

DEPARTMENT OF NATURAL RESOURCES

Colorado Water Conservation Board

RULES CONCERNING THE COLORADO INSTREAM FLOW AND NATURAL LAKE LEVEL PROGRAM

2 CCR 408-2

4. DEFINITIONS.

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 <https://cwcb.colorado.gov>. <http://www.cwcb.state.co.us>.

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 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 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 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, 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 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 application for a decree to use the acquired right for instream flow purposes.

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 Person 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 include, but need not be limited to consideration of the following factors:

- (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 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) The natural flow regime;
- (3) Any potential material injury to existing decreed water rights;
- (4) The historical consumptive use and historical return flows of the water right proposed for acquisition that may be available for instream flow use;
- (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) The location of other water rights on the subject stream(s);
- (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;
- (8) The effect of the proposed acquisition on the maximum utilization of the waters of the state;
- (9) Whether the water acquired will be available for subsequent use or reuse downstream;
- (10) The cost to complete the transaction or any other associated costs; and
- (11) The administrability of the acquired water right when used for instream flow purposes.

The Board shall 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 Parks and Wildlife (CPW), 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 determine, through negotiation and discussion with the lessor, the 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.
 - (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 and timing of where return flows have historically returned to the 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:
 - (a) Maintain records of how much water the Board uses under the contract or agreement each year it is in effect; and
 - (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.
- (2) All contracts or agreements for leases or loans of water shall provide for the recording of the actual amount of water legally available and capable of being diverted under the leased or loaned water right during the term of the lease or loan, with such records provided to the Division of Water Resources for review and publication.

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 Purposes.

The Board shall file a change of water right application or other applications as needed or required 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 shall file a joint application 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 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 to 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 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. 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.

6k. Temporary (Expedited and Renewable) Loans of Water to the Board.

Section 37-83-105, C.R.S. authorizes the Board to accept and exercise two types of temporary loans of water for ISF use: (1) expedited loans; and (2) renewable loans. Expedited loans have a term of up to one year and may be used to preserve the natural environment to a reasonable degree on a decreed instream flow reach. Renewable loans, which can be used to preserve or improve the natural environment on a decreed instream flow reach, may be exercised for up to five years in a ten-year period and for no more than three consecutive years, and may be renewed for up to two additional ten-year periods. The Board may ~~accept~~ exercise both expedited and renewable temporary loans of water for instream flow use for a period not to exceed 120 days in ~~any one a single calendar~~ year, in accordance with the procedures and subject to the limitations set forth in section 37-83-105, C.R.S. The owner of a decreed water right who has offered water to the Board for an expedited or renewable loan is referred to herein as an "applicant."

(1) Expedited Loans.

- (a) An expedited loan approved to preserve the natural environment to a reasonable degree has a term of up to one year, with instream flow use not to exceed 120 days in a single calendar year. The loan period begins when the State Engineer approves the expedited loan. If an expedited loan is approved, the applicant may not reapply for an additional expedited loan of the subject water right.
- (b) Within ~~five~~5 working days after receiving an offer of an expedited temporary loan of water to the Board for temporary instream flow use, the Director will provide a response to the ~~proponent~~ applicant. If the proposed loan appears to be appropriate and, unless the proposed loan has no potential value for instream flow use, staff will coordinate with the ~~applicant to~~ ~~proponent on~~:
- i. 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
 - ii. providing the ~~written public~~ notice required by section 37-83-105(2)(b)(II), C.R.S. and access to all documentation provided to the State Engineer under Rule 6k(1)(b)i, to: (1) all parties on the substitute water supply plan notification list established pursuant to section 37-92-308(6), C.R.S. for the water division in which the proposed loan is located; and (2) a registered agent of a ditch company, irrigation district, water users' association, or other water supply or delivery entity within whose system the water rights fall.
- (c) 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 expedited loans of water for instream flow use in accordance with the procedures and subject to the limitations set forth in section 37-83-105, to execute an agreement for the loan of the water, and to take any administrative action necessary to put the loaned water to instream flow use. The purpose of this delegation is to expedite the Board's exercise use of a temporarily loaned of water for instream flow use under this Rule 6k.(1) by the Board.
- (d) 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 rate(s), time period(s), and amount or extend beyond the CWCB's decreed instream flow reach(es) at any time during the expedited 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.~~

(e) At the first regular or special Board meeting after the Director accepts, or rejects over applicant's objection an offer of an expedited loan of water to the Board for temporary instream flow use under (4b) and/or (2c) above, the Board shall vote either to ratify or overturn the Director's decision.

(e)(f) The Board, Director and staff will expedite all actions necessary to implement Rule 6k.(1).

(2) Renewable Loans.

- (a) A renewable loan approved to preserve or improve the natural environment must not be exercised for more than five years in a ten-year period and for no more than three consecutive years, for which only a single approval by the State Engineer is required. Instream flow use may not exceed 120 days in a single calendar year. The ten-year period begins when the State Engineer approves the loan. If an applicant for a renewable loan has previously been approved for and has exercised an expedited loan using the same water right(s) that are the subject of the pending application, the one-year loan period of the expedited loan counts as the first year of the five-year allowance for the subsequent renewable loan.
- (b) The Board will use a two-Board meeting process to review, consider public comment, and direct Staff whether to move forward with proposed renewable loans of water for instream flow use to preserve or improve the natural environment to a reasonable degree.
- (c) Any Person may request the Board to hold a hearing on a proposed renewable loan. Such a request must be submitted to the Board in writing within twenty days after the first Board meeting at which the Board considers the proposed renewable loan, and must include a brief statement, with as much specificity as possible, of why a hearing is being requested. The Board shall conduct all hearings on renewable loans pursuant to Rule 6m.(5).
- (d) For renewable loans to improve the natural environment to a reasonable degree, the Board will:
 - i. request and review a biological analysis from Colorado Parks and Wildlife concerning the extent to which the proposed loan will improve the natural environment to a reasonable degree, and review any other biological or scientific evidence presented to the Board;
 - ii. make findings on flow rates appropriate to improve the natural environment to a reasonable degree with the loaned water; and
 - iii. give preference to loans of stored water, when available, over loans of direct flow water.
- (e) When evaluating a proposed renewable loan, the Board shall consider any potential injury to decreed water rights, decreed exchanges of water, or other water users' undeclared existing exchanges of water to the extent that the undeclared existing exchanges have been administratively approved before the date of the Board's consideration.
- (f) If the Board directs Staff to move forward with a proposed renewable loan, staff will coordinate with the applicant to:
 - i. prepare and submit the necessary documentation to the State Engineer required by sections 37-83-105(2)(a)(I) and (2)(b)(I); and
 - i-ii. provide the written notice required by section 37-83-105(2)(b)(II), and access to all documentation provided to the State Engineer under Rule 6k(2)(f)i, to: (1) all parties on the substitute water supply plan notification list established pursuant to section 37-92-308(6) for the water division in which the proposed loan is located; and (2) a registered agent of a ditch company, irrigation district, water users' association, or other water supply or delivery entity within whose system the water rights fall.
- (g) Board direction to Staff to move forward with a proposed renewable loan will include authorizing Staff to execute an agreement for the loan of water and to take any administrative action necessary to put the loaned water to instream flow use, provided that the State Engineer determines that no injury will result from the proposed loan.

- (h) The CWCB's instream flow use of loaned water shall not extend beyond the CWCB's decreed instream flow reach(es) at any time during the renewable loan term, and shall comply with any terms and conditions imposed by the State Engineer to prevent injury.
- (i) In each year that a renewable loan is exercised, the applicant, coordinating with Staff if necessary, shall provide the written notice required by section 37-83-105(2)(b)(II).
- (j) The applicant may reapply for a renewable loan, and the State Engineer may approve such loan for up to two additional ten-year periods. Prior to any such reapplication, at a properly noticed public meeting, Staff will inform the Board about the exercise of the loan during the previous ten-year period and request approval for the loan to continue for the additional ten-year period. The Board shall consider any public comment and objections to the renewal provided at the public meeting. If the Board authorizes renewal of the loan, staff will coordinate with the applicant to: (1) prepare and submit the necessary documentation to the State Engineer required by sections 37-83-105(2)(a)(I) and (2)(b)(I); and (2) provide the written notice required by section 37-83-105(2)(b)(II).
- (3) Water rights loaned to the Board pursuant to expedited or renewable loans are not precluded from concurrent or subsequent inclusion in a water conservation, demand management, compact compliance, or water banking program or plan, as is or may be subsequently defined or described in statute.

6l. Funds for Water Right Acquisitions.

The Board may use any funds available to it for costs of the acquisition of water rights and their conversion to ISF 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. 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 expedited and renewable temporary loans or leases as provided in Rule 6k. 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;
 - (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 after 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, except for renewable loans, 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) For hearings on acquisitions other than renewable loans, 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) For hearings on renewable loans, at least thirty days prior to the hearing date, the Board shall provide written notice of the hearing to the owner of the water right to be loaned and to: (1) all parties on the substitute water supply plan notification list established pursuant to section 37-92-308(6) for the water division in which the proposed loan is located; and (2) a registered agent of a ditch company, irrigation district, water users' association, or other water supply or delivery entity within whose system the water rights fall. Such notice shall include the process and deadlines for participating in the hearing.
- ~~(de)~~ 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.
- ~~(ef)~~ 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).

- (fg) Any Party may present testimony or offer evidence identified in its prehearing statement regarding the proposed acquisition.
- (gh) 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.
- (hi) The Board will not apply the Colorado Rules of Evidence at hearings on proposed acquisitions.
- (ij) 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.
- (jk) The Board may take final action at the hearing(s) or continue the hearing and/or deliberations to a date certain.
- (kl) 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.
- (lm) When necessary, the Board may modify this hearing procedure schedule or any part thereof as it deems appropriate.

6n. 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.

7. INUNDATION OF ISF RIGHTS.

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7d. Staff Investigation.

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

8. PROTECTION OF ISF APPROPRIATIONS.

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8i.(3) Injury Accepted with Mitigation.

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 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:

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- (f) After receipt and review of the required information, staff will consult with ~~the DOW~~ Colorado Parks and Wildlife (CPW) and with the entity that originally recommended the affected ISF or NLL water rights(s) (if other than CPWDOW) to determine whether additional field work is necessary and to identify any scheduling concerns. Staff will request a recommendation from CPW~~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 will use best efforts to consult with affected land owners and managers regarding the proposal.

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- (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 CPWDOW. 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.

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- (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:

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- iii. A provision allowing CWCB or CPWDOW 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);

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 Colorado Parks and 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 Colorado Parks and 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.