

# STATE OF COLORADO

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## Colorado Water Conservation Board Department of Natural Resources

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TO: Colorado Water Conservation Board Members

FROM: Linda Bassi  
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Stream and Lake Protection Section

DATE: May 3, 2012

SUBJECT: **Agenda Item 11, May 15-16, 2012 Board Meeting**  
**Stream and Lake Protection – Temporary Leases of Water for Instream Flow Use**

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John W. Hickenlooper  
Governor

Mike King  
DNR Executive Director

Jennifer L. Gimbel  
CWCB Director

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### Introduction

On April 23, 2012, the Colorado Water Trust (“CWT”) issued a “Request for Water” to solicit interested water rights owners to temporarily lease water to the CWCB for instream flow (“ISF”) use under section 37-83-105(2), C.R.S. (2011). The CWT is a private, nonprofit organization dedicated to protecting and restoring streamflows in Colorado through market-based, voluntary mechanisms, and has partnered with the CWCB on several ISF water acquisitions. Under section 37-83-105(2), a water rights owner can lease water to CWCB for ISF use pursuant to a decreed ISF water right for a period not to exceed 120 days, provided that the State and Division Engineers have determined that the lease will not injure existing decreed water rights.

This memo explains how this CWT pilot program will operate and outlines the CWCB’s process for accepting such leases under the Rules Concerning Colorado’s Instream Flow and Natural Level Program (“ISF Rules”), specifically Rule 6k. This is an informational item with no Board action required.

### Discussion

The CWT initiated the Request for Water based upon projections of drought conditions this year. According to the Natural Resources Conservation Service, streamflow forecasts indicate flows are likely to be below average to well below average in all basins across the state due to low snowpack combined with a dry spring and warmer than usual March and April temperatures. The goal of the pilot temporary lease program is to address both the impacts of drought on Colorado’s streams and the financial needs of Colorado’s water users this summer and fall. The CWT will work with water right owners on a voluntary basis to compile the necessary information to obtain State and Division Engineer approval and CWCB acceptance of temporary leases of water for ISF use. The CWT has assembled volunteer technical and legal teams to prepare documents and perform the analyses required for state approval. Additionally, the CWT will pay fair market value for pilot program leases.

## 1. CWT Process

The CWT has developed a structured process for receiving and evaluating offers of water for temporary ISF leases. The Request for Water materials include an Initial Offer Form, Leasing Terms and Conditions, and a Guide to Initial Offer Form and Frequently Asked Questions. The Terms and Conditions document is attached to this memo, and the additional materials can be found on the CWT website at <http://www.coloradowatertrust.org/request-for-water/>. While the CWT has identified a list of priority rivers and streams, it will consider offers on other streams if the water will provide value to the ISF Program. The CWT developed the list of priority streams based upon critical streams identified on the Governor's Wildlife Impact Task Force Watch List in 2002 on which the CWCB holds decreed ISF water rights.

The CWT has requested that initial offers be submitted to it by May 11, 2012 to enable it to perform the required analyses and coordinate with the CWCB staff to apply for and obtain State and Division Engineer approval of leases by late June or early July. As of the date of this memo, the CWT has received approximately 20 inquiries about the program and one initial offer.

## 2. CWCB Process

ISF Rule 6k., attached to this memo, sets forth the Board's process for accepting temporary loans/leases of water for ISF use. Rule 6k. authorizes the CWCB Director to accept temporary leases that the State and Division Engineers have approved and requires the Board to ratify or overturn the Director's decision at the next regularly scheduled Board meeting. Consequently, staff anticipates bringing one or more leases to the Board at its July meeting for consideration.

## 3. Potential Benefits of the CWT's Temporary Lease Program

The CWT's program will enable the CWCB to lease water to bring its existing decreed ISF water rights up to their decreed amount and continue to preserve the natural environment to a reasonable degree during times of low flows. It also gives water rights owners an alternative approach in a dry year that could provide more financial certainty than irrigating a crop.

Temporary leases of water for ISF use will implement one of the mitigation actions identified in the Colorado Drought Mitigation & Response Plan, prepared by the CWCB in 2010: "Enact policy to allow for greater flexibility during drought conditions to protect instream flows and/or wetlands critical to the survival of species of greatest conservation need." While the policy allowing for greater flexibility already has been enacted in the form of section 37-83-105, C.R.S., exercising temporary ISF leases under that statute will directly result in mitigation of drought conditions by protecting instream flows.

Attachments

### **ISF Rule 6k. 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) 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.

(4) 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.

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



## COLORADO WATER TRUST

### COLORADO WATER TRUST'S REQUEST FOR WATER 2012

#### TERMS AND CONDITIONS

Thank you for your interest in the Colorado Water Trust's Request for Water. We are excited to offer a choice to water right holders during a dry year that puts money in people's pockets and benefits Colorado's rivers at the same time. If, after reviewing the Request for Water Terms and Conditions, you wish to participate in the leasing program, please complete an Initial Offer Form in its entirety and submit it to CWT by the **close of business on May 11, 2012**. CWT may invite additional rounds of the Request for Water later in the 2012 season.

#### Types of Water Leases

This Request for Water is for three types of water leasing transactions:

- a. **Three-in-ten Lease**. Beginning with the 2012 irrigation season, a water right holder agrees to lease their water right to the CWCB, as facilitated by CWT, to be managed in the state's Instream Flow Program for this irrigation season, and for at least two more years in the following nine years, as permitted under the state's short-term instream flow leasing law.
- b. **Single-year Lease**. A water right holder agrees to lease their water right to the CWCB as facilitated by CWT, to be managed in the state's Instream Flow Program for this irrigation season. These leases will include a clause that suggests that the lessor would be willing to work with CWT in subsequent years, but without obligation.
- c. **Split-season Lease**. A water right holder would agree to lease their water right to the CWCB as facilitated by CWT, to be managed in the state's Instream Flow Program for a portion of each of three irrigation seasons, starting with 2012 (i.e., the minimum term of these leases is three-in-ten years).

You will need to specify which category of lease you would like to implement in Part 3 of the Initial Offer Form.

#### Packaging Your Initial Offer

CWT will consider Initial Offers for water rights that meet the following conditions:

- **Sources**: The water right must be for direct flow or storage and must divert from or store water on the following rivers *or their tributaries*:
  - Middle and South Forks of the South Platte upstream from their confluence (Div. 1)
  - Boulder Creek (Div. 1)

- North Fork of the Republican River upstream from the confluence with Holy Joe Creek (Div. 1)
- Lake Fork (tributary to the Arkansas River) (Div. 2)
- Greenhorn Creek (tributary to the St. Charles River, tributary to the Arkansas River) above the confluence with Graneros Creek (Div. 2)
- Texas Creek (tributary to the Arkansas River) (Div. 2)
- Huerfano River (tributary to the Arkansas River) above the confluence with Stanley Creek (Div. 2)
- Saguache Creek above the confluence with the North Branch of the Saguache Creek (Div. 3)
- La Jara Creek (tributary to the Rio Grande) above the confluence with Hot Creek (Div. 3)
- Sangre de Cristo Creek (tributary to Ute Creek, tributary to Trinchera Creek, tributary to the Rio Grande River) above the confluence with Ute Creek (Div. 3)
- North Fork of the Gunnison River (tributary to the Gunnison River) upstream from the confluence with the Gunnison River (Div. 4)
- Gunnison River upstream from the Crystal Dam (Div. 4)
- San Miguel River upstream from the confluence with Horsefly Creek (Div. 4)
- Dolores River upstream from the confluence with the San Miguel River (Divs. 4 & 7)
- Crystal River (tributary to the Roaring Fork River) (Div. 5)
- Roaring Fork River upstream from the confluence of the Frying Pan River (Div. 5)
- Eagle River (tributary to the Colorado River) (Div. 5)
- Colorado River between Windy Gap Reservoir and Kremmling, CO (Div. 5)
- Yampa River (Div. 6)
- White River upstream from the confluence with Piceance Creek (Div. 6)
- Mancos River (Div. 7)
- **Amount:** The minimum offer must be for at least 1 cfs or 50 acre-feet. If your water right is decreed for an amount less than 1 cfs or 50 acre-feet, we suggest you visit with your neighbors and see if you can submit a package of water rights that will meet this threshold. We can provide an Initial Offer Form that contemplates a package.
- **Yield in 2002:** The water right must have had water available to it in 2002.
- **Lease commencement:** The party submitting the Initial Offer Form must be willing to lease the water right for at least a portion of the 2012 irrigation season.

#### **Additional Support for Initial Offer Form**

In addition to filling out the Initial Offer Form, you will be asked to provide the following supporting documents and participate in or agree to the following actions:

- **Documents:** The party submitting the Initial Offer Form must provide copies of all reasonably accessible documents that will assist in the review of the offer, including deeds, decrees, maps, engineering reports and analyses, share certificates, conservation easements, and any relevant agreements.
- **Period of use:** The party submitting the Initial Offer Form must be prepared to show that the water right has been consistently used for the decreed purpose(s) during the period from 2000 through 2011.

- **Irrigation cessation:** The land to which the water right is appurtenant cannot be irrigated during the periods proscribed in the lease; or, in the case of a split-year lease option, during the time specified in the lease when it will be used instream.
- **Preliminary inspection:** The party submitting the Initial Offer Form must be willing to allow staff from the Colorado Water Trust and/or the Colorado Water Conservation Board access to all facilities related to the water right (source, headgate or other diversion structure, ditch system, irrigated acreage) for the purpose of evaluating the stream and habitat characteristics in the reach of stream that would benefit from the lease of the water right and the historical use of the water right.
- **Follow-up inspections:** The party submitting the Initial Offer Form must be willing to allow CWT and/or the CWCB and any of their representatives access to the above-described features upon request at reasonable times to ensure compliance with the terms of the lease. Measuring and reporting water use associated with any portion of the water right not leased will be required.
- **Authority:** The party submitting the Initial Offer Form must represent and warrant that they own the land to which the water right is appurtenant and/or that they have the authority to lease the water right.
- **Ditch/Reservoir company shares:** If the water rights are in a shared ditch or reservoir or represented by shares in a ditch or reservoir company, the party submitting the Initial Offer Form must submit written permission from the ditch/reservoir company or other owners to lease their water right.
- **Time is of the essence:** Under the Colorado short-term leasing law, there are a series of steps that need to be taken to ensure approval of the lease by the state. In order to put water back into streams this summer, these leases will need to be implemented quickly. The party submitting the Initial Offer Form must be willing to work promptly to complete the negotiations for the lease of the water right or portion of the water right to the state's Instream Flow Program.

### **CWT's Screening Process for Initial Offer applications**

When we receive an Initial Offer Form, the water right will be evaluated to determine its suitability for the state's short-term leasing program. The evaluation will include:

- a general assessment of the suitability of the water right;
- an analysis of stream conditions in 2002 and the water right's availability that year;
- a reasonable estimate of historical consumptive use; and
- other considerations required by the short-term leasing law.

Acceptance of an Initial Offer will be documented by letter and negotiations will begin immediately thereafter.

### **CWT's Response Time and Post-Screen Process**

CWT will notify in writing water users who submit an Initial Offer whether or not the offer passed the screening process by early June. If a water right passes these initial screening processes, a Letter of Intent will be offered to owner(s) of the water right. The water user will be expected to enter into negotiations at that time. Additional information on the water right may be requested of the water right owner at that time, as well. If a water right is not accepted, the owner(s) will receive an explanation of why the Initial Offer was declined along with suggestions, if any, for modifying or improving the offer. If CWT invites additional rounds of

the Request for Water, water rights owners who receive suggestions for modifying or improving their offer are encouraged to re-submit their updated offers during subsequent rounds.

### **Compensation and Payment**

CWT will offer fair market value for leasing water rights. Every water right value will be different. Value will be primarily based on the net revenue each water user would expect from their forgone use this season. For irrigators, we will look at your crop type, acreage, and market value to come up with this value. We will then measure our estimated value against the value you provided in the Initial Offer Form, if any, to determine if we are close enough in price to make negotiations worthwhile (i.e., if your estimated value is significantly higher than what we determine to be market value, we may conclude that we will not be able to afford what you want for your lease). Thus, it is critical for the value you provide to us to be realistic and closely reflect what you would have made if you had used your water right for its decreed purposes for the time it will instead be in the Instream Flow Program.

Payment will be made to the water right owner in accordance with a completed and signed agreement between CWT, the CWCB, and the lessor upon execution of the lease and implementation of use of the water right in the State's Instream Flow Program. We are aiming for a start date of July 1 for leases approved through this Request for Water process.

Please retain a copy of these Terms and Conditions for your records, along with a copy of any Initial Offer Forms you might submit.

Participation in this process shall not result in any obligation on CWT's part to lease a water right. We will lease a water right only if meets the requirements of the short term leasing law and other criteria. Any water right owner participating in this process agrees to hold CWT harmless from any and all claims that may arise from participation in the process.

If you have any questions, please contact the Colorado Water Trust at 720-570-2897 or [admin@coloradowatertrust.org](mailto:admin@coloradowatertrust.org).