potentially affected instream flow water right; or (2) a waiver of the CWCB's right to place an administrative call for any instream flow water right. Rule 8e.(1) sets forth what type of notice the CWCB will provide to water court applicants and to the Division Engineer when it elects not to file a statement of opposition to a water court application under this Rule.

Finally, in 2009, the Board amended Rule 8i.(3) (Injury Accepted with Mitigation) to provide notice to water users of: (1) the information they must submit to the CWCB when requesting that the CWCB enter into a pretrial resolution under which it will accept injury with mitigation; (2) the factors the CWCB will consider in evaluating an injury with mitigation proposal; and (3) the terms and conditions the CWCB will require in decrees incorporating injury with mitigation.

In general, it is the policy of the CWCB to approve injury with mitigation proposals only when no other reasonable water supply alternatives can be implemented. Exceptions to the policy may be granted when the proponent can demonstrate that the proposed mitigation will result in significant and permanent enhancements to the natural environment of the subject stream or lake existing at the time the proponent proposes the injury with mitigation.

**EXHIBIT F**

### Notice of Rulemaking Hearing

<b>Tracking Number</b>	2008-01268
<b>Department</b>	400 - Department of Natural Resources
<b>Agency</b>	408 - Colorado Water Conservation Board
<b>CCR Number</b>	2 CCR 408-2
<b>Rule Title</b>	RULES CONCERNING THE COLORADO INSTREAM FLOW AND NATURAL LAKE LEVEL PROGRAM

### Rulemaking Hearing

<b>Date</b>	01/27/2009
<b>Time</b>	01:30 PM
<b>Location</b>	Hilton Garden Inn, 7675 East Union Ave., Denver, Colorado

<b>Subjects and Issues Involved</b>	Substantive changes have been made to Rules 6, 8e. - 8h. and (3) with a new Rule 8e.(1). Non-substantive changes have been made to Rules 1 - 12. See attached proposed rules for details.
<b>Statutory Authority</b>	Sections 37-60-108, C.R.S., 2008 and 37-92-102, C.R.S., 2008.
<b>Select this link to view the text of the Proposed Rule</b>	<a href="#">ProposedRuleAttach2008-01268.PDF</a>
<b>Material Incorporated by Reference in the Proposed Rule</b>	
<b>Select this link to view important information regarding the Rulemaking Hearing, including information on attending the hearing and participating in the rulemaking process</b>	<a href="#">AddInfoAttach2008-01268.PDF</a>

### Contact Information

<b>Name</b>	Linda Bassi
<b>Title</b>	Chief, Stream and Lake Protection Section, CWCB
<b>Telephone</b>	303-866-3441

<b>Email</b>	linda.bassi@state.co.us
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**NOTICE OF PUBLIC RULEMAKING HEARING  
BEFORE THE  
COLORADO WATER CONSERVATION BOARD**

**SUBJECT**

This is a notice of a public rulemaking hearing before the Colorado Water Conservation Board (CWCB) for consideration of amendments to the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, 2 CCR 408-2. The amendments affect Rule 6 (Acquisition of Water, Water Rights or Interests in Water for Instream Flow Purposes), Rules 8e. - h. (De Minimis Rule), and Rule 8i.(3) (Injury Accepted with Mitigation). The proposed amendments are summarized below, and for the convenience of interested persons, are attached to this notice as Exhibit 1. A redlined version of these proposed amendments to the current rules is posted on the CWCB's website at <http://www/cwcb.state.co.us>. A hard copy is available upon request to the CWCB staff, located at 1313 Sherman Street, Room 721, Denver, CO 80203; (303) 866-3441. The CWCB may change the proposed amendments as set forth in Exhibit 1 at the rulemaking hearing. The CWCB will consider any alternative proposals related to the proposed amendments.

**HEARING SCHEDULE**

**Prehearing Conference**

DATE: January 12, 2009

TIME: 1:30 p.m. to 3:30 p.m.

PLACE: 1313 Sherman Street, Room 318, Denver, Colorado

**Rulemaking Hearing**

DATE: January 27, 2009

TIME: 1:30 p.m. to 5:30 p.m.

PLACE: Hilton Garden Inn, 7675 E. Union Ave., Denver, Colorado

**PUBLIC PARTICIPATION**

All public comments on the proposed amendments should be made in writing. Oral presentations of the information contained in the written comments will not be necessary; however, the CWCB will allow brief oral summaries of the public written comments to be made, to the extent time allows, as described below. Although the CWCB strongly encourages all interested persons to submit their comments in writing, a short period of time at the end of the rulemaking hearing (a total of 30 minutes or less) will be reserved for oral comments by those persons unable to provide the CWCB with written comments.

**Written Comment Deadline**

Twenty copies of all public written comments must be delivered to the CWCB office at 1313 Sherman Street, Room #721, Denver, CO 80203 by the close of business (5:00 p.m.) on December 30, 2008. The CWCB will accept and consider late written comments and day-of-

hearing written comments, but any person who fails to deliver written comments by the December 30, 2008 deadline will not be entitled to make a Scheduled Oral Presentation, as described below.

#### Oral Presentations

The opportunity for two types of oral presentations will be available to the public. The first, referred to as Scheduled Oral Presentation, will be an assignment of a 15 minute time period on the agenda. (NOTE: Time may be reduced depending upon the number of people seeking a Scheduled Oral Presentation.) The second, referred to as General Public Comment, will be allotted three minutes or less (determined by the available time and number of speakers) and scheduled on a "first come, first serve" basis.

Scheduled Oral Presentations are available for persons who deliver their written comments to the CWCB on or before December 30, 2008 and who attend the January 12, 2009 prehearing conference. Anyone who submits written comments by December 30, 2008 but cannot attend the prehearing conference may make a written request for a Scheduled Oral Presentation on or before January 12, 2009, but will have to accept whatever time slot is available after those attending the prehearing conference have been assigned a time slot.

#### Contents of Written Comments

Written comments may include any written data, views or arguments concerning the proposed amendments to the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, and may contain alternative amendments, legal arguments or briefs, and materials prepared by persons other than the submitter.

#### **PROPOSED AGENDA OF RULEMAKING HEARING**

1:30 p.m.	Rulemaking procedures explained
1:45	Staff presentation
2:15	Scheduled oral presentations
3:00	Break
3:15	Scheduled oral presentations
3:45	General public comment
4:15	Response to questions arising during oral presentations and public comment
4:45	Board deliberations
5:30	Hearing adjourns

**NOTE: THIS AGENDA MAY BE MODIFIED AT THE PREHEARING CONFERENCE DEPENDING UPON THE NUMBER OF SPEAKERS.**

### Review of Administrative Record

The Administrative Record, including public written comments, all staff written comments and all other written materials to be considered by the CWCB in this rulemaking will be available for inspection at the CWCB office during normal business hours (8:00 a.m. -5:00 p.m.) December 10, 2008 through January 27, 2009. Copies are available upon request from the CWCB for a fee of 25 cents per page.

### HEARING PROCEDURE

The CWCB will not apply the rules of evidence or civil procedure. No member of the public or CWCB Staff shall have the right to cross examine any person speaking at the hearing. CWCB members may ask questions of any person appearing before them. At the end of all public comment, the CWCB may allow members of the public to submit questions to the CWCB to ask in its discretion.

The chair of the CWCB may stop any Scheduled Oral Presentation or General Public Comment if the person speaking has exceeded his/her allotted time. No exhibits, maps, demonstrative exhibits or physical evidence may be presented in the oral summary unless such material was attached to the participant's written comment. Once the written comment is submitted to the CWCB, the material becomes part of the Administrative Record and the property of the CWCB and will not be returned to the person offering the material.

Subject to section 24-4-103, C.R.S., the Board may modify the proposed revised Rules prior to promulgating final revised Rules.

### DESCRIPTION OF THE SUBJECTS AND ISSUES INVOLVED

1. The CWCB is considering revising Rule 6 (Acquisition of Water, Water Rights or Interests in Water for Instream Flow Purposes) to adopt criteria specified in House Bill 08-1280 for evaluating proposed leases or loans of water, and to incorporate House Bill 08-1280's requirements of: (1) specific conditions that must be met as part of the CWCB's approval of a proposed loan or lease of water; (2) provisions that must be included in all agreements for loans or leases of water under section 37-92-102(3)(b), C.R.S.; and (3) actions that the Board must take in connection with loans or leases of water.
2. The CWCB is considering revising Rules 8e.—h. (De Minimis Rule) to recognize priority administration of the CWCB's instream flow water rights and to clarify that the decision not to file a statement of opposition under this Rule does not constitute (1) acceptance by the CWCB of injury to any potentially affected instream flow water right; or (2) a waiver of the CWCB's right to place an administrative call for any instream flow water right. New Rule 8e.(1) sets forth what type of notice the CWCB will provide to water court applicants and to the Division Engineer when it elects not to file a statement of opposition to a water court application under this Rule.
3. The CWCB is considering revising Rule 8i.(3) (Injury Accepted with Mitigation) to provide notice to water users of: (1) the information they must submit to the CWCB when requesting that the CWCB enter into a pretrial resolution under which it will accept injury with mitigation; (2) the factors the CWCB will consider in evaluating an injury with mitigation

proposal; and (3) the terms and conditions the CWCB will require in decrees incorporating injury with mitigation.

A COPY OF THE PROPOSED AMENDED RULES IS ATTACHED AS EXHIBIT 1.

To be fully informed of every proposed change to the Rules, the CWCB staff recommends review of the redlined version of the Rules, which is posted on the CWCB website and available at the CWCB office.

**EFFECTIVE DATE**

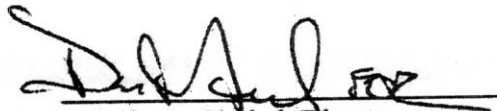
The amendments to the rules shall become effective 20 days after publication of the final rules in the Colorado Register.

**SPECIFIC STATUTORY AUTHORITY**

The statutory authority for the amendments to the Rules Concerning the Colorado Instream Flow and Natural Lake Level Program is found at sections 37-60-108, C.R.S. (2008) and 37-92-102, C.R.S. (2008).

Dated this 24th day of November 2008.

Colorado Water Conservation Board

  
Jennifer L. Gimbel, Director

**DEPARTMENT OF NATURAL RESOURCES**

**Colorado Water Conservation Board**

**RULES CONCERNING THE COLORADO INSTREAM FLOW AND NATURAL LAKE LEVEL PROGRAM**

**2 CCR 408-2**

*{Editor's Notes follow the text of the rules at the end of this CCR Document.}*

**1. TITLE.**

Rules Concerning the Colorado Instream Flow and Natural Lake Level Program, hereafter referred to as the Instream Flow ("ISF") Program as established in §37-92-102 (3) C.R.S., shall be hereinafter referred to as the "ISF Rules."

**2. PURPOSE OF RULES.**

The purpose of the ISF Rules is to set forth the procedures to be followed by the Board and Staff when implementing and administering the ISF Program. By this reference, the Board incorporates the Basis and Purpose statement prepared and adopted at the time of rulemaking. A copy of this document is on file at the Board office.

**3. STATUTORY AUTHORITY.**

The statutory authority for the ISF Rules is found at §37-60-108, C.R.S. and §37-92-102 (3), C.R.S. Nothing in these rules shall be construed as authorizing the Board to deprive the people of the state of Colorado of the beneficial use of those waters available by law and interstate compact.

**4. DEFINITIONS.**

**4a. Agenda Mailing List.**

The agenda mailing list consists of all Persons who have sent a notice to the Board Office that they wish to be included on such list. These Persons will be mailed a Board meeting agenda prior to each scheduled Board meeting.

**4b. Board.**

Means the Colorado Water Conservation Board as defined in §§37-60-101, 103 and 104, C.R.S.

**4c. Board Office.**

The Colorado Water Conservation Board's office is located at 1313 Sherman Street, 7th Floor, Denver, CO 80203. The phone number is (303) 866-3441. The facsimile number is (303) 866-4474. The Board's website is <http://www.cwcb.state.co.us>.

**4d. Contested Hearing Mailing List.**

The Contested Hearing Mailing List shall consist of all Persons who have received Party status or Contested Hearing Participant status pursuant to Rules 5l. or 5m. This mailing list is specific to a contested appropriation.

**4e. Contested Hearing Participant.**

Any Person who desires to participate in the contested ISF process, but not as a Party, may obtain Contested Hearing Participant status pursuant to Rule 5m. A Person with such status will receive all Party documents. Contested Hearing Participants may comment on their own behalf, but may not submit for the record technical evidence, technical witnesses or legal memoranda.

**4f. CWCB Hearing Officer.**

The Hearing Officer is appointed by the Board and is responsible for managing and coordinating proceedings related to contested ISF appropriations, acquisitions or modifications, such as setting prehearing conferences and adjusting deadlines and schedules to further the Parties' settlement efforts or for other good cause shown. The Hearing Officer does not have the authority to rule on substantive issues.

**4g. Final Action.**

For purposes of Rule 5, final action means a Board decision to (1) file a water right application, (2) not file a water right application or (3) table action on an ISF appropriation; however, tabling an action shall not be construed as abandonment of its intent to appropriate.

**4h. Final Staff ISF Recommendation.**

Staff's ISF recommendation to the Board is based on Staff's data and report, and public comments and data contained in the official record.

**4i. ISF.**

Means any water, or water rights appropriated by the Board for preservation of the natural environment to a reasonable degree, or any water, water rights or interests in water acquired by the Board for preservation or improvement of the natural environment to a reasonable degree. "ISF" includes both instream flows between specific points on a stream and natural surface water levels or volumes for natural lakes.

**4j. ISF Subscription Mailing List(s).**

The ISF Subscription Mailing List(s) are specific to each water division. The ISF Subscription Mailing List(s) shall consist of all Persons who have subscribed to the list(s) by sending notice(s) to the Board Office that they wish to be included on such list for a particular water division. The Staff shall, at such times as it deems appropriate, mail to all Persons on the water court resume mailing list in each water division an invitation to be included on the ISF Subscription Mailing List for that water division. Persons on the list are responsible for keeping Staff apprised of address changes. Persons on the ISF Subscription Mailing List(s) shall receive agendas and other notices describing activities related to ISF recommendations, appropriations and acquisitions in the particular water division. Persons may be required to pay a fee in order to be on the ISF Subscription Mailing List(s).

**4k. Mail.**

For the purposes of the ISF Rules, mail refers to regular or special delivery by the U.S. Postal Service or other such services, electronic delivery (e-mail), or delivery by FAX transmission.

**4l. Party.**

Any Person may obtain Party status pursuant to Rule 5l. Only a Person who has obtained Party status may submit, for the record, technical evidence, technical witnesses or legal memoranda. Each Party is responsible for mailing copies of all documents to all other Parties and Contested Hearing Participants.

**4m. Person.**

Means any human being, partnership, association, corporation, special district, water conservancy district, water conservation district, municipal entity, county government, state government or agency thereof, and federal government or agency thereof.

**4n. Proper Notice.**

Means the customary public notice procedure that is provided each year by the Board in the preamble to the Board's January Board meeting agenda. This customary public notice procedure may include posting of the agenda at the Board office, filing legal notices when required, mailing to Persons on the Board mailing lists and posting notices on the Board's website.

**4o. Stacking.**

As used in Rule 6, the terms "stack" or "stacking" refer to an instance in which the Board holds more than one ISF water right for the same lake or reach of stream and exercises the rights separately according to their decrees.

**4p. Staff.**

Means the Director of the Colorado Water Conservation Board ("CWCB Director") and other personnel employed by the Board.

**5. ORIGINAL APPROPRIATION PROCEDURE.**

**5a. Recommendation of Streams and Lakes for Protection.**

All Persons interested in recommending certain stream reaches or natural lakes for inclusion in the ISF Program may make recommendations to the Board or Staff at any time. Staff will provide a preliminary response to any Person making such a recommendation within 30 working days after receipt of the recommendation at the Board Office. Staff will collaborate with State and Federal agencies and other interested Persons to plan and coordinate collection of field data necessary for development of ISF recommendations. The Staff shall advise the Board, at least annually, of all new recommendations received and of streams and lakes being studied for inclusion in the ISF Program.

**5b. Method of Making Recommendations.**

All recommendations transmitted to the Board or Staff for water to be retained in streams or lakes to preserve the natural environment to a reasonable degree must be made with specificity and in writing.

**5c. Board Approval Process.**

Periodically, after studying streams and lakes for inclusion in the ISF Program, Staff will recommend that the Board appropriate ISF rights. The Board and Staff will use the following annual schedule for initiating, processing and appropriating ISF water rights:

**January**

- The January Board meeting agenda will list proposed ISF appropriations to be appropriated that year.
- Staff will provide data, engineering and other information supporting each proposed ISF appropriation to the Board prior to or at the January Board meeting.

- Staff will present its information and recommendation for each proposed ISF appropriation at the January Board meeting.
- The Board will take public comment on the proposed ISF appropriations at the January Board meeting.
- The Board may declare its intent to appropriate for each proposed ISF appropriation at the January Board meeting, provided that the particular ISF appropriation has been listed as being under consideration in a notice, mailed at least 60 days prior to the January Board meeting, to the ISF Subscription Mailing List for the relevant water division(s).
- Notice of the Board having declared its intent to appropriate will be distributed through the ISF Subscription Mailing List for the relevant water division(s).

### March

- The Board will take public comment on all ISF appropriations at the March Board meeting.
- Notice to Contest an ISF appropriation, pursuant to Rule 5k, must be submitted to the Board Office by March 31<sup>st</sup>, or the first business day thereafter.

### April

- Staff will notify all persons on the ISF Subscription Mailing List(s) of contested ISF appropriations by April 10<sup>th</sup>, or the first business day thereafter.
- Notice of Party status or Contested Hearing Participant status, pursuant to Rules 5l. or 5m., must be submitted to the Board Office by April 30<sup>th</sup>, or the first business day thereafter.

### May

- Staff will report to the Board which ISF appropriations are being contested.
- The Board may set hearing dates for contested ISF appropriations.
- At the May Board meeting, the Board may take final action on all uncontested ISF appropriations.

### July

- A prehearing conference will be held prior to the July Board meeting for all contested ISF appropriations (Date specific to be determined by the Hearing Officer).
- Five working days before the prehearing conference, all Parties shall file at the Board office, for the record, any and all legal memoranda, engineering data, biological data and reports or other information upon which the Party will rely.

### August

- All Parties must submit written rebuttal statements, including testimony and exhibits, by August 15<sup>th</sup>, or the first business day thereafter. Except for such rebuttal and testimony provided at the hearing pursuant to Rule 5p.(2), the Board will not accept any statements,



related documentation or exhibits submitted by any Party after the prehearing conference, except for good cause shown or as agreed upon by the Parties.

#### **September**

- Staff will make its final recommendations to the Board, based upon its original report, all public comments, documents submitted by the Parties and all data contained in the official record, at the September Board meeting.
- Notice of the Final Staff ISF Recommendations will be sent to all Persons on the Contested Hearing Mailing List prior to the September Board meeting.
- Parties may choose to continue or withdraw their Notice to Contest an ISF appropriation at or before the September Board Meeting.
- The Board will hold hearings on all contested ISF appropriations.

#### **November**

- The Board shall update the public on the results of any hearings through its agenda and may take final action on contested ISF appropriations.

When necessary, the Board may modify or delay this schedule or any part thereof as it deems appropriate.

#### **5d. Board's Intent to Appropriate.**

Notice of the Board's potential action to declare its intent to appropriate shall be given in the January Board meeting agenda and the Board will take public comment regarding its intent to appropriate at the January meeting.

- (1) After reviewing Staff's recommendations for proposed ISF appropriations, the Board may declare its intent to appropriate specific ISF water rights. At that time, the Board shall direct the Staff to publicly notice the Board's declaration of its intent to appropriate.
- (2) After the Board declares its intent to appropriate, notice shall be published in a mailing to the ISF Subscription Mailing Lists for the relevant water divisions and shall include:
  - (a) A description of the appropriation (e.g. stream reach, lake location, amounts, etc.);
  - (b) Availability (time and place) for review of Summary Reports and Investigations Files for each appropriation; and,
  - (c) Summary identification of any data, exhibits, testimony or other information in addition to the Summary Reports and Investigations Files supporting the appropriation.
- (3) Published notice shall also contain the following information:
  - (a) The Board may change flow amounts of contested ISF appropriations based on information received during the public notice and comment period.
  - (b) Staff will maintain, pursuant to Rule 5e.(3), an ISF Subscription Mailing List for each water division composed of the names of all Persons who have sent notice to the Board Office that they wish to be included on such list for a particular water division. Any

Person desiring to be on the ISF Subscription Mailing List(s) must send notice to the Board Office.

- (c) Any meetings held between Staff and members of the public will be open to the public. Staff may provide Proper Notice prior to any such meetings and may provide notice to Persons on the ISF Subscription Mailing List(s).
  - (d) Any Notice to Contest must be received at the Board office no later than March 31<sup>st</sup>, or the first business day thereafter. All Notices of Party status and Contested Hearing Participant status must be received at the Board office no later than April 30<sup>th</sup>, or the first business day thereafter.
  - (e) Staff will announce its Final Staff ISF Recommendation concerning contested appropriations at the September Board meeting and will send notice of the Final Staff ISF Recommendations to all Persons on the Contested Hearing Mailing List.
  - (f) The Board may take final action on any uncontested ISF appropriations at the May Board meeting.
- (4) After the Board declares its intent to appropriate, notice of the Board's action shall be mailed within five working days to the County Commissioners of the county(ies) in which the proposed reach or lake is located.

(5) Final action by the Board on ISF appropriations will occur no earlier than the May Board meeting.

**5e. Public Comment.**

- (1) The Board will hear comment on the recommended action to declare its intent to appropriate at the January Board Meeting.
- (2) ISF appropriations will be noticed in the Board agenda for each regularly scheduled subsequent meeting until the Board takes final action. Prior to March 31<sup>st</sup>, at each regularly scheduled Board meeting, time will be allocated for public comment. Subsequent to March 31<sup>st</sup>, the Board will accept public comment on any contested ISF appropriations or lake levels only at the hearings held on those appropriations pursuant to Rule 5j.
- (3) Staff will maintain an ISF Subscription Mailing List for each water division. Any Person desiring to receive information concerning proposed ISF appropriations for that water division must contact the Board Office to request inclusion on that ISF Subscription Mailing List.

**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.

**5g. Notice.**

Agenda and ISF Subscription Mailing List(s) notice shall be given pursuant to Rule 5d. and the public shall be afforded an opportunity to comment pursuant to Rule 5e. Notice of the date of final action on uncontested ISF appropriations shall be mailed to Persons on the ISF Subscription Mailing Lists for the relevant water divisions, maintained pursuant to Rule 5e.(3).

**5h. Final Board Action on an ISF Appropriation.**

The Board may take final action on any uncontested ISF appropriation(s) at the May Board meeting or any Board meeting thereafter. If a Notice to Contest has been filed, the Board shall proceed under Rules 5j. - 5q.

**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 §§24-4-106(6) and (7), C.R.S.

**5j. Procedural Rules for Contested ISF Appropriations.**

- (1) Whenever an ISF appropriation is contested, the Board shall hold a hearing at which any Party may present evidence, witnesses and arguments for or against the appropriation and any Contested Hearing Participant or member of the public may comment. The hearing shall be a notice and comment hearing as authorized in §37-92-102(4)(a), C.R.S., and shall not be a formal agency adjudication under §24-4-105, C.R.S.
- (2) These rules are intended to assure that information is received by the Board in a timely manner. Where these rules do not address a procedure or issue, the Board shall determine the procedures to be followed on a case-by-case basis. The Board may waive the requirements of these rules whenever the Board determines that strict adherence to the rules is not in the best interests of fairness, unless such waiver would violate applicable statutes. For any such waiver, the Board shall provide appropriate justification, in writing, to Persons who have Party or Contested Hearing Participant status.
- (3) In a hearing on a contested ISF appropriation, a Party may raise only those issues relevant to the statutory determinations required by §37-92-102(3)(c), C.R.S. and the required findings in Rule 5i.

**5k. Notice to Contest.**

- (1) To contest an ISF appropriation, a Person must comply with the provisions of this section. The Board must receive a Notice to Contest the ISF appropriation by March 31<sup>st</sup>, or the first business day thereafter.
- (2) A Notice to Contest an ISF appropriation shall be made in writing and contain the following information:

- (a) Identification of the Person(s) requesting the hearing;
  - (b) Identification of the ISF appropriation(s) at issue; and,
  - (c) The contested facts and a general description of the data upon which the Person will rely to the extent known at that time.
- (3) After a Party has filed a Notice to Contest an ISF appropriation, any other Person may participate as a Party or a Contested Hearing Participant pursuant to Rules 5l. or 5m.
  - (4) Staff will notify all Persons on the relevant ISF Subscription Mailing List(s) of contested ISF appropriations by April 10<sup>th</sup>, or the first business day thereafter.

**5l. Party Status.**

- (1) Party status will be granted to any Person who timely files a Notice of Party Status with the Staff. Any Person filing a Notice to Contest shall be granted Party status and need not also file a Notice of Party Status. A Notice of Party status must be received by April 30<sup>th</sup>, or the first business day thereafter. A Notice of Party status shall set forth a brief and plain statement of the reasons for obtaining Party status, the contested facts, the matters that the Person claims should be decided and a general description of the data to be presented to the Board. The Board will have discretion to grant or deny Party status to any Person who files a Notice of Party Status after April 30<sup>th</sup> or the first business day thereafter, for good cause shown.
- (2) Only a Party may submit for the record technical evidence, technical witnesses or file legal memoranda. Each Party is responsible for mailing copies of all documents submitted for Board consideration to all other Parties and Contested Hearing Participants.
- (3) The Staff shall automatically be a Party in all proceedings concerning contested ISF appropriations.
- (4) Where a contested ISF appropriation is based fully or in part on another agency's recommendation pursuant to Rule 5a., that agency shall automatically be a Party in any proceeding.
- (5) All Parties, whether they achieved such status by filing a Notice to Contest or a Notice of Party Status, shall be afforded the same rights in the contested ISF appropriation proceedings. Specifically, but without limiting the generality of the foregoing sentence, any Person who filed a Notice of Party Status is entitled to raise issues not raised by any Person who filed a Notice to Contest.

**5m. Contested Hearing Participant Status.**

- (1) Any Person who desires to participate in the process, but not as a Party, may obtain Contested Hearing Participant status by filing a notice thereof at the Board Office prior to April 30<sup>th</sup>. A Person with such status will receive all Party documents specific to the contested appropriation. Contested Hearing Participants may comment on their own behalf, but may not submit for the record technical evidence, technical witnesses or legal memoranda. The Board will have discretion to grant or deny Contested Hearing Participant status to any Person who filed a Notice of Contested Hearing Participant Status after April 30<sup>th</sup> or the first business day thereafter, for good cause shown.
- (2) The request for Contested Hearing Participant status must be received by April 30<sup>th</sup>, or the first business day thereafter.

- (3) Staff shall notify all Parties and Contested Hearing Participants of the list of Contested Hearing Participants prior to May 31<sup>st</sup>. Thereafter, Parties shall also mail their prehearing statements and any other documents to Contested Hearing Participants.

**5n. Prehearing Conference.**

- (1) The Board will designate a Hearing Officer, who shall schedule and preside over prehearing conferences and assist the Parties with procedural matters, such as setting prehearing conferences and adjusting deadlines and schedules to further the Parties' settlement efforts or for other good cause shown. All prehearing conferences will be scheduled and held prior to the July Board meeting.
- (2) On or before five working days before the prehearing conference, each Party shall file 25 copies of its prehearing statement with the Board, and provide an electronic version when possible. The prehearing statement shall identify all exhibits, engineering data, biological data and reports or other information that the Party will rely upon at the hearing and shall contain:
- (a) A specific statement of the factual and legal claims asserted (issues to be resolved) and the legal basis upon which the Party will rely;
  - (b) Copies of all exhibits to be introduced at the hearing;
  - (c) A list of witnesses to be called and a brief description of their testimony;
  - (d) Any alternative proposal to the proposed ISF appropriation;
  - (e) All written testimony to be offered into evidence at the hearing;
- and
- (f) Any legal memoranda.

Each Party shall deliver a copy of its prehearing statement to all other Parties, Contested Hearing Participants, the Hearing Officer and directly to the Assistant Attorneys General representing Staff and the Board five working days before the prehearing conference. The Board will not consider information, other than rebuttal statements and testimony provided at the hearing pursuant to Rule 5p.(2), submitted by the Parties after this deadline except for good cause shown or as agreed upon by the Parties.

- (3) Any Contested Hearing Participant may also submit written comments 5 working days prior to the prehearing conference. Contested Hearing Participants who submit written comments for the Board's consideration shall provide 25 copies to the Board, and a copy to all other Contested Hearing Participants, Parties, the Hearing Officer and the Assistant Attorneys General representing Staff and Board, and provide an electronic version when possible.
- (4) The prehearing conference will afford the Parties the opportunity to address such issues as time available for each Party at the hearing, avoiding presentation of duplicative information, consolidation of concerns, etc. The Parties may formulate stipulations respecting the issues to be raised, witnesses and exhibits to be presented, and/or any other matters which may be agreed to or admitted by the Parties. At the prehearing conference, the Parties shall make known any objections to the procedures or evidence that they may raise at the hearing unless such objections could not have been reasonably determined at that time.
- (5) August 15<sup>th</sup>, or the first business day thereafter, is the last day for submission of written rebuttal statements, including testimony, legal memoranda, and exhibits. Twenty-five copies of such

materials must be provided to the Board, and an electronic version also provided, when possible. Except for such rebuttal and testimony provided at the hearing pursuant to Rule 5p.(2), the Board will not accept any statements, related documentation or exhibits submitted by any Party after the deadline set forth in Rules 5n.(2) and 5n.(3), except for good cause shown or as agreed upon by the Parties. The scope of rebuttal is limited to issues and evidence presented in the prehearing statements. Any documentation to be submitted pursuant to this subsection (5) shall be delivered to the Board and mailed to all Parties and Contested Hearing Participants by August 15<sup>th</sup>, or the first business day thereafter, unless the Parties agree otherwise.

**5o. Notice of Hearings on Contested ISF Appropriations.**

- (1) Staff shall mail notice of prehearing conference(s) on contested ISF appropriations to all Persons on the Contested Hearing Mailing List for the particular ISF appropriation. The notice shall specify the time and place of the prehearing conference and any procedural requirements that the Board deems appropriate.
- (2) The Board may postpone a hearing to another date by issuing written notice of the postponement no later than 7 calendar days prior to the original hearing date.

**5p. Conduct of Hearings.**

- (1) In conducting any hearing, the Board shall have authority to: administer oaths and affirmations; regulate the course of the hearing; set the time and place for continued hearing; limit the number of technical witnesses; issue appropriate orders controlling the subsequent course of the proceedings; and take any other action authorized by these Rules.
- (2) At the hearing, the Board shall hear arguments, concerns or rebuttals from Parties, Contested Hearing Participants and interested members of the public. The Board may limit testimony at the hearing. Without good cause, the Board will not permit Parties or Contested Hearing Participants to introduce written material at the hearing not previously submitted pursuant to these Rules. The Board, in making its determinations, need not consider any written material not timely presented.
- (3) Only the Board may question witnesses at the hearing except where the Board determines that, for good cause shown, allowing the parties to question witnesses may materially aid the Board in reaching its decision, or where such questioning by the Parties relates to the statutory findings required by §37-92-102(3)(c), C.R.S. The Board may terminate questioning where the Board determines that such questioning is irrelevant or redundant or may terminate such questioning for other good cause.
- (4) The hearing shall be recorded by a reporter or by an electronic recording device. Any Party requesting a transcription of the hearing shall be responsible for the cost of the transcription.

**5q. Final Board Action.**

The Board may take final action at the hearing or at a later date.

**5r. Statement of Opposition.**

In the event that any Person files a Statement of Opposition to an ISF water right application in Water Court, the Staff may agree to terms and conditions that would prevent injury. Where the resolution of the Statement of Opposition does not involve a change regarding the Board's determinations under Rule 5i. (including but not limited to the amount, reach, and season), the Board is not required to review and ratify the resolution. Staff may authorize its counsel to sign any court documents necessary to finalize this type of pretrial resolution without Board ratification.

**5s. Withdrawal of Filing.**

If the Board elects to withdraw a Water Court filing, notice shall be given in the agenda of the Board meeting at which the action is expected to occur.

**6. ACQUISITION OF WATER, WATER RIGHTS OR INTERESTS IN WATER FOR INSTREAM FLOW PURPOSES.**

The Board may acquire water, water rights, or interests in water for ISF purposes by the following procedures:

**6a. Means of Acquisition.**

The Board may acquire, by grant, purchase, donation, bequest, devise, lease, exchange, or other contractual agreement, from or with any Pperson, including any governmental entity, such water, water rights, or interests in water that are not on the Division Engineer's abandonment list in such amounts as the Board determines are appropriate for stream flows or for natural surface water levels or volumes for natural lakes to preserve or improve the natural environment to a reasonable degree.

**6b. 120 Day Rule.**

At the request of any Pperson, including any governmental entity, the Board shall determine in a timely manner, not to exceed one hundred twenty days, unless further time is granted by the requesting Pperson, what terms and conditions the Board will accept in a contract or agreement for the acquisition. The 120-day period begins on the day the Board first considers the proposed contract or agreement at a regularly scheduled or special Board meeting.

**6c. Stacking Evaluation.**

The Board shall evaluate whether to combine or stack the acquired water right with any other ISF appropriation or acquisition, based upon the extent to which the acquired water will in order to provide flows or lake levels to preserve or improve the natural environment to a reasonable degree.

If the Board elects to combine or stack the acquired water right, the details of how the water rights are to be combined or stacked with other existing ISF appropriations or acquisitions must be set forth in the change application for the acquired right.

**6d. Enforcement of Acquisition Agreement.**

Pursuant to section 37-92-102(3), C.R.S., any contract or agreement executed between the Board and any Pperson which provides water, water rights, or interests in water to the Board shall be enforceable by either party thereto as a water matter in the water court having jurisdiction over the water right according to the terms of the contract or agreement.

**6e. Appropriateness of an Acquisition.**

The Board shall evaluate the appropriateness of any acquisition of water, water rights, or interests in water to preserve or improve the natural environment. Such evaluation may include, but need not be limited to consideration of the following factors:

- (4) (1) •————The reach of stream or lake level for which the use of the acquired water is proposed, which may be based upon any one or a combination of the following: the historical location point of return flow; the length of the existing instream flow reach, where applicable; whether an existing instream flow water right relies on return flows from the water right proposed

for acquisition; the environment to be preserved or improved by the proposed acquisition; or such other factors the Board may identify;

- (2) (2) the natural flow regime;
- (3) (3) Any potential material injury to existing decreed water rights;
- (4) (4) the historical consumptive use and historical return flow patterns of the water right proposed for acquisition; that may be available for instream flow use;
- (5) (5) the natural environment that may be preserved or improved by the proposed acquisition;
- (6) (6) the location of other water rights on the subject stream(s);
- (7) (7) the effect of the proposed acquisition on any relevant interstate compact issue, including whether the acquisition would assist in meeting or result in the overdelivery of compact obligations;
- (8) (8) the effect of the proposed acquisition on the maximum utilization of the waters of the state;
- (9) (9) Whether the water acquired will be available for subsequent use or reuse downstream;
- (10) (10) and/or the cost to complete the transaction or any other associated costs; and
- (11) (11) The administrability of the acquired water right when used for instream flow purposes.

The Board shall also determine how to best utilize the acquired water, water rights or interest in water to preserve or improve the natural environment.

#### **6f. Factors Related to Loans and Leases.**

In addition to considering the factors listed above, for loans and leases of water, water rights and interests in water for ISF purposes under section 37-92-102(3),

- (1) The Board shall consider the extent to which the leased or loaned water will preserve or improve the natural environment to a reasonable degree, including but not limited to:
  - (a) Whether the amount of water available for acquisition is needed to provide flows to meet a decreed ISF amount in below average years; and
  - (b) Whether the amount of water available for acquisition could be used to and would improve the natural environment to a reasonable degree, either alone or in combination with existing decreed ISF water rights.
- (2) In considering the extent to which the leased or loaned water will preserve or improve the natural environment to a reasonable degree, the Board will request and review a biological analysis from the Colorado Division of Wildlife, and will review any other biological or scientific evidence presented to the Board.
- (3) If other sources of water are available for acquisition on the subject stream reach(es) by purchase or donation, the Board shall fully consider each proposed acquisition and give preference first to the donation and then to a reasonable acquisition by purchase.



(4) The Board shall obtain confirmation from the Division Engineer that the proposed lease or loan is administrable and is capable of meeting all applicable statutory requirements.

(5) The Board shall calculate and determine the amount of compensation paid to the lessor of the water based, in part, upon the use of the water during and after the term of the lease.

(6) The Board shall consider the historical record(s) of diversion, the beneficial use of the subject water right, the location where return flows have historically returned to the stream, the locations of other water users on the subject reach of stream, and the reason(s) the water is available for lease or loan.

**6g. Recording Requirements.**

All contracts or agreements for leases or loans of water, water rights or interests in water under section 37-92-102(3) shall require the Board to:

(1) Maintain records of how much water the Board uses under the contract or agreement each year it is in effect; and

(2) Install any measuring device(s) deemed necessary by the Division Engineer (a) to administer the lease or loan of water and (b) to measure and record how much water flows out of the reach after use by the Board under the lease or loan.

**6h. Water Reuse.**

All contracts or agreements for the acquisition of water, water rights or interests in water under section 37-92-102(3) shall provide that the Board or the seller, lessor, lender or donor of the water may bring about beneficial use of the historical consumptive use of the acquired water right downstream of the ISF reach as fully consumable reusable water, pursuant to the water court decree authorizing the Board to use the acquired water.

(1) The bringing about of beneficial use of the historical consumptive use of the water may be achieved by direct use, sale, lease, loan or other contractual arrangement by the Board or the seller, lessor, lender or donor.

(2) The contract or agreement also shall provide that the Division Engineer must be notified of any agreement for such beneficial use downstream of the ISF reach prior to the use.

(3) Prior to any beneficial use by the Board of the historical consumptive use of the acquired water right downstream of the ISF reach, the Board shall find that such use:

(a) Will be consistent with the Board's statutory authority and with duly adopted Board policies and objectives; and

(b) Will not injure vested water rights or decreed conditional water rights.

**6i. Change of Water Right.**

The Board shall file a change of water right application or other application with the water court to obtain a decreed right to use water for ISF purposes under all contracts or agreements for acquisitions of water, water rights or interests in water under section 37-92-102(3), including leases and loans of water. The Board may file a joint application to change a water right with the Person from whom the Board has acquired the water or a Person who has facilitated the acquisition. The Water Court shall determine matters that are within the scope of section 37-92-305, C.R.S. In the change of water right proceeding, the Board shall request the Water Court to:

- (1) Verify the quantification of the historical consumptive use of the acquired water right;
- (2) Verify the identification, quantification and location of return flows available for ISF use to the extent that no injury will result to vested water rights and decreed conditional water rights;
- (3) Include terms and conditions providing that:
  - (a) The Board or the seller, lessor, lender, or donor of the water may bring about the beneficial use of the historical consumptive use of the changed water right downstream of the ISF reach as fully consumable reusable water, subject to such terms and conditions as the water court deems necessary to prevent injury to vested water rights and decreed conditional water rights; and
  - (b) When the Board has not identified such downstream beneficial use at the time of the change of water right, the Board may amend the subject change decree, if required by the Division Engineer, to add such beneficial use(s) of the historical consumptive use downstream of the ISF reach at the time the Board is able to bring about such use or reuse, without requiring requantification of the original historical consumptive use calculation;

and

- (4) Determine the method by which the historical consumptive use should be quantified and credited during the term of the agreement for the lease or loan of the water right pursuant to section 37-92-102(3), C.R.S.

**6j.f. Limitation on Acquisitions.**

The Board may not accept a donation of water rights that were acquired by condemnation, or that would require the removal of existing infrastructure without approval of the current owner of such infrastructure, or a donation of water rights that were acquired by condemnation.

**6kg. Temporary Loans of Water to the Board.**

The Board may accept temporary loans of water for instream flow use for a period not to exceed 120 days in any one year, in accordance with the procedures and subject to the limitations set forth in section 37-83-105, C.R.S.

- (1) Within 5 working days after receiving an offer of a temporary loan of water to the Board for temporary instream flow use, the Director will provide a response to the proponent and, unless the proposed loan has no potential value for instream flow use, staff will coordinate with the proponent on preparing and submitting the necessary documentation to the State and Division Engineers required by sections 37-83-105(2)(a)(I) and (2)(b)(I), C.R.S., and providing the public notice required by section 37-83-105(2)(b)(II), C.R.S.
- (2) Provided that the State Engineer has made a determination of no injury pursuant to section 37-83-105(2)(a)(III), C.R.S., the Board hereby delegates authority to the CWCB Director to accept temporary loans of water for instream flow use in accordance with the procedures and subject to the limitations set forth in section 37-83-105 and to take any administrative action necessary to put the loaned water to instream flow use.
- (3) ~~In subsequent years, and p~~ Provided that the State Engineer's determination of non-injury is still in effect, the Director shall notify the proponent and the State Engineer whether the temporary loan is to be exercised in subsequent years. Such notification shall be provided within 5 working days of the Director being notified by the proponent that the water is available for use under the

temporary loan. The CWCB's use of loaned water for instream flows shall not exceed the CWCB's decreed instream flow amount or extend beyond the CWCB's decreed instream flow reach at any time during the loan term, and shall comply with any terms and conditions imposed by the State Engineer to prevent injury. The purpose of this delegation is to expedite use of temporarily loaned water for instream flows by the Board.

- (43) At the first regular or special Board meeting after the Director accepts or rejects an offer of a loan of water to the Board for temporary instream flow use under (1) or (2) above, the Board shall vote either to ratify or overturn the Director's decision.
- (54) The Board, Director and staff will expedite all actions necessary to implement Rule 6k.g.

**6jh. Funds for Water Right Acquisitions.**

The Board may use any funds available to it, ~~other than the Construction Fund created in §37-60-121, C.R.S.,~~ for costs of the acquisition of water rights and their conversion to ISF water rights use. The Board shall spend available funds for such costs in accordance with section 37-60-123.7, C.R.S. and any other applicable statutory authority, and with applicable Board policies and procedures.

**6mi. Public Input on Proposed Acquisitions.**

The Board shall follow the public review process in Rules 11a. - 11c. when acquiring water, water rights or interests in water, except for temporary loans or leases as provided in Rule 6k.g. above and except as provided below.

- (1) Prior to Board consideration of any proposed acquisition, Staff shall mail notice of the proposed acquisition to all ~~persons~~ on the ISF Subscription Mailing List and the State Engineer's Substitute Supply Plan Notification List for the relevant water division, and shall provide Proper Notice. Such notice shall include:
- (a) ~~The~~ case number adjudicating the water right proposed to be acquired, and the appropriation date, adjudication date, priority, decreed use(s), and flow amount of the water right proposed to be acquired, and approximately how much of the water right the Board will consider acquiring;
  - (b) ~~The~~ location of the stream reach or lake that is the subject of the proposal, including, when available, the specific length of stream reach to benefit from the proposed acquisition;
  - (c) Any available information on the purpose of the acquisition, including the degree of preservation or improvement of the natural environment to be achieved; ~~and~~
  - (d) Any available scientific data specifically supporting the position that the acquisition will achieve the goal of preserving or improving the natural environment to a reasonable degree; and
  - (e) In addition to (a) - (d) above, for leases and loans of water, water rights or interests in water under section 37-92-102(3), such notice shall include the proposed term of the lease or loan and the proposed season of use of the water under the lease or loan.
- (2) At every regularly scheduled Board meeting subsequent to the mailing of notice, and prior to final Board action, Staff will report on the status of the proposed acquisition and time will be reserved for public comment.

- (3) Any Person may address the Board regarding the proposed acquisition prior to final Board action. Staff shall provide any written comments it receives regarding the proposed acquisition directly to the Board.
- (4) Any Person may request the Board to hold a hearing on a proposed acquisition. Such a request must be submitted to the Board in writing within twenty days of the first Board meeting at which the Board considers the proposed acquisition, and must include a brief statement, with as much specificity as possible, of why a hearing is being requested.
- (5) At its next regularly scheduled meeting after receipt of the request for a hearing, or at a special meeting, the Board will consider the request and may, in its sole discretion, grant or deny such a request. All hearings scheduled by the Board shall be governed by the following procedures:
  - (a) A hearing on a proposed acquisition must be held within the 120 day period allowed for Board consideration of an acquisition pursuant to Rule 6b., unless the Person requesting the Board to consider the proposed acquisition agrees to an extension of time.
  - (b) The Board shall appoint a Hearing Officer to establish the procedures by which evidence will be offered.
  - (c) -At least thirty days prior to the hearing date(s), the Board shall provide written notice of the hearing(s) to the Person proposing the acquisition, all interested parties known to the Board, and all Persons on the ISF Subscription Mailing List and the State Engineer's Substitute Supply Plan Notification List for the relevant water division. The Board also shall provide Proper Notice, as defined in ISF Rule 4n.
  - (d) Any Person who desires party status shall become a Party upon submission of a written Notice of Party Status to the Board Office. The Notice shall include the name and mailing address of the Person and a brief statement of the reasons the Person desires party status. The Board Office must receive Notice of Party Status within seven days after notice of the hearing is issued.
  - (e) The Hearing Officer shall set timelines and deadlines for all written submissions. Prehearing statements will be required, and shall include, but not be limited to, the following: 1) a list of all disputed factual and legal issues; 2) the position of the Party regarding the factual and legal issues; 3) a list identifying all of the witnesses that will testify for the Party, and a summary of the testimony that those witnesses will provide; and 4) copies of all exhibits that the Party will introduce at the hearing(s).
  - (f) Any Party may present testimony or offer ~~other evidence~~ identified in its prehearing statement regarding the proposed acquisition.
  - (g) The Hearing Officer shall determine the order of testimony for the hearing(s), and shall decide other procedural matters related to the hearing(s). The Hearing Officer does not have authority to rule on substantive issues, which authority rests solely with the Board.
  - (h) The Board will not apply the Colorado Rules of Evidence at hearings on proposed acquisitions.
  - (i) The Board may permit general comments from any Person who is not a Party; however, the Board may limit these public comments to five minutes per Person.
  - (j) The Board may take final action at the hearing(s) or continue the hearing and/or deliberations to a date certain.

- (k) Board hearings may be recorded by a reporter or by an electronic recording device. Any Party requesting a transcription of the hearing(s) shall be responsible for the cost of the transcription.
- (l) -When necessary, the Board may modify this hearing procedure schedule or any part thereof as it deems appropriate.

**6nj. Board Action to Acquire Water, Water Rights or Interests in Water.**

The Board shall consider the acquisition during any regular or special meeting of the Board. At the Board meeting, the Board shall consider all presentations or comments of Staff or any other person. After such consideration, the Board may acquire, acquire with limitations, or reject the proposed acquisition.

**6k. Water Court Proceeding.**

~~In the event water, water rights or interests in water acquired by the Board are not decreed for ISF uses to preserve or improve the natural environment to a reasonable degree, the Board may authorize the Attorney General to file a water court application to change the decreed type of use and place of use of the water, water rights or interests in water acquired by the Board. The Board may pursue joint applications to change a water right with the owner of any water, water right, or interests in water. The Water Court shall determine matters that are within the scope of §37-92-305, C.R.S., which may include injury and the potential impact of the change upon return flows.~~

**7. INUNDATION OF ISF RIGHTS.**

Inundation of all or a portion of an ISF stream reach or lake may be an interference with the Board's usufructuary rights that have been acquired by Board action. "Inundation" as used in this section is the artificial impoundment of water within an ISF or natural lake; "inundation" does not refer to the use of a natural stream as a conveyance channel as long as such use does not raise the waters of the stream above the ordinary high watermark as defined in §37-87-102 (1)(e), C.R.S.

**7a. Small Inundations.**

Staff may file a Statement of Opposition to inundations described in this section if it determines that the ISF right or natural environment will be adversely affected by the inundation. The Staff shall not be required to file a Statement of Opposition to applications proposing small inundations. Small inundations are those in which the impoundment is 100 acre-feet or less, or the surface acreage of the impoundment is 20 acres or less, or the dam height of the structure is 10 feet or less. The dam height shall be measured vertically from the elevation of the lowest point of the natural surface of the ground, where that point occurs along the longitudinal centerline of the dam up to the flowline crest of the spillway of the dam.

- (1) All structures proposed by any applicant on a stream reach shall be accumulated for the purpose of determining whether the inundations proposed by the applicant are small inundations. In the event the cumulative surface acreage, volume impounded, or dam height of all impoundments exceed the definition of a small inundation, Staff may file a Statement of Opposition to that application.
- (2) In the event that no Statement of Opposition is filed pursuant to the terms of this section, the Board shall be deemed to have approved the inundation proposed without a request by the applicant.

**7b. Application of Rule 7.**

The provisions of this rule will not be applied to the following water rights:

- (1) any absolute or conditional water right that is senior to an ISF right;
- (2) any senior conditional water right that seeks a finding of reasonable diligence;
- (3) any junior absolute or conditional water right which was decreed prior to July 10, 1990, or had an application for decree pending prior to July 10, 1990, unless the Board had filed a Statement of Opposition to the absolute or conditional water right application prior to July 10, 1990; or
- (4) any inundation of an ISF reach by water that does not have an absolute or conditional water right if the inundation occurred prior to July 10, 1990.

**7c. Request to Inundate.**

Any Pperson seeking permission to inundate shall timely submit a written request for permission to inundate to the Board Office. No requests for inundation will be considered or approved until the Pperson seeking permission to inundate files a water court application outlining their storage plans or files plans and specifications with the State Engineer for a jurisdictional dam pursuant to §37-87-105, C.R.S. The Board will consider the request to inundate in a timely manner.

**7d. Staff Investigation.**

After receiving the request to inundate, the Staff may seek the recommendations from the Division of Wildlife, Division of Parks and Outdoor Recreation, Division of Water Resources, United States Department of Agriculture and United States Department of Interior.

**7e. Required Information.**

In any written request to inundate, the requesting Pperson shall at a minimum include information on the following factors: the location of the inundation, the size of the inundation, impact of the inundation on the natural environment, any unique or rare characteristics of the ISF water right to be inundated, any regulatory requirements or conditions imposed upon the applicant by federal, state and/or local governments, all terms and conditions included in applicant's water court decree, and any compensation or mitigation offered by the Pperson proposing the inundation.

**7f. Determination of Interference.**

In response to the request to inundate, the Board shall determine whether the proposed inundation interferes with an ISF right. When making this determination, the Board shall consider, without limitation, the extent of inundation proposed and the impact of the proposed inundation on the natural environment existing prior to the inundation.

**7g. Consideration of Request to Inundate.**

If the Board determines that a proposed inundation interferes with an ISF right, the Board may then approve, approve with conditions, defer, or deny the request to inundate. In making this decision, the Board shall consider all relevant factors, including, but not limited to (1) the extent of inundation proposed; (2) the impact of the proposed inundation on the natural environment existing prior to the inundation; (3) the degree to which the beds and banks adjacent to the ISF right subject to the inundation are publicly or privately owned; (4) the economic benefits arising from the inundation; (5) the benefits to recreation and downstream ISF segments arising from the inundation; (6) the degree to which the proposed inundation will allow development of Colorado's allotment of interstate waters as determined by compact or adjudication; and, (7) any mitigation or compensation offered to offset adverse impacts on the ISF right. After considering all relevant factors, the Board shall take one of the actions set forth in Rules 7h. - 7k. below.

7h. **Approval.**

If the Board approves the request to inundate, any Statement of Opposition filed by the Board shall be withdrawn.

7i. **Conditional Approval.**

The Board may require certain conditions to be performed prior to approval. Failure to perform any condition will be a reason for denial.

7j. **Deferral.**

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.

7k. **Denial of Request to Inundate.**

Requests for permission to inundate may be denied if in the discretion of the Board the request is inconsistent with the goals of the ISF Program. The Board may decide to deny a request for permission to inundate if it finds:

- (1) No compensation or mitigation would be adequate for the injury caused by the inundation; or
- (2) No compensation or mitigation acceptable to the Board has been proposed by applicant; or
- (3) The proposed inundation is inconsistent with the goals of the ISF Program.

7l. **Remedies.**

The Board may seek any administrative, legal or equitable remedy through state courts (including water courts), federal courts, city, county, state or federal administrative proceedings to resolve actual or proposed inundation of its ISF rights.

7m. **Board Has Sole Right to Protect ISF Rights from Interference.**

Only the Board may seek to prevent interference with an ISF right by inundation and only the Board may seek compensation or mitigation for such interference.

7n. **Public Review Process.**

The Board shall follow the public review process in Rules 11a. - 11c. prior to any Board decision on a request to inundate an ISF right.

8. **PROTECTION OF ISF APPROPRIATIONS.**

The Board delegates the day-to-day management and administration of the ISF Program to Staff. Staff shall seek ratification of its decisions as set forth in Rules 8c., 8e.(2), 8i., and 8j.

8a. **Resume Review.**

Staff shall review the monthly resumes of all water divisions. The Staff shall evaluate each resume entry for the possibility of injury or interference to an ISF right.

8b. **Statement of Opposition.**

In the event Staff identifies a water right application in the resume that may injure an ISF right, Staff shall file a Statement of Opposition to that application. In the event Staff identifies a water right application in the resume that may interfere with an ISF right as contemplated in Rule 7, Staff may file a Statement of Opposition to that application.

**8c. Ratification of Statements of Opposition.**

At a Board meeting following the filing of the Statement of Opposition, Staff shall apprise the Board of the filing of a Statement of Opposition and the factual basis for the Staff action. At that time, the Board shall ratify the filing, disapprove the filing, or table the decision to a future meeting if more information is needed prior to making a decision.

**8d. Notice.**

Prior to ratification of a Statement of Opposition, the Staff shall mail the applicant a copy of the Board memorandum concerning the ratification and a copy of the agenda of the meeting in which the ratification will be considered. Following a Board action considering a Statement of Opposition, the Staff shall notify the applicant and/or its attorney in writing of the Board's action.

**8e. De Minimis Rule.**

In the event that Staff determines a water court application would result in a 1 percent depletive effect or less on the stream reach or lake subject of the ISF right, and the stream reach or lake has not been excluded from this rule pursuant to Rules 8f. or 8h., Staff shall determine whether to file a Statement of Opposition. Staff's decision not to file a Statement of Opposition does not constitute: (1) acceptance by the Board of injury to any potentially affected ISF water right; or (2) a waiver of the Board's right to place an administrative call for any ISF water right.

(1) If Staff does not file a Statement of Opposition, Staff shall notify the Division Engineer for the relevant water division that it has not filed a Statement of Opposition, but that it may place an administrative call for the potentially affected ISF water right(s). Such a call could be enforced against the water right(s) subject of the application by the Division Engineer in his or her enforcement discretion. Staff also shall mail a letter to the applicant at the address provided on the application notifying the applicant: (a) of Staff's decision not to file a Statement of Opposition pursuant to this Rule; (b) that the CWCB may place a call for its ISF water rights to be administered within the prior appropriation system; and (c) that the Division Engineer's enforcement of the call could result in curtailment or other administration of the subject water right(s).

(2) If Staff files a Statement of Opposition, Staff shall seek Board ratification by identifying and summarizing the Statement of Opposition identify any Statements of Opposition filed pursuant to this rule on the Board meeting consent agenda pursuant to Rule 8c.

**8f. Cumulative Impact.**

In determining existence of a de minimis impact, Staff shall consider the existence of all previous de minimis impacts on the same stream reach or lake. If the combined total of all such impacts exceeds 1 percent, then Staff will file a Statement of Opposition ~~no longer apply the De Minimis rule regardless of the individual depletive effect of that an application.~~

**8g. Notification of Staff Action.**

At a Board meeting following a Staff determination to apply the De Minimis rule, the Staff shall notify the Board about the factual basis leading to its application of the De Minimis rule.



**8h. Exclusion from De Minimis Rule.**

The Board may at any time exclude any stream reach or lake, or any portion thereof, from application of the De Minimis rule.

**8i. Pretrial Resolution.**

Staff may negotiate a pretrial resolution of any injury or interference issue that is the subject of a Statement of Opposition. The Board shall review the pretrial resolution pursuant to the following procedures:

**(1) No Injury.**

In the event the pretrial resolution includes terms and conditions preventing injury or interference and does not involve a modification, or acceptance of injury or interference with mitigation, the Board is not required to review and ratify the pretrial resolution. Staff may authorize its counsel to sign any court documents necessary to finalize this type of pretrial resolution without Board ratification.

**(2) No Injury/Modification.**

In the event the pretrial resolution addresses injury or interference through modification of the existing ISF decree, the process set forth in Rule 9 shall be followed prior to any Board decision to ratify the pretrial resolution.

**(3) Injury Accepted with Mitigation.**

In the event a proposed ~~the~~ pretrial resolution will allow injury to or interference with ~~to~~ an ISF right, but mitigation offered by the applicant would enable the Board to accept the injury or interference while continuing to preserve or improve the natural environment to a reasonable degree, and if the proposed pretrial resolution does not include a modification under ISF Rule 9, the Board shall:

- (a) Conduct a preliminary review of the proposed pretrial resolution during any regular or special meeting to determine whether the natural environment could be preserved or improved to a reasonable degree with the proposed injury or interference if applicant provided mitigation; and,
- (b) At a later regular or special meeting, take final action to ratify, refuse to ratify or ratify with additional conditions.
- (c) No proposed pretrial resolution considered pursuant to this Rule 8i.(3) may receive preliminary review and final ratification ~~in~~ at the same Board meeting.
- (d) The Board shall not enter into any stipulation or agree to any decretal terms and conditions under this Rule that would result in the Division of Water Resources being unable to administer the affected ISF water right(s) in accordance with the priority system or with Colorado water law.
- (e) To initiate CWCB staff review of an Injury with Mitigation proposal, the proponent must provide the following information in writing:
  - i. Location of injury to ISF water right(s) (stream(s) affected, length of affected reach(es));
  - ii. Quantification of injury (amount, timing and frequency);

- iii. Type of water use that would cause the injury;
  - iv. Analysis showing why full ISF protection is not possible;
  - v. Detailed description of the proposed mitigation, including all measures taken to reduce or minimize the injury;
  - vi. Detailed description of how the proposed mitigation will enable the Board to continue to preserve or improve the natural environment of the affected stream to a reasonable degree despite the injury;
  - vii. Identification and feasibility analysis of all other alternatives considered, including discussion of environmental and economic benefits and consequences of each alternative; and
  - viii. A discussion of the reasonableness of each alternative considered.
- (f) After receipt and review of the required information, staff will consult with the DOW and with the entity that originally recommended the affected ISF water rights(s) (if other than DOW) to determine whether additional field work is necessary and to identify any scheduling concerns. Staff will request a recommendation from the DOW as to whether the proposed mitigation will enable the Board to continue to preserve or improve the natural environment of the affected stream to a reasonable degree despite the injury, including a discussion of the reasonableness of the alternatives considered.
- (g) Prior to bringing the proposal to the Board for preliminary consideration, staff will consult with the Division of Water Resources on whether the proposal would result in the Division of Water Resources being unable to administer the affected ISF water right(s) in accordance with the priority system or with Colorado water law.
- (h) At the first meeting of the two-meeting process required by this Rule, staff will bring the proposal to the Board for preliminary consideration after completing its review of the proposal and its consultation with DOW. Staff will work with the proponent and interested parties to address any preliminary concerns prior to bringing a proposal to the Board. Preliminary consideration by the Board may result in requests for more information or for changes to the proposal. Staff will work with the proponent and interested parties to finalize the proposal and bring it back to the Board for final action at a subsequent Board meeting.
- (i) The Board will consider the following factors when evaluating Injury with Mitigation proposals. Because Injury with Mitigation proposals may involve unique factual situations, the Board may consider additional factors in specific cases. Further, evaluation of each Injury with Mitigation proposal will require the exercise of professional judgment regarding the specific facts of the proposal.
- i. Extent of the proposed injury:
    - 1. Location of injury – affected stream(s) and length of affected reach(es);
    - 2. Amount, timing and frequency of shortage(s) to the affected ISF water right(s); and
    - 3. Potential impact to the natural environment of the affected stream reach(es) from such shortage(s).

- ii. Benefits of the mitigation to the natural environment:
  - 1. The nature and extent of the benefits the mitigation will provide to the existing natural environment of the affected stream;
  - 2. The scientific justification for accepting the mitigation; and
  - 3. Whether the mitigation will enable the Board to continue to preserve or improve the natural environment of the subject stream to a reasonable degree.
  
- (i) Evaluation of proposed alternatives. This evaluation applies both to alternatives explored to provide full protection of the potentially affected ISF water right, and to mitigation alternatives:
  - i. Availability of on-site mitigation alternatives;
  - ii. Technical feasibility of each alternative;
  - iii. Environmental benefits and consequences of each alternative;
  - iv. Economic benefits and consequences of each alternative;
  - v. Reasonableness of alternatives; and
  - vi. For mitigation alternatives, whether the mitigation was or will be put in place to satisfy a requirement or need unrelated to the Injury with Mitigation proposal.
  
- (k) The Board will consider mitigation on a different reach of stream or another stream ("off-site mitigation") as a last resort and will only consider mitigation in an area other than the affected stream reach if no reasonable alternative exists for mitigation on the affected stream reach. The Board only will consider off-site mitigation on stream(s) located in the same drainage as the affected stream. Factors that the Board may consider in looking at such a proposal include, but are not limited to, the degree and frequency of impact to the affected stream; the environmental benefits provided to the off-site stream by the mitigation; whether the proposal could, in effect, constitute a modification of the ISF water right on the affected stream; or whether the proposal could result in the Division of Water Resources being unable to administer the affected ISF water right(s) in accordance with the priority system or with Colorado water law.
  
- (l) Stipulations and water court decrees that incorporate Injury with Mitigation shall include, but not be limited to inclusion of, the following terms and conditions:
  - i. A provision that the proponent will not divert water or take any other action that would reduce flows in the affected stream below the decreed ISF amount until the agreed-upon mitigation measures are in place and fully operational;
  - ii. A requirement that the structural components of the mitigation be maintained permanently;
  - iii. A provision allowing CWCB or DOW staff access to the property on which structural components of the mitigation are located to inspect the structures at certain time intervals, and, if necessary, to perform biological stream monitoring. This provision shall clearly define the reasonable nature, extent and timing of

such access (i.e. advance notice, dates, times or season of access, coordination with proponent, and location and routes of access);

- iv. A term providing that if the proponent ceases to provide the agreed upon mitigation (such as removing structural components or failing to maintain them to a specified level, or ceasing to implement non-structural components), that the proponent will not divert water or take any other action that would reduce flows in the affected stream below the decreed ISF amount because the Board will no longer accept the injury based upon the mitigation no longer being in effect -- in such case, if the Board places a call for the affected ISF water right, the Board will notify the Division Engineer that this provision of the decree now is in effect and that the Board is not accepting the injury;
- v. A requirement that the proponent install and pay operation and maintenance costs of (or commit to pay operation and maintenance costs if the CWCB installs) any measuring devices deemed necessary by the Division Engineer to administer the terms of the stipulation and decree implementing the Injury with Mitigation pretrial resolution; and
- vi. A term providing that the water court will retain jurisdiction to enforce the terms and conditions set forth above in subsections (i) - (vi), and any other terms and conditions specific to the Injury with Mitigation pretrial resolution, as a water matter.

**8j. Authorization to Proceed to Trial.**

In the event that a Statement of Opposition filed by the Board is not settled prior to the last regularly scheduled Board meeting prior to the trial date, Staff shall seek Board authorization to proceed to trial. In the event that Staff is authorized to proceed to trial, the Board may adjourn to executive session to discuss settlement parameters with its counsel. Staff is authorized to settle any litigation without Board ratification if the settlement terms are consistent with instructions given by the Board to its counsel.

**8k. Public Review Process.**

The Board shall follow the public review process in Rules 11a. - 11c. prior to consideration of a request to ratify a pretrial resolution pursuant to Rule 8i.(3).

**8l. Notice.**

At any time Staff verifies that an ISF water right is not being fulfilled as a result of water use against which the ISF water right is entitled to protection, the Staff shall provide Proper Notice, including a description of what the Board is doing in response to the situation.

**9. MODIFICATION OF ISF RIGHTS.**

The Board may modify any existing decreed ISF right according to the procedures set forth in this Rule. "Modification" of an ISF right within the meaning of this Rule includes a decrease in the rate of flow described in the existing ISF decree, segmenting an existing ISF reach into shorter reaches with the result of decreasing the rate of flow in any portion of an ISF reach, or subtracting water from an ISF right during any particular time period or season.

**9a. Need for Modification.**

Modification may be requested by the Staff or by any person who has filed a water right application on an ISF reach or who has applied for any governmental permit for facilities located in or near an ISF reach

and who complies with Rules 9b. and 9c. Any request for modification, except by staff, shall be made in writing, submitted to Staff and such writing shall contain the following information:

- (1) name, address and telephone number of the Person seeking modification;
- (2) stream or lake subject of request;
- (3) modification requested;
- (4) reason for modification; and
- (5) the scientific data supporting the request.

**9b. Need for Water.**

Any Person who requests a modification of an ISF right must, as a precondition to the Board's consideration of the request, establish a need for the water made available by the modification. Staff does not have to comply with this rule and any governmental entity seeking to implement the terms of an agreement specified in Rule 9f. does not have to comply with this section.

**9c. Grounds for Modification.**

No request for modification may be considered until the applicant establishes that one of the following reasons for modification exists:

**(1) Mistake.**

An ISF right may be considered for modification if the requesting Person establishes that an error was made in the calculations upon which the original or supplemental appropriation or enlargement to an original appropriation was made.

**(2) Excessive Flow.**

An ISF right may be considered for modification if the requesting Person establishes that the ISF flow rate is in excess of the amount of water necessary to accomplish the purpose of the original, supplemental or enlarged ISF right when that right was appropriated.

**9d. Recovery Implementation or Other Intergovernmental Agreement.**

An ISF right may be modified if such modification was agreed upon by the Board as part of the Recovery Implementation Program for the Endangered Fishes of the Colorado River Basin or any other agreement between the Board and another governmental entity. Modifications made as a part of the Recovery Implementation Program for the Endangered Fishes of the Colorado River Basin need not be subject to the public review process in Rule 9e. Criteria for modifications made in the ISF rights decreed as part of the Recovery Implementation Program for the Endangered Fishes of the Colorado River Basin will be established in the decrees governing such appropriations.

**9e. Public Review Process of Requests for Modification.**

The Board shall adhere to the following public review process when considering requests for modification:

**(1) Notice.**

Notice of the proposed modification and the date of the public meeting at which it will first be considered shall be printed in the resume in the Water Court having jurisdiction over the decree that is the subject of

the modification. The first public meeting of the Board at which the modification is to be considered shall occur at least sixty days after the month in which the resume is published. Notice shall also be published in a newspaper of statewide distribution within thirty to forty-five days prior to such first public meeting.

**(2) Public Meeting.**

If the Board decides at such first public meeting to give further consideration to the proposed modification, the Board shall announce publicly the date of a subsequent public meeting for such purpose. If the Board decides that it will not give further consideration to the proposed modification, it shall state, in writing, the basis for its decision.

**(3) Request for Delay.**

On the written request of any Person made within thirty days after the date of the first public meeting, the Board shall delay the subsequent public meeting for up to one year to allow such Person the opportunity for the collection of scientific data material to the proposed modification. The Board need not grant the request if it determines that the request is made solely to delay the proceedings.

**(4) Procedures.**

On the written request of any Person made within thirty days after the date of the first public meeting, the Board shall, within sixty days after such request, establish fair and formal procedures for the subsequent public meeting, including the opportunity for reasonable disclosure, discovery, subpoenas, direct examination, and cross examination. Subject to these rights and requirements, where a meeting will be expedited and the interests of the participants will not be substantially prejudiced thereby, the Board may choose to receive all or part of the evidence in written form.

**(5) Final Determination.**

The Board shall issue a final written determination regarding the modification that shall state its effective date, be mailed promptly to the Persons who appeared by written or oral comment at the Board's proceeding, and be filed promptly with the water court.

**10. ENFORCEMENT AGREEMENTS.**

The Board may attach conditions to an appropriation, decreased appropriation, or acquisition, and may enter into any enforcement agreements that it determines will preserve or improve the natural environment to a reasonable degree. The Board may enter into enforcement agreements that limit the Board's discretion in the protection, approval of inundation, modification or disposal of ISF right, and/or may delegate limited authority to act on the Board's behalf.

**10a. Ratification of Enforcement Agreements.**

No enforcement agreement shall be effective to limit the discretion of the Board until that agreement and all of its terms are reviewed and ratified by the Board. Upon ratification, the Director may execute the agreement and the agreement shall be binding upon the Board for the term set forth in the enforcement agreement.

**10b. Public Review Process.**

The Board shall follow the public review process set forth in Rules 11a. - 11c. prior to any Board decision to ratify an Enforcement Agreement.

**11. PUBLIC REVIEW PROCESS.**

Except as otherwise provided in the ISF Rules, the Board shall follow the public review process set forth below prior to any Board decision requiring public review.

**11a. Public Notice.**

Public notice of all Board actions under these Rules shall be provided through the agenda of each regular or special Board meeting.

**11b. Public Comment.**

Except as otherwise provided in Rules 5k. and 6mi., at a regular or special meeting, the Board shall consider public comment on the recommended ISF action prior to the Board action on the recommendation in any or all of the following manners:

- (1) Oral and/or written comments may be directed to Staff. When such comments are made, Staff may summarize these comments to the Board.
- (2) Oral and/or written comments, subject to reasonable limitations established by the Board, may be made directly to the Board during the public meeting.

**11c. Public Agency Recommendations.**

Prior to taking an ISF action pursuant to Rules 5 or 6, the Board shall request recommendations from the Division of Wildlife and the Division of Parks and Outdoor Recreation. The Board shall also request recommendations from the United States Department of Agriculture and the United States Department of Interior. The Board may also request comments from other interested Persons or agencies as it deems appropriate.

Prior to taking an ISF action pursuant to Rules 7, 8, 9, or 10, the Board may request recommendations from the Division of Wildlife, the Division of Parks and Outdoor Recreation, the Division of Water Resources, the United States Department of Agriculture, the United States Department of Interior or other Persons as it deems appropriate.

**11d. Board Procedures.**

At a regular or special Board meeting, the Board may, as necessary, adopt or amend procedures to supplement these rules.

**12. SEVERABILITY.**

In the event that any section or subsection of these Rules are judged to be invalid by a court of law or are allowed to expire by the General Assembly, the remaining Rules shall remain in full force and effect.

**EXHIBIT G**



# An Act

HOUSE BILL 08-1280

BY REPRESENTATIVE(S) Fischer, Levy, Madden, Pommer, Borodkin, Kefalas, Kerr A., King, Massey, McGihon, Primavera, Scanlan, Solano, Stafford, Todd, Weissmann, White, and Green;  
also SENATOR(S) Schwartz, Gibbs, Tochtrop, Bacon, Groff, Harvey, Isgar, Kopp, Romer, Sandoval, Shaffer, Spence, Tupa, Wiens, Williams, and Windels.

CONCERNING PROTECTION OF WATER RIGHTS USED BY THE COLORADO WATER CONSERVATION BOARD FOR INSTREAM FLOWS UNDER CONTRACTS WITH WATER RIGHTS OWNERS.

*Be it enacted by the General Assembly of the State of Colorado:*

**SECTION 1.** The introductory portion to 37-92-102 (3), Colorado Revised Statutes, is amended to read:

**37-92-102. Legislative declaration - basic tenets of Colorado water law.** (3) Further recognizing the need to correlate the activities of mankind with some reasonable preservation of the natural environment, the Colorado water conservation board is hereby vested with the exclusive authority, on behalf of the people of the state of Colorado, to appropriate in a manner consistent with sections 5 and 6 of article XVI of the state constitution, such waters of natural streams and lakes as the board

determines may be required for minimum stream flows or for natural surface water levels or volumes for natural lakes to preserve the natural environment to a reasonable degree. In the adjudication of water rights pursuant to this article and other applicable law, no other person or entity shall be granted a decree adjudicating a right to water or interests in water for instream flows in a stream channel between specific points, or for natural surface water levels or volumes for natural lakes, for any purpose whatsoever. The board also may acquire, by grant, purchase, donation, bequest, devise, lease, exchange, or other contractual agreement, from or with any person, including any governmental entity, such water, water rights, or interests in water THAT ARE NOT ON THE DIVISION ENGINEER'S ABANDONMENT LIST in such amount as the board determines is appropriate for stream flows or for natural surface water levels or volumes for natural lakes to preserve or improve the natural environment to a reasonable degree. At the request of any person, including any governmental entity, the board shall determine in a timely manner, not to exceed one hundred twenty days unless further time is granted by the requesting person or entity, what terms and conditions it will accept in a contract or agreement for such acquisition. Any contract or agreement executed between the board and any person or governmental entity that provides water, water rights, or interests in water to the board shall be enforceable by either party thereto as a water matter under this article, according to the terms of the contract or agreement. THE BOARD SHALL ADOPT CRITERIA FOR EVALUATING PROPOSED CONTRACTS OR AGREEMENTS FOR LEASES OR LOANS OF WATER, WATER RIGHTS, OR INTERESTS IN WATER UNDER THIS SUBSECTION (3), INCLUDING, BUT NOT LIMITED TO, CRITERIA ADDRESSING PUBLIC NOTICE, THE EXTENT TO WHICH THE LEASED OR LOANED WATER WILL BENEFIT THE NATURAL ENVIRONMENT TO A REASONABLE DEGREE, AND CALCULATION OF THE COMPENSATION PAID TO THE LESSOR OF THE WATER BASED UPON THE USE OF THE WATER AFTER THE TERM OF THE LEASE. AS A CONDITION OF APPROVAL OF A PROPOSED CONTRACT OR AGREEMENT FOR A LEASE OR LOAN OF WATER, WATER RIGHTS, OR INTERESTS IN WATER PURSUANT TO THIS SUBSECTION (3), THE BOARD SHALL OBTAIN CONFIRMATION FROM THE DIVISION ENGINEER THAT THE PROPOSAL IS ADMINISTRABLE AND IS CAPABLE OF MEETING ALL APPLICABLE STATUTORY REQUIREMENTS. ALL CONTRACTS OR AGREEMENTS ENTERED INTO BY THE BOARD FOR LEASES OR LOANS OF WATER, WATER RIGHTS, OR INTERESTS IN WATER PURSUANT TO THIS SUBSECTION (3) SHALL REQUIRE THE BOARD TO MAINTAIN RECORDS OF HOW MUCH WATER THE BOARD USES UNDER THE CONTRACT OR AGREEMENT EACH YEAR IT IS IN EFFECT AND TO INSTALL ANY MEASURING DEVICES DEEMED NECESSARY BY THE DIVISION

ENGINEER TO ADMINISTER THE CONTRACT OR AGREEMENT AND TO MEASURE AND RECORD HOW MUCH WATER FLOWS OUT OF THE REACH AFTER USE BY THE BOARD UNDER THE CONTRACT OR AGREEMENT, UNLESS A MEASURING DEVICE ALREADY EXISTS ON THE STREAM THAT MEETS THE DIVISION ENGINEER'S REQUIREMENTS. ALL CONTRACTS OR AGREEMENTS FOR WATER, WATER RIGHTS, OR INTERESTS IN WATER UNDER THIS SUBSECTION (3) SHALL PROVIDE THAT, PURSUANT TO THE WATER COURT DECREE IMPLEMENTING THE CONTRACT OR AGREEMENT, THE BOARD OR THE LESSOR, LENDER, OR DONOR OF THE WATER MAY BRING ABOUT BENEFICIAL USE OF THE HISTORICAL CONSUMPTIVE USE OF THE LEASED, LOANED, OR DONATED WATER RIGHT DOWNSTREAM OF THE INSTREAM FLOW REACH AS FULLY CONSUMABLE REUSABLE WATER. THE BOARD SHALL FILE A CHANGE OF WATER RIGHT APPLICATION OR OTHER APPLICATION WITH THE WATER COURT TO OBTAIN A DECREED RIGHT TO USE WATER FOR INSTREAM FLOW PURPOSES UNDER A CONTRACT OR AGREEMENT FOR A LEASE OR LOAN OF WATER, WATER RIGHTS, OR INTERESTS IN WATER PURSUANT TO THIS SUBSECTION (3). THE RESULTING WATER COURT DECREE SHALL QUANTIFY THE HISTORICAL CONSUMPTIVE USE OF THE LEASED OR LOANED WATER RIGHT AND DETERMINE THE METHOD BY WHICH THE HISTORICAL CONSUMPTIVE USE SHOULD BE QUANTIFIED AND CREDITED DURING THE TERM OF THE AGREEMENT FOR THE LEASE OR LOAN OF THE WATER RIGHT. SAID METHOD SHALL RECOGNIZE THE ACTUAL AMOUNT OF CONSUMPTIVE USE AVAILABLE UNDER THE LEASED OR LOANED WATER RIGHT AND SHALL NOT RESULT IN A REDUCTION OF THE HISTORICAL CONSUMPTIVE USE OF THAT WATER RIGHT DURING THE TERM OF THE LEASE OR LOAN, EXCEPT TO THE EXTENT SUCH REDUCTION IS BASED UPON THE ACTUAL AMOUNT OF WATER AVAILABLE UNDER SAID RIGHTS. ALL WATER RIGHTS UNDER SUCH DECREES SHALL BE ADMINISTERED IN PRIORITY. The board may not accept a donation of water rights that either would require the removal of existing infrastructure without approval of the current owner of such infrastructure or that were acquired by condemnation. The board may use any funds available to it, other than the construction fund created in section 37-60-121, for acquisition of water rights and their conversion to instream flow rights. The board may initiate such applications as it determines are necessary or desirable for utilizing water, water rights, or interests in water appropriated, acquired, or held by the board, including applications for changes of water rights, exchanges, or augmentation plans. Prior to the initiation of any such appropriation or acquisition, the board shall request recommendations from the division of wildlife and the division of parks and outdoor recreation. The board also shall request recommendations from the United States

department of agriculture and the United States department of the interior. Nothing in this article shall be construed as authorizing any state agency to acquire water by eminent domain or to deprive the people of the state of Colorado of the beneficial use of those waters available by law and interstate compact. Nothing in this subsection (3) shall impact section 37-60-121 (2.5). Any appropriation made pursuant to this subsection (3) shall be subject to the following principles and limitations:

**SECTION 2.** The introductory portion to 37-92-103 (2) (b), Colorado Revised Statutes, is amended, and the said 37-92-103 (2) (b) is further amended BY THE ADDITION OF A NEW SUBPARAGRAPH, to read:

**37-92-103. Definitions.** As used in this article, unless the context otherwise requires:

(2) "Abandonment of a water right" means the termination of a water right in whole or in part as a result of the intent of the owner thereof to discontinue permanently the use of all or part of the water available thereunder. Any period of nonuse of any portion of a water right shall be tolled, and no intent to discontinue permanent use shall be found for purposes of determining an abandonment of a water right for the duration that:

(b) The nonuse of a water right BY ITS OWNER is a result of participation in:

(VI) ANY CONTRACT OR AGREEMENT WITH THE COLORADO WATER CONSERVATION BOARD THAT ALLOWS THE BOARD TO USE ALL OR A PART OF A WATER RIGHT TO PRESERVE OR IMPROVE THE NATURAL ENVIRONMENT TO A REASONABLE DEGREE UNDER SECTION 37-92-102 (3).

**SECTION 3.** 37-92-305 (3), Colorado Revised Statutes, is amended to read:

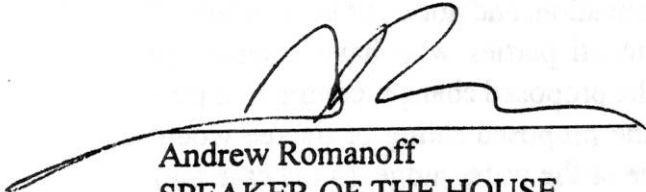
**37-92-305. Standards with respect to rulings of the referee and decisions of the water judge.** (3) (a) A change of water right, implementation of a rotational crop management contract, or plan for augmentation, including water exchange project, shall be approved if such change, contract, or plan will not injuriously affect the owner of or persons

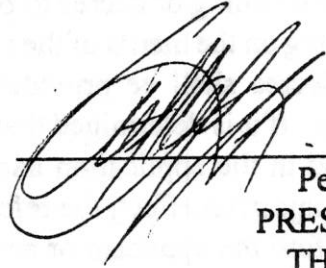
entitled to use water under a vested water right or a decreed conditional water right. In cases in which a statement of opposition has been filed, the applicant shall provide to the referee or to the water judge, as the case may be, a proposed ruling or decree to prevent such injurious effect in advance of any hearing on the merits of the application, and notice of such proposed ruling or decree shall be provided to all parties who have entered the proceedings. If it is determined that the proposed change, contract, or plan as presented in the application and the proposed ruling or decree would cause such injurious effect, the referee or the water judge, as the case may be, shall afford the applicant or any person opposed to the application an opportunity to propose terms or conditions that would prevent such injurious effect.

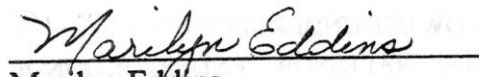
(b) DECREES FOR CHANGES OF WATER RIGHTS THAT IMPLEMENT A CONTRACT OR AGREEMENT FOR A LEASE, LOAN, OR DONATION OF WATER, WATER RIGHTS, OR INTERESTS IN WATER TO THE COLORADO WATER CONSERVATION BOARD FOR INSTREAM FLOW USE UNDER SECTION 37-92-102 (3) (b) SHALL PROVIDE THAT THE BOARD OR THE LESSOR, LENDER, OR DONOR OF THE WATER MAY BRING ABOUT BENEFICIAL USE OF THE HISTORICAL CONSUMPTIVE USE OF THE CHANGED WATER RIGHT DOWNSTREAM OF THE INSTREAM FLOW REACH AS FULLY CONSUMABLE REUSABLE WATER, SUBJECT TO SUCH TERMS AND CONDITIONS AS THE WATER COURT DEEMS NECESSARY TO PREVENT INJURY TO VESTED WATER RIGHTS OR DECREED CONDITIONAL WATER RIGHTS.

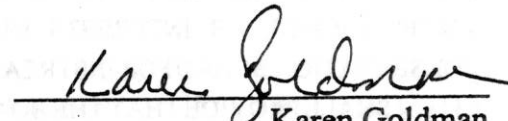
**SECTION 4. Effective date - applicability.** (1) This act shall take effect at 12:01 a.m. on the day following the expiration of the ninety-day period after final adjournment of the general assembly that is allowed for submitting a referendum petition pursuant to article V, section 1 (3) of the state constitution, (August 6, 2008, if adjournment sine die is on May 7, 2008); except that, if a referendum petition is filed against this act or an item, section, or part of this act within such period, then the act, item, section, or part, if approved by the people, shall take effect on the date of the official declaration of the vote thereon by proclamation of the governor.

(2) The provisions of this act shall apply to water court determinations of historic consumptive use and abandonment occurring on or after the applicable effective date of this act.

  
Andrew Romanoff  
SPEAKER OF THE HOUSE  
OF REPRESENTATIVES

  
Peter C. Groff  
PRESIDENT OF  
THE SENATE

  
Marilyn Eddins  
CHIEF CLERK OF THE HOUSE  
OF REPRESENTATIVES

  
Karen Goldman  
SECRETARY OF  
THE SENATE

APPROVED April 21, 2008 at 12:27 p.m.

  
Bill Ritter, Jr.  
GOVERNOR OF THE STATE OF COLORADO