



COLORADO

**Colorado Water
Conservation Board**

Department of Natural Resources

1313 Sherman Street
Denver, CO 80203

P (303) 866-3441

F (303) 866-4474

John Hickenlooper, Governor

Mike King, DNR Executive Director

James Eklund, CWCB Director

TO: Colorado Water Conservation Board Members

FROM: Jeff Baessler, Deputy Chief, Stream and Lake Protection Section
Linda Bassi, Chief, Stream and Lake Protection Section

DATE: July 15-16, 2015 Board Meeting

AGENDA ITEM: 22. Southwestern Water Conservation District Request to Address the Board on Instream Flow Policy

Background

In May 2015, the Southwestern Water Conservation District (SWCD) formally requested to appear before the Colorado Water Conservation Board to discuss "how CWCB instream flow rights downstream of population centers or in close proximity to the state line impact upstream water use" and "the concept of future use allocations."

Three documents addressing these topics are attached to this memo:

- June 25, 2015 Letter from Jennifer Russell of Russell & Pieterse, LLC, San Miguel County's representative on the SWCD Board
- June 29, 2015 Letter from Leigh Robertson, Executive Director of Sheep Mountain Alliance
- Memo from Southwestern Water Conservation District to Colorado Water Conservation Board received on July 1, 2015

Staff Recommendation

This item is informational only, with no Board action requested.





real estate · water · business ·

June 25, 2015

Colorado Water Conservation Board
1313 Sherman St., 7th Floor
Denver, CO 80203
Rob.Viehl@state.co.us

By Electronic Mail

**Re: Discussion with Southwestern Water Conservation District Regarding
Future Use Allocations or “Carve-Outs”**

Dear CWCB Board Members:

I represent San Miguel County on the Board of Directors of the Southwestern Water Conservation District, and I submit this letter to voice my objection to the future use allocation concept promoted by the District with respect to instream flows that will greatly benefit the residents of San Miguel County. (I am currently out of the country and not able to attend the Board meeting in person.)

Moreover, I also object to the Board having this discussion in light of the pending contested hearing on the Dolores River Instream Flow appropriation (“Dolores ISF”). While I understand that this conversation is supposed to be separate from the hearing, the future use allocation is the primary basis of the District’s objection to the Dolores ISF (as discussed at a previous District Board meeting), and it is the reason that the District wanted this discussion to occur prior to the hearing on the ISF. Consequently, I strongly urge the Board to table this discussion until after the Dolores ISF contested hearing to avoid this discussion affecting the outcome of that hearing.

As San Miguel County’s representative, I object to the future use allocation proposed by the District on several bases:

- It violates state anti-speculation law.
 - SWCD seeks a future use allocation to set aside water for future unknown users without a specific plan and intent to divert, store and control a specific quantity of water for specific beneficial uses. State law expressly states that this is speculation.¹

¹ C.R.S. § 37-92-103(3)(a)(II).

- It violates the intent and purpose of S.B. 79, the legislation creating the instream flow program, and would make instream flows second-class water rights.
 - As the Colorado Supreme Court pointed out in rejecting a similar argument from the District over 35 years ago, “The legislative intent is quite clear that [ISF] appropriations are to protect and preserve the natural habitat and that the decrees confirming them award *priorities which are superior to the rights of those who may later appropriate. Otherwise, upstream appropriations could later be made, the streams dried up, and the whole purpose of the legislation destroyed.*”²
- It creates a precedent that will threaten the efficacy and purpose of the instream flow program and likely will, consequently, increase interest in the public trust doctrine.
- It threatens the ability of the federal government to protect species through the state water system rather than through permitting processes or other means.
- It risks the recovery of the fish species that the ISF is intended to protect.
 - San Miguel County, like many of the counties in the District, is highly dependent upon healthy river flows for our recreation and tourism economy.
 - An endangered species listing will directly and negatively affect San Miguel County and its citizens. While we have made this point to the District numerous times, the District appears to be much more interested in pushing their position than in recognizing the legitimate, economic concerns of one of its member counties.

We request that you table consideration of the District’s future use allocation proposal until after the Dolores ISF contested hearing. If you do consider the proposal, we urge you to reject it.

Sincerely,



Jennifer Russell

ec: San Miguel County Commissioners

² *Colo. River Water Conservation Dist. v. Colo. Water Conservation Bd.*, 594 P.2d 570, 575 (Colo. 1979).



PO Box 389, Telluride, CO 81435 • 970-728-3729 • www.sheepmountainalliance.org

June 29, 2015

Diane Hoppe, Chair
Colorado Water Conservation Board
1313 Sherman Street, Room 718
Denver, CO 80203

Dear Ms. Hoppe and CWCB Board Members:

I am writing the CWCB to strongly express my opposition to any policy that would allow carve-outs for imagined future water uses. Carving out water for speculative uses goes against Colorado water law. Furthermore, this isn't needed, since the Instream Flow Program allows the Board flexibility.

The idea of carve outs below population centers makes no sense. For example, if Telluride—at the headwaters of the San Miguel River—was considered a population center, then carve outs could effect the whole river. This would be completely detrimental to the environmental and recreational values of the watershed. Many businesses depend directly on natural river flows for their survival. Other support businesses would be harmfully affected if we lost the lure of water that supports fishing and boating. This same situation is true for many towns, cities, and rivers across the entire state.

I wholeheartedly support the CWCB's Instream Flow and Natural Lake Level Program. It's a critical tool to protect important species and habitat. Instream flows may help prevent the listing of aquatic species as threatened or endangered, which could have a detrimental effect on both the natural environment and local economies.

According to the bipartisan Colorado College *Conservation in the West Poll* of Colorado registered voters:

- 93% say low levels of water in rivers in Colorado is a serious problem (69% believe it is an extremely or very serious problem)
- Concern about rivers and snowpack exceeds the proportion of the electorate which say "unemployment" is an extremely or very serious problem in the state
- State voters overwhelmingly identify as a conservationist – fully 68% say that label describes them, with majorities throughout the state and of all partisan persuasions in this camp.

It's critical that the CWCB considers what's important to the majority of Coloradans, as opposed to a small, but vocal, minority that favors saving water for future uses that don't preserve and improve the natural environment. If we need "more" water in the future, we can "create" it using conservation measures and efficiencies.

Thank you for considering these comments.

Sincerely,

A handwritten signature in cursive script that reads "Leigh Robertson". The ink is dark and the signature is fluid, with the first and last names being more prominent than the middle name.

Leigh Robertson,
Executive Director
Leigh@SheepMountainAlliance.org
970.316.1650

To: Colorado Water Conservation Board

From: Southwestern Water Conservation District

Re: SWCD position paper for July 16 1:45 p.m. CWCB agenda item
Southwestern Water Conservation District Request to Address the Board on Instream
Flow Policy

A COOPERATIVE PROPOSAL

(To include a development allocation in ISF water rights close to the state line)

1. The Problem and the Proposal

As the designation of segments of Colorado streams and rivers for instreamflow (ISF) purposes increases, the optimum use of Colorado's prime natural resource – water – by all the people of the State of Colorado is jeopardized.

The success of the Colorado Water Conservation Board's (CWCB) ISF program is evident by the facts set forth on the CWCB website: CWCB has ISF water rights on more than 1,500 stream segments in Colorado covering more than 8,500 miles of stream and 477 natural lakes.

Initially the CWCB appropriated ISF reaches of Colorado rivers in the high country close to the streams' headwaters. As more stream segments are appropriated by the CWCB for ISF water rights, inevitably the appropriations will move downstream so that now the CWCB is appropriating ISF water rights within miles of the state line. When the ISF reaches were higher in the watersheds, the People of the State of Colorado could put the water to beneficial use after it left the ISF reach. When an ISF reach is close to the stateline, fewer opportunities will be available to the People of the State of Colorado to put the water to beneficial use before the water leaves the state for use by downstream states.

To allow the water of the State of Colorado to be put to optimum use as directed by the Colorado Supreme Court, and to allow water to be used by the People of the State of Colorado before it leaves the state, the CWCB should adopt a policy that its ISF water rights will include a de minimis allocation of water for future development by the People of the State of Colorado.¹

Such a policy will allow users of smaller amounts of water, including small municipalities, to utilize Colorado water in the future without exorbitant and environmentally harmful storage projects or extensive augmentation plans.

Such a policy would work hand-in-hand with the designation of segments of Colorado rivers for ISF purposes so that the state's natural resource of water may be put to optimum use by all the People of the State of Colorado.

Such a policy would be a proper exercise of the CWCB's fiduciary duty to all the People of the State of Colorado and can be promulgated within the CWCB's quasi-legislative role of implementing the ISF program.

Such a policy would not diminish the effectiveness of ISFs in preventing the dry-up of streams, in protecting the environment, or in making continued progress in balancing human and environmental uses of Colorado's waters.

Such a policy, if adopted by the CWCB, is within the dictates of Colorado law as it stands today without any legislative changes.

II. Legal Support for the Proposal

The statutory linchpin of the ISF program is

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

¹ We use "de minimis" in its legal sense, which derives from the latin phrase *de minimis non curat lex* ("The law does not concern itself with trifles"). In other words, we are talking about an amount of water that is not likely to noticeably, either to people or the environment, diminish the magnitude of an instream flow but that, with proper attention to conservation and reuse, will allow for not insubstantial municipal development.

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.

CRS 37-92-102(3) (emphasis added).

Under the statute, the CWCB is expressly charged with actively correlating the “activities of mankind” when analyzing, under its instream flow program, the minimum flows necessary to preserve the natural environment to a reasonable degree. A manner in which the CWCB may balance the activities-of-mankind with the preservation of the natural environment is to include a development allowance to meet future water use needs as part of the ISF water right the CWCB ultimately seeks to appropriate.

The ISF statute makes the CWCB the exclusive authority, in its discretion, to determine the minimum stream flows required to preserve the natural environment to a reasonable degree. In addressing the future needs of all the People of the State of Colorado, and as part of its fiduciary duty to all the People of the State of Colorado, the CWCB must exercise its fiduciary duty within the guideposts established by the General Assembly, including correlating the activities of mankind with some reasonable preservation of the natural environment.

At the Contested Hearing for the San Miguel ISF water right in 2008, and informally in discussions since, the Attorney General’s office has expressed the opinion that the “activities of mankind” referenced in the first sentence of CRS 37-92-102 is a preamble referring to the *legislature’s consideration* of the correlation of the activities of mankind with some reasonable preservation of the natural environment, but not an express requirement for the CWCB to consider in determining ISF appropriations.

This position has no support in the statute's legislative history and loses its reasonableness when considering the limitation the Colorado Supreme Court has identified for CWCBC in exercising its exclusive authority. The Court has ruled that the CWCBC performs as a quasi-legislative body on behalf of *all* the People of the State of Colorado when considering instream flow water rights. *Concerning Application for Water Rights of Colorado Water Conservation Bd. in the San Miguel River*, 346 P.3d 52, 56 (Colo. 2015) (quoting "correlate the activities of mankind" in showing that the General Assembly vested exclusive authority to appropriate instream flows in the CWCBC). In *Aspen Wilderness Workshop, Inc. v. Colorado Water Conservation Bd.*, 901 P.2d 1251 (Colo. 1995), the Court stated that the CWCBC "acts on behalf of the People of the State of Colorado and is thereby burdened with a fiduciary duty arising out of its unique statutory responsibilities." *Aspen* at 1259.

In the *Matter of R. and Regulations Governing Use, Control, and Protec. of Water Rights for both Surface and Underground Water Located in Rio Grande and Conejos River Basins and their Tributaries*, 674 P.2d 914 (Colo. 1983), the Court referenced the "need to correlate the activities of mankind with some reasonable preservation of the natural environment" as an example in Colorado statutes of "optimum use" of the waters in Colorado and stated that the optimum use doctrine provides "proper regard for all significant factors, including environmental and economic concerns." *Id.* at 935.

In addition to the concept of "optimum use," Colorado's goal has been to establish that the goal of maximum utilization must be "implemented so as to ensure that water resources are utilized in harmony with the protection of other valuable state resources." *Castle Meadows*, 856 P.2d at 505. In *Southeastern Colorado Water Conservancy District v. Shelton Farms, Inc.*, 187 Colo. 181, 529 P.2d 1321 (1974), the Court recognized the potential dangers of adopting a water

principle that would encourage the elimination of plant life to the detriment of land and other resources:

We are not unmindful that the statute speaks of the policy of maximum beneficial and integrated use of surface and subsurface water. But efficacious use does not mean uplifting one natural resource to the detriment of another. The waters of Colorado belong to the people, but so does the land. There must be a balancing effect, and the elements of water and land must be used in harmony to the maximum *feasible* use of both.

Id. at 191, 529 P.2d at 1327 (emphasis in original).

Not only is it within the discretion of the CWCB to adopt a policy where the “activities of mankind” may be correlated with a “reasonable preservation of the natural environment,” it arguably is the fiduciary duty of the CWCB to engage in such a correlation, or balancing, of the two interests in order to provide the People of the State of Colorado the optimum use of the state’s prime natural resource – water.

III. CWCB’s current policy needs to be slightly amended

When preparing its reports to the CWCB on proposed ISFs, the CWCB staff correctly addresses impacts on and injury to existing water rights. The conclusion invariably is that no injury will occur because the existing water rights will be senior to the proposed ISF water right. This includes existing water uses which may not be decreed at the time the ISF water right is decreed.

Under its current policy, the CWCB staff also brings to the CWCB scientific support for the amounts it deems appropriate to protect the natural environment to a reasonable degree. In doing so, the CWCB staff works closely with the U.S. Bureau of Land Management and Colorado Parks and Wildlife in developing the recommended flows. While there can be disagreement over whether the staff’s general findings of the “maximum amount of useable

habitat” reflects the statutory mandate of the “*minimum stream flows* or for natural surface water levels or volumes for natural lakes *to preserve the natural environment to a reasonable degree,*” it is indisputable that no analysis is currently conducted by the CWCB staff to determine a recommendation for how the proposed ISF habitat findings “correlate with the activities of mankind.”

The CWCB staff does not provide the CWCB with an analysis of the activities of mankind, in the form of an analysis of the future needs of People of the State of Colorado in correlation with its findings on the preservation of the natural environment to a reasonable degree. While the staff report addresses the impact of the proposed ISF on existing rights and uses, in order to address future needs of water users the CWCB staff has encouraged water users to file for adjudication of water rights before the ISF application is filed so as to obtain a senior priority. This suggestion has seen limited success at great cost because municipalities which know they will have future water demands are hard pressed to make a reasonable prediction of what its future water needs will be. Courts and non-governmental conservation groups also have erected new barriers to appropriating conditional water rights, even for municipal uses, making this approach even more uncertain. For the San Miguel River ISF, multiple public and private entities rushed to the court house to seek conditional water rights senior to that ISF. The result was millions of dollars spent litigating conditional water rights that may or may not be needed and obligate those holders to maintain diligence for decades until they may be needed. Had the CWCB provided for a de minimis development allowance, most or all of that conflict and expense could have been avoided without diminishing the ISF. This has been demonstrated on the Animas River, where intense conflict and unwarranted expense were avoided in the

appropriation of a very large RICD not far from the State line by cooperatively negotiating a modest development allowance.

Admittedly, the CWCB staff also cannot reasonably predict what the exact type of water use may be needed to address the future needs of the People of the State of Colorado, however there can be no denial that it is very likely that there will be water needs – in addition to the ISF – in the future for the People of the State of Colorado for water in the ISF reach.

Another way the CWCB staff addresses water for future needs of the People of the State of Colorado is to assert that the ISF never uses all the water in the reach, leaving some for future development. While this approach may be effective for times when the hydrograph is high, invariably there will be times when the ISF will use all the water in the reach or be in a situation to call for more water. This situation precludes a year-round supply for small users or municipalities from a junior position and leaves year-round use only to those entities with the financial resources to seek storage projects or adjudicated augmentation plans.

IV. The Proposal.

Exercising its fiduciary duty to act in its quasi-legislative role on behalf of all the People of the State of Colorado, the CWCB has the legal discretion to implement a policy whereby a de minimis development allocation for future uses may be included in an ISF appropriation for those ISF reaches located geographically close to the state line. This policy may be implemented in accord with the statutory mandate that the CWCB correlate the activities of mankind with a reasonable preservation of the natural environment.

The development allocation may be in the form of a percentage of the flows appropriated for the ISF water right. It may be in the form of a de minimus amount that will have little impact, if any, on the ISF flows, but will provide water supplies sufficient to meet reasonable

future needs of the People of the State of Colorado. It can be in the form of an affirmative recognition that the CWCB will not place a call for ISF water if the ISF levels are within the margin of error of stream level calculation by stream gauges.

There may be other ways the CWCB may address the future needs of the People of the State of Colorado with a development allowance as part of the ISF water right. SWCD is ready to work with the CWCB to create the policy that best addresses a reasonable development allowance so that the future needs of the People of the State of Colorado can be met before water which began in the Colorado headwaters may be put to optimum use before it leaves the state.

Adoption of the proposed policy is an opportunity to promote a cooperative approach to addressing this new and difficult problem. It would not impede the Board's duty and objective to preserve the environment, but it would address the most controversial and pernicious policy issue that doing so on such streams creates. It would recognize and promote a better balance in the use of Colorado's water resources. But a failure to address these issues would be sure to result in continued, unnecessary and contentious hearings and litigation for instream flows about which there otherwise would be a consensus of support.